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No.: **ICC-RoC85-01/13**

Date: **20 May 2014**

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU
& NARCISSE ARIDO***

Public Redacted with Public Annex

**Corrigendum to the “Decision on the ‘Defence application to the Presidency for judicial review of the Registrar’s second decision on legal assistance dated 27 February 2014’”,
ICC-RoC85-01/13-21-Conf-Exp, 20 May 2014**

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

The Office of the Prosecutor
Fatou Bensouda
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REGISTRY

Registrar
Herman von Hebel

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The Presidency of the International Criminal Court (“Court”) has before it an application brought by Counsel for Mr Jean-Pierre Bemba Gombo (“Suspect”) in case ICC-01/05-01/13 for judicial review, pursuant to articles 55(2)(c) and 67(1)(d) of the Rome Statute of the International Criminal Court (“Statute”) and regulation 85(3) of the Regulations of the Court, of the decision of the Registrar of 27 February 2014 denying the Suspect’s application for legal assistance paid for by the Court.¹

The Application is granted, in part, for the reasons set forth below.

I. PROCEDURAL HISTORY

1. This is the second recent application concerning legal assistance brought by the Suspect before the Presidency. It contests the Registrar’s second denial of his application for legal assistance paid for by the Court (“Second Application”). The first application, of 6 January 2014, impugned the Registrar’s first decision dated 20 December 2013 (“First Decision”), and the Presidency handed down its subsequent decision on 6 February 2014 (“Presidency Decision”).² The Presidency notes that the procedural history is the same for both applications for the most part. In the interest of completeness, relevant paragraphs from the Presidency Decision are repeated below:

1. On 20 November 2013, the Single Judge of Pre-Trial Chamber II issued the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” in case ICC-01/05-01/13 (“Case”).
2. On 27 November 2013, the Suspect made his initial appearance in the Case and was represented by duty counsel.
3. On 5 December 2013, the Suspect submitted the “Questionnaire sur la situation financière du Demandeur” to the Registrar requesting legal assistance in order to ensure his legal representation in the Case.
4. On 8 December 2013, the Suspect instructed Mr Kaufman as his Counsel on a *pro bono* basis, according to the latter “en attendant une décision au sujet de l’aide judiciaire”. The Court registered Counsel’s acceptance of that instruction

¹ Defence application to the Presidency for judicial review of the Registrar’s second decision on legal assistance dated 27 February 2014, ICC-RoC85-01/13-12-Conf-Exp of 3 March 2014.

² Decision on the “Defence application to the Presidency for judicial review of the Registrar’s Decision on legal assistance of 20 December 2013”, ICC-RoC85-01/13-7-Conf-Exp.

on 10 December 2013. Counsel notes that he informed the Suspect that, failing a positive decision regarding legal assistance from the Registrar, the Suspect would have to meet the costs of his defence.

5. On 20 December 2013, the Registrar issued the “*Décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée le 5 décembre 2013 par M. Jean-Pierre Bemba Gombo*”..., in which he provisionally rejected the Suspect’s application for legal assistance, stating that the Suspect “*n’est pas indigent et ne peut, en conséquence, en application de la norme 85-1 du Règlement de la Cour, bénéficier ni totalement, ni partiellement de l’aide judiciaire aux frais de la Cour*”.
 6. On 30 December 2013, Counsel informed the Suspect that he was obliged to pay his legal fees and expenses, at the rate currently considered appropriate under the Court’s legal assistance scheme at the very least. Counsel indicated that “[s]hould [the Suspect] fail to meet this obligation...[Counsel] will regrettably have to request [his] withdrawal from [the Suspect’s] defence in case ICC-01/05-01/13”.
 7. On 6 January 2014, Counsel sought judicial review of the aforementioned decision of the Registrar before the Presidency of the Court pursuant to article 67(1)(d) of the Rome Statute and regulation 85(3) of the Regulations of the Court (“Application”).
 8. On 8 January 2014, Counsel filed supplementary information relating to the Application before the Presidency (“Supplementary Information”).
 9. On 21 January 2014, noting that the Application and the Supplementary Information called into question the legal assistance scheme of the Court and could have an impact upon the resources of the Court, the Registrar submitted observations in accordance with rule 20(1)(d) of the Rules of Procedure and Evidence and regulation 24 *bis* of the Regulations of the Court (“Observations”).
 10. On 22 January 2014, Counsel sought leave from the Presidency to reply to the Registrar’s Observations, pursuant to regulation 24(5) of the Regulations of the Court. [Footnotes omitted].³
2. On 6 February 2014, the Presidency quashed the Registrar’s decision dated 20 December 2013 and ordered the Registrar to make a new decision on the Suspect’s “*Questionnaire sur la situation financière du Demandeur*” requesting legal assistance, dated 5 December 2013, providing details of the calculations and taking into account the findings set out in the Presidency Decision and the relevant financial information before him.⁴ In light of the findings quashing the Registrar’s decision of 20 December and remitting the issue to the Registrar,

³ ICC-RoC85-01/13-7-Conf-Exp, paragraphs 1-10.

⁴ ICC-RoC85-01/13-7-Conf-Exp, paragraph 62 and page 26.

Counsel's application for leave to reply to the Registrar's Observations was denied.⁵

3. On 27 February 2014, the Registrar issued the "Décision du Greffier sur la demande d'aide judiciaire de M. Jean-Pierre Bemba Gombo conformément à la décision de la Présidence du 6 février 2014" ("Impugned Decision"), in which he provisionally rejected the Suspect's application for legal assistance pending finalisation of the financial investigation into his alleged indigent status, stating that the Suspect "n'est pas indigent et ne peut, en conséquence, bénéficier ni totalement, ni partiellement de l'aide judiciaire aux frais de la Cour en application de la norme 85-1 du Règlement de la Cour".⁶
4. On 3 March 2014, Counsel sought judicial review of the Impugned Decision pursuant to articles 55(2)(c) and 67(1)(d) of the Statute. He also sought the recusal from the Presidency of Judge Cuno Tarfusser, the Second Vice-President, in reliance upon article 41(2)(a) of the Statute.⁷ Vice-President Tarfusser decided not to excuse himself from the Presidency.
5. On 14 March 2014, the Presidency ordered the Registrar to provide clarifications on certain aspects of the Impugned Decision.⁸
6. On 31 March 2014, the Registrar filed such clarifications ("Clarifications").⁹
7. On 2 April 2014, Counsel filed a request to reply to the Registrar's Clarifications.¹⁰
8. That request was granted on 16 April 2014¹¹ and Counsel filed his reply on 17 April 2014.¹² The Registrar filed further information on the reply on 30 April 2014 ("Information"),¹³ following the Presidency's invitation of 22 April 2014.¹⁴

⁵ ICC-RoC85-01/13-7-Conf-Exp, paragraph 64.

⁶ Defence submission of the Registrar's second decision on legal assistance issued on 27 February 2014, ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 8.

⁷ Defence application to the Presidency for judicial review of the Registrar's second decision on legal assistance dated 27 February 2014, ICC-RoC85-01/13-12-Conf-Exp, paragraph 31.

⁸ Order concerning the "Defence application to the Presidency for judicial review of the Registrar's decision on legal assistance dated 27 February 2014", ICC-RoC85-01/13-14-Conf-Exp.

⁹ Clarifications from the Registrar in response to the "Order concerning the 'Defence application to the Presidency for judicial review of the Registrar's decision on legal assistance dated 27 February 2014'" of 14 March 2014, ICC-RoC85-01/13-15-Conf-Exp.

¹⁰ Defence request to file a response to Registry filing: ICC-RoC85-01/13-15-Conf-Exp, ICC-RoC85-01/13-16-Conf-Exp.

¹¹ Decision on the "Defence request to file a response to Registry filing: ICC-RoC85-01/13-15-Conf-Exp, ICC-RoC85-01/13-16-Conf-Exp", ICC-RoC85-01/13-17-Conf-Exp.

¹² Defence response to Registry filing ICC-RoC85-01/13-15-Conf-Exp of 31 March 2014, ICC-RoC85-01/13-18-Conf-Exp, ICC-RoC85-01/13-18-Conf-Exp.

¹³ Information provided by Registrar concerning the "Defence response to Registry filing ICC-RoC85-01/13-15-Conf-Exp of 31 March 2014", dated 17 April 2014, ICC-RoC85-01/13-20-Conf.

II. MERITS

A. Relevant parts of the Impugned Decision

9. In the Impugned Decision, the Registrar provisionally rejected the Suspect's request for legal assistance paid for by the Court.¹⁵ In reaching the Impugned Decision, the Registrar considered articles 43 and 67(1)(d) of the Statute, rules 20 and 21 of the Rules of Procedure and Evidence, regulations 83 to 85 of the Regulations of the Court, regulations 130 to 132 of the Regulations of the Registry, the Presidency Decision, and a number of policy documents submitted by the Court to the Assembly of States Parties on the subject of legal assistance.¹⁶

1. Calculation of the financial means of the Suspect

10. The Registrar noted that the Suspect's eligibility for legal assistance paid for by the Court, in accordance with regulation 84 of the Regulations of the Court and regulation 132 of the Regulations of the Registry, must be based on the means available to the Suspect, at the time of the decision or in the near future.¹⁷

11. The Registrar further noted that while some of the assets of the Suspect had been frozen by order of the Court, it was reasonable to consider that the assets in question could become available and accessible in the near future. To this end, the Registrar stated that it was incumbent on the Suspect to act diligently to obtain an order from the Court to unfreeze those assets and, thereby, the necessary funds to meet his legal costs.¹⁸

12. In order to determine the Suspect's Monthly Disposable Means ("MDM"), the Registrar estimated the monthly value of his assets and excluded those deemed necessary to cover his expenses and those of his dependants.¹⁹

13. The Registrar considered that the following assets were available to the Suspect or would become available to him in the near future:

¹⁴ Decision concerning "Defence response to Registry filing ICC-RoC85-01/13-15-Conf-Exp of 31 March 2014", ICC-RoC85-01/13-19-Conf-Exp.

¹⁵ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 8.

¹⁶ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 2.

¹⁷ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 3.

¹⁸ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 3.

¹⁹ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 4.

- (i.) The villa at [REDACTED] (estimated at €1,700,000);
- (ii.) The villa at [REDACTED] (estimated at €97,600);
- (iii.) The [REDACTED] boat (estimated at €50,000); and
- (iv.) The Suspect's principal residence at [REDACTED] (estimated at €2,500,000) where his wife and five children reside.

14. The Registrar found these assets to have a total value of €5,447,600.²⁰

15. The Registrar calculated the monthly value of the Suspect's assets in accordance with Recommendation 5 of ICC-ASP/8/24,²¹ which states that "[t]he valuation method for real estate should be changed, the [Estimated Monthly Rent] EMR calculation being abandoned in favour of the total capital value, which would thereafter be divided by 60". The Registrar noted that this recommendation was approved by Resolution of the Assembly of States Parties (ICC-ASP/8/Res.3) on 26 November 2006. The Registrar thus divided the total value of the Suspect's assets by 60 as follows:

- (i.) The villa at [REDACTED] €1,700,000 / 60 = €28,333;
- (ii.) The villa at [REDACTED] €97,600 / 60 = €1,627;
- (iii.) The [REDACTED] boat €50,000 / 60 = €833; and
- (iv.) The Suspect's principal residence at [REDACTED] €2,500,000 / 60 = €41,667).

16. The Registrar found that these assets came to a total monthly value of €50,793.²²

17. When calculating the monthly value of the Suspect's assets, the Registrar deducted the Suspect's monthly obligations from the total value of the principal residence, in order to take into account the needs of the persons living there.²³

18. In calculating the Suspect's monthly obligations towards his dependants, the Registrar took into consideration the sources set out, in order of priority, at paragraph 27 of ICC-ASP/12/3.²⁴ The Registrar thus found, from the official government statistics on the cost of living in the region of [REDACTED], that the

²⁰ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 4.

²¹ Report of the Court on Legal Aid: alternative Models for Assessment of Indigence, 5 October 2009 at paragraph 38.

²² ICC-RoC85-01/13-13-Conf-Exp-AnxA, pages 3, 4 and 5.

²³ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 4.

²⁴ Registry's single policy document on the Court's legal aid system, 4 June 2013.

cost of living was €1,141 per month per person, coming to a total of €6,846 for six people per month.²⁵

19. In respect of the MDM of the Suspect, which is used to determine whether a person is able to meet the costs of his defence, the Registrar deducted the Suspect's monthly obligations (€6,846) from the monthly value of his assets (€90,793) reaching a total of €83,947 of disposable funds per month.²⁶

2. Determination of the defence costs within the scheme of legal assistance paid for by the Court

20. In relation to the costs of the defence during article 70 proceedings in case ICC-01/05-01/13, the Registrar stated that by virtue of regulation 83(1) of the Regulations of the Court, legal assistance paid for by the Court only covers those costs considered "reasonably necessary... for an effective and efficient defence". The Registrar noted that this regulation gives the competent authority the power to reconsider the allocated resources where warranted. Thus, the level of resources allocated to the defence in respect of proceedings under article 70 of the Statute will not always be equal to that allocated in respect of article 5 proceedings.²⁷
21. The Registrar noted that in accordance with the principle of objectivity set out in paragraph 98 of ICC-ASP/12/3, the scope of legal assistance in case ICC-01/05-01/13 for three teams of indigent persons was determined on the basis of information available at the time of the decision to grant legal assistance, including the magnitude of the tasks expected of the defence and the elements of the case. The amount awarded could later be revised upward or downward as warranted.²⁸
22. Whilst noting that factors relating to the scope of legal assistance under article 70 remain relevant for the purposes of calculating the indigence of the Suspect, the Registrar referred to the cost of the defence during the most expensive stage in the proceedings, in accordance with paragraph 30 of ICC-ASP/12/3, as a parameter for assessing the costs of the defence in the instant case.²⁹

²⁵ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 5.

²⁶ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 5.

²⁷ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 6.

²⁸ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 6.

²⁹ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 6.

23. The Registrar noted that, by virtue of paragraphs 43, 85, 95 and 139 of ICC-ASP/12/3, the monthly cost of the defence must be calculated by adding the monthly amount of expenses or overhead costs (€3,000) to the monthly fee for a defence team during the trial phase which is the most expensive under the legal assistance scheme of the Court. The Registrar noted that during this phase, a legally aided defence team is composed of Counsel (€10,687), Associate Counsel (€9,043), a Legal Assistant (€5,622), and a Case Manager (€4,570). When these figures are added to the sum of €3,000 for the aforementioned overhead defence costs, the Registrar found the total defence costs to amount to a sum of €32,922.³⁰
24. In dismissing the application for legal assistance paid for by the Court, the Registrar concluded that the Suspect's MDM (€83,947) was higher than the costs of his defence (€32,922) and as consequence, he could not be considered indigent.³¹

B. Arguments of the Suspect

25. Counsel refers to the first application of 6 January 2014 and submits that he has already "extensively laid out the difficulties faced in this case".³² He submits that the Registrar is responsible for managing the funds allocated to legal assistance paid for by the Court.³³ He further submits that article 67(1)(d) of the Statute provides that an accused person is guaranteed the assignment of legal assistance without payment where that person lacks sufficient means to pay for it.³⁴ Counsel argues that the Suspect lacks sufficient means, or that his means are unavailable and thus it follows that he should be granted legal assistance so to as uphold his rights to a fair trial pursuant to article 67 of the Statute.³⁵
26. Counsel refers to article 41(2)(a) of the Statute and asks that Judge Cuno Tarfusser, the Second Vice-President excuse himself from the Presidency "bearing in mind the Suspect's right to an impartial trial".³⁶ Counsel argues that there is "a

³⁰ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 7.

³¹ ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 7.

³² ICC-RoC85-01/13-12-Conf-Exp, paragraph 22.

³³ ICC-RoC85-01/13-12-Conf-Exp, paragraph 23, citing regulation 130(2) of the Regulations of the Registry.

³⁴ ICC-RoC85-01/13-12-Conf-Exp, paragraph 28, citing ICC-RoC85-01/08-4-Anx, paragraph 48.

³⁵ ICC-RoC85-01/13-12-Conf-Exp, paragraph 29.

³⁶ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 31-32.

real, effective danger of bias or perception thereof”,³⁷ in light of the fact that: i) the Second Application impugns decisions made by Judge Tarfusser as Single Judge of Pre-Trial Chamber II; ii) an application for leave to appeal those decisions to the Appeals Chamber is currently pending before Judge Tarfusser in Pre-Trial Chamber II;³⁸ and iii) the latter’s “clearly stated opinion on the issues” which are before the Presidency in the Second Application.³⁹

27. Counsel asks the Presidency to quash the Impugned Decision and order the Registrar to provide legal assistance to the Suspect, or in the alternative to order the Registrar to provide legal assistance to the Suspect in the form of a loan, on the terms previously formulated by Trial Chamber III.⁴⁰

1. Grounds for Quashing the Impugned Decision

a. The Registrar must consider whether means are actually disposable

28. Counsel refers to the Presidency Decision and in particular paragraph 51, in which the Presidency found that “the inability to directly or indirectly enjoy or dispose of one’s means...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 defen[c]e.”⁴¹ He further refers to paragraph 52 of the Presidency Decision in which the Presidency found that “[t]he Registry has expressly recognised that the unavailability of means due to freezing of assets may lead to a person being granted legal assistance”.⁴²

³⁷ ICC-RoC85-01/13-12-Conf-Exp, paragraph 34.

³⁸ Defence Request for Leave to Appeal the “Decision on the ‘Defence request for financial assistance or, in the alternative, suspension of the proceedings against Jean-Pierre Bemba Gombo and withdrawal of Counsel’ and on the ‘Second Defence request for a loan in lieu of legal assistance’”, 3 March 2014, ICC-01/05-01/13-231-Conf-Exp

³⁹ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 30-35. On the latter point Counsel argues at paragraph 33 that “[t]he record clearly reflects that the Second Vice-President has suggested that Counsel is obligated to choose between either continuing to serve as *pro bono* counsel or to allow another attorney to replace him in the instant case. This is despite the Suspect’s clear indication that Counsel is the representation of his choice and the fact that Suspect has no access to funds to pay any other counsel in any event”.

⁴⁰ ICC-RoC85-01/13-12-Conf-Exp, paragraph 40, referring to Trial Chamber III’s Decision on legal assistance for the accused, ICC-01/05-01/08-567-US, 20 October 2009, redacted to ICC-01/05-01/08-567-Red, 26 November 2009.

⁴¹ ICC-RoC85-01/13-12-Conf-Exp, paragraph 42, citing ICC-RoC85-01/13-7-Conf-Exp, paragraph 51.

⁴² ICC-RoC85-01/13-12-Conf-Exp, paragraph 43, citing ICC-RoC85-01/13-7-Conf-Exp, paragraph 52.

29. Counsel argues that the Impugned Decision *ex post facto* places the burden of releasing frozen assets upon the Suspect.⁴³ In particular, he notes that the Impugned Decision states: “[...] qu’il incombe à la Défense de prendre les mesures diligentes auprès de la chambre compétente pour obtenir la levée de l’emprise ordonnée par la Cour.”⁴⁴
30. Counsel submits that the Suspect’s assets and property have been frozen and seized since late 2008 and early 2009, and that he “has had absolutely no disposable means since his incarceration.”⁴⁵ He further submits that insofar as the Suspect has means, they are not available to him either immediately or in the near future.⁴⁶
31. Counsel argues that the Suspect should be provided with legal assistance pursuant to the “interests of justice” principle under article 67(1)(d) of the Statute, and that the Registrar has erred in law by not conforming with this principle.⁴⁷

b. The Registrar must adhere to his own “indigence test” as a criterion in determining legal assistance pursuant to regulation 84 of the Regulations of the Court

32. Counsel submits that the Registrar made a number of errors when calculating the Suspect’s indigence,⁴⁸ errors regarding both the Suspect’s means and whether the Suspect should be provided with full or partial payment of legal assistance.⁴⁹
33. Counsel argues that the Registrar’s errors contradict the principles set out in the policy documents concerning the legal assistance scheme.⁵⁰ He submits that only the value of the Suspect’s residence which exceeds the “extent considered reasonable”,⁵¹ should be taken into account when calculating the Suspect’s means.⁵² Counsel further argues that the Impugned Decision does not provide supporting documentation to demonstrate how the EMR was calculated, when determining the “extent considered reasonable” of the Suspect’s residence.⁵³

⁴³ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 46 and 56.

⁴⁴ ICC-RoC85-01/13-12-Conf-Exp, paragraph 46, citing ICC-RoC85-01/13-13-Conf-Exp-AnxA, page 3.

⁴⁵ ICC-RoC85-01/13-12-Conf-Exp, paragraph 46.

⁴⁶ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 50-52.

⁴⁷ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 55-56.

⁴⁸ ICC-RoC85-01/13-12-Conf-Exp, paragraph 58.

⁴⁹ ICC-RoC85-01/13-12-Conf-Exp, paragraph 59.

⁵⁰ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 60-61.

⁵¹ ICC-RoC85-01/13-12-Conf-Exp, paragraph 63, citing ICC-ASP/12/3, paragraph 24.

⁵² ICC-RoC85-01/13-12-Conf-Exp, paragraph 64.

⁵³ ICC-RoC85-01/13-12-Conf-Exp, paragraph 67.

34. Counsel takes issue with the Registrar's inclusion of new assets in the Impugned Decision, which he submits undermines the Registrar's credibility concerning his previous due diligence.⁵⁴ He also argues that the [REDACTED] boat valued at €650,000 in the Impugned Decision has only scrap metal value due to neglect during the Suspect's incarceration and that the Suspect does not have title or ownership of [REDACTED] villa.⁵⁵ Counsel further submits that he has not had the opportunity to re-examine the list of exhibits seized at the time of the Suspect's arrest in 2008.⁵⁶ He argues that the number and value of the Suspect's assets have been increased and inflated.⁵⁷

2. In the Alternative, the Registrar must advance the costs of legal assistance to the Suspect

35. Counsel notes that the Registrar has significant flexibility in executing his fiduciary duties pursuant to the Financial Regulations and Rules.⁵⁸ Counsel submits that the indigence determination is not applicable in this case, as the Suspect does not have any available means.⁵⁹ Counsel submits that unless he receives legal assistance, the Suspect's right to a fair trial and minimum guarantees will not be preserved.⁶⁰ Counsel refers to the Trial Chamber III decision in which it formulated the terms of a loan of legal assistance to be provided to the Suspect, and argues that the Registrar made a legal and administrative error by failing to provide a new loan to the Suspect in the monthly amount of "€32,922" retrospectively to 20 December 2013.⁶¹

36. In relief, Counsel prays that the Presidency:

- (i) Overturns the Impugned Decision on judicial review pursuant to articles 55(1)(c) and 67(1)(d) of the Statute and regulations 84 and 85 of the Regulations of the Court;⁶²

⁵⁴ ICC-RoC85-01/13-12-Conf-Exp, paragraph 68.

⁵⁵ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 69-70.

⁵⁶ ICC-RoC85-01/13-12-Conf-Exp, paragraph 70.

⁵⁷ ICC-RoC85-01/13-12-Conf-Exp, paragraph 71.

⁵⁸ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 29, 73.

⁵⁹ ICC-RoC85-01/13-12-Conf-Exp, paragraph 75.

⁶⁰ ICC-RoC85-01/13-12-Conf-Exp, paragraph 75.

⁶¹ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 76-78. Counsel mistakenly refers to the sum of €32,933 at this juncture.

⁶² ICC-RoC85-01/13-12-Conf-Exp, paragraph 80.

- (ii) Finds that the Registrar “erred or acted unreasonably or unfairly” by failing to provide full legal assistance as it considered means which were unavailable, and made errors in the indigence calculations;⁶³
- (iii) Quashes the Impugned Decision and recommends that the Registrar re-issues a decision which approves legal assistance in the monthly amount of “€32,922 (as deemed appropriate)”⁶⁴ (paragraphs (i) to (iii) together the “Primary Request”);
- (iv) Alternatively, finds that the Registrar “failed to take the initiative of forwarding an additional loan to the Suspect”, and orders him to do so immediately⁶⁵ (“First Alternative Request”); and
- (v) Failing all of the above, finds that the Registrar “erred or acted unreasonably or unfairly in” the indigence calculation, that the Impugned Decision should be quashed, and a new decision must be issued (“Second Alternative Request”).⁶⁶

C. Clarifications of the Registrar

37. The Registrar filed clarifications addressing the Presidency’s following five questions:

- (i) Which of the four assets listed in the Impugned Decision (“Four Listed Assets”) are subject to freezing or seizure orders?
- (ii) Whether the Suspect has full title to, or owns, the Four Listed Assets?
- (iii) When the most recent valuation of each of the Four Listed Assets was carried out?
- (iv) By what means the Four Listed Assets will become available, and upon which date funds from those assets will be disbursable to Counsel?
- (v) Whether the calculation of the Suspect’s obligations towards his dependants is the same as the value of the Suspect’s residence which is excluded to the “extent considered reasonable”.⁶⁷

⁶³ ICC-RoC85-01/13-12-Conf-Exp, paragraph 81.

⁶⁴ ICC-RoC85-01/13-12-Conf-Exp, paragraph 82. See footnote 61 above.

⁶⁵ ICC-RoC85-01/13-12-Conf-Exp, paragraph 83.

⁶⁶ ICC-RoC85-01/13-12-Conf-Exp, paragraph 84.

⁶⁷ ICC-RoC85-01/13-14-Conf-Exp, page 4.

38. The Registrar confirmed that two of the Four Listed Assets have been seized by the [REDACTED] authorities, namely the villa at [REDACTED], and the villa at [REDACTED].⁶⁸ The Registrar indicated that the [REDACTED] boat was never seized and that the Suspect's principal residence at [REDACTED] was seized for a period of five years but that this has now lapsed. The Registrar indicated that he was awaiting confirmation from the [REDACTED] authorities as to whether the seizure is still in force.⁶⁹
39. The Registrar stated that the Suspect has "always refused to cooperate with the Court in clarifying the status of his assets".⁷⁰ The Registrar confirmed that the Suspect is the beneficial owner of the Four Listed Assets, and in this regard referred to the [REDACTED] seizing order which names the Suspect as the beneficial owner of the villa at [REDACTED] which is registered under the company "[REDACTED]"; and the Suspect's signed declaration dated 23 October 2009 as regards the remaining assets.⁷¹ Moreover, the Registrar noted that no third party has sought to seize any of these assets.⁷²
40. The Registrar stated that the most recent valuation of the [REDACTED] boat, the villa at [REDACTED], and the Suspect's principal residence at [REDACTED], was conducted in September 2009; while the most recent valuation of the villa at [REDACTED] was conducted in June 2011.⁷³
41. The Registrar submitted that all Four Listed Assets are available to the Suspect and funds can be raised from the same upon his instruction. In this regard the Registrar referred to previous occasions when the Suspect successfully applied to unfreeze funds held in [REDACTED] bank accounts.⁷⁴
42. The Registrar maintained that he "considers reasonable an expense in lodging equal to the standard cost of lodging in the region where the principal residence is located".⁷⁵ The Registrar stated that the Suspect's dependents' lodging costs are included in the standard expenses compiled by the [REDACTED] Government,⁷⁶ which the Registrar subsequently used to calculate the Suspect's monthly

⁶⁸ ICC-RoC85-01/13-15-Conf-Exp, paragraph 1.

⁶⁹ ICC-RoC85-01/13-15-Conf-Exp, paragraph 1.

⁷⁰ ICC-RoC85-01/13-15-Conf-Exp, paragraph 5.

⁷¹ ICC-RoC85-01/13-15-Conf-Exp, paragraphs 3-4.

⁷² ICC-RoC85-01/13-15-Conf-Exp, paragraph 5.

⁷³ ICC-RoC85-01/13-15-Conf-Exp, paragraph 6.

⁷⁴ ICC-RoC85-01/13-15-Conf-Exp, paragraph 8.

⁷⁵ ICC-RoC85-01/13-15-Conf-Exp, paragraph 9.

⁷⁶ ICC-RoC85-01/13-15-Conf-Exp, paragraphs 9-10.

obligations in both decisions on the Suspect's request for legal assistance. The Registrar submits that in this regard he has used data which is more favourable to the Suspect.⁷⁷

D. Defence Reply to the Registrar's Clarifications

1. The alleged assets are not disposable "immediately or in the future"

43. Counsel argues that the Registrar has responded to the Presidency's Order by "providing only the bare minimum of information and legal reasoning, contrary to the Presidency's clear expectation that the Registrar analyse the Suspect's requests for legal assistance with more rigour".⁷⁸
44. Counsel argues that the Registrar has failed to demonstrate that the [REDACTED] and [REDACTED] properties are disposable "immediately or in the near future" as required by the Presidency Decision and articles 67(1)(d) of the Statute and regulation 84(2) of the Regulations of the Court.⁷⁹ Counsel notes the Registrar's admission that the [REDACTED] and [REDACTED] properties remain "seized by the [REDACTED] authorities" and that the legal status of the [REDACTED] property is "unclear".⁸⁰ Counsel further notes the Registrar's admission that he "cannot indicate" the date on which the Suspect would have access to the alleged assets; which, he argues, indicates that the Registrar is "not concerned with the Suspect's de facto immediate or near future access to the means but only with the application of his formalistic reasoning which contains calculations which fail to conform even to his own policy documents".⁸¹
45. In respect of the Registrar's submission that the assets could be unfrozen at the request of the Suspect,⁸² Counsel "strenuously objects to the Registrar's attempt to reverse the burden of proof as regards the disposability of the alleged assets".⁸³ Counsel submits that the Registrar would have the Suspect initiate lengthy and costly legal proceedings in foreign jurisdictions, which would take primacy over

⁷⁷ ICC-RoC85-01/13-15-Conf-Exp, paragraph 11.

⁷⁸ ICC-RoC85-01/13-18-Conf-Exp, paragraph 20.

⁷⁹ ICC-RoC85-01/13-18-Conf-Exp, paragraph 16.

⁸⁰ ICC-RoC85-01/13-18-Conf-Exp, paragraph 18.

⁸¹ ICC-RoC85-01/13-18-Conf-Exp, paragraph 21.

⁸² ICC-RoC85-01/13-18-Conf-Exp, paragraph 18.

⁸³ ICC-RoC85-01/13-18-Conf-Exp, paragraph 20.

his need to finance his defence before the Court.⁸⁴ Counsel submits that “[n]ot only is placing this kind of formalistic legal burden on the Suspect contrary to the spirit of a fair trial, but it is financially and materially unachievable by the Suspect.⁸⁵ The Suspect cannot expend money which is not available to him in order to realise assets which he cannot access”.⁸⁶

46. Counsel asks the Presidency to reject the Registrar’s indigence analysis, or in the alternative to order the Registrar to find that the [REDACTED], [REDACTED], and [REDACTED] properties are not means at the Suspect’s disposal in the “immediate or near future”, and that such properties must therefore be excluded from the Registrar’s analysis of the Suspect’s assets.⁸⁷

2. There is no proof of title to the [REDACTED] residence

47. Counsel maintains that there is no proof of title to the [REDACTED] residence, pointing to a decision of Trial Chamber III deploring the “wholesale lack of clarity as to who is legally competent to provide an enforceable power of attorney and power of sale over this [REDACTED] property”.⁸⁸ Counsel argues that the Registrar has not proffered, in the Clarifications, any evidence to support his submissions that the Suspect owns the [REDACTED] property.⁸⁹ Noting further that the Suspect avers that he has no title over the property, Counsel argues that the lack of clarity noted by the Trial Chamber persists to date.⁹⁰ Counsel notes that the Registry’s analysis of the [REDACTED] property took place in confidential *ex parte* filings in case ICC-01/05-01/08 to which Counsel has not had access since December 2013, when such access was abruptly terminated “without [a] judicial decision pursuant to [r]egulation 78 of the Regulations of the Court”.⁹¹ Counsel argues that, as such, the Registrar has committed an abuse of the Suspect’s rights by relying on confidential documents to which Counsel does not have access.⁹²

⁸⁴ ICC-RoC85-01/13-18-Conf-Exp, paragraph 22.

⁸⁵ ICC-RoC85-01/13-18-Conf-Exp, paragraph 22.

⁸⁶ ICC-RoC85-01/13-18-Conf-Exp, paragraph 23.

⁸⁷ ICC-RoC85-01/13-18-Conf-Exp, paragraph 25.

⁸⁸ ICC-RoC85-01/13-18-Conf-Exp, paragraph 28 citing Decision on the defence application to lift Order iii) of the “Decision on legal assistance for the accused” dated 20 October 2009, 4 November 2009, ICC-01/05-01/08-596-US, paragraph 12. Redacted to ICC-01/05-01/08-596-Red, 19 November 2009.

⁸⁹ ICC-RoC85-01/13-18-Conf-Exp, paragraph 34.

⁹⁰ ICC-RoC85-01/13-18-Conf-Exp, paragraph 30.

⁹¹ ICC-RoC85-01/13-18-Conf-Exp, paragraph 31 and 34.

⁹² ICC-RoC85-01/13-18-Conf-Exp, paragraph 31-34.

48. In light of the above, Counsel asks the Presidency instruct the Registrar to exclude the [REDACTED] property from his indigence analysis.⁹³

3. The Registrar proffers no recent valuations of the alleged assets

49. In reply to the Registrar's Clarifications that the last valuations of the assets took place in 2009 and 2011, Counsel submits that "since the summer of 2008, the properties (other than the [REDACTED] residence) have lurched into a state of unsupervised neglect and/or are burdened with debt instruments and encumbrances and/or remain subject to freezing orders and/or recovery proceedings". Counsel recalls his earlier submissions that the [REDACTED] boat has "only scrap metal value" and submits that its precise location remains unknown.⁹⁴

50. Counsel argues that the burden of proof is on the Registrar to demonstrate both the disposability *and* value of the assets.⁹⁵ Counsel requests the Presidency to reject the Registrar's analysis entirely, or, in the alternative, order the Registrar to exclude the barge from such analysis.⁹⁶

4. The Registrar committed a discernible error in his indigence calculation

51. Counsel for the Suspect argues that pursuant to regulation 84(2) of the Regulations of the Court, the Registrar must calculate the Suspect's bowl of available means, or assets, by taking the sum of a number of elements, including the value of the person's residence that exceeds "the extent considered reasonable" in accordance with paragraph 24(1) of ICC-ASP/12/3.⁹⁷ Counsel argues that the Registrar is therefore bound to apply the following equation in determining the value of the Suspect's residence to be included in his assets:

(Amount considered reasonable) – (value of the residence) = (amount to be included in Suspect's assets).

52. Counsel submits that the Registrar has erroneously included the full value of Suspect's principal residence in the "bowl of assets".⁹⁸ The Registrar was instead

⁹³ ICC-RoC85-01/13-18-Conf-Exp, paragraph 35.

⁹⁴ ICC-RoC85-01/13-18-Conf-Exp, paragraph 37.

⁹⁵ ICC-RoC85-01/13-18-Conf-Exp, paragraph 38.

⁹⁶ ICC-RoC85-01/13-18-Conf-Exp, paragraph 39.

⁹⁷ ICC-RoC85-01/13-18-Conf-Exp, paragraph 42.

⁹⁸ ICC-RoC85-01/13-18-Conf-Exp, paragraph 44.

bound to determine the value of the residence considered reasonable by applying the following formula:

$$(\textit{Monthly subsistence allowance}) - (\textit{EMR}) = (\textit{Amount considered reasonable})$$

53. Counsel avers that expressed in full, this would be as follows:

$$(\textit{Monthly subsistence allowance}) - (\textit{EMR}) - (\textit{value of the residence}) = (\textit{amount to be included in Suspect's assets})^{99}$$

54. Counsel argues that the Registrar's failure to implement this calculation breaches the Suspect's rights enshrined in article 67 of the Statue.¹⁰⁰

E. Registry Information

55. The Registrar argues that the Suspect has not met the required conditions to benefit from the legal assistance scheme of the Court; "[t]he Registry finds no justifiable reasons to arrive to any conclusion other than that the [S]uspect is not indigent for the purposes of [...] legal assistance provided for by the Court. The [S]uspect's assets used in the calculation of indigence are not only available to the latter immediately or in the near future, but are also sufficient to cover the costs of the Defence in the case under Article 70".¹⁰¹

56. In response to Counsel's argument that the Registrar has reversed the burden of proof as regards the disposability of alleged assets, the Registrar argues that Counsel has failed to take into account, *inter alia*, the decision of Trial Chamber III of 12 November 2010 which, in particular, ordered the defence to "report to the Registry on a monthly basis as to the steps taken to free up all or parts of the funds needed to finance the defence team and reimburse the amounts previously advanced by the Registry".¹⁰² Noting that this decision was never appealed or challenged by the Suspect, the Registrar indicates that "compliance with these orders was supposed to be a condition of the continuation of the advancement of fees in case ICC-01/05-01/08" and insists that "failure to comply with these orders

⁹⁹ ICC-RoC85-01/13-18-Conf-Exp, paragraph 47.

¹⁰⁰ ICC-RoC85-01/13-18-Conf-Exp, paragraphs 48-49.

¹⁰¹ ICC-RoC85-01/13-20-Conf, paragraph 9.

¹⁰² ICC-RoC85-01/13-20-Conf, paragraph 10 citing "Decision on the Defence Application for Review of the Registrar's Decision of 15 October 2010 on the Application for Adjustment of the Expenses and Fees of the Defence", 12 November 2010, ICC-01/05-01/08-1007-Conf, paragraph 39. Redacted to ICC-01/05-01/08-1007-Red, 7 December 2010.

therefore justifies the denial of such advance”.¹⁰³ The Registrar maintains that the Registry was never informed, “either by the Suspect or by his defence counsel or his teams in either case before the Court”, of any actions taken to secure the release of Mr Bemba’s property and assets in order to obtain the necessary resources for his legal assistance, contrary to the Chamber’s order.¹⁰⁴

57. The Registrar argues that “the [S]uspect has not taken the minimum steps reasonably expected from an applicant for legal assistance paid by the Court to disclose any assets he has ownership of or of which he is the beneficial owner”.¹⁰⁵

The Registrar states that, but for the main residence, the pool of assets used for the purpose of calculating his indigence in the Impugned Decision were not declared by the Suspect, but rather discovered following investigative activities of the Registry pursuant to regulation 132(2) of the Regulations of the Registry.¹⁰⁶ The Registrar maintains that the Suspect did not act in good faith, “which is a condition *sine qua non* for benefiting from legal assistance paid for by the Court”.¹⁰⁷

58. In relation to Counsel’s argument that the Registrar has failed to demonstrate that the assets are disposable immediately or in the near future, the Registrar maintains that it does not fall within his responsibility to request the relevant authorities to unfreeze the assets of the person concerned. This process, the Registrar maintains, is between the Suspect and the relevant authorities (i.e. the Chamber or other relevant institutions);¹⁰⁸ he can only provide his services to facilitate such a request, such as channelling requests for cooperation to national authorities and identifying the amounts to be excluded or released for the purpose of meeting defence costs.¹⁰⁹

59. The Registrar further argues that, where assets are not subject to freezing orders, there exist avenues to make these means available immediately or in the very near future, *inter alia*, through the mortgaging or sale of properties, which can be set in

¹⁰³ ICC-RoC85-01/13-20-Conf, paragraphs 10 and 16.

¹⁰⁴ ICC-RoC85-01/13-20-Conf, paragraph 11.

¹⁰⁵ ICC-RoC85-01/13-20-Conf, paragraph 12.

¹⁰⁶ ICC-RoC85-01/13-20-Conf, paragraph 13.

¹⁰⁷ ICC-RoC85-01/13-20-Conf, paragraph 14.

¹⁰⁸ ICC-RoC85-01/13-20-Conf, paragraphs 18 and 20.

¹⁰⁹ ICC-RoC85-01/13-20-Conf, paragraphs 20 and 26.

motion by the Suspect instructing a lawyer, his spouse or other immediate relatives.¹¹⁰

60. The Registrar argues that the time frame involved in accessing frozen assets is contingent on the timely application by the Defence to the Chamber to lift the freezing orders to raise funds.¹¹¹ In the interim period, before funds become available, the Registrar argues that the Suspect may continue to be represented by Counsel *pro bono* or by the Office of Public Counsel for the Defence pursuant to regulation 77 of the Regulations of the Court or he may represent himself pursuant to article 67(1)(d) of the Statute.¹¹²
61. In response to Counsel's submissions concerning the disputed title to one of the [REDACTED] villas, as set out in the Trial Chamber decision to which Counsel referred,¹¹³ the Registrar clarifies that the Trial Chamber was referring to the [REDACTED] property.¹¹⁴ In respect of the [REDACTED] villa, the Registry reiterates that the Suspect enjoys at least beneficial interests in that property. The Registrar further submits that the [REDACTED] villa is well maintained in accordance with the surveyor's report annexed to the Information and that the Suspect has submitted no affidavit to the contrary.¹¹⁵
62. With respect to the [REDACTED] boat, the Registrar submits that the Suspect's arguments concerning its condition and location are speculative and that he has produced no evidence to corroborate its alleged depreciation.¹¹⁶
63. In relation to the date of the valuation of the assets, the Registrar argues that there are no reasonable grounds to support a significant depreciation. Even considering a hypothetical depreciation of 10% of the assets, the Registrar argues that his findings on the non-indigent status of the Suspect would remain unchanged.¹¹⁷
64. The Registrar also argues that the method of calculation in respect of determining indigence advanced by Counsel in the Reply is obsolete, referring to ICC-ASP/12/3, ICC-ASP/8/24 and ICC-ASP/8/Res.3.¹¹⁸

¹¹⁰ ICC-RoC85-01/13-20-Conf, paragraph 23.

¹¹¹ ICC-RoC85-01/13-20-Conf, paragraph 24.

¹¹² ICC-RoC85-01/13-20-Conf, paragraph 25.

¹¹³ Cited at footnote 88 above.

¹¹⁴ ICC-RoC85-01/13-20-Conf, paragraphs 4 and 27.

¹¹⁵ ICC-RoC85-01/13-20-Conf, paragraph 28.

¹¹⁶ ICC-RoC85-01/13-20-Conf, paragraph 29.

¹¹⁷ ICC-RoC85-01/13-20-Conf, paragraph 30.

¹¹⁸ ICC-RoC85-01/13-20-Conf, paragraph 5.

65. The Registrar provides, in a confidential *ex parte* “Registrar only” annex, supplementary information concerning the Suspect’s “extensive property portfolio”, assets in an account in [REDACTED] and rights to inheritance funds.¹¹⁹

F. Determination of the Presidency

66. It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.¹²⁰

1. Indigence

67. The Registrar provisionally determined that the Suspect could not be considered indigent in reliance upon the Suspect’s Four Listed Assets which were valued in 2009 and 2011. Counsel contests the valuations of those assets, arguing that they have not been recently valued and their value has been inflated. Counsel further contests the Registrar’s finding that the Suspect owns one or more of the [REDACTED] villas and challenges the Registrar’s reliance upon the [REDACTED] villa and the [REDACTED] boat on the ground that they did not form part of the Registrar’s analysis in the First Decision. Moreover, Counsel contests the formula used by the Registrar in calculating the Suspect’s eligibility for legal assistance.

68. The Presidency accepts that, on the information before it, the Suspect is at least the beneficial owner of the assets relied upon by the Registrar. In this regard it has taken note of the Suspect’s signed declaration of 23 October 2009 to that effect, in

¹¹⁹ ICC-RoC85-01/13-20-Conf, paragraph 6.

¹²⁰ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

respect of the [REDACTED] residence, the [REDACTED] villa and [REDACTED] boat.¹²¹ Further, it has taken note of the search and seizure order of the [REDACTED] court which expressly names the Suspect as the owner or person having rights or undertakings over the [REDACTED] villa.¹²²

69. The Presidency has considered Counsel's arguments that the Registrar must only include, in the calculation of assets, the value of the person's residence that exceeds "the extent considered reasonable" as well as the formula submitted by Counsel to be used in preference to that used by the Registrar (*(Monthly subsistence allowance) – (EMR) – (value of the residence) = (amount to be included in Suspect's assets)*). Noting Recommendation 5 of ICC-ASP/8/24, cited at paragraph 15 above, the Presidency considers that the EMR has been abandoned by virtue of Resolution ICC-ASP/8/Res.3 of the Assembly of States Parties.
70. Although the Presidency does not consider it inappropriate for the Registrar to have considered additional assets in the Impugned Decision,¹²³ even taking into account only the principal residence in [REDACTED] and the [REDACTED] villa in [REDACTED], which were previously considered in the First Decision, the Presidency, without any recent valuations of the assets, considers that in order to impact the calculation of the Registrar to the detriment of the Suspect, the value of those properties would have had to have fallen in a manner that would be unrealistic.
71. As such, the Presidency sees no reason to reverse the Registrar's provisional determination that the Suspect is not indigent.

2. Disposability of means

72. Whereas the Registrar found the Suspect to have assets at his disposal that could be used to fund the costs of his defence, Counsel, *inter alia*, argues that he lacks "sufficient means" to pay for his defence within the meaning of article 67(1)(d) of the Statute.

¹²¹ ICC-RoC85-01/13-15-Conf-Exp, paragraph 3 citing ICC-RoC85-01/13-5-Conf-Exp-AnxIII (which refers to ICC-01/05-01/08-545-Conf-Exp-Anx2 (see page 2)).

¹²² ICC-01/05-01/08-1112-US-Exp-Anx6 cited at paragraph 4 of ICC-RoC85-01/13-15-Conf-Exp.

¹²³ Noting paragraph 62 of the First Decision which ordered the Registrar to make a new decision on the Suspect's request for legal assistance, *inter alia*, taking into account the relevant financial information before him, ICC-RoC85-01/13-7-Conf-Exp.

73. The Presidency has previously found that “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 his or her defence where his or her assets are confirmed as unavailable”.¹²⁴ 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.”¹²⁵
74. The Presidency has taken note of the Four Listed Assets which are considered by the Registrar to be available to the Suspect now or in the near future. Whilst the Presidency accepts the submissions of the Registrar that it is for the Suspect to seek the release of funds from his frozen or seized assets with the assistance of the Registrar, it remains uncertain that the Four Listed Assets would indeed become available for the purpose of paying the costs of the Suspect’s defence immediately or in the near future for the reasons outlined below.
75. It is noted that there are uncertainties or disputes concerning the rights of conveyance or transfer of one or both of the [REDACTED] properties. The Presidency notes the finding of Trial Chamber III in 2010 that since the seizure of the [REDACTED] villa in 2008, no sale had taken place because of uncertainty as to whether or not the Suspect had the necessary authority to authorise the sale of the property.¹²⁶ The Clarifications of the Registrar fail to shed more light on this issue. Further, in his Second Application, Counsel disputes the Registrar’s assertion that the Suspect has any rights over the [REDACTED] villa, although it is unclear whether this submission is based purely on the Trial Chamber III finding, which Counsel misinterpreted to pertain to the [REDACTED] villa, or,

¹²⁴ ICC-RoC85-01/13-7-Conf-Exp, paragraph 54.

¹²⁵ ICC-RoC85-01/13-7-Conf-Exp, paragraph 51

¹²⁶ ICC-01/05-01/08-596-US, paragraph 15.

noting that the Suspect avers that he has no title over the property, on independent reasons.¹²⁷

76. 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. The Presidency will therefore allow an advancement of legal fees on a repayable basis in order to bridge the gap until such funds are at the disposal of the Suspect, considering a four month time frame to be reasonable for that purpose.
77. The Presidency reiterates its expectation that the funds advanced to the Suspect shall be repaid to the Court in full by him once his means are available. The Presidency is acutely aware that the Court must manage its resources in a responsible manner and, noting the allegations levelled against the Suspect by the Registrar concerning attempts to conceal his wealth and mislead the Court, the Presidency is particularly concerned that funds from the legal assistance scheme of the Court should not be squandered.
78. The Second Vice-President agrees with all of the above findings except the finding of the Majority that proceeds from the Four Listed Assets would not become available for the purpose of paying the costs of the Suspect's defence immediately or in the near future. In this respect, the Second Vice-President concurs with the Registrar's assessment that the Suspect has not taken the minimum steps reasonably expected of an applicant for legal assistance paid by the Court either to disclose, resolve legal disputes concerning, or release, his assets. The current circumstances are, as such, attributable to the Suspect. Therefore, the Second Vice-President finds that the Suspect should not be entitled to benefit from a bridge-loan as so ordered by the Majority.

¹²⁷ ICC-RoC85-01/13-12-Conf-Exp, paragraphs 69-70.

III. CLASSIFICATION

79. The Presidency notes that all documents in the instant Application were filed confidentially and *ex parte*. The Presidency considers that, *prima facie*, there is no reason to retain the confidential *ex parte* classification of this decision, subject to ensuring the redaction of the Suspect's financial information.

80. Counsel for the Suspect and the Registrar may make submissions on whether any other aspects of this decision should remain confidential and *ex parte* by 9 June 2014.

IV. DISPOSITION

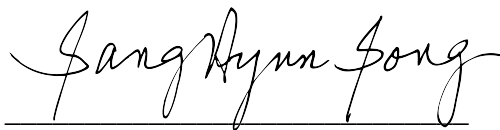
By Majority (Second Vice-President Tarfusser partially dissenting),

The Primary Request and the Second Alternative Request are denied and

The First Alternative Request is granted in part, in that the Presidency hereby orders:

The Registrar to advance legal fees for the payment Suspect's defence in case ICC-01/05-01/13 for a period of four months to the amount deemed appropriate at this stage of the proceedings, to be administered within the legal assistance scheme of the Court.

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



Judge Sang-Hyun Song
President

Dated this 20 May 2014

At The Hague, The Netherlands