

ANNEX 1

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoC85-01/13
Date: 12 November 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

Decision on the “Request for reconsideration of decision ICC-RoC85-01/13-21”

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for Jean-Pierre Bemba Gombo
Mr Nicholas Kaufman

Other
Pre-Trial Chamber II

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section
Mr Esteban Peralta Losilla
Mr Abdoul Aziz Mbaye

The Presidency of the International Criminal Court (“Court”) has before it the application by Counsel for Mr Jean-Pierre Bemba Gombo (“Suspect”) in case ICC-01/05-01/13 for reconsideration of the Presidency’s decision ICC-RoC85-01/13-21¹ granting in part the Suspect’s application for judicial review of the decision of the Registrar of 27 February 2014 (“Application”).²

The Application is dismissed for the reasons set forth below.

I. PROCEDURAL HISTORY

1. The Application seeks reconsideration of the decision of the Presidency (“Presidency Decision”) granting in part an application for judicial review brought by the Suspect on 3 March 2014.³ The application for judicial review contested the Registrar’s decision to deny the Suspect’s request for legal assistance paid for by the Court.
2. The Suspect is a defendant in two cases currently pending before the Court. The first of these cases, ICC-01/05-01/08, is brought under article 5 of the Rome Statute of the International Criminal Court (“Statute”) for alleged crimes against humanity and war crimes (“Article 5 Case”). The second, ICC-01/05-01/13, is brought under article 70 of the Statute for alleged offences against the administration of justice (“Article 70 Case”).
3. The Application is filed in the Article 70 Case. However, both cases against the Suspect have involved litigation regarding his claims for legal assistance paid for by the Court, and as decisions made in the Article 5 Case form part of the background to the Application, the Presidency begins with a brief summary of the relevant proceedings in that case.
Article 5 Case
4. On 9 May 2008, the Prosecutor filed the “Prosecutor’s Application for Warrant of Arrest under Article 58” together with a request to freeze or seize the “proceeds, property and assets” of the Suspect.⁴

¹ 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, ICC-RoC85-01/13-21-Corr-Red. The Corrigendum was filed on 12 June 2014.

² Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28.

³ 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, ICC-RoC85-01/13-21-Corr-Red.

⁴ Annex A to “Prosecution’s Submission of the Redacted English and French Versions of Prosecution’s

5. In May 2008, Pre-Trial Chamber III issued several decisions aimed at freezing and seizing the Suspect's assets. In accordance with these decisions, the Chamber issued requests to certain states to identify, trace, freeze and seize the property and assets of the Suspect.⁵
6. On 20 October 2009, Trial Chamber III issued a decision finding that although the Suspect "is clearly a man of considerable means",⁶ the "lack of access on the part of the accused to assets that have been traced and identified" justified the granting of temporary financial assistance.⁷ Accordingly, the Chamber ordered the Registry, *inter alia*, to provide legal assistance to the Suspect, which was to be paid retrospectively to March 2009 and is to be ongoing until there is a material change in circumstances.⁸ The Chamber noted that funds from elsewhere becoming available could constitute such a change in circumstances,⁹ and emphasised that the financial assistance would be subject to reimbursement by the Suspect.¹⁰ Subsequent decisions regarding the continued advancements were issued by the Trial Chamber on 19 November 2009 and 7 December 2010.¹¹

The Application

7. The application that was the subject of the Presidency Decision was the second of two recent applications concerning legal assistance brought by the Suspect before the Presidency in the Article 70 Case. The procedural history of these applications was summarized in the Presidency Decision,¹² and in the interests of simplicity and completeness, the Presidency repeats the relevant paragraphs below:¹³

Application for Warrant of Arrest and Further Submission against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-128-Conf-AnxA, 30 September 2008, paragraphs 129 - 131.

⁵ An example of one such request is «Decision et demande en vue d'obtenir l'identification, la localisation, la gel et la saisie des biens et avoirs adressées à la republique portugaise», ICC-01/05-01/08-8.

⁶ Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, paragraph 1. Note that although this decision was filed on 26 November 2009, the summary was filed on 20 October 2009 (Summary of the Decision on legal assistance for the accused, 20 October, ICC-01/05-01/08-568).

⁷ Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, paragraph 4.

⁸ Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, paragraph 108.

⁹ Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, paragraph 108, page 36.

¹⁰ Redacted version of "Decision on legal assistance for the accused", ICC-01/05-01/08-567-Red, paragraph 110.

¹¹ Redacted version of "Decision on the defence application to lift Order iii) of the "Decision on legal assistance for the accused" dated 20 October 2009", ICC-01/05-01/08-596-Red; "Redacted Version of 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 (ICC-01/05-01/08-1007-Conf)", ICC-01/05-01/08-1007-Red.

¹² 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, ICC-RoC85-01/13-21-Corr-Red, paragraphs 1-8.

¹³ Paragraph 1 of the Presidency Decision repeated in part the procedural history set forth in the Presidency's decision on the first application (Decision on the « Defence application to the Presidency for judicial review of

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.
2. On 27 November 2013, the Suspect made his initial appearance in the [Article 70] 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 [Article 70] 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 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” [“First Registrar Decision”].
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 [“First Application”].
8. On 8 January 2014, Counsel filed supplementary information relating to the [First] Application before the Presidency.
9. On 21 January 2014, noting that the [First] 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 [“First Observations”].
10. On 22 January 2014, Counsel sought leave from the Presidency to reply to the Registrar’s [First] Observations, pursuant to regulation 24(5) of the Regulations of the Court.
11. 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,

the Registrar’s Decision on legal assistance of 20 December 2013 », ICC-RoC85-01/13-7-Conf-Exp). That part is repeated here as sub-paragraphs 1-10.

providing details of the calculations and taking into account the findings set out in the Presidency [d]ecision and the relevant financial information before him. In light of the findings quashing the Registrar's decision of 20 December and remitting the issue to the Registrar, Counsel's application for leave to reply to the Registrar's [First] Observations was denied.

12. 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".
 13. 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. Vice-President Tarfusser decided not to excuse himself from the Presidency.
 14. On 14 March 2014, the Presidency ordered the Registrar to provide clarifications on certain aspects of the Impugned Decision.
 15. On 31 March 2014, the Registrar filed such clarifications ["Clarifications"].
 16. On 2 April 2014, Counsel filed a request to reply to the Registrar's Clarifications.
 17. That request was granted on 16 April 2014 and Counsel filed his reply on 17 April 2014. The Registrar filed further information on the reply on 30 April 2014, following the Presidency's invitation of 22 April 2014. [Footnotes and abbreviations omitted]
8. On 20 May 2014, the Presidency issued its decision granting in part the Suspect's application for judicial review of the Impugned Decision. The Presidency concurred with the Registrar that, based on the valuation of the four assets relied upon by the Registrar in the Impugned Decision, specifically two villas, a boat and the Suspect's primary residence ("Four Listed Assets"),¹⁴ the Suspect could not be considered indigent and was therefore not entitled to full legal assistance.¹⁵ Instead, recalling that the funds must be available to the Suspect "immediately or in the near future",¹⁶ and noting that there may be some delay before the Suspect could realise upon the Four Listed Assets,¹⁷ the Presidency granted the Suspect's alternative request for an

¹⁴ 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, ICC-RoC85-01/13-21-Corr-Red, paragraphs 13, 67. A fuller description of the Four Listed Assets is provided in section II.A below.

¹⁵ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 71, page 25.

¹⁶ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 73.

¹⁷ 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, ICC-RoC85-01/13-21-Corr-Red, paragraphs 74-76.

advancement of legal fees.¹⁸ The Presidency limited this advancement to a period of four months, which it considered sufficient to bridge the gap until sufficient funds, from the Four Listed Assets, to cover the cost of the Suspect's legal representation were at his disposal.¹⁹

9. Pursuant to the Presidency Decision, the Registrar advanced to the Suspect legal fees in the amount of €8,542 per month (along with a monthly cumulative amount of €1,000 for travel costs) between 20 May 2014 and 20 September 2014.²⁰
10. On 29 May 2014, the Court received the amount of €2,067,982.25 ("Funds") from a State Party which had implemented a seizure order against a bank account held by the Suspect.²¹
11. On 3 June 2014, and again on 14 July 2014, the Registrar invited the Suspect to take the steps necessary to guarantee the availability of the funds sufficient to cover his defence costs and to inform the Registrar of any such steps that had been or were going to be taken.²²
12. On 17 July 2014, the Registrar informed the Suspect by letter of the transfer of the Funds to the Court, noting that the Funds were owed the Court in accordance with the advances that it had made to the Suspect to date and pursuant to the respective Trial Chamber and Presidency decisions under which those advances were made.²³
13. On 25 August 2014, the Court submitted to the Assembly of the States Parties ("ASP") its proposed budget programme for 2015.²⁴ The proposed budget included a submission of the Registry that informed the ASP that as of December 2014 the Court will have advanced to the Suspect in the form of legal assistance a total of €2,799,380.94 and noted that in accordance with the orders of Trial Chamber III and the Presidency, the Funds are to be used to reimburse the sums advanced to the

¹⁸ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 76, page 25.

¹⁹ 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, ICC-RoC85-01/13-21-Corr-Red, paragraphs 76-77.

²⁰ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, page 3. Although the Registrar notes the relevant dates as 22 May 2014 to 22 September 2014, he has since clarified that the advancements were in fact made from 20 May 2014 to 20 September 2014.

²¹ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 1.

²² The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 8; Letters CSS/2014/367, dated 3 June 2014 (annex III) and CSS/2014/461, dated 14 July 2014 (annex IV).

²³ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 3.

²⁴ ICC-ASP/13/10.

Suspect by the Court. On this basis, the Registry requested that, instead of the Court returning the Funds to the States Parties, the ASP establish a special account in the amount of the Funds and authorise the Court to use the money in that account “to finance the continued advance of legal aid funds for the Suspect’s defence in both cases as of January 1, 2015” (“Registrar’s Request”).²⁵

14. On 9 September 2014, on becoming aware of the Registrar’s budget proposal, Counsel for the Suspect wrote to the Registrar to enquire when the Registrar learned of the implementation of the seizure order and to object to the Funds being subject to a decision of the ASP.²⁶ Counsel also informed the Registrar that he would be claiming five months of unpaid legal fees.²⁷ Counsel noted that as of 21 October 2014 he had received no response from the Registrar to this correspondence.²⁸
15. On 18 September 2014, the ASP published the “*Proposed Programme Budget for 2015 of the International Criminal Court*” (“Proposed Budget”).²⁹ The Proposed Budget includes a draft resolution which will put the Registrar’s Request to the vote of the ASP.³⁰
16. On 21 October 2014, Counsel for the Suspect filed the Application. In the Application, Counsel notes that he has not been paid for the five months of legal services that preceded the Presidency Decision and remains unpaid for his legal services since the four-month period of legal fees advanced in accordance with the Presidency Decision expired on 20 September 2014.³¹ In light of the seizure of the Funds and Registrar’s Request, the Application requests that the Presidency reconsider the Presidency Decision to order that the Registrar advance the Suspect a further loan out of the Funds to cover the debt owed to Counsel by the Suspect for his legal services in the five months prior to 20 May 2014, the date of the Presidency Decision, and for Counsel’s ongoing legal representation in the Article 70 Case since 20 September 2014.³² In addition, the Application seeks an order requiring that the Registrar state when he first became aware that the Funds had been seized.³³
17. On 3 November 2014, the Registrar filed his observations on the Application (“Registrar’s Observations”). In the Registrar’s Observations, the Registrar notes that

²⁵ ICC-ASP/13/10, paragraph 271.

²⁶ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 12.

²⁷ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 12.

²⁸ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 13.

²⁹ ICC-ASP/13/10.

³⁰ ICC-ASP/13/10, Annex I.

³¹ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 16.

³² Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 21.

³³ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 21.

he had informed the Suspect of the transfer of the Funds on 17 July 2014.³⁴ The Registrar further notes that the Funds belong to the States Parties in accordance with the terms under which the advancements to date were made to the Suspect, and submits that the conditions set by the Presidency Decision for an extension of the advance of defence's fees have not been met, noting that to his knowledge the Suspect has taken no steps to realize any of his assets.³⁵

18. On 11 November 2014, noting the decision of the same day by Pre-Trial Chamber II committing the Suspect to trial in the Article 70 Case, Counsel filed a request for an urgent ruling on the Application.³⁶

II. MERITS

A. Relevant parts of the Presidency Decision

18. In the Presidency Decision, the Presidency first considered the Registrar's provisional determination in the Impugned Decision that the Suspect could not be considered indigent. The Presidency noted that the Impugned Decision was based on consideration of the Four Listed Assets, which consisted of:³⁷

- a) The villa at [REDACTED];
- b) The villa at [REDACTED];
- c) The [REDACTED] boat; and
- d) The Suspect's principal residence at [REDACTED].

19. The Presidency noted that the Suspect contested the Registrar's finding that, based on the Four Listed Assets, the Suspect could not be considered indigent on the following grounds:³⁸

- a. the Suspect was not the owner of all of the Four Listed Assets;

³⁴ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 3.

³⁵ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraphs 4-5, 7.

³⁶ Request for a ruling on ICC-RoC85-01/13-28, ICC-RoC85-01/13-30-Conf-Exp.

³⁷ 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, paragraph 13.

³⁸ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 67.

- b. the Registrar used the wrong formula in calculating the value of the Four Listed Assets;
 - c. the Registrar relied on two assets that were not part of the First Registrar Decision; and,
 - d. the Registrar relied on an outdated and inflated valuation of the Four Listed Assets.
20. The Presidency considered each of Counsel's arguments. The Presidency noted that, based on the available evidence, the Suspect was at least the beneficial owner of the Four Listed Assets.³⁹ The Presidency further found that the Registrar had applied the proper formula to determine the value of the Four Listed Assets, and in particular that the Registrar was not bound to include, as asserted by Counsel, only the value of the Suspect's residence that exceeded "the extent considered reasonable".⁴⁰
21. The Presidency did not find the Registrar's consideration of additional assets in the Impugned Decision inappropriate.⁴¹ It noted, however, that even if consideration was limited to those assets considered in the First Registrar Decision, a drop in value sufficient to undermine the Registrar's finding that the Suspect was not indigent was unrealistic.⁴²
22. Accordingly, the Presidency concluded that there was no basis on which to reverse the Registrar's provisional determination that the Suspect was not indigent.⁴³
23. The Presidency then proceeded to consider Counsel's argument that, even if the Suspect was not indigent, he lacked sufficient means to pay the costs of his legal defence. The Presidency recalled in this respect 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", and that although an applicant may not be indigent, he or she may not have

³⁹ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 68.

⁴⁰ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 69.

⁴¹ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 70.

⁴² 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 70.

⁴³ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 71.

the ability to “directly or indirectly enjoy or dispose of [his or her] means, within the meaning of regulation 84(2) of the Regulations of the Court”.⁴⁴

24. The Presidency noted that there remained uncertainties or disputes concerning the rights of conveyance or transfer of one or more of the properties and that the Clarifications failed to shed any additional light on these issues.⁴⁵ The Presidency further noted that in addition to any issues as to the rights of conveyance or transfer having to be resolved, several steps would be required before the Suspect could realize the assets.⁴⁶ These steps would likely include petitioning the relevant Chamber to lift the seizure and freezing orders; the lifting of government seizures; and the process of actually realizing those assets being considered and undertaken.⁴⁷
25. The Presidency, having already noted the Registrar’s submission that the Suspect had not acted in good faith regarding his obligation to disclose his assets to the Registry,⁴⁸ agreed with 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”.⁴⁹ Nonetheless, in light of the impediments to realizing those assets, the Presidency decided that the means were not available to the Suspect in the immediate or near future and therefore to “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”.⁵⁰

⁴⁴ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 73 (citing ICC-RoC85-01/13-7-Conf-Exp, paragraph 54).

⁴⁵ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 75.

⁴⁶ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 76.

⁴⁷ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 76.

⁴⁸ 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, ICC-RoC85-01/13-21-Corr-Red, paragraphs 56-57.

⁴⁹ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 74.

⁵⁰ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 76.

26. The Presidency accordingly ordered that the Registrar advance legal fees to the Suspect for the payment of his defence for a period of four months, which was to be administered within the legal assistance scheme of the Court.⁵¹

B. Arguments of the Applicant

27. Counsel states that the Registrar has failed to clarify when he became aware that the Funds had been seized from the Suspect's bank account.⁵² Counsel appears to imply that the Registrar would have acted improperly had he been aware that the Funds had been seized before or during his submissions to the Presidency in respect of the Presidency's judicial review of the Impugned Decision, in light of the fact that the Registrar disputed the Suspect's claim that the Suspect was unable to access his assets.⁵³
28. Counsel argues that the Funds belong to the Suspect and that the Suspect should be permitted to determine how that money is deployed in order to cover the debt incurred in the Article 5 Case and the Article 70 Case.⁵⁴
29. In this respect, Counsel states that it is unclear on what basis the Funds were seized and transferred to the Court.⁵⁵ Counsel notes that he does not have access to the confidential decisions in the Article 5 Case, but that the Court decisions requesting the freezing of the Suspect's assets were calculated to guarantee only victim reparation and provided only for the appointment of a domestic authority to administer the assets pending a decision of the Suspect's guilt or innocence, and not for the transfer of monies to the Court.⁵⁶ Counsel argues that it is not clear what legal authority the ASP has to decide the deployment of the Funds and for this reason objects to the matter being subject to a decision of the ASP.⁵⁷
30. Counsel also contends that it is inequitable that monthly funding is being advanced to the defence team in the Article 5 Case while Counsel is owed five months of unpaid fees – from 30 December 2013 to 20 May 2014 – for his services in the Article 70

⁵¹ 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, ICC-RoC85-01/13-21-Corr-Red, page 25.

⁵² Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 14.

⁵³ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 14.

⁵⁴ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 15.

⁵⁵ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 20.

⁵⁶ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 20.

⁵⁷ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 20.

Case, and remains unpaid since the four-month period granted by the Presidency Decision expired on 20 September 2014.⁵⁸

31. Finally, Counsel suggests that the Presidency would not have limited the advancement of legal fees to four months in the Presidency Decision had it known of the seizure of the Funds.⁵⁹ Counsel argues that the transfer of the Funds to the Court constitutes “new information”, which justifies reconsideration of the Presidency Decision.⁶⁰

C. Observations of the Registrar

32. In response to the Application, the Registrar observes that, pursuant to orders of Trial Chamber III, the Registry undertook efforts to identify, trace and claim assets of the Suspect for the purpose of reimbursing the Court for its advances of legal fees.⁶¹ In respect of the bank account from which the Funds were seized, the Registrar notes that although his office knew of the account’s existence since at least 2010, the issue was kept confidential to avoid compromising the ongoing investigation.⁶² The Registrar further notes that he was only aware of the precise amount transferred when the sum was received in the Court’s bank account,⁶³ and that, once having ascertained the source of the Funds, he informed the Suspect of the transfer by letter dated 17 July 2014.⁶⁴
33. The Registrar disputes Counsel’s claim that the “[m]onies in question belong to the Suspect and to no one else”.⁶⁵ The Registrar observes that the Suspect is under a legal obligation to repay all advances to the Court, referencing decisions of the Trial Chamber and statements signed by the Suspect to this effect, and notes that the funds received are less than the debt that he owes to the Court.⁶⁶
34. The Registrar observes that the Registrar’s Request remains subject to approval by the ASP, and that should the ASP refuse to approve it, the Funds would be returned to the

⁵⁸ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 16.

⁵⁹ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 17.

⁶⁰ Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, paragraph 18.

⁶¹ The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 1.

⁶² The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 2.

⁶³ The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 2.

⁶⁴ The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 3.

⁶⁵ The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 1.

⁶⁶ The Registrar’s Observations on the defence “Request for reconsideration of decision ICC-RoC85-01/13-21”, dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 1;

States Parties pursuant to regulation 5.4(c) of the Financial Regulations.⁶⁷ The Registrar further notes that the purpose of his proposal for the use of the Funds is to ensure that any further advancements should not burden the legal aid budget, and emphasises that it should not be confused with a proposal to advance further loans to the Suspect in the Article 70 Case absent a decision to that effect from the Presidency.⁶⁸

35. The Registrar observes that the Presidency Decision concurred with the Registrar's provisional determination in the Impugned Decision that the Suspect was not indigent and allowed the advancement of legal fees for four months "to bridge the gap until such funds are at the disposal of the Suspect".⁶⁹ The Registrar notes that he made the advancements as ordered, and that he invited the Suspect to take action to ensure that the necessary funds would be available to cover the remainder of his own defence costs.⁷⁰ The Registrar notes that despite this invitation, to the Registrar's knowledge, the Suspect has taken no steps to secure funds for the payment of his legal fees.⁷¹
36. Finally, the Registrar submits that the conditions established by the Presidency Decision for an extension of the advance of defence fees to the Suspect, specifically taking steps to secure access to his assets, have not been met.⁷²

D. Determination of the Presidency

Reconsideration of the Presidency Decision

37. Counsel submits that the transfer of the Funds constitutes "new information" that justifies reconsideration of the Presidency Decision. On this basis, Counsel requests further loans from the Court to cover both the period prior to the Presidency Decision and then on an ongoing basis, following 20 September 2014, when the four months of assistance granted by the Presidency Decision expired.
38. Regarding Counsel's request that the Court advance the Suspect funds sufficient to cover the period *prior to* the Presidency Decision, the Presidency notes that Counsel

⁶⁷ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 5.

⁶⁸ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraphs 5-6.

⁶⁹ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 7.

⁷⁰ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 8.

⁷¹ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 8.

⁷² The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraph 9.

does not explain how the transfer of Funds could justify reconsideration of this element of the Presidency Decision. The Presidency recalls that the distinction between the period prior to the Presidency Decision and the period that followed was the terms on which Counsel agreed to represent the Suspect. Initially, Counsel agreed to represent the Suspect on a *pro bono* basis.⁷³ Counsel may have, as he notes, 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,⁷⁴ but that does not justify a retroactive disbursement to cover the portion of services that were provided on a *pro bono* basis. As the seizure of the Suspect's assets can have no bearing on the terms on which Counsel agreed to provide his initial services, Counsel's request for advancements to cover that period is dismissed.

39. In respect of Counsel's request for advancements to cover the period after 20 September 2014, the Presidency notes that in granting a loan that was temporary in nature and designed only to permit the Suspect sufficient time to secure access to the Four Listed Assets, the Presidency Decision clearly contemplated that the issue of advancements to the Suspect beyond the four months could require assessment at a later date. The question of whether such additional advancements are justified on the basis of steps being taken regarding assets other than the Four Listed Assets – in this case funds from a bank account – could not therefore give cause for reconsideration; rather, as one that the Presidency Decision, at least implicitly, contemplated could be the subject of future assessment, it is a question that the Presidency can only consider *ex novo*.

Request that the Registrar state when he became aware of the Funds

40. Counsel appears to imply that the Registrar's submissions in the Presidency Decision would have been inconsistent, and that the Registrar would therefore have acted improperly, had he known about the seizure and transfer of the Funds at the time of those submissions. On that basis, Counsel requests an order compelling the Registrar to disclose the time at which he became aware that the Funds had been seized.
41. In the Registrar's Observations, the Registrar notes that he advised the Suspect of the Fund's transfer on 17 July 2014, as soon as he became aware of the source of the

⁷³ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 1.

⁷⁴ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 1.

Funds, and has attached the notifying letter to his submission. The Registrar further notes that until that date, knowledge of the relevant account's existence was kept confidential lest disclosing it compromise the Registrar's ongoing investigation.

42. Counsel seeks now to discover not only when the Funds were transferred, but when the Registrar became aware that the seizure order against the Funds was implemented. However, the Presidency finds no impropriety in the Registrar's decision not to disclose his knowledge of the Funds to the Suspect until after they had been transferred to the Court. Particularly in light of the Registrar's concerns regarding the Suspects' efforts "to conceal his wealth and mislead the Court",⁷⁵ confidentiality is a necessary element of the Registrar's investigation into the Suspect's assets. The Presidency Decision concerned only the Four Listed Assets and whether the Suspect could access them in the immediate or near future. The existence of assets in addition to those Four Listed Assets could only have reinforced the Registrar's position that the Suspect was not indigent, and their seizure could have had no bearing on the Registrar's contention that the Suspect could have access in the immediate or near future to funds from the Four Listed Assets. Accordingly, there could be no inconsistency or impropriety in the position adopted by the Registrar regardless of any knowledge that he may have had of steps being taken to seize and transfer the Funds.
43. The Presidency further notes that Counsel's position regarding the ownership of the Funds is without basis. As the Registrar observes,⁷⁶ the Funds are owed to the Court in accordance with the terms on which the advancements in the two proceedings before the Court were made, and their disbursement is subject to the legal authority of Trial Chamber III, pursuant to whose order they were seized. The Suspect cannot therefore be said, as Counsel contends, to have the right to decide how those Funds are deployed.

Further advancement of legal fees

44. The Presidency considers that, although on its face the Application requests reconsideration, in seeking an order for additional advancements, it is in substance a request that the Presidency consider whether the Suspect's current circumstances justify such advancements. As such, the Presidency finds that the Application

⁷⁵ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 77.

⁷⁶ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraphs 5-6.

provides an appropriate opportunity to consider whether further advancements to the Suspect may now be appropriate.

45. The Presidency begins by noting that although the Registrar's Request, which remains subject to the approval of the ASP, may be relevant to the manner in which additional advancements may be funded after 1 January 2015, it is not relevant to determining whether such advancements are justified. That determination must be made by the Presidency, a fact that is acknowledged by the Registrar in the Registrar's Observations,⁷⁷ and can only be made by reference to the applicable provisions established by the legal framework, and in particular to the question of whether the Suspect can access, in the immediate or near future, the means sufficient to fund the costs of his legal defence.
46. In answering that question, the Presidency recalls that "the Court must manage its resources in a responsible manner" and ensure "that funds from the legal assistance scheme of the Court should not be squandered".⁷⁸ The Presidency notes in this respect, as it did in the Presidency Decision, "the allegations levelled against the Suspect by the Registrar concerning attempts to conceal his wealth and mislead the Court".⁷⁹
47. The Presidency notes that Counsel has not been paid since the four-month period covered by the Presidency Decision expired on 20 September 2014. However, the Suspect is not indigent. His claim for legal assistance from the Court has rested solely on the basis that various barriers prevent him from accessing the assets that would permit him to fund his defence. It is evident that in such circumstances, advancements can only be justified for so long as the Suspect is unable, *despite good faith efforts*, to access sufficient means to pay the costs of his legal representation. Yet, notwithstanding the clear direction from the Presidency that "it is for the Suspect to seek the release of funds from his frozen or seized assets with the assistance of the Registrar",⁸⁰ and the invitations of the Registrar to act in accordance with this direction, the Suspect has failed to show that he has taken any meaningful steps

⁷⁷ The Registrar's Observations on the defence "Request for reconsideration of decision ICC-RoC85-01/13-21", dated 21 October 2014, ICC-RoC85-01/13-29-Conf-Exp, paragraphs 6, 9.

⁷⁸ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 77.

⁷⁹ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 77.

⁸⁰ 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, ICC-RoC85-01/13-21-Corr-Red, paragraph 74.

toward realizing any of his assets, including the Four Listed Assets. The Presidency finds that, absent any evidence of such steps, no further advancements may be justified. To find otherwise would be to permit the Suspect to ignore the directions of the Presidency, and to receive from the finite resources of the Court funds that are intended to be reserved for those who genuinely, and through no failures of their own, cannot otherwise finance the costs of their own defence.

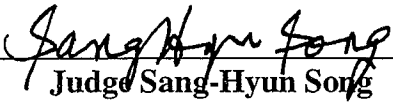
48. Counsel claims that, regardless of any failure on the Suspect's part to make efforts to secure access to sufficient funds, it is inequitable that the defence team in the Article 5 Case continues to be funded through advancements from the Court, whereas the advancements made in the Article 70 Case ended on 20 September 2014. However, the Presidency notes that the advancements made in the Article 5 Case are pursuant to decisions by Trial Chamber III that were issued in a different factual and jurisdictional context and at a different time. The Chamber can only make decisions based on the facts before it, as must the Presidency. On the facts now before the Presidency, further advancements of legal assistance are not justified. The Presidency finds no inequity in denying a request that is without a sound legal basis.
49. The Presidency therefore dismisses Counsel's request for further advancements.

III. CLASSIFICATION

50. The Presidency notes that although Counsel filed the Application publicly, the Registrar's Observations have been 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 and the related documents in the file, subject to ensuring the redaction of any confidential information contained therein.
51. If there is any factual and/or legal basis for retaining the confidential *ex parte* classification of this decision, or if there is any specific information requiring redaction before publication, the Applicant and the Registrar are each ordered to inform the Presidency thereof by 26 November 2014. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, the need for redactions.

The Application is dismissed.

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


Judge Sang-Hyun Song
President

Dated this 12 November 2014

At The Hague, The Netherlands