Annex 1

Public Redacted

Introduction

1. The Defence for Mr. Bemba in ICC-01/05-01/13 hereby submits its response to the Registry request for additional documentation concerning the financial status of Mr. Bemba.

2. In so doing, the Defence underscores that it has cooperated fully with the Registry as concerns any information or documents that were within the possession of the Defence or Mr. Bemba, to the extent that was compatible with the privacy rights of third persons. In contrast, the Registry has failed to respect the principle of procedural fairness; it has declined to disclose all information in its control that could be relevant to its determination of indigence

3. Without prejudice to the right of the Defence to adduce further submissions or clarifications in light of Registry documents, which have yet to be disclosed, the position of the Defence is that:
    a. Mr. Bemba should be reimbursed or credited with additional legal aid resources in relation to:
        i. The time period on which the right to legal aid crystallised in the Article 70 case, up until the date on which legal aid was first paid;
        ii. Fees and expenses paid to Defence expert witnesses;
        iii. Fees and expenses associated with the testimony of the 14 witnesses, which occurred <u>after</u> Trial Chamber and Registry were informed of evidence that Mr. Joachim Kokate was introducing false witnesses to the Defence.

    b. Mr. Bemba should be provided with an effective remedy as concerns financial damage, which was incurred through the failure of the Registry or State parties to take appropriate preservation measures;
    c. Since the payment of legal expenses should not be overly punitive, the calculation of Mr. Bemba's total debt of legal expenses cannot exceed 75% of the amount of the total value of his identified assets, after reasonable expenses for his dependents and other legal obligations are deducted (and should in fact be substantially <u>less</u> than 75%);

d. The value of Mr. Bemba's assets is fully exhausted by the maximum acceptable amount of his debt to the ICC (including possible reparations order).

4. For the reasons set out above, the Defence submits that the Registry is obliged to assume the remaining costs of the Article 70 Defence. This position is without prejudice to obligation of the Registry to take into consideration the above matters in its calculation of the legal rights and obligations of Mr. Bemba in ICC-01/05-01/08.[1]

Submissions

The Registry has failed to act in accordance with procedural fairness

5. The Defence requested to meet with the Registry on multiple occasions, including with the Registry financial investigator, and the internal working group which is seized of this issue. The Registry declined all such requests.

6. At the same time, the Registry also failed to respond to a Defence request to receive a copy of any documentation that could be relevant to the issue of Mr. Bemba's financial status. [2]

7. From a practical perspective, the Defence respectfully submits that this stance has been counterproductive, and has delayed the timely resolution of this matter. It would have been useful for the Defence to engage with the Registry in order to ascertain firstly, the current value ascribed to Mr. Bemba's assets, and the method that they intend to use to calculate indigence. The latter is particularly complex since different methods apply to the two cases.

[1] The Defence would also like to note that Mr. Bemba provided authorisation for the Article 70 team to access and rely on Main Case filings, for the purpose of this submission, subject to the obligation of the Defence to respect the confidentiality level imposed in the Main Case. See Annex C.
[2] Defence email of 5 September 2016 to OTR Counsel Support Section, [Redacted]

8. The Registry also has access to critical information concerning the legal and factual basis for the freezing of Mr. Bemba's assets, and the national procedures that applied to such measures. A significant component of this information has only been filed in the record on an ex parte (Registry only) basis. Given that the documents concern assets that are alleged to belong to Mr. Bemba, there does not appear to be any basis for withholding this information from him.

9. From a legal perspective, the prejudice caused by such non-disclosure is incompatible with the case law of international tribunals, and the standards required by human rights law.

10. As set out by the ICTY Appeals Chamber in the *Kvocka* case, proceedings concerning indigency should be governed by procedural fairness; this encompasses the right to have: notice of the allegations against the accused; notice in reasonable detail of the nature of the material upon which the contemplated action is to be based; and the opportunity to respond to the material relied upon by the Registry to assess the indigency of the accused.[3]

11. The case law of the European Court of Human Rights (ECHR) also underscores that the process used to determine the financial means of an accused should not be unfair, arbitrary, or unreasonably complex or delayed.[4]

12. In light of the above, it would be unfair to render a final and adverse determination concerning the specific parameters of Mr. Bemba's financial assets and their value, without affording the Defence a further opportunity to adduce observations, and if necessary, evaluations or reports that might be relevant. Either possibility mandates that the Registry should continue to provide legal aid to the Article 70 team for the remainder of the proceedings.

[3]Prosecutor v. Kvocka *et al.,* Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic, February 7, 2003, Case No. IT-98-30/1-A at para. 39

[4]Del Sol v France, Application no. 46800/99, para. 26; A. B. v. Slovakia ; Tabor v. Poland, Application no. 12825/02 ; Bakan v Turkey, Application no. 50939/99, VM v Bulgaria, Application no. 45723/99, Santambrogio v. Italy, Application no. 61945/00,

The Defence has fully cooperated with the Registry in this process

13. The Defence has transmitted with this application the following documents: [Redacted]
14. In terms of the Registry request for documents [Redacted].

15. With respect to the Registry request [Redacted].

16. [Redacted].[5]

17. This voluntary cooperation should be given significant weight by the Court. Mr. Bemba has no means to compel or require [Redacted] to cooperate with the Court. Although there is an arguable duty on Mr. Bemba to cooperate with the Registry, this duty does not extent to third persons, particularly those who are not members of Mr. Bemba's household.

18. For this reason, when the Registry first requested the Defence to provide documents, which emanate from [Redacted], the Defence requested the Registry to provide the legal basis for requiring the Defence to provide documents or information from third persons. The Registry's response was simply to note that it had the right to request information, and that its decision would be based on any information provided by the Defence.[6]

19. Given the absence of any stated legal basis for this request, no adverse consequences can be drawn against Mr. Bemba due to the inability of the Defence to furnish such a document. This is particularly the case given that the broad and vague wording of the request is contrary to domestic and human rights principles concerning data protection and privacy rights.

[5] In an email dated 13 October 2016, [Redacted]

[6] [Redacted]

20. The principles underscore that individuals can only freely consent to the provision of personal data if such consent is specific, informed, and free;[7] of critical importance, the individual must be aware of the specific types of information that will be accessed, and the specific purposes for such access. It is, however, not possible to ascertain from the Registry's wording which specific documents will be accessed, and what safeguards will be put in place to protect [Redacted]general privacy rights.

21. This intrusion into [Redacted] privacy is also unnecessary and disproportionate in light of the fact that the question of ownership is irrelevant to the question as to whether these companies have any <u>means</u> available after debts and liabilities are taken into consideration. This will be addressed in a separate section below.

22. Finally, the Defence notes in this regard that it has requested to meet with both the Registry investigator, and the internal working group addressing this issue in order to ascertain whether it was possible for the Defence to address the queries of the Registry through alternative means. The Registry repeatedly declined this proposal.

The Defence should be credited with legal aid that should have been provided at earlier junctures

23. On 24 September 2015, the Defence requested the Registry to review the following matters:[8]

> I note the following:
>
> - the 2014 Presidency decision on Mr. Bemba's financial status declined to rely on either the [Redacted} or any putative value concerning the [Redacted] in its previous decision;

[7] See Council of Europe Parliamentary Assembly, Resolution 1843 (2011) 'The protection of privacy and personal data on the Internet and online media;, 7 October 2011, par 18(4); CJEU, C-543/09, 5 May 2011, Deutsche Telekom, paras. 55-58;
[8] Email from [Redacted] .

- the Registry Decision does not take into account the forecasted fines associated with the {Redacted] for the next couple of years;

- Mr. Bemba's estimated debt concerning his past legal expenses fails to take into consideration any debts associated with the Article 70 case from December 2014 and in 2015 as a result of our pro bono status.

In terms of the last aspect, it would appear that our pro bono status is in fact incompatible with Mr. Bemba's right to effective representation, as it does not allow us to conduct any missions on his behalf. It would therefore be unfair and improper to calculate Mr. Bemba's indigency on the basis of an assumption that Counsel could or should work pro bono for any length of time. At the very least, the indigency calculation should have assumed costs from December 2014 until September in 2015, and deducted such costs from the amount available.

The final result should also ensure that Mr. Bemba is able to fund sufficient members to conduct missions (whilst others attend trial hearings), and logistical funds for such members.

I also note that the Decision committed the Registry to contributing a certain amount, but did not preclude the possibility that the Registry would contribute more during the actual trial, in order to ensure that issues not investigated during the pre-trial phase can now be addressed in an effective and expeditious manner.

I therefore respectfully request the Registry to contribute sufficient funds to Mr. Bemba's Article 70 Defence in order to ensure that he is in a position to defend himself in an effective and efficient manner. To that end, I request that the pro bono savings from 2014 and 2015 should be factored into the future contributions in order to ensure a minimum basis of 18 000 euros per month for the duration of the trial.

24. The Registry responded on 28 September 2015 that it was conducting internal discussions on these matters, and would revert in due course.[9] The Registry has yet to do so.

25. The Defence therefore considers that such issues remain pending (as iterated in Defence requests submitted in June 2016), and should be considered in conjunction with the following.

[9] Email from {Redacted] dated 28 September 2015.

26. Throughout the course of 2014 and 2015, the Defence was denied timely access to legal aid funds due to the fact that the Registrar failed to calculate legal costs in an accurate manner. Concretely, the Registry committed three factual and procedural errors:
    i. The Registry failed to allocate legal aid on a retrospective basis from the point on which Mr. Bemba's entitlement to legal aid crystallised;
    ii. The Registry failed to assume the existence of any debt to the Article 70 defence for any periods during which legal aid had not been provided; and
    iii. The Registry failed to include investigations costs in its 2015 calculation.

27. Regarding the first error, in its September 2015 decision, the Registry implicitly acknowledged that its previous calculations were erroneous due to the first failure; that is, it had wrongly included all of Mr. Bemba's assets in its calculation without taking in consideration that some or all of these assets were burdened with debt from the Main Case. However, although the Registrar found, on the basis of the revised calculations, that Mr. Bemba was partially indigent, it declined to provide any legal aid on a retrospective basis.

28. This amounts to a procedural error, which is unreasonable. A finding that an accused is entitled to legal aid is declaratory;[10] if an accused is entitled to legal aid after the Registry has conducted its investigations, it follows that the accused was also entitled to legal aid at the commencement of the investigation. There is therefore no justification for denying the Defence remuneration for necessary and reasonable work conducted in the interceding period.

[10] ICC-01/04-01/10-142, para. 16: "there is no provision in the legal assistance scheme or in the statutory framework of the Court which would operate to preclude the retroactive payment of legal assistance to a time before an application for legal assistance was made in the circumstances hereinbefore outlined. In this regard, it should be reiterated that the right of the suspect to legal assistance paid by the Court where he lacks sufficient means to pay for it himself emanates from article 67(l)(d) and that the decision of the Registrar as to the indigence of the suspect and his entitlement to legal assistance is merely declaratory of the fact that the requisite conditions for the right to paid legal assistance are satisfied and does not per se give rise to or create the right in question."

29. This is consistent with the fact that provisional legal aid is generally provided whilst an indigence assessment is pending.[11] UN Principles on Legal Aid also recommend firstly, that provisional legal aid should be provided to detainees whilst their application for legal aid is pending,[12] and secondly, that defendants should be afforded an effective remedy if there have been delays or errors in the procedure for assessing legal aid.[13]

30. In its decision on the applicable legal aid for the other Article 70 Defence teams, the Registry decided to allocate the amount of 32, 922 euros to the Defence on a retrospective basis; i.e. dating from 30 January 2015.

31. However, whilst the Registry acknowledged in its decision of 1 September 2016 that the increased amount of legal aid for Article 70 teams triggered the partial indigency of Mr. Bemba, it failed to either:
    a. Inform the Bemba Defence that this increased legal aid allotment had been retrospectively paid to other teams from 30 January 2015; or
    b. Provide any payments for partial indigence on a retrospective basis.

[11] See ICC 01/04-490-tENG, 26 March 2008, pp. 3-4; ICC-01/04-01/06-63; ICC-01/04-01/07-79, ICC-01/04-01/07-298; ICC- 01/04-01/07-562; ICC-01/04-01/07-563, ICC-CPI-20120117-PR762

[12] The United Nations Principles on Legal Aid: "41. Whenever States apply a means test to determine eligibility for legal aid, they should ensure that: (a) Persons whose means exceed the limits of the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would have otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance; (b) The criteria for applying the means test are widely publicized; (c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined"

[13] "Principle 9. Remedies and safeguards 31. States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid". See also Article 6 and paragraph 26 of the Legal Aid Directive adopted by the European Parliament 7 July 2016 (available at https://www.fairtrials.org/european-parliament-adopts-legal-aid-directive-incorporating-leaps-proposed-amendments/), which underlines firstly, the obligation to process legal aid requests in a speedy manner, and secondly, the duty to afford a remedy for prejudice caused by delays in the process.

32. In terms of the first aspect, the Registry repeatedly rejected Bemba Defence requests for access to the CSS decision allocating legal aid to the other Article 70 teams.[14] Although Defence communications with CSS erroneously referred to the change in legal aid allotment as occurring in June 2015, CSS did not correct this error. The Defence was not aware of the fact that Article 70 teams had in fact been paid the amount of 32 992, dating from January 2015, until very recently, and was therefore unable to request a remedy until the present submission.

33. With respect to the second aspect, CSS has confirmed that the other Article 70 Defence teams were allocated a full Article 5 legal budget, dating from the assignment of the case to Trial Chamber VII.[15] In contrast, the decision concerning Mr. Bemba stated the following:

> 6. The Registrar hereby concludes that, since the monthly disposable means of the Applicant are lower than the monthly cost of defence during the trial phase of the proceedings, he is to be considered as partially indigent for the purpose of eligibility to legal aid in the present case.
>
> 7. Thus, the contribution to the Court to the legal assistance of the Applicant in the framework of the case ICC-01/05-01/13 will be of €8,337.00 per month, starting today, 1 September 2015.

34. There is absolutely no justification for the Registry's omission to contribute partial indigency allotments from January 2015; if the other Article 70 teams were entitled to receive the difference between the initial Registry allocations, and the increased allocations on a retrospective basis, then the same approach should have been adopted with respect to Mr. Bemba.

35. This discrimination was both arbitrary and unreasonable, and deprived the Defence of 7 months x 8334 euros = 58, 338 euros.

36. A further factor, which warrants the allocation of additional resources, is the fact that the Registry failed to contribute any investigative funds to the

[14] The breakdown of figures for legal aid in the Article 70 case was cited in the footnote in the Bemba decision, but the footnote was itself omitted. On 20 September 2016, the Defence requested CSS to disclose the letter transmitted to other Article 70 teams; the Registry refused, which piqued the interest of the Defence. Further inquiries revealed the discrepancy. See below:
[Redacted]
[15] [Redacted]

Defence. CSS has confirmed that the figure of 32 992 euros, which was used to calculate the extent of Mr. Bemba's partial indigence, did not include investigations costs.[16] It follows that if such amount fell outside the scope of the 32 992 euros, then they also fell outside the scope of Mr. Bemba's contribution. The Registry therefore owes the Bemba Defence the full amount (which the Defence understands to be about 36 503 euros).

37. The Registry's September 2015 and June 2016 calculations were also flawed in that they failed to take into consideration any past or future debt to the Article 70 Defence team. Partial indigency is based on the assumption that the accused will contribute the component which is not provided by the Registry; this means that for the trial stage, Mr. Bemba was expected to contribute at least 24 000 euros a month.

38. In the absence of retrospective legal aid, Mr. Bemba would also have been required to provide the full allotment prior to September (approximately 33 000 from January until beginning of September).

39. As of 1 October 2016, this equates to an Article 70 post-confirmation debt of 264 000 + 240 000 = 504,000 euros. If the "missing" investigations budget is factored in, the total amount is = 540, 503 euros.

40. It is a clear error not to take this debt into consideration; the Registry cannot, on the one hand, refuse to provide legal aid to the Defence on the basis that Mr. Bemba can fund his Defence through available assets, whilst at the same time, fail to ring-fence those available assets in future indigence calculations in order to ensure that the funds are in fact, available.

41. In essence, the Registry's indigence calculation is predicated on the assumption that the Defence will not attempt to be paid for any fees, which are not provided by the Registry. This assumption runs counter to the

[16] See [Redacted]

principle of effective representation; the legal aid scheme for Mr. Bemba cannot be based on an assumption that the Defence can and will defend Mr. Bemba with less means than the amount which has been determined to be necessary and reasonable for other Article 70 Defence teams, under the minimum amount available for legal aid. [17] Nor can the Registry entrench the ineffective representation of the accused by using the existence of funds, which should have been nominally earmarked for the Article 70 Defence, as a basis for denying future legal aid allotments.

42. The prejudice to the accused can be demonstrated by the following two scenarios. In scenario 1, the assets of the accused – which are worth 50 000 euros - are not frozen. The accused is ordered to contribute 10 000 euros per month, and the Registry contributes the remaining 10 000 euros. After five months, the case enters the next stage. The accused has no more assets, and is then entitled to receive legal aid for the next five months (say, 20 000 euros per month). The total expenditure of the accused has been 50 000 euros, and the accused has in addition received 200 000 euros of legal assistance for the case (150 000 euros from legal aid, and 50 000 euros privately funded).

43. In scenario 2, the assets of the accused – which are frozen – are again worth 50 000. The accused is ordered to contribute 10 000 euros per month, and the Registry contributes the remaining 10 000 euros. Since the assets are frozen, the Defence is only allocated 10 000 euros per month in total for the first five months. For the second phase, since the accused still has frozen assets of 50 000 euros, the Registry contribution remains the same. At the end of the case, the assets are unfrozen, and the accused is ordered to reimburse the Registry the full value of his assets. The total expenditure of the accused has been 50 000 euros (which is the same as scenario 1), but the accused has only received 100 000 euros worth of legal assistance throughout the case.

[17] In the case of Pakelli v. Germany, Application no. 8398/78, at para. 47, the European Court of Human Rights found that the fact that the applicant's lawyer had not yet demanded payment (in light of financial circumstances of the applicant), did not constitute a waiver of payment. The Court further underscored that it was in the interests of human rights for the lawyer to continue to represent the applicant (even if the applicant could not immediately pay the lawyer), and that such an interest should not be opposed to the applicant or the lawyer.

44. The calculation employed by the Registry fails to take into consideration relevant circumstances, and should therefore be modified to credit the Defence with the "missing funds", in the manner set out in the table attached as Annex A.

45. Further resources are also owing due to the fact that a significant component of the partial legal aid funds allocated to the Defence was spent on expert witnesses, and the preparation of an expert report which was submitted into evidence. This use of such expertise was necessitated by the particular nature of this case, and the strategic choice of the Prosecution to rely heavily on forensic expertise.

46. The first witness called by the Prosecution was an internal analyst, who had prepared a lengthy, detailed technical report on telephone attribution and contact patterns. The initial report was 222 pages long, and the Prosecution tendered an updated attribution analysis at the end of the case, which was 21 pages long (excluding cover-page).[18]

47. The Prosecution also called a telecommunications expert (P-361), whom they remunerated at [Redacted] per hour excluding VAT.[19] Apart from testifying, the Prosecution also tendered his report, which was 40 pages.

48. The Prosecution requested the Registry to commission a technical report from Bumicom, in relation to sound quality issues concerning detention unit calls, and the technical problem of call 'synchronisation'. The Bumicom report concerned technical issues that fell completely outside of the expertise of the Defence.

[18] ICC-01/05-01/13-1905-Conf-AnxD1
[19] CAR-OTP-0090-2110 at 2112.

49. Each of these expert reports touched on issues which were central to the case against Mr. Bemba, and necessitated a response from the Defence. Although the Defence attempted to collaborate with the co-defendants in order to share costs, it was unsuccessful in convincing the co-defendants to do so. It was also not feasible for the Defence to jointly instruct P-361 due to the fact that the expert refused to meet with the Defence.

50. As a result of the above, it was necessary for the Defence to allocate a significant component of its partial legal aid to the remuneration of forensic experts, rather than legal assistance. The fact that it was compelled to do so is contrary to UN principles on legal aid, which stipulate that:[20]

> 62. The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate **special funding** should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses (emphasis added).

51. The legal aid system for contempt cases and war crimes cases at MICT also specifies that the funds for expert witnesses should be allocated separately; that is, they are not deducted from the amount provided to the Defence for legal representation.[21]

52. According to Amnesty International, "the right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of

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[20] *Ibid*, para. 62.

[21] *Experts*

28. The Registry may allot a maximum of 150 remunerable hours for experts for the pre-trial stage and a maximum of 150 remunerable hours for experts for the trial stage of the proceedings. Upon a written request, an Accused may be allowed to carry forward unused expert hours from the pre-trial stage to the trial stage of the proceedings. The Registry may increase the maximum allotment of hours for experts for a particular stage if the Accused demonstrates exceptional circumstances warranting the need for additional hours.
http://www.unmict.org/sites/default/files/documents/160525-remuneration-policy-persons-assisting-indigent-self-represented-accused.pdf

relevant independent experts in the course of preparing and presenting a defence".[22]

53. The Registry legal aid policy specifies that,[23]

> The monthly expenses allotment may also be used when soliciting preliminary expert advice or opinions in the legal representation. However, if an expert - defence expert or otherwise - has been approved and requested to give testimony by the Chamber, the payment of his/her fees and expenses is assumed by the budget allocated for that purpose by the Victims and Witnesses Unit.

54. However, after the Defence conducted extensive inquiries on this point, it emerged that there is indeed no such budget allocated by CSS or the VWU for this purpose.[24] The absence of such an allotment means that the only funding available for Defence expert witnesses is the funding for preliminary expert advice or opinions. In the case of a non-indigent accused, this would mean that the witness would be entirely funded by the Defence.

55. Given the particular factual matrix of the Article 70 case (which was initiated through Prosecution investigations into the funding of Defence experts), this was clearly an undesirable approach. As a result, the Defence was compelled to dedicate a disproportionate amount of the funds allocated by the Registry to expert assistance, in order to avoid any appearance of impropriety.

56. The timing on which the Registry issued its decision on partial legal aid also prevented the Defence from challenging the decision of the Registrar to deduct this amount from legal aid. In particular, the decision was issued on 1 September – that is, only 28 days from the commencement of the trial, which was scheduled to begin with the testimony of the Prosecution forensic analyst.

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[22] Amnesty International, Fair Trial Manual, 2nd ed., 2014, p.75: https://www.amnesty.org/en/documents/POL30/002/2014/en/, citing Guideline 12 §62 of the Principles on Legal Aid; Article 8(2)(f) of the American Convention, and See *G.B. v France* (44069/98), European Court (2001) §§56-70: http://hudoc.echr.coe.int/eng#{"fulltext":["GB v France"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-59690"]}

[23] ICC-ASP/12/3, para. 140.

[24] [Redacted]

57. As a result of this expert frontloading, as soon as the Defence was notified that it would have some funds allocated to it, it had to then arrange for the prospective Defence expert to be included on the Registry list of experts. His appointment was "however, protracted through further inquiries on a range of issues, including whether the other teams would contribute to his funding, and his fees, and was then confirmed on 16 September 2015." [25]

58. The Prosecution also altered its line up of witnesses in order to bring forward the testimony of its other telecommunications expert (P-361) such that he was scheduled to testify the subsequent week. A Bemba Defence request for the Trial Chamber to adjourn P-361's testimony,[26] was rejected. In requesting such an adjournment, the Defence had also indicated that it lacked the time and resources necessary to protect Mr. Bemba's interests at that juncture. [27]

In the event of convictions in the Article 70 case, the Defence should be credited legal aid, or reimbursed the amounts that were expended on missions associated with the 14 tainted witnesses.

59. At the time that these observations are filed, a possible appeal of the Article 70 judgment remains pending.

60. Notwithstanding the issue of Mr. Bemba's own alleged responsibility (which must be resolved, ultimately, by the Appeals Chamber), it is possible at this point to assert the general principle that the Court had a duty to ensure the effective legal representation of Mr. Bemba in the Main Case.

61. This right to effective legal representation translates to a duty to step in to replace Counsel or to take remedial steps to ensure the right, where necessary to guarantee the overall fairness of the proceedings.[28] Conversely,

[25] ICC-01/05-01/13-1333-Conf, para. 27,
[26] ICC-01/05-01/13-1333-Conf
[27] ICC-01/05-01/13-1333-Conf, paras. 31-36.
[28] Artico v. Italy, Daud v. Portugal; **Czekalla v. Portugal** ; **Siałkowska v. Poland**, Application Number 8932/05, Judgment of 22 March 2007

the accused has the right to an effective remedy on issues concerning legal aid, where he has suffered prejudice due to the failure of the relevant authorities to inform him timeously of his rights.[29]

62. All members of Mr. Bemba's Defence team were vetted, appointed, and paid through the Registry, subject to Mr. Bemba's obligation to reimburse at a later stage. The same held true for all Defence missions.

63. Trial Chamber III and the Registry were aware from the end of November 2012 of the existence of Prosecution allegations that several prospective witnesses had provided false information in relation to their background; they were, in effect, imposters. No steps were taken to notify the Defence of such allegations.

64. Irrespective of the reasons for maintaining the secrecy of these allegations throughout the entire trial proceedings, it is irrefutable that a significant amount of Defence funds was expended on collecting evidence (testimony) that was abandoned by the Defence after the allegations were disclosed.

65. In submissions to the Trial Chamber, the Registry affirmed that it would be in a position to adduce specific financial data concerning the amount expended in connection with the 14 tainted witnesses, within three days.[30]

66. The Defence requests the Registry to disclose such data to the Defence, so that the Defence can evaluate which amounts should be credited to Mr. Bemba (or deducted from the amount owing to the Court).

Mr. Bemba should be provided with an effective remedy as concerns financial damage which was incurred through the failure of the Registry or State parties to take appropriate preservation measures;

And Staroszyk v. Poland, Application Number 59519/00, Judgment of 22 March 2007; Sannino v. Italy Application no. 30961/03; Michael Edward Cooke v. Austria Application no. 25878/94; Cuscani v. United Kingdom, Application no. 32771/96

[29] See footnote 63 below.

[30] ICC-01/05-01/13-1973

67. The freezing of Mr. Bemba's interfered with Mr. Bemba's right to property. Given that the ICC Pre-Trial Chamber decided to take such an adverse measure for the ultimate benefit of victims, the Chamber and the Registry (and not the Defence or accused) bore the burden of ensuring that the measure interfered with the rights of the Mr. Bemba to the least extent possible. This is consistent with the requirement under Article 57(3)(e) of the Statute that such measures must be taken with due regard for the rights of the parties concerned. The Registry is also required to act in a manner that "promotes the rights of the defence, consistent with the principle of fair trial".[31]

68. Mr. Bemba is the first accused appearing before an international court or tribunal, whose assets were frozen at the exclusive request of the Court (as opposed to the Security Council or European Union), and frozen for the specific purpose of of facilitating potential victims reparations.[32] It would appear that due the dearth of case law or practice to guide the ICC, key issues -such as the adoption of mechanisms to preserve the value of assets - were not addressed in an effective manner, to the detriment of Mr. Bemba. As result of the failure of the Court and State parties to take measures to either preserve the value of the assets, or to realise immediately the value of assets of a 'perishable' or depreciating nature, Mr. Bemba suffered a significant loss as concerns the current value of his assets.

69. Concretely, the following occurred.

70. The Pre-Trial Chamber's objective in freezing the assets of Mr. Bemba was to ensure their availability in the event of a future order for forfeiture or reparations. In a series of decisions, which affirmed the Court's power to

[31] Rule 20(1) of the Rules of Procedure and Evidence.

[32] A request to freeze the assets of an accused at the Special Court for Sierra Leone was rejected due to the incompatibility of such measures with the presumption of innocence, and the failure of the Prosecution to substantiate reasonable grounds to believe that the assets were derived from the proceedings of crime: Prosecutor v. Norman, 'Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at Any Other Bank in Sierra Leone', 19 April 2004. The use of freezing measures at the ICTY and ICTR was also directed to the specific purpose of limiting the resources available to a suspect or accused, which could assist them to evade arrest-see Prosecutor v. Milosevic et al, 'Decision on Review of Indictment and Application for Consequential Orders', 24 May 1999, at para 27.

seize the assets, the Pre-Trial Chamber underscored that the Chamber had both the power and the duty to take steps to preserve Mr. Bemba's assets in order to ensure their availability for a future reparations order.[33] ICC Chamber have also affirmed that freezing orders are intended to be preservative rather than punitive in nature.[34]

71. It is, nonetheless, apparent that apart from ordering States to 'freeze' the assets, no legal or practical framework was put in place to ensure that the freeze achieved its objective of preserving the value of the assets for future reparations orders.

72. When the Defence first contested the Registry's determination of Mr. Bemba's financial status before the Presidency, the Presidency confirmed the legitimacy of this system on the basis that it had been adopted after substantive consultation with the legal profession, and appeared to be consistent with the rights of the defendant.[35]

73. However, throughout the course of the proceedings in both ICC-01/05-01/08 and ICC-01/05-01/13, the Registry omitted to apply procedural protections, which are core elements of the legal aid scheme, due to their incompatibility with the asset freeze. This *ad hoc* amendment of the legal aid scheme violated Mr. Bemba's right to due process,[36] and undermined the basis of the Presidency's ratification of the initial indigence determination.

74. For example, in Case ICC-01/05-01/08 the system for indigence calculated the disposable means of the accused by ascribing a monthly rental value to property. The [Redacted] was calculated as generating a potential monthly

[33] See for example, ICC-01/05-01/08-339-Red, para. 11.
[34] ICC-01/05-01/08-8, para 6.
[35] ICC-RoC85-01/08-3-Conf.
[36] As emphasised by the ICTY Presidency, the Registry has a duty to apply policies in a transparent and prospective manner:*Prosecutor v. Sljivancanin*, Decision on Assignment of Defence Counsel, 13 August 2003, para. 25.

rental value of [Redacted] euros.[37] The assumption underlying this system allowed the Defence to consider generating income from properties (and preserving the future value) rather than liquidating them to satisfy an immediate debt based on sale price.[38] However, as a result of the asset freeze, the presumption underlying the system (that assets could be utilised to generate a monthly income) was completely inoperative.

75. ICC Registry policies at that time anticipated that in the event of a conflict between the accused right to adequate time and resources to prepare his Defence, and victims' hypothetical right to future reparations, the former should prevail; concretely, asset freeze should be lifted or modified in order to accommodate the needs of the defendant.[39]

76. In line with this position, in 2008, the Presiding Judge of the Pre-Trial Chamber affirmed "the Chamber's duty and power to retain control over any assets and/or financial resources which might be available to Mr Jean-Pierre

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[37] ICC-RoC85-01/08-3-Conf, para. 33.

[38] It would appear that the Registry did not factor into consideration the need for Mr. Bemba to pay tax on the estimated monthly value.

[39]" A second relevant principle is the presumption of innocence. In so far as a conflict of interest might arise between the victims' legitimate right to reparations and the right of the accused to legal representation and adequate defence, it is, in principle, to be expected that the latter interest will prevail, due to the 'presumption of innocence' that is a basic tenet of criminal law, and to the fact that the accused sits in jeopardy of losing his or her liberty.

[…]

It is consistent with established law that frozen financial assets and economic resources may be unfrozen to the extent determined to be necessary for basic expenses, including payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services. Making such an exception, in other words allowing accused persons access to their frozen assets to pay for the reasonable legal costs of their defence is consistent with the interests of justice, with the approach adopted in national jurisdictions and international sources, and with the Court's wider approach to legal aid, and the notion that accused who have the means should contribute to the costs of their defence.

[…]

[a]s regards how any unfreezing of assets would be effected, this would be a matter between the defendant and the Chamber, since it does not fall within the ambit of the Registrar to request the relevant Chamber to unfreeze the assets of the person concerned. It is to be expected that the Chamber would decide, at the request of the defendant or on its own motion, to request States Parties to exclude from seizure any assets which needed to be realized for the purpose of the individual's defence or, in the case of assets already seized, that they be released forthwith for that purpose, on the basis of an assessment provided to it by the Registry"

ICC-ASP/7/23, paras. 78, 80, 81.

Bemba".[40] The Single Judge therefore ordered [Redacted] to release designated amount for both legal aid and maintenance for Mr. Bemba's family from a designated account.[41]

77. This solution succeeded only on a short-term basis; within a few months, the funds from the account in [Redacted] were exhausted.[42] Although funds were available in Mr. Bemba's account in [Redacted], the Court then froze this account, which blocked this source of funding.

78. The matter was then referred to the Trial Chamber, which ordered the Registry to provide funding subject to the caveat that the funds should be reimbursed from Mr. Bemba's assets.[43]

79. Whereas the Pre-Trial Chamber had agreed previously that an allowance should be released each month for Mr. Bemba's family, and general maintenance costs,[44] the solution proposed by the Trial Chamber failed to address this issue. As a result, no maintenance allowance was provided for for the remaining duration of the ICC proceedings.

80. Moreover, notwithstanding the Pre-Trial Chamber's affirmation that the Chamber had a positive duty to manage and preserve the value of the assets, the Trial Chamber did not establish guidelines as to the manner in which the accused's assets should be preserved or used to satisfy the debt.

81. In particular, although the Presidency had approved the application of the ASP endorsed indigence system to Mr. Bemba's case, the Trial Chamber did not clarify whether its order reversed or modified the system for indigence which was based on calculations regarding income generated through monthly rental rather than the liquidation of the assets.

[40] ICC-01/05-01/08-339-Red, para. 11.
[41] ICC-01/05-01/08-149-Conf
[42] ICC-01/05-01/08-339-Red, para. 3.
[43] ICC-01/05-01/08-567-Red
[44] ICC-01/05-01/08-149-Conf, para. 16.

82. In essence, the Trial Chamber signed off on a new system for indigence half-way through the proceedings, without fleshing out specific criteria as to how it would be applied in a manner which ensured Mr. Bemba's rights.

83. In terms of practical details, Trial Chamber III limited itself to directing the Registry's attention to the issue as to whether Mr. Bemba should be compelled to sell his assets at less than a fair market value.[45] This direction was itself, at odds, with the assumption underlying the scheme that the accused's obligations should be calculated on the basis of income that could be generated from properties, rather than sale price.

84. The Defence also expressed the view that Mr. Bemba should be able to make commercial use of his assets in order to generate funds for his Defence. In particular, Mr. Bemba proposed to the Registry that a management company arrange for [Redacted] to be leased out, in order to fund his Defence.[46] [Redacted].[47] The Registry itself estimated it could generate at least [Redacted] a month.[48]

85. The Defence further requested the Chamber and the Registry to organise the return of the documentation necessary to organise the commercial leasing of the [Redacted].[49] The Registry responded, however, that it was not worthwhile pursuing this option as it would be necessary to pay outstanding parking fees, and conduct maintenance work in order to obtain [Redacted] certificates.[50] These certificates had expired due to the fact that the Prosecution's seizure of the [Redacted] certificates had prevented it from being flown in the interim.

86. Given that the Registry closely cooperated with the Prosecution in relation to issues concerning Mr. Bemba's assets,[51] there is no objective justification for

[45] See ICC-01/05-01/08-583-US, p. 5
[46] ICC-01/05-01/08-T-15-CONF-EXP-ENG, p.2. See also ICC-01/05-01/08-1563-Conf-Exp.
[47] See [Redacted]
[48] ICC-01/05-01/08-T-15-CONF-EXP-ENG, p.2.
[49] ICC-01/05-01/08-T-15-CONF-EXP-ENG, pp.2-3.
[50] ICC-01/05-01/08-T-15-CONF-EXP-ENG, p.12.
[51] See ICC-01/05-01/08-583-US, para. 26.

the Registry's failure to request and obtain the certificates at an earlier juncture.

87. The Registry's reliance on parking fees also illustrated the flawed and short-sighted nature of the Registry's approach to indigence. Since the debt associated with the parking fees would have to be addressed at some point, it would be have been preferable to have paid them then and either moved or leased the [Redacted] on a commercial basis, rather than allowing the parking fees to continue to accumulate during the remainder of the proceedings.

88. This approach stemmed from the Registry's mistaken position that it had no duty to take steps to preserve the value of Mr. Bemba's assets. A Registry representative advanced this position at a status conference, claiming that the ability of the Defence to be funded from Mr. Bemba's frozen assets was a private matter, which did not concern the Registry (a position described by the Trial Chamber as "unhelpful"). [52] The Registry representative further averred that:[53]

> […] we are not in a position to protect the interest of the accused as well as he could do himself or his Defence team could do itself on this point. And there is no point for the Registry to do that.

89. In stark contrast to their hand-off approach to preserving the interests of the defendant, the Registry displayed an exceedingly proactive approach as concerns the Court's interest in liquidating the assets of the defendant. To this end, the Registry liaised with [Redacted] authorities in relation to applicable domestic legislation, and took steps to engage [Redacted] legal experts in order to obtain further legal opinions regarding the ability of the Registry to execute a sale of assets either prior to judgment, or without Mr. Bemba's consent.[54]

[52] ICC-01/05-01/08-T-15-CONF-EXP-ENG, p. 20.
[53] ICC-01/05-01/08-583-US, para. 16.
[54] ICC-01/05-01/08-583-US, paras. 7 and 8.

90. As set out in the table attached as Annex B, over the last eight years, the value of Mr. Bemba's asset has diminished by over [Redacted] euros. This diminution was caused by the Court's failure to take necessary and reasonable measures to either preserve the value of the assets, or to realise the value of assets of a depreciating nature.

91. Due to these omissions, Mr. Bemba was deprived of access to the full value of his properties on a permanent basis.

92. The ICC system for indigence is predicated on the principle that:[55]

> the determination of the indigence of applicants requesting legal assistance paid for by the Court needs to correspond to the actual legal cost of the system put in place, which the Committee on Budget and Finance ("the Committee") supported as being founded on "a sound structure."

93. In the case of Mr. Bemba, this principle has not been respected. Unless he is provided with a form of compensation or credit as concern the losses he has suffered, his overall contribution to the costs of his Defence will end up being much greater than the actual cost to the Court.

94. During the drafting of the Statute, States were sensitive to the issue that measures taken for the purpose of preserving assets for reparations should not occasion pre-conviction, financial harm for the defendant. According to Donat-Cattin,[56] `

> [s]everal States participating in the ICC negotiations had been extremely cautious in dealing with this matter. On the one hand, they based their attitude against protective measures on the strict interpretation of the presumption of innocence, and more broadly, the right of the accused not to be potentially damaged by a provisional measure such as freezing of assets (with all the problematic consequences in the area of compensation for damages in the hypothesis of acquittal or pre-trial dismissal of charges). On the other hand some State's delegates feared that "non-crime related

[55] ICC-ASP/8/4, para. 5.
[56] D Donat-Cattin 'Article 75 Reparations to Victims' in Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article (Hart Publishing 2008) at pp 1408-1409.

property" could have been subject to such measures, thus infringing upon prohibitions related to property rights under their domestic law.

95. These considerations should inform the ICC's approach to pre-conviction freezing orders, and translate to a duty to compensate or credit the accused for any financial harm that was caused by the freezing order.

96. The duty to provide a remedy for the loss of value also stems from internationally recognised human rights law, and domestic practice. The former derives from Article 21(3) of the Statute, and the latter from the fact that domestic practice formed the model for the Pre-Trial Chamber's decision to impose freezing measures in *Lubanga* and later cases.[57]

[57] See ICC-ASP/7/23, footnote 41, which refers to the following: "For example, in the context of legislation on proceeds of crime, or on anti-terrorism, provisions for the freezing of assets are often subject to a proviso that those assets which are required to provide for the reasonable costs of legal representation should be excluded from the seizure/freezing order. See e.g. *Serious Organized Crime and Police Act 2005* (UK), *Proceeds of Crime Act 2002* (UK), Chapter 6, Section 98(1); Practice Note No. 23: Freezing Orders (also known as 'Mareva orders') supplementing Order 25A of the Federal Court Rules relating to freezing orders (also known as '*Mareva* orders' after *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509, or 'asset preservation orders'); *Mansfield v Director of Public Prosecutions for Western Australia, P53/2005, 20 July 2006, High Court of Australia*, at para. 53; *United States of America, v. Richard H. Thier*, No. 85-4857, 10 October 1986, United States Court of Appeals, Fifth Circuit, at paras. 69-60. For international sources see e.g. United Nations Security Council resolution 1596 (2005), para. 16(a), whereby the Council introduces exceptions to the freezing of assets declaration of the resolution by stating that its provisions do not apply to funds, other financial assets and economic resources that "have been determined by relevant States to be *necessary* for *basic expenses*, including payment of (...) *reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services*." (Emphasis added). his resolution was cited in the Pre-Trial Chamber's decision of 31 March 2006 as the basis of its request to States Parties to freeze the assets of the accused, Thomas Lubanga Dyilo. Council Regulation (EC) No 1183/2005 of 18 July 2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, article 3; Council Regulation (EC) No 1763/2004 of 11 October 2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), article 3(b); Council Regulation (EC) No 560/2005 of 12 April 2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Cote d'Ivoire, article 3.1(b); Council Regulation (EC) No 423/2007 of 19 April 2007 concerning restrictive measures against Iran, article 10.1(a) (ii); Council Regulation (EC) No 305/2006 of 21 February 2006 imposing specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri, article 3.1(b); Council Regulation (EC) No 872/2004 of 29 April 2004 concerning further restrictive measures in relation to Liberia, article 3.1(b); Council Regulation (EC) No 1184/2005 of 18 July 2005 imposing certain specific restrictive measures directed against certain persons impeding the peace process and breaking international law in the conflict in the Darfur region in Sudan, article 3.1(b); United Nations

97. As concerns the application of internationally recognised human rights law, the ICC Appeals Chamber recently affirmed that ICC Chambers possess the power to freeze assets prior to a conviction, for the purpose of a potential order for forfeiture or reparations. In order to reach this conclusion, the Chamber relied on the existence of similar compensatory schemes in national jurisdictions,[58] but nonetheless indicated that such a freezing regime would need to be implemented in a manner which was consistent with internationally recognised human rights law (as per Article 21(3) of the Statute).[59]

98. That corpus of law in turn, imposes stringent procedural safeguards as concerns the imposition of freezing measures against an accused. The European Court of Human Rights has clarified in its case law that measures which constitute 'control on the use of property' infringe on the right to property, unless they are legitimate and proportionate.[60] Such limitations are legitimate and proportionate when they achieve 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[61]

99. Similarly, while applying EU law on fundamental rights, the Court of Justice of the European Union held in the *Kadi* case that "the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed".[62] An asset freeze, which depletes rather than preserves the

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Security Council resolution 1452 (2002), para. 1(a); United Nations Security Council resolution 1532 (2004) (concerning the freezing of assets of Charles Taylor), para. 2 (a); United Nations Security Council resolution 1737 (2006) (concerning the freezing of assets in connection with Iran), para. 13(a)."

[58] ICC-ACRed-01/16, para. 50.

[59] ICC-ACRed-01/16, para 53

[60] *James v. UK*, 8 July 1986, A/98, para. 46; *Jahn and others v. Germany*, Nos 46720/99, 72203/01 and 72552/01, 30 June, 2005.

[61] *Air Canada v UK*, 5 May 1995, A/316-A, para. 36.

[62] *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 355.

value of the defendant's assets, clearly constitutes a disproportionate restriction of the defendant's right to property.

100. The United Nations' and EU entities have also underscored that due to the deleterious impact of asset freezes on the rights of the individual and their family, asset freezes can amount to sanctions, unless adequate protections are implemented.[63] Such protections include the right to an effective remedy,[64] which necessarily encompasses the right to a remedy for any damage to the individual's interests caused by the asset freeze.

101. In terms of domestic practice, freezing or asset preservation orders are generally accompanied by a strict duty to manage the value of the assets; the entity which requested the freezing order can be held liable for any financial loss triggered through the implementation of the freezing order.[65]

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[63] A/63/223, para. 16. ECJ, Case C-584/10 P, Commission and others v Kadi, 18 July 2013, §132

[64] A/63/223, para. 16; See A/HRC/4/88, paras. 23-31; Article 8 of Directive 2014/42/EU of the European Parliament: " Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights".
See also A/61/267, para. 40, in which the UN Special Rapporteur on Terrorism and Human Rights, cites to the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985), as a legal basis for remedying harm caused by the implementation of asset freezes.

[65] S185(1) of the *Portuguese Code of Criminal Procedure* reads 'If the seizure is imposed on (…) perishable items, the judicial authority may order, as appropriate, their necessary preservation or maintenance measures (…)' (emphasis added). In terms of analogous provisions from Portuguese insolvency law, Portuguese law, *Código Da Insolvência E Da Recuperação De Empresas* (DL n.º 53/2004 as amended) provides the applicable legal framework.
S31 reads 'the provisional liquidator who is granted exclusive administration powers should provide for the maintenance and preservation of the debtor's property, and the continued operation of the company, unless she considers that the suspension of activity is most advantageous to the interests of creditors and such action is authorized by a judge' (emphasis added)
S55(1)(b) reads '(…) the insolvency administrator with the cooperation and under the supervision of the committee of creditors (…) provides, in the meantime, the preservation and culmination of the insolvent's rights and the continued operation of the company, if applicable, avoiding as possible worsening of their economic situation' (emphasis added).
S59(1) reads 'the insolvency administrator is liable for the damage caused to the debtor and creditors on insolvency and bankrupt estate by culpable breach of his duties; the fault is assessed by the diligence of a careful administrator and orderly insolvency' (emphasis added).
S99-2 of the *French Code of Criminal Procedure* reads '(…) the investigating judge may also order that ownership of personal property placed under judicial safekeeping which belongs to the persons being prosecuted (…) be surrendered to the State property service with a view to their disposal, where to continue the seizure would decrease the value of the property. If the sale of the asset is then carried out, the proceeds of this are deposited for a period of ten years. Where the proceedings are dropped,

or end in a discharge or acquittal, or where the court does not order confiscation, these proceeds are given back to the owner of the items, if he so requests' (emphasis added).

Under UK law and more specifically SS27-30 of the *2003 Proceeds of Crime Act*, restraint and charging orders serve the purpose of preventing the dissipation or depreciation of assets which may be confiscated from a convicted criminal.

S27(6) reads 'Where the Court has made a restraint order, the Court (a) may at any time appoint a receiver- (i) to take possession of any realizable property; and (ii) in accordance with the directions of the Court, to manage or otherwise deal with any property in respect of which he is appointed (…)' (emphasis added).

Similarly, S29(7) reads 'Where the Court has made a charging order, the Court may give such directions to such person as the Court thinks fit to safeguard the assets under the charging order' (emphasis added).

S34 regulates the liability of the receiver; provided that he/she acts pursuant to his reasonable beliefs with regard to his rights, he/she is not liable to any person in respect to any loss or damage resulting from his action, except in so far as the loss or damage is caused by his negligence.

Under German law, the *Insolvency Statute of 5 October 1994* is relevant.

According to S21(1), 'The insolvency court shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request' (emphasis added).

This obligation is further clarified in the next paragraph, providing for the possibility of appointing a 'provisional insolvency administrator' to ensure the satisfactory management of the property in question.

S22(1) elaborating on the provisional administrator's rights and responsibilities reads 'the provisional insolvency administrator shall (…) see to the arrestment and preservation of the debtor's property' and 'verify whether the debtor's property will cover the costs of the insolvency proceedings' (emphasis added).

S60(1) reads 'The insolvency administrator shall be held liable to damages for all parties to the proceedings if he wrongfully violates the duties incumbent on him under this Statute. He shall ensure the careful action of a proper and diligent insolvency administrator' (emphasis added).

Under EU law, *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings* provides the applicable framework governing Member State cooperation in such cases.

A21(3) of the Regulation reads 'In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action'.

A52 of the Regulation reads 'Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of a debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that Member State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings' (emphasis added).

For the United States, seeUnited States of America, v. Richard H. Thier, No. 85-4857, 10 October 1986, United States Court of Appeals, Fifth Circuit, para. 67: Due process is not a procedural absolute. What is required may depend on the weight of the interests involved. The Government certainly has a valid interest in assuring that funds illegally obtained are not laundered or secreted between the time a defendant is indicted and the time when his criminality is determined by actual conviction. This is sufficiently important to weigh heavily in deciding what due process requires when the Government seeks to protect its interest. But due process must be determined on a scale whose balances weigh both sides, not simply the Government's interest. *The scale must also weigh the private interests of the affected individual, the risk of an erroneous deprivation of that interest under the procedures used, and the*

102. In line with the above precedents, if no compensation or effective remedy is provided to Mr. Bemba, the amount of financial loss will constitute an *ultra vires* penalty or form of property forfeiture.

103. The Appeals Chamber has observed in this regard that "while the word "forfeiture" is not defined in the Statute or Rules of Procedure and Evidence, it is used consistently across the statutory framework to mean the deprivation of property."[66] The loss suffered by Mr, Bemba falls squarely within this meaning: he was permanently deprived of the property in question due to the freezing order and confiscation of papers of the [Redacted].

104. Former ICTY Judge, S. Trechsel has also observed that whilst human rights jurisprudence does not prohibit national authorities from seizing the assets of a defendan,t such measures "may become so intrusive that they must be viewed as anticipating the punishment. This could even be the case with seizure, if it lasts for an excessive length of time and if the goods seized consequently lose their value."[67]

105. The ECHR has, in this connection, emphasised that the question as to whether an adverse judicial measure constitutes a penalty is a matter of substance and not form. Thus, in *Öztürk v. Germany*[68] the Court held that if the Contracting States were able at their discretion, by classifying an offence as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 of the Convention, the application of these provisions would be subordinated to their sovereign will. Accordingly, for the protections of Article 6 to apply, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.[69] A financial penalty can in principle have a nature and degree of severity that belongs to the criminal sphere.

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probable value and additional costs, if any, of additional or substitute procedural safeguards (https://www.courtlistener.com/opinion/476830/united-states-v-richard-h-thier/)

[66] ICC-ACRed-01/16, para. 45.

[67] S Trechsel, Human Rights in Criminal Proceedings(Oxford University Press 2006) at p. 180, citing the case of Raimondo v. Italy at footnote 126.

[68] *Öztürk v. Germany,* Application no. 8544/79, 21 February 1984; Engels and others v Netherlands ECHR judgment 6\8\1976, Series A, No. 22.

[69] *Ibid,* para 54.

106. The direct linkage between the power to freeze assets and the legal regime for reparations and forfeiture, also supports the conclusion that any uncompensated diminution in the value of the assets, which has been caused by the asset freeze, should be considered as a type of forfeiture or financial penalty.

107. It is of further import that the Appeals Chamber explicitly relied on the legal provisions concerning forfeiture in order to conclude that a Pre-Trial Chamber possesses the power to freeze the assets of a person (for the purpose of potential reparations), prior to the issuance of a conviction.[70]

108. The link between penal fines and measures taken in connection with reparations is also reflected in the drafting history of the Statute. A '*Proposal Concerning Part 7 of the Rome Statute of the International Criminal Court, on Penalties'*, which was submitted by Australia, Canada and Germany, stated that "(a) In determining whether to impose a fine under article 77 (…) the Court shall take into account (…): (iii) The making of any reparation order under article 75 and of any forfeiture order under article 77, paragraph 2 (b)".[71] This proposal was adopted in the final text of Rule 146(1) of the RPE.[72]

109. This wording evidences the intent of State parties that there should not be financial duplication between the payment of fines, and reparations; if an accused had financial liabilities because of reparations orders, the Chamber should take that into consideration in determining the quantum of any fine which should be imposed.

110. ICC Chambers have also affirmed that payment in reparations is contingent on a prior conviction;[73] reparation payments are thus inextricably

[70] ICC-ACRed-01/16, paras. 45-46.
[71] PCNICC/1999/WGRPE(7)/DP.5, found at http://www.legal-tools.org/doc/30821f/, p2.
[72] "The Court shall give due consideration to the financial capacity of the convicted person, including an orders for forfeiture in accordance with article 77, paragraph 2(b), and as appropriate, any orders for reparation in accordance with article 75."
[73] ICC-01/09-01/11-2038, para. 7.

tied to the punishment process, and are intended to reflect the criminal culpability of the accused for the conduct for which he has been convicted.[74]

111. This is consistent with the fact that "although reparations were seen as a way of providing redress for victims, it was clear to many delegations [at Workshop 4 of the Paris Seminar, (PCNICC/1999/WGRPE/INF/2, 6 July 1999)] that they were nevertheless part of the sanction of the Court to be ordered against a convicted defendant."[75]

112. In turn, *per* Rule 146(1), the quantum of any fine paid is also relevant to the sentence imposed by the Chamber: "In determining whether to order a fine under article 77, paragraph 2(a), and in fixing the amount of the fine, the Court shall determine whether imprisonment is a sufficient penalty".[76]

113. In the case of ICC-01/05-01/18, Trial Chamber III rejected a Defence request to discount Mr. Bemba's sentence due to the financial losses caused by the asset freeze, ruling that such issues should be addressed with the Registry. At the same time, the Chamber also determined that the sentence that it imposed (18 years) reflected fully the individual culpability of Mr. Bemba, and that as such, it was not appropriate to impose an additional fine.[77] A further financial penalty would exceed the parameters of the punishment imposed by Trial Chamber III, and fall foul of the Statutory prohibition on punishing Mr. Bemba twice for the same conduct.

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[74] ICC-01/04-01/06-3129, para 65.

[75] "Although reparations were seen as a way of providing redress for victims, it was clear to many delegations [at Workshop 4 of the Paris Seminar, (PCNICC/1999/WGRPE/INF/2, 6 July 1999)] that they were nevertheless part of the sanction of the Court to be ordered against a convicted defendant, and that making an interim award before a trial, it was concluded, may be an indication that the Court had already determined the guilt of the person. ... [I]t was decided that reparations were not an appropriate place to deal with interim relief." Peter Lewis and Håkan Friman in Roy Lee (Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*) 474, at 488:

[76] Similarly worded proposals confirm this interpretation: "If the Court decides to impose a fine, this shall be taken into account in determining the sentence of imprisonment": Rule 7.2(d), PCNICC/1999/WGRPE(7)/DP.5

[77] "[n]oting that the parties and Legal Representative do not request the imposition of a fine or order of forfeiture under Article 77(2) and Rules 146 to 147, the Chamber decides that, in the circumstances of this case, imprisonment is a sufficient penalty", ICC-01/05-01/08-3399, para. 95.

114. Accordingly, unless the Appeals Chamber reverses the Trial Chamber's finding that Mr. Bemba's financial losses can be set-off his sentence, it is incumbent on the Registry to provide an effective remedy for these losses.

The calculation of Mr. Bemba's total debt of legal expenses should not exceed 75% of the amount of the total value of his identified assets, after reasonable expenses for his dependents and other legal obligations are deducted

115. It is exceedingly rare – within the sphere of international courts and tribunals - for an accused to be required to fund Defence costs of the size that have been generated by the two cases of ICC-01/05-01/08 and ICC-01/05-01/13.

116. At the conclusion of proceedings before the ICC, the legal assistance costs in ICC-01/05-01/08 alone will amount to roughly [Redacted] – which was the debt that was paid for through the funds released from the [Redacted] bank account). This amount does not include the fees, which were paid privately in 2008 and 2009 (i.e before Trial Chamber III ordered the Registry to advance funds). The costs of Mr. Bemba's Defence have also been subjectively, very high, in the sense that unless the Registry imposes an upper limit as concerns his debt to the Court, the costs may consume the entirety of his identified assets.

117. Although accused have privately financed defence teams in other cases, the length of the proceedings was significantly shorter, which reduced the overall costs (the Kenyatta case, for example, lasted only four years). In such instances, the funds often came from States or fundraising rather than from the defendant himself. The defendants also had the corollary freedom to use their private funds in order to bolster the size and resources of the Defence. In contrast, due to the asset freeze, the amounts released to Mr.

Bemba were pegged to rates and amounts, which are available under legal aid.

118. Not only did Mr. Bemba not obtain any strategic advantage through the private payment of his Defence, but, due to the prolonged retention of the asset freeze, suffered a significant degradation as concerns the value of his assets (which was addressed in the section above). It is also pertinent that Defence costs at the ICC are far larger than the domestic equivalent.[78]

119. A significant component of these costs is also attributable to factors, which are unique to the were beyond the control of the defendant. This includes, for example, delays in 2009, which were caused by disputes over legal funding,[79] and the Prosecution's filing of an amended DCC.[80] The start-date of the trial was pushed back,[81] following which the trial then stalled for Prosecution witnesses to postpone their testimonies for personal and professional reasons,[82] despite Defence concerns over the "unacceptable number of non-sitting days".[83] The trial stalled again after the close of the

[78] A 2009 Registry report acknowledges that "the need to enable adequate legal representation before the Court differs significantly from the need existing before national jurisdictions: the scope and complexity of the crimes under the Court's jurisdiction, the specificity of the law of the Court and the sheer number of documents both in the case file and disclosed by the Prosecutor, all combine to make representation before the Court both *sui generis* and demanding. Practical considerations such as the distance between the lawyer's domestic practice and the seat of the Court, the need to travel to and stay in The Hague for the purpose of hearings, contacts with the client and all other participants, investigation missions to the field to search for evidence and interview potential witnesses, inter alia, only add to the taxing reality of the legal practice before the Court": ICC-ASP/8/4, para. 16.

[79] See for example, ICC-01/05-01/08-452; ICC-01/05-01/08-524, which led to two of Mr Bemba's counsel withdrawing from the case. The decision was rendered 2 months after the Defence Request was filed.

[80] ICC-01/05-01/08-388, the Single Judge rendered its decision on 3 March 2009 on adjournment of hearing, in which it requested the Prosecution to consider filing an amended DCC and gave 30 days to the Prosecution (until 30 March 2009) and the Defence was given until the 24 April 2009 to file submissions in relation to the amended DCC.

[81] ICC-01/05-01/08-803, ordering the postponement of the trial after the judicial recess, from 5 July 2010 to 30 August 2010.

[82] See, for example, ICC-01/05-01/08-1904; ICC-01/05-01/08-2146: P-36 was scheduled to testify at the end of 2011, a first postponement was granted to early 2012. He was then scheduled to testify on 16 February 2012 but testified only on 13 March 2012. The transcripts also demonstrate the 30 day lapse in hearings: ICC-01/05-01/08-T-210 and ICC-01/05-01/08-T-212.

[83] ICC-01/05-01/08-1893-Conf-Red, paras.5-6.

Prosecution Case, before the hearing of LRV evidence.[84] Two months passed during the resolution of the Trial Chamber's Regulation 55 notice.[85] The judgment was rendered 15 months after the presentation of closing arguments.[86]

120. Unless the resultant costs are capped or remitted, Mr. Bemba will be placed at a significant disadvantage as compared to his litigation adversaries.

121. A defendant in a criminal trial faces the full forces of the State, and its related resources (or in the case of the ICC, the resources of the international community on whose behalf the Prosecutor acts). Although equality of arms does not equate to equality of resources, a concrete access to justice issue arises in circumstances in which a privately funded defendant is forced to expend a considerable amount of money in order to achieve procedural parity with his adversary (or in the case of ICC-01/05-01/08 – multiple adversaries). At a certain point, such high costs act as a serious disincentive as concerns the defendant instructing his Defence to undertake necessary and reasonable measures on his behalf.[87]

122. For this reason, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recommend that "[l]egal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty".[88]

123. It is also notable that although the ECHR has confirmed that requiring an accused to reimburse legal aid is not *ipso facto* incompatible with the right

[84] ICC-01/05-01/08-2180.
[85] ICC-01/05-01/08-2480l ICC-01/05-01/08-2500.
[86] ICC-01/05-01/08-3191, ICC-01/05-01/08-3343.
[87] "the amount of the costs assessed in the light of the particular circumstances of a given case is a material factor in determining whether or not a person enjoyed the right of access to court (see *Stankov*, cited above, § 52)": *Klaus v. Croatia,* 28963/10, Judgment, 18 July 2013, para. 82.
[88] Principle 3, (21), https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

to a fair trial under Article 6 of the Convention, the right to a fair trial might be compromised in circumstances in which the amount claimed for the reimbursement of legal expenses is excessive, or unreasonable.[89]

124. In the case of *Croissant v. Germany*, the ECHR upheld the Germany's right to seek reimbursement from convicted defendants, but noted the Government's submission that "in accordance with the standard practice followed in the Land of Baden-Württemberg, a costs debtor who has a source of income will be granted a remission of costs only after he has made some payment towards them; where the costs are high, the greater part of them will often be remitted".[90]

125. In the case of *Stankiewicz v. Poland*, the ECHR also underscored that the State had an obligation to ensure that excessive court fees did not violate the principle of access to justice, or place the Prosecutor at an undue advantage.[91]

126. In proceedings which involve a possible financial award (either to or from the applicant), the Court also has an obligation to ensure that the amount expended on legal fees does not divert an unreasonable amount from the sum, which is potentially available for the award.[92] This is of particular relevance given the fact that the amount expended on Mr. Bemba's Defence minimises the amount that is potentially available for reparations.[93] By the

[89] European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice, 2016, p. 117: http://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf citing ECtHR, Stankov v. Bulgaria, No. 68490/01, 12 July 2007, paras. 50-67

[90] App. No. 13611/88, para. 37.

[91] *Stankiewicz v. Poland*, Judgment of 6 April 2006, paras. 59, 62 and 68.

[92] *Klauz v. Croatia*, 28963/10, Judgment, 18 July 2013, para. 76-97; *Stankov v. Bulgaria*, No. 68490/01, 12 July 2007, paras. 50-67.

[93] The Court has yet to address the specific modalities of reparations payment by an accused. Nonetheless, in the context of payment for fines, Rule 146 states that the total amount should be determined after assessing the financial needs of the accused. Financial needs encompass legal aid debts to the Court, since the position of the ICC is that this takes priority in payment (see ICC-ASP/7/23, para 78). Concretely, this means that the amount of the reparations order directed against Mr. Bemba personally must first deduct the amount that he has already contributed or will contribute to Defence costs. This interpretation is consistent with the need to harmonise the position as

same token, the fact that Mr. Bemba faces a potential order to pay financial reparations in the Main Case acts as a chilling factor as concerns his willingness to continue to expend additional necessary and reasonable funds on his Article 70 Defence.

127. There is an obvious and understandable payment fatigue as concerns ongoing expenditure towards ICC-related proceedings. Given the importance of legal representation in complex and protracted international criminal proceedings, the question arises as to whether the accused should be compelled to shoulder such a heavy burden of ensuring an effective defence, without any assistance from the Court itself.

128. In this regard, in the sphere of international criminal law, Courts have noted that the "t*he role of the Defence Counsel* (…) *is institutional and is meant to serve, not only the interests of his client, but also those of the Court and the overall interests of justice".*[94] For example, in the *Norman* case, the SCSL underscored,[95]

> certain critical issues namely: (i) that the right of counsel (…) is predicated upon the notion that representation by Counsel is an essential and necessary component of a fair trial. (ii) The right to counsel relieves trial Judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming

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concerns the payment of fines and legal aid debts in order to avoid discrimination between defendants. The Lubanga reparation appeals decision found that Mr. Lubanga is required to repay reparations paid out by the Trust Fund for Victims if it is determined in the future that he has the means to do so (ICC-01/04-01/06-3129, para. 104.) Conversely, he is only obliged to pay back legal aid if it is discovered that he had assets existing at the time of the ICC proceedings (as per Regulation 85(4) of the ROC). This means that Mr. Lubanga can devote his future assets entirely towards satisfying the reparations order. In contrast, unless legal debts to the ICC are deducted from the amount payable as reparations, because of timing of reparations order (i.e. towards end of the proceedings),Mr. Bemba would be required to pay both the full amount of his Defence costs, and still contribute his future assets to the satisfaction of the reparations order.

[94] *Prosecutor v. Sam Hinga Norman et al.,* SCSL-04-14-T, Decision On The Application Of Samuel Hinga Norman For Self-Representation Under Article 17(4)(D) Of The Statute Of The Special Court, 8 June 2004, para. 23.

[95] *Prosecutor v. Sam Hinga Norman et al.,* SCSL-04-14-T, Decision On The Application Of Samuel Hinga Norman For Self-Representation Under Article 17(4)(D) Of The Statute Of The Special Court, 8 June 2004, para. 26.

> routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings. (iii) Given the complexity of the trial in the present case, it cannot be denied that a joint trial of such magnitude, having regard to the gravity of the offences charged, and considering the number of witnesses to be called by the Prosecution and the Defence, make for a trial fraught with a high potential of complexities and intricacies typical of evolving international criminal law. (iv) There is also the public interest, national and international, in the expeditious completion of the trial. (v) Furthermore, there is the high potential for further disruption to the Court's timetable and calendar which we are already witnessing in this case (…). (vi) The tension between giving effect to the 1st Accused's right to self-representation and that of his co-accused, to a fair and expeditious trial as required by law.

129. In line with these principles, Counsel funded by the Court have been appointed to non-indigent accused in order to ensure that the overall fairness of the proceedings is not compromised.[96] For example, in appointing Court-funded *amicus*, assigned or standby counsel, the *ad hoc* Tribunals have relied on domestic precedents concerning the necessity of legal representation in complex or sensitive proceedings, irrespective of the financial status of the accused.[97]

130. Of particular relevance, the ICTY has stressed the importance of legal representation in cases involving sexual violence.[98] Several victims of rape were heard in the Main Case, and cross-examined by professional Defence Counsel. Similarly, in the Article 70 case, given the highly technical nature of the expert evidence on intercepts, call data records, and acoustic quality, it was clear that absent legal representation, the proceedings would have been manifestly unfair and inefficient. Since the Court benefitted from the services and professionalism of Counsel in both cases, the Court should contribute to the costs of such Counsel.

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[96] *Prosecutor v. Prlić et al.*, IT-04-74-A, Decision On Praljak's Request For Stay of Proceedings, 27 June 2014; cite Milosevic and Karadzic)

[97] See *Prosecutor v. Milosevic*, Decision On Interlocutory Appeal Of The Trial Chamber's Decision On The Assignment Of Defense Counsel, 1 November 2004, para. 12.

[98] As an example, Section 288C of the Scottish Criminal Procedure Code (cited at footnote 38 of the Milosevic 1 November 2004 decision) mandates representation by Counsel in relation to cases involving sexual violence. Section 288D then specifies that such Counsel will be appointed by the State, if the accused fails to do so.

131. This is consistent with the position of the ECHR that where States set up complex legal fora that require Counsel with specific competence, the State has a corresponding duty to ensure that the accused is in a position to exercise his or her rights before such fora, in an effective and fair manner.[99]

132. By following ICTY precedents, Mr. Bemba could have elected to represent himself in order to avoid the financial burden of funding his Defence, whilst benefitting from standby counsel or amicus funded by the Court. It would therefore be perverse and unfair if instead by cooperating fully with the Court and electing to be represented by Registry-vetted and appointed Counsel, Mr. Bemba receives no financial assistance from the Court.

133. Accordingly, in order to ensure that the extraordinarily high costs of legal expenses do not deter Mr. Bemba from from electing to be represented through Counsel, or with a full Defence team for the remainder of the proceeding, the interests of justice mandate the imposition of an upper threshold (in absolute monetary terms or as a percentage of identified assets) beyond which Mr. Bemba should not be required to contribute.

134. In determining the threshold at which the total amount of Mr. Bemba's legal expenses would become excessive or unreasonable, the Registry should take into consideration the fact that the State parties to the ICC have determined that it would be excessive and unreasonable to require a defendant to contribute more than 75% of his identified assets (after legal obligations and the reasonable needs of dependents are deducted) towards a fine. [100]

[99] Tabor v. Poland, Application no. 12825/02, paras. 42-43 , citing Vacher v. France, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2148-49, §§ 24 and 28, and R.D. v. Poland, nos. 29692/96 and 34612/97, § 44, 18 December 2001)
[100] Rule 146(2) of the RPE.

135. A fine is a criminal penalty, which is supposed to reflect the individual criminal responsibility of the accused; it contains both a compensatory and a punitive element. If the maximum fine that can be imposed for genocide, war crimes and crimes against humanity is less than 75% of the accused's identified assets, it would be clearly excessive and unreasonable for the accused to be forced to foot legal costs, which exceed this amount.

The value of Mr. Bemba's assets is fully exhausted by the maximum acceptable amount of his debt to the ICC (including possible reparations order).

136. In addition to, or in alternative to the arguments set out above, Mr. Bemba is entitled to receive legal aid for the remainder of the Article 70 proceedings due to the fact that the assets, of which he freely disposes, are insufficient to meet the costs of his Defence.

137. The Registry's previous assessment that Mr. Bemba was partially, rather than fully indigent, is erroneous due to:

i. The Registry's reliance on frozen assets, which cannot be 'disposed of' by the Article 70 Defence;
ii. The Registry's failure to take into consideration legal obligations and debts to *bona fides* third parties;
iii. The Registry's failure to take into consideration the depreciation of key assets; and
iv. The Registry's failure to include an accurate estimation of the necessary and reasonable expenses of Mr. Bemba's dependents.

138. As confirms the first aspect, the ICC Presidency found that,[101]

> "the 'means' referred to in article 67(1)(d) of the Statute must be available to the applicant immediately or in the near future", noting that it is "not in the interests of justice to deprive a person of legal assistance paid for by the Court if that person lacks the means to fund

[101] ICC-RoC85-01/13-21-Corr-Red, paras. 73 and 76.

> his or her defence where his or her assets are confirmed as unavailable". The Presidency further found that "the inability to directly or indirectly enjoy or dispose of one's means, within the meaning of regulation 84(2) of the Regulations of the Court, may lead to a situation where an applicant for legal assistance who does not meet the threshold for the payment thereof, having failed the indigence test, still lacks sufficient means to pay for the costs of his or her defence, for example due to his bank accounts having been frozen or his property seized, or his means being otherwise unavailable."
>
> […]
>
> Any issues as to rights of conveyance or transfer will have to be resolved. In addition: the relevant Chamber will have to be petitioned to lift the seizure and freezing orders; government seizures will have to be lifted; and options regarding the sale, rent, mortgage or other of the assets considered and eventually realised. It is unlikely that effecting those necessary steps will yield results which will enable funds from the relevant assets to be disbursed for the purpose of the Suspect's defence in the immediate or near future.

139. According to the Registry's most recent report on Mr. Bemba's assets, the "unfrozen" assets of Mr. Bemba are comprised of:

i. The [Redacted] , which is valued at [Redacted] (the cost of scrap metal); and
ii. A [Redacted].

140. Even assuming that these estimations are correct (which they are not) The value of these assets is subsumed by the amount of Mr. Bemba's debt to the [Redacted].

141. In its September 2015 decision, the Registry recognised that it was necessary to factor depreciation into its calculation. It would therefore be a procedural error not to further depreciate the value of these assets in order to reflect the actual value at the time that the Registry issues its decision.

142. The remainder of Mr. Bemba's assets are subject to judicial orders issued by Trial Chamber III. Far from having the power to access such assets,

the Article 70 Defence team cannot even directly access *ex parte* documentation concerning their legal status, even where necessary to avoid the imposition of unfair fines. The status quo is, in any case, a far cry from a situation in which- as per the Presidency's directive above - all issues concerning rights of conveyance/transfer, the lifting of the freeze, and the modalities for realising funds have been resolved.

143. With respect to the second error, even if the Court were to take into consideration frozen assets, it is also evident the value of the frozen assets would not exceed the overall value of Mr. Bemba's debts. This debt is comprised of:

a. Debts associated with the properties;
b. The potential enforcement of legal assistance debts accrued in the Main Case; and
c. Mr. Bemba's ongoing obligations to his dependents,

144. As concerns the first aspect, in 2009 submissions, the Registry acknowledged the possibility that "the Registrar was not assured of reimbursement once the accused's funds become available because there may be other charges on his property that will take priority."[102] The Registry nonetheless informed the Trial Chamber that it would only take steps to ascertain the existence of a mortgage or encumbrance as and when it takes steps to sell the asset in question.[103]

145. This is a plainly unsatisfactory approach. The existence of such debts is directly relevant to the Registry's assessment as to whether the amount, which can be realised from Mr. Bemba's assets, could cover his Defence costs. Regulation 84(1) of the RoC requires the Registrar to make a determination as to the means of the accused, before reaching his decision as to whether the accused is entitled to legal aid. Regulation 84(2) further specifies that the Registrar may only base his decisions on means "of which the applicant has

[102] ICC-01/05-01/08-567-Red, para. 82.
[103] "The Registrar indicates that she has not yet investigated whether or not the property is subject to a mortgage, research which she indicates will clearly be necessary if the property is to be sold or if a (further) mortgage is to be raised on it to assist Mr Bemba with his present financial obligations." ICC-01/05-01/08-596-US, para. 9.

direct or indirect enjoyment or power freely to dispose". It follows that the Registrar must first assess whether the applicant (the accused) has direct or indirect enjoyment of a specific assets before including that asset in his assessment.

146. The Registrar therefore acted improperly by denying Mr. Bemba legal aid on the basis of assets, which the Registrar suspected to be encumbered, without first reaching a determination as to whether, and if so, to what extent, Mr. Bemba had the power to freely dispose of the asset. This error is compounded by the fact that the Registrar disregarded consistent Defence claims that Mr. Bemba did not have the power to realise any income through the [Redacted] property.

147. The Registry deferred its re-evaluation of Mr. Bemba's indigence due to requests for further particulars that it considered relevant to the ownership of the [Redacted] property. However, as has been repeatedly emphasised by the Defence, the salient issue for the purposes of Regulation 84(2) of the RoC is whether Mr. Bemba has the power to dispose of funds due to the existence of this property; due to the existent of significant debts associated with the property, he does not. The Defence has submitted relevant and probative documentation as concerns the existence of this debt. As found by the ECHR in the case of *Pakelli v Federal Republic of Germany*, [104] the applicant is not required to prove lack of sufficient means beyond all doubt; an offer to prove the lack of means in the absence of clear indications to the contrary satisfies the requirements of Article 6.3 (c).

148. The Defence has, in this connection, submitted documentation which establishes that the outstanding value of the loan associated with this property, which was transferred [Redacted].[105] The Defence also clarified

[104] Pakelli v Germany - Series A, Vol. 64- 25 April 1983
[105] See for {Redacted].

further queries from the Registry, which were triggered by their misreading of the bank documents.[106]

149. It is unclear how the 2010 cadastral value [Redacted],[107]

[Redacted].

150. It does not, therefore, appear that the cadastral value takes mortgages, debts or encumbrances into consideration.

151. Accordingly, irrespective as to the issue as to ownership [Redacted], given that the amount outstanding on the loan is almost [Redacted] (and will only increase pending sale), it does not appear feasible to realize any funds through the sale of [Redacted]. If anything, rightly or wrongly, the [Redacted] authorities consider Mr. Bemba to be the 'beneficial owner' of this property, then it also stands to reason that he will be held to account for its debt. Depending on the time of sale (and any further interest that will have accrued in the interim), this is likely to be **at least** 2 million euros.

152. In addition to the debts associated with this property, the Registry erred by failing to take into consideration the debts associated with its "sister property",[108] {Redacted].[109] [Redacted].

153. [Redacted].

154. [Redacted]. It would therefore be a fundamental error not to include this debt in the Registry's assessment of Mr. Bemba's indigence.

[106] [Redacted].
[107] [Redacted]
[108] [Redacted].
[109] A copy of this personal guarantee was sent to CSS on 21 July 2016.

155. As noted in the earlier section of these submissions, the Defence has attached with this submission, documents requested by the Registry concerning correspondence and [Redacted] accounts in the relevant time period. As noted by the Registry itself, these documents pertain only to the issue of ownership, and does not alter the over-arching issue concerning the debt accrued with these properties.

156. The Defence nonetheless underscores that no adverse conclusions can be drawn against Mr. Bemba in relation to the ownership of these properties. In particular, [Redacted] is the beneficial owner of both [Redacted]. [Redacted] ownership of these entities pre-dates Mr. Bemba's arrest, and there is no basis for concluding that they were listed on [Redacted] name for the sole purpose of avoiding a confiscation order.[110]

157. A further error concerned the Registry's failure to take into account future debts in it assessment. For example, although the Registry took into consideration documentation submitted by the Defence in 2015 regarding the debts for taxes and parking fees regarding [Redacted], the Registry's calculation did not project the costs associated with such debts into the future. In April 2016, the Registry estimated that Mr. Bemba had a debt of over [Redacted] euros in parking fines. This estimate was based on a statement that the debt – as of November 2012 – was [Redacted] euros. This debt will obviously have increased in the interim, such that it is now likely to be in the region of [Redacted] euros, and will be approaching [Redacted] by the end of the ICC proceedings. Given that the Registry rejected Mr. Bemba's 2009 proposal to restore and lease [Redacted], Mr. Bemba does not have the power to mitigate this debt.

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[110] The Registry legal aid policy presages that the Court can take into account assets, which have been transferred to dependents in "order to fraudulently decrease his own disposable means for the purpose of qualifying for legal aid, or seeking to elude the freezing of his or her assets", ICC-ASP/7/23, para. 61.
See also, for example, Article 94a(4) of the Dutch Code of Criminal Procedure, which specifies that it is possible to freeze property belonging to a third party if there are *reasonable grounds to assume that the property seemingly belonging to a third party actually belongs to the suspect and the structure of ownership seemingly exists to frustrate confiscation of the property*. In addition to this objective of concealment the *third party needs to be aware that his or her ownership of the property exists for this reason only*.

158. The Registrar must also take into consideration future legal assistance debts. Mr. Bemba has been convicted in the Main Case, and Trial Chamber III has commenced the reparations phase. The asset freeze, which was ordered by Trial Chamber III, remains in place. Since there is an order from Trial Chamber III advancing funds to the Defence team in ICC-01/05-01/08, any request by the Defence in ICC-01/05-01/13 to access funds would be subservient to the prior claim by the Defence in the Main case. Concretely, Court itself is a prior debtor and would have a claim on behalf of the existing debt in ICC-01/05-01/08 that supercedes any future claim of the Defence in ICC-01/05-01/13.

159. Although the legal debt for ICC-01/05-01/8 has yet to be finalised, the projected costs would be likely to exhaust the amount of available funds. In April this year, the Registry estimated that the legal debt for ICC-01/05-01/08 was [Redacted], based on an ongoing commitment of [Redacted] euros per month. Based on the current appellate schedule, it must be anticipated that these costs will continue for the remainder of 2016 and at least the first six months of 2017. There will then be residual costs for 1 Counsel for at least 6 months. That equates to a total debt of at least [Redacted] euros. This is, in effect, [Redacted].

160. In assessing any necessary and reasonable expenses for the purposes of Regulation 84(2) of the RoC, the Registry must also take consideration the fact that Mr. Bemba's conviction means that as a detainee, he will not have the ability to generate income for at least a further three to four years. It is therefore imperative that Mr. Bemba retains sufficient funds to meet the needs of his dependents during this time period. These expenses do not disappear after the conclusion of the trial and appeal.

161. The issue of dependency allowance is also not an issue that is regulated by the standard Agreement on the Enforcement of Sentences; it is therefore not an obligation that is assumed by the enforcing State.

162. If no resources were reserved for the future needs of Mr. Bemba's family, this would also trigger financial implications for Belgium, as the State of their residence. This would be contrary to the principle of international law that a State's legal responsibility cannot be triggered through legal proceedings to which it is not a party. [111]

163. When a similar situation arose regarding the funding of family visits, the Assembly of State Parties expressed the position that ICC should endeavour to ensure that its legal decisions did not create financial implications for States.[112] Indeed, if insufficient resources are reserved for Mr. Bemba's family, additional issues can arise regarding the ability of his family to visit him in detention in the State where his sentence will be enforced (if upheld on appeal).[113]

164. As acknowledged by the Registry, the system for legal aid at the ICC should not operate as a sanction against otherwise innocent relatives;[114] the Court therefore has a duty to ensure a minimum living standard for an accused's dependents.[115]

165. This is consistent with articles 10 and 11 of the International Covenant on Economic and Social Rights,[116] and State practice regarding the

[111] *Monetary Gold Removed from Rome in 1943, Italy v France and ors, Preliminary Question, Judgment, [1954] ICJ Rep 19, ICGJ 183 (ICJ 1954), 15th June 1954, International Court of Justice [ICJ]*
[112] See ICC-ASP/7/30, p. 4.
[113] The Bureau of the ASP has already foreshadowed its concern that the ICC should not create an obligation for States to fund such visits through additional social security allowances: ICC-ASP/7/30, p. 4.
[114] ICC-ASP/7/23, para. 67.
[115] ICC-ASP/7/23, para. 70.
[116] Article 10(1): "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children";
Article 11(1):"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take

implementation of freezing orders, which specify that necessary and reasonable funds should be released to family members on an ongoing basis. This practice recognises that innocent family members should not be compelled to rely on social welfare due to the existence of an asset freeze against the primary care giver; rather, funds should be released to ensure the necessary and reasonable means of the family.

166. As argued above, the approach concerning legal aid should not be more punitive than the approach which applies to penal fines. It is therefore pertinent that Rule 146(2) of the ICC Rules of Procedure and Evidence specifies in connection with the payment of fines, that:

> Under no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, and property, **after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependents.**

167. The reference to 'financial needs' is not time limited to the duration of ICC proceedings; the financial needs of the dependents of a convicted person will continue throughout the life of the convicted person (particularly if the person has been sentenced to a lengthy sentence, and is unlikely to have any future earning potential).[117]

168. A draft version of the Rules also reflects the drafters' intent that the Chamber should consider the impact of the duration of the entire sentence on the rights and interests of the defendant's family:

> Rule 7.1(a) "(a) In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall balance any mitigating and aggravating factors and shall consider the circumstances both of the convicted person and of the crime in deciding on the sentence. In addition to the factors mentioned in article 78, paragraph 1, the Court, when determining the sentence, shall give due consideration, *inter alia* to: […] The effect of the length of the sentence on the convicted person's family."

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appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent".

[117] *Proposal Concerning Part 7 of the Rome Statute of the International Criminal Court, on Penalties / Submitted by Australia, Canada and Germany*, PCNICC/1999/WGRPE(7)/DP-5

169. In light of the above, in addition to assessing the monthly dependency costs of Mr. Bemba's family during the length of ICC proceedings, the Court must assume a future debt of at least two further years of dependency payments. This equates to a debt of € [Redacted] euros, which must be ring-fenced for the requirements of Mr. Bemba's family.

170. Apart from future contributions, the Registry must also factor into its consideration past dependency contributions, which are still owing to Mr. Bemba's family. In its decision of 10 October 2008, the Pre-Trial Chamber concurred with the Defence that:[118]

> as to the expenses of Mr Jean-Pierre Bemba to support his family, the Chamber acknowledges that he has financial obligations to his family and must be able to pay for the basic needs of his wife and children.

171. The Pre-Trial Chamber therefore ruled that a basic amount (€[Redacted]) should be exempted from the asset freeze, and released each month (from 1 October 2008 onwards) in order to ensure Mr. Bemba's monthly commitments to his family.

172. In a subsequent decision, the Pre-Trial Chamber stressed that it was the responsibility of the Registry to obtain the funds from[Redacted], and to ensure that the amount in question was distributed to Mr. Bemba's family.[119] The Registry were further tasked to report to the Chamber in relation to any difficulties they might face in relation to the implementation of this decision.

173. At the trial stage, the Trial Chamber adopted the approach of the Pre-Trial Chamber subject to its later decision to order the Registry to provide funds to the Defence on an upfront basis. Although the Defence did not address the issue of dependency funds, the obligation did not fall on them to do so. The Pre-Trial Chamber had placed the onus of implementing the decision and addressing any problems on the Registry, not the Defence.

[118] ICC-01/05-01/08-251-Anx, p.7.
[119] ICC-01/05-01/08-249, para. 26.

174. Mr. Bemba's Defence has also undergone a significant change in composition; Mr. Van der Spoel withdrew in 2008, Mr. Khan QC withdrew in 2009, Mr. Nkwebe Liriss died in 2012, and Mr. Kilolo and Mr. Mangenda were arrested at the end of 2013. Mr. Bemba's family should not be prejudiced through the omission of the Defence to raise this issue with the Court.

175. Although the Registry declined to respond to a Defence inquiry as concerns the total amount of family maintenance that has been paid out,[120] it would appear that after the [Redacted] account was exhausted and the [Redacted] account was frozen, no further allotments were transmitted. The amount that should have been provided to them equates to €[Redacted] euros. This amount is owing to Mr. Bemba's family and should be allocated to them from any remaining assets.

176. Regulation 84(2) of the RoC specifies that an accused's contributions to Defence fees should occur after the amount owing to dependents is deducted. It follows that Mr. Bemba's family should be paid the outstanding amount in priority to any other debts to the Court, or putative payment to victims.

Conclusion

177. Mr. Bemba has, to the extent which is within his control, fully cooperated with this process. Since the Defence has not received all relevant documentation, the figures in Table A might not reflect the full extent of Mr. Bemba's debts and obligations, and should not be considered as binding on Mr. Bemba or his Defence for the purpose of any other proceedings before the ICC.

[120] [Redacted]

178. Mr. Bemba is simultaneously participating in two separate appeals in the Main case, Main case reparations, and Article 70 appeals and sentencing. His time and attention have been diverted to the important task of participating in these proceedings; it is therefore possible that there may be further debts or obligations that Mr. Bemba yet to recall or bring to the attention of the Article 70 Defence.

179. Even if some amounts are not 100% accurate, or require revision upwards or downwards in light of undisclosed information, it is patently clear that Mr. Bemba lacks sufficient means to fund his Article 70 Defence for the remainder of the proceedings. In the alternative, given the amount of debt that has already accrued in the Main Case, it would be punitive and unreasonable to require Mr. Bemba to fund the remainder of the Article 70 case.

[Redacted]