

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18
Date: 21 February 2025

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

***IN THE CASE OF THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM &
PATRICE-EDOUARD NGAÏSSONA***

**Public redacted version of ‘Request for Review of the ‘Registrar Decision on
“Request for Reconsideration of Counsel Support Section Decision of 24 May
2024” submitted by Counsel for Mr Yekatom”, 18 July 2024, ICC-01/14-01/18-2599-
Conf-Exp**

**With Confidential Ex Parte annexes A to J only available to the Yekatom Defence
and the Registry**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

☒ The Office of the Prosecutor

☒ Counsel for the Defence

D29

D30

☒ Legal Representatives of the Victims

V44

V45

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☒ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

M. Zavala Giler, Osvaldo

☒ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

INTRODUCTION

1. Lead Counsel for the Defence for Mr Alfred Rombhot Yekatom ('Lead Counsel' or 'Counsel') hereby respectfully requests that Trial Chamber V review the 'Registrar Decision on "Request for Reconsideration of Counsel Support Section Decision of 24 May 2024" submitted by Counsel for Mr Yekatom' ('Impugned Decision').¹ This is a decision on the scope of legal assistance and is reviewable by the Trial Chamber under regulation 83(4) of the Regulations of the Court.
2. Until January this year, Lead Counsel received monthly payments of [REDACTED] to cover her transportation-accommodation costs in The Hague ('[REDACTED]'). She is entitled to these payments under the former Legal Aid Policy ('Former LAP') because she maintains her residence in Canada but is temporarily required to be in the Netherlands to represent Mr Yekatom in these proceedings. Counsel Support Section ('CSS') terminated these payments when the reformed Legal Aid Policy ('Reformed LAP') came into effect on 1 January 2024. The Registrar confirmed the decision to discontinue the monthly payments in the Impugned Decision.²
3. The Defence submits that the Impugned Decision is materially affected by errors of law and fact and should be reversed. When the Reformed LAP was enacted, the Registrar had an obligation to ensure that existing Counsel suffered no overall disadvantage by the new policy, and he was given, by the Assembly State Party ('ASP') who adopted the Reformed LAP, discretionary powers to implement transitional measures to specifically prevent any such negative impact. In the Impugned Decision, the Registrar miscalculates the impact of the new policy on Lead Counsel and arrives at the wrong conclusion that she is not earning less overall. If he had applied the correct calculations, he would have concluded that she is placed at a disadvantage by the new policy, meaning that he should have applied transitional measures to prevent such a loss. His failure to do so amounts to an abuse of discretion, and the Chamber should order the Registrar to exercise his discretion properly in favour of Lead Counsel.
4. Further and/or in the alternative, Lead Counsel should be entitled to transportation-accommodation costs under the Reformed LAP because she does not reside in the Netherlands. The Registrar, erred in law and fact in finding that Lead Counsel is resident

¹ Registrar Decision on "Request for Reconsideration of Counsel Support Section Decision of 24 May 2024" submitted by Counsel for Mr Yekatom, dated 9 July 2024 (Annex J).

² Impugned Decision, para. 40.

in The Hague, and this Trial Chamber is respectfully requested to reverse this determination. The Registrar invents a test for residency that ignores existing legal authorities on residency and contradicts several of his own *Notes Verbales* to the Host State. Moreover, the Registrar's new interpretation of residency discriminates against counsel who come from countries farther away from the Netherlands and those who have children.

PROCEDURAL HISTORY

5. On 18 November 2018, Mr Yekatom was surrendered to the Court. He was subsequently declared indigent by the Registry and assigned Counsel pursuant to article 67(1)(d) of the Rome Statute and rules 21 and 22 of the Rules of Procedure and Evidence.
6. On 25 January 2019, Ms. Mylène Dimitri was appointed Associate Counsel for Mr Yekatom.³ On 8 August 2019, the latter was appointed Lead Counsel for Mr Yekatom.⁴
7. Pursuant to the Former LAP,⁵ specifically paragraph 141, transportation expenses incurred by counsel and associate counsel to and from The Hague were covered by the expenses budget. This included the cost of travel by air or train, as well as a Daily Subsistence Allowance ('DSA') and terminal expenses during counsel's stay in The Hague. These expenses were covered by a maximum monthly allotment of €1,500 per Counsel to a maximum of €3,000 in total.
8. At the time of Lead Counsel's appointment, the Registry had a policy allowing counsel to waive their right to claim transportation costs and DSA in exchange for claiming [REDACTED]. This option was chosen by Lead Counsel – who had young children and wanted to reconcile family and work – [REDACTED]. Lead Counsel maintained Canada, however, as her legal residence. As a result of this, Counsel and the Registry had [REDACTED] to contribute to her transportation-accommodation costs in The Hague which were also used to cover her trips to Canada that were now undertaken at her own expense.
9. [REDACTED].⁶ Neither [REDACTED] nor the MFA card provided Counsel the status of a permanent resident in the Netherlands.

³ ICC-01/14-01/18-66.

⁴ ICC-01/14-01/18-266.

⁵ ICC-ASP/12/3.

⁶ [REDACTED]

10. Based on the [REDACTED], Counsel paid [REDACTED] in The Hague and in Canada due to her work at the seat of the Court. This dual financial burden significantly impacted her.
11. The [REDACTED] was facilitated by submitting a monthly "*Formulaire de demande de mission*" ('Mission form') to the Registry, wherein Counsel requested reimbursement of [REDACTED].⁷ The Mission form clearly stated that the mission was in The Hague, thereby ruling out that The Hague was a residence but rather the mission location. The Registry processed this reimbursement every month upon receipt of the expense form to contribute to Lead Counsel's accommodation costs in The Hague as she had to maintain accommodation cost in her country of residence as well.⁸
12. As per the [REDACTED], each month, the Registry approved the Mission form,⁹ clearly indicating Counsel's status as being on a mission in The Hague rather than as a resident.
13. On 9 December 2022, after a campaign by external team members for the Court to remedy poor working conditions, the ASP adopted a resolution requesting "the Court to consider interim measures [...] to the benefit of members of defence and victims teams".¹⁰
14. [REDACTED] the Registrar sent a *Note Verbale* to the Host State stating that Counsel is "a resident and national of Canada, practising as counsel before the ICC in ongoing proceedings (emphasis added)." This was reiterated in another *Note Verbale* sent by the Registry on 13 February 2024.¹¹ On 19 January 2024, CSS confirmed in a letter that Counsel is "registered with the Québec Bar and [*has*] her address at [REDACTED]".¹²
15. On 27 January 2023, the former Registrar, Mr Peter Lewis, sent a letter to all Counsel on his decision to implement interim measures pursuant to ASP Resolution of 9 December 2022, providing, among other things, an increase of 10% to the remuneration of all external team members.¹³
16. After the implementation of these interim measures, but before the adoption of the Reformed LAP,¹⁴ the Registrar conducted a town hall meeting on 27 October 2023. Lead

⁷ See Annex B.

⁸ Request of payment and reimbursement of expenses for April 2024 (Annex C).

⁹ By way of example, see email from CSS to Lead Counsel dated 01 August 2023 at 14:10 (Annex D).

¹⁰ Resolution [ICC-ASP/21/Res.2](#), Strengthening the International Criminal Court and the Assembly of States Parties, para. 92.

¹¹ *Notes Verbales* dated 17 January 2023 and 13 February 2024 (Annex E).

¹² Letter from CSS dated 19 January 2024, reference CSS/2024/019 (Annex H).

¹³ Letter from the Registrar, Peter Lewis, to all Counsel, 27 January 2023, Ref: 2023/IOR/0025, p. 2.

¹⁴ ICC-ASP/22/9.

Counsel alerted the Registrar that the application of the Reformed LAP would lead to losses to Counsel due to the elimination of the expenses budget for travel and accommodation costs. The Registrar assured attendees – which included Lead Counsel - that nobody would face a negative impact from the new policy or be in a worse situation, and thus, no individual's total revenue would be reduced, and that there were discretionary transitional measures available to address this situation if it arose. He invited Counsel to meet with him in case a reduction was implemented.

17. The Reformed LAP came into effect on 1 January 2024. As soon as the Reformed LAP was applied, the losses as alerted by Lead Counsel began materialising, particularly for transport and accommodation expenses. CSS refused to reimburse in the same spirit as under the Former LAP. As invited by the Registrar during the 27 October 2023 townhall meeting, Associate Counsel wrote to the Registrar requesting a meeting for Lead and Associate Counsel,¹⁵ which to this day remains unanswered.
18. In the meantime, Lead Counsel continued making monthly claims to the Registry requesting reimbursement of accommodation costs in The Hague.¹⁶
19. On 24 May 2024, the Registrar responded to all the claims filed by Counsel from January to May 2024 and indicated that: [REDACTED]. Based on the above, the requested reimbursement of accommodation costs while in The Hague cannot be approved”.¹⁷
20. On 3 June 2024, Lead Counsel for Mr Yekatom submitted to the Registrar a request for reconsideration of a decision taken by the CSS on 24 May 2024 (‘Request’), denying Counsel’s request for continued reimbursement of transportation and accommodation costs while in The Hague based on her [REDACTED].¹⁸
21. In her Request, Counsel argued that since the beginning of the trial, she had performed her work by being present at the premises of the Court on a daily basis. This involves supervising the work of support staff and linguistic assistants, attending court hearings, familiarisation meetings with witnesses, interviewing witnesses, and meeting relevant chiefs of sections of the court, such as VWS, OPCD, and CSS, to deal with punctual matters when appropriate. Lead Counsel has also occasionally met with her Prosecution

¹⁵ See email from Yekatom Defence Counsels to the Registrar sent on 26 January 2024 at 12:08 (Annex F).

¹⁶ Upon receipt of each email, CSS expressly indicated that the documents were received in good order and that they would revert back. By way of example, see email from CSS to Yekatom Defence Counsels sent on 29 April 2024 at 10:13 (Annex G).

¹⁷ See email from the Head of Legal Aid Unit to Lead Counsel dated 24 May 2024 at 15:17 (Annex A).

¹⁸ Request for reconsideration of Counsel Support Section Decision of 24 May 2024, dated 3 June 2024, Annex I.

counterparts to discuss certain matters or the Prosecution's position on certain submissions. More importantly, Counsel has visited her client at the Detention Center and received calls from him to discuss the case. She has also utilized the court's tools to review disclosed documents or binders and attended in person all witness familiarizations. These essential tasks for the efficient and meaningful representation of Mr Yekatom would have been difficult and some impossible if Counsel had remained in her home country. Remote access difficulties and being in a completely different time zone than the Court (6-7 hours difference) would have posed significant challenges. It is worth noting that even when in Canada, Counsel cannot attend hearings, nor live court and cannot visit her client at the detention center.

22. On 9 July 2024, the Registrar issued the Impugned Decision dismissing the request for reconsideration having incorrectly concluded that 'Counsel has not been put at a disadvantage by the CSS' decision to discontinue the [REDACTED].¹⁹ Whilst this conclusion was the sole basis for dismissing the Request, the Registrar provided further observations concerning 'residence [and] temporary measures' which he contended were 'of additional and clarifying nature only'.²⁰

APPLICABLE LAW

23. Regulation 83(4) of the Regulations of the Court provides that '[d]ecisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance'.
24. Regulation 135(1) of the Regulations of the Registry requires the Registrar to 'take a decision on any dispute concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly'. Regulation 135(2) provides that 'counsel may request the Chamber to review any decision taken under sub-regulation 1' within '15 calendar days of notification'.
25. Other Chambers have held previously, the standard for reviewing Registry decisions in the legal assistance context is as follows:

[T]he Chamber should only interfere with the exercise of the Registrar's discretion in the area of legal assistance where there are compelling reasons for doing so, taking into consideration

¹⁹ Impugned Decision, para. 25.

²⁰ Impugned Decision, para. 26.

the rights of the defence as enshrined in the Statute. In reviewing the Registrar's decisions, the Chamber must not consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess, inter alia: whether the decision of the Registrar was materially affected by an error of law or fact; whether the Registrar abused his discretion; the propriety of the procedure by which the Registrar reached a particular decision; or whether the Registrar could not rationally have reached a given conclusion.²¹

SUBMISSIONS

A. The Impugned Decision constitutes a decision on the scope of legal assistance and is reviewable by this Chamber

26. Regulation 83(1) of the Regulations governs the scope of 'all costs reasonably necessary as determined by the Registrar for an effective and efficient defence', including the remuneration of counsel, administrative costs, and travel costs and daily subsistence allowances.
27. The Impugned Decision, confirming the termination of the [REDACTED] with Counsel, essentially pertains to the determination of costs reasonably necessary to cover travel expenses and daily subsistence allowances for Lead Counsel, which she incurred while representing Mr Yekatom before the Court.
28. The Impugned Decision constitutes a dispute regarding the scope of legal assistance provided under Regulation 83(4) of the Regulations. Therefore, the Chamber has the authority to review such disputes.

B. The Registrar erred in fact and law in concluding that Lead Counsel was not put at a disadvantage by the Reformed LAP

29. It was widely understood by all involved in reforming the legal aid policy in recent years that the Reformed LAP would be implemented in a way to protect the existing resources available for existing Counsel to defend their clients, and in particular ensure they are not disadvantaged under the new policy compared to the Former LAP. The Registrar also understood this and has provided assurances, such as those given during the town hall of 27 October 2023, that the Reformed LAP would have no 'negative impact' on the scope of legal assistance already being provided.
30. These assurances are protected as a matter of law. As evidenced by the legal test in the Impugned Decision, the Registrar considers it an obligation to ensure that existing

²¹ Trial Chamber VII, *Prosecutor v. Bemba et al.*, [Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase](#), 21 May 2015, ICC-01/05-01/13-955, para. 33. See also Trial Chamber X, *Prosecutor v. Al Hassan*, [Decision on the Defence's request for review of the Registrar's decision on legal aid](#), 22 January 2024, ICC-01/12-01/18-2582, para. 11.

Counsel are not ‘put at a disadvantage’ by the Reformed LAP in comparison with the Former LAP. The implication is that if Counsel were put at a disadvantage, then the Registrar would exercise transitional measures specifically given to him by the ASP to:

[...] ensure the stability of operating teams and to prevent any negative impact of the transition to the new legal aid system on ongoing judicial proceedings, as well as to take into account any pending reimbursement or compensation for taxes or professional charges for previous years as applicable under the previous legal aid system.²²

31. Although the Registrar correctly recognised that the assurances were legally protected, he made errors of law and fact in his calculations when concluding that the application of the Reformed LAP led to ‘no negative impact on the scope of legal assistance available to Mr Yekatom’.²³
32. The Impugned Decision erroneously concludes that, based on Tables 2 and 3, the discontinuation of the [REDACTED] does not put Counsel at a disadvantage compared to the Former LAP. To reach this conclusion, the Registrar conducted an overall comparison, considering the total monthly fees available under both legal aid policies. The Registrar determined that the critical factor was whether, overall, Counsel would earn less money without the [REDACTED].²⁴
33. The Registrar made three mixed errors of fact and law in this assessment. The first error is that he took as the starting point for the comparison the remuneration under the Former LAP without the interim measures applied in 2023.²⁵ These interim measures had increased the remuneration by 10%. The correct starting point for a comparison must be the remuneration figures post-2023 including the interim measures. This is the only reasonable interpretation of the promises made by the Registrar. He had announced his assurance that no defence team would be in a worse situation at the town hall meeting of 27 October 2023, which was nine months after Mr Peter Lewis had adopted interim measures increasing the remuneration by 10%. By applying the old figures in the Impugned Decision, the Registrar made it appear that the Reformed LAP increased the remuneration to a greater extent than what actually changed from 31 December 2023 to the next day on 1 January 2024.

²² Reformed LAP, para. 15.

²³ Impugned Decision, para. 25.

²⁴ Impugned Decision, paras 16-18.

²⁵ Impugned Decision, para. 19.

TABLE 1: Counsel overall remuneration under Former LAP without 10% interim measures

	Monthly Remuneration	Reimbursement for (professional charges) and taxes	[REDACTED]	20% Monthly living cost lump-sum	Total monthly outcome
Former LAP <u>without</u> 10% Interim measures	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

TABLE 2: Counsel overall remuneration under Former LAP with 10% interim measures i.e. the correct total monthly income prior to the abrupt conclusion of the [REDACTED]

	Monthly Remuneration	Reimbursement for (professional charges) and taxes	[REDACTED]	20% Monthly living cost lump-sum	Total monthly outcome
Former LAP <u>with</u> 10% Interim measures	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

34. The second error is that the Registrar failed to take into account that the restructuring of the legal fees in the Reformed LAP has led to tax implications for Lead Counsel which means that she is now earning less on a net basis. Although the monthly remuneration for Counsel on paper has increased from [REDACTED].
35. The following is a table showing the total tax on the additional income (Reformed LAP [REDACTED]) – (Former LAP [REDACTED]) = Additional Income per month [REDACTED] which is reflected in Table 3 of the Impugned Decision:

Item	Value
Monthly Additional Income (EUR)	[REDACTED]
Annual Additional Income (EUR)	[REDACTED]
Annual Additional Income (CAD)	[REDACTED]
Marginal Federal Tax Rate	[REDACTED]
Federal Tax on Additional Income (CAD)	[REDACTED]
Marginal Provincial Tax Rate (Quebec)	[REDACTED]
Provincial Tax on Additional Income (CAD)	[REDACTED]
<u>Total Tax on Additional Income (CAD)</u>	[REDACTED]
Tax Percentage on Additional Income	[REDACTED]

36. While it is understood that the Court cannot take into account each Counsel's different income tax liabilities, this particular request is premised on the individual assurance the

Registrar made to each existing Counsel already appointed to ICC cases. So while any prospective Counsel for a future ICC case will have to accept the Reformed LAP as it is, the Registrar had an obligation vis-à-vis Lead Counsel for Mr Yekatom to ensure she was not ‘overall’ disadvantaged²⁶ in her unique and specific situation. This includes taking into account her specific tax liabilities, which he knew about, having issued *Notes Verbale* informing of her Canadian tax residency status.

37. This is also premised on the fact that the Registrar decided in the Impugned Decision to assess whether *overall* Counsel was earning less, therefore he had to take into account the fact that [REDACTED]. Furthermore, the monthly reimbursement of [REDACTED] listed in Table 2 by the Registrar is contingent on proof of tax payment and cannot be counted because it is now reduced to tax reimbursement only upon proof of the submission of income taxes a year or two later, while before it was covering taxes, health insurance, bar fees, pension payments, as well as expenses related to Counsel’s dormant law office in Canada. In addition, because the Reformed LAP has shifted funds that were once reimbursed as professional charges to the monthly remuneration section, [REDACTED], the 10% reflected in Tables 2 and 3 [REDACTED]. As indicated in the tables below, the correct calculation is that Lead Counsel earns [REDACTED] less under the Reformed LAP compared to the Former LAP, which evidently puts her at a disadvantage compared to her previous position.

TABLE 3: Registrar incorrect calculation of Counsel’s remuneration under Reformed LAP

	Monthly Remuneration	Reimbursement for (professional charges) and taxes	[REDACTED]	20% Monthly living cost lump-sum	Total monthly outcome
Registrar’s calculation under Reformed LAP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

TABLE 4: Correct calculation by taking into account that the increase in taxes paid by Counsel will entirely absorb the [REDACTED] for tax payment appearing in Table 2 or 3 of the Impugned Decision. Additionally, calculation should consider payment through Counsel’s income for [REDACTED] costs.

	Monthly Remuneration used to pay Transport-Accommodation Costs formerly	Reimbursement for taxes entirely absorbed by new tax brackets due to shifted funds that were once	[REDACTED]	20% Monthly living cost lump-sum	Total monthly outcome

²⁶ Impugned Decision, para. 18.

	partially paid by Registry	reimbursed as professional charges to the monthly remuneration section			
	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

TABLE 5 : Differences between Former LAP and Reformed LAP

	Monthly Remuneration	Reimbursement for (professional charges) and taxes	[REDACTED]	20% Monthly living cost lump-sum	Total monthly outcome
Former LAP without interim measures	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]
Former LAP with interim measures	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Reformed LAP correct calculation	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

38. The third error, and notwithstanding the aforementioned errors, concerns the misnomer that on a superficial calculation, as that adopted in the Impugned Decision, Lead Counsel appears to earn more on an overall monthly basis under the Reformed LAP. This simplistic calculation ignores the fact that the ‘boost’ in income comes from the monthly remuneration provided to counsel under the Reformed LAP. It is pertinent to recall here that the Reformed LAP was introduced as a result that as the former LAP was adopted eleven years ago, it failed to take the increase of cost of living and was therefore no longer fit for purpose.

39. As can be shown in Table 6 below, if the Registrar’s calculation is applied to Counsel’s monthly remuneration under the former LAP (i.e. 10% for reimbursement of professional charges and taxes + 20% for monthly living cost lump-sum²⁷) the overall total monthly income is far less than what she was previously earning. This exercise reveals that the total reimbursement provided to Counsel – provided to all counsel to facilitate services in the Host State - is far less than what she was provided under the [REDACTED] and that the difference in total monthly income is only as a result of the increase in the monthly

²⁷ Additionally, upon providing proof of health insurance, a member of the Defence Legal team would receive the 20% lump sum, regardless of whether residing in Canada, the Netherlands, or elsewhere. This sum is provided to every individual working in a defense team regardless as there place of residence, although the amount may vary.

remuneration apportioned to all counsel. As such, the Registrar is effectively making Lead Counsel pay for expenses, which she was previously entitled to on a separate budget, out of her monthly remuneration and thereby denying her a reasonable income.

TABLE 6 : Reduction in total reimbursements

	Monthly Remuneration	Reimbursement for professional charges and taxes	Reimbursement for accommodation and travel expense	Total reimbursements
Former LAP	[REDACTED]	[REDACTED] ²⁸	[REDACTED] ²⁹	[REDACTED] ³⁰
Former LAP with interim measures	[REDACTED]	[REDACTED] ³¹	[REDACTED] ³²	[REDACTED] ³³
Reformed LAP	[REDACTED]	[REDACTED] ³⁴	[REDACTED] ³⁵	[REDACTED] ³⁶

40. As demonstrated in the aforementioned tables, the Registrar made an error in paragraph 21 of the Impugned Decision by concluding that there is a financial improvement for Counsel of [REDACTED] compared to the former LAP.
41. This issue concerning the higher [REDACTED] that Counsel has to pay as a result of the restructuring of the remuneration under the Reformed LAP was already highlighted in the Request.³⁷ The Registrar ignored this argument, which affected his entire calculation and, consequently, his decision.
42. Additionally, under the former Reformed LAP, Counsel could claim mandatory pension payments, health insurance, bar fees, and office fees in Montreal, which she continues to incur despite temporarily ceasing to use them for the trial. Under the Reformed LAP, this is no longer possible, despite the incorrect reference to professional charges in Tables 2 and 3 of the Registrar's Impugned Decision, leading to a further negative impact.
43. If the Registrar had made the proper calculations and correctly concluded that Lead Counsel has been put at a disadvantage under the Reformed LAP, the Defence had a legitimate expectation that the Registrar would have taken transitional measures to

²⁸ 30% of overall monthly remuneration.

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ 30% of overall monthly remuneration.

³² [REDACTED]

³³ [REDACTED]

³⁴ 10% of monthly remuneration.

³⁵ 20% of monthly remuneration.

³⁶ [REDACTED]

³⁷ Annex I, paras 15-17.

prevent any negative impact. Such a legitimate expectation was created by: (i) the widely held understanding that the Reformed LAP would not adversely affect existing legal resource allocations; (ii) assurances made by the Registrar at the town hall meeting of 27 October 2023, and (iii) the ASP's inclusion of discretionary transitional measures clearly for the purpose of preventing any negative impact for operating teams.

44. To avoid any disadvantage to Lead Counsel, the appropriate transitional measure is to restore the [REDACTED] as agreed to cover the costs of Lead Counsel's accommodation while she is in The Hague. By failing to take this transitional measure, the Registrar abused the discretion extended to him by the ASP to guard against these kinds of situations. This Chamber is respectfully requested to order the Registrar to order that the [REDACTED] continue to be honoured since 1 January 2024.
45. In any event, the Registrar made an error of calculation by attributing the increase in salary solely to income adjusted for inflation, rather than considering additional reimbursements. Lead Counsel's salary was increased to reflect inflation, a separate issue from the additional [REDACTED]. Counsel had a legitimate expectation to rely on, which was distinct from the monthly income.

C. Further and/or in the alternative, the Registrar erred in fact and law in concluding that Lead Counsel is resident in The Hague and therefore not eligible to receive reimbursement for her costs of staying there under the Reformed LAP

46. Even if the Chamber considers that the Registrar made no error in failing to honour the [REDACTED], Lead Counsel is at the very least entitled to rely on the Reformed LAP to reimburse her accommodation expenses up to a maximum of €1,200 per month. Indeed, if the Registrar provides reimbursement under this programme, it could partially offset the loss incurred through imposing the Reformed LAP. The Registrar, however, erroneously held that Lead Counsel is a resident of The Hague, thereby denying Lead Counsel this entitlement. This is an error of law because the Registrar's interpretation of residence: (i) failed to take into account relevant and applicable existing legal interpretations of residence, including in *Notes Verbales* which the Registrar sent to the Host State; and (ii) has a discriminatory effect on Counsel who are geographically farther away from the Netherlands and those with children.
47. The Registrar erroneously held as 'irrelevant' the existing legal interpretations of residence.³⁸ First, considering the role of Counsel and the requirement for prolonged

³⁸ Impugned Decision, paragraphs 33-34.

presence in the Host State, the Host State Agreement explicitly states that ‘periods during which counsel are present in the Host State for the discharge of their functions shall not be considered as periods of residence.’ Indeed, Lead Counsel is not treated as a resident by the Host State authorities. She is not entitled to a wide range of rights in the Netherlands, including the right to stay on the territory of the Host State after the end of her appointment as Mr Yekatom’s Counsel. As a Canadian and thus a non-European, Counsel is not permitted to stay in the Schengen area for more than 90 days within a period of 180 days.³⁹ Upon the conclusion of her appointment, she must return her identity card, which allows her to reside in the Host State, to the Ministry of Foreign Affairs. Additionally, she and her family members forming part of her household must be deregistered within ten working days.⁴⁰ Notably, the Registrar has stated in a recent *Note Verbale* that Lead Counsel is a resident of Canada to clarify Lead Counsel’s status to the Host State Authorities.⁴¹

48. Taken alone, this should be sufficient to demonstrate that the Impugned Decision is affected by a material error warranting its review. In contrast to the Registrar’s position that references to counsel status as a non-resident in the Host State are *irrelevant*,⁴² the correct interpretation evidently relates to whether or not Counsel is entitled to programme 3 under the Reformed LAP.
49. A term used by the Registrar should have the same meaning consistently. When the Registrar used the term ‘resident’ with regards to the Host State, this term should have the same meaning as in the Reformed LAP. Instead, in what can only be described as a regressive move, the Registrar invents a new interpretation of residence in the Impugned Decision which reverts to a facile dictionary definition of the term, and ignores the *sui generis* purpose that Counsel from all around the world assigned to ICC cases temporarily come to The Hague.
50. Indeed the Registrar’s decision discriminates against her, as a Canadian lawyer, and any other counsel who may come from countries similarly far away from the Netherlands. The Registrar reasoned that Lead Counsel is resident in The Hague because she remained in The Hague for ‘several years taking into account the duration of proceedings before

³⁹ <https://www.netherlandsworldwide.nl/visa-the-netherlands/schengen-visa/apply-canada>

⁴⁰ Protocol and Host Country Affairs Department1 Ministry of Foreign Affairs, Article 2.1 Notifying the Ministry of Foreign Affairs.

⁴¹ Annex E.

⁴² Impugned Decision, paragraphs 33-34.

the Court'.⁴³ Virtually all cases at the ICC last for at least several years. The implication is that all Counsel assigned to an ICC case who come to the Hague are therefore automatically qualified as residents of The Hague.

51. This cannot be the intention of the drafters of the Reformed LAP because it would render programme 3 on transportation and accommodation expenses meaningless or discriminatory. According to the Registry's interpretation of programme 3, in each month she wishes to claim the full transportation and accommodation expenses Lead Counsel would have to incur transportation costs of over €400. But this places her in a catch-22 situation because the cost of returning to the only place she can return to – her place of residence, Canada – exceeds the full maximum of €1,200 per month available under this programme. This discriminates against her for living far away from the Netherlands, and would similarly discriminate against all Counsel who live in places where the cost of return travel exceeds €1,200 while treating favourably those (predominantly European) who live closer to the Netherlands.
52. Lead Counsel in this case has indeed spent a considerable time in The Hague attending to her duties to legally represent Mr Yekatom. But the fact that she did so cannot be used to prejudice her by determining she is a resident in The Hague when she has taken all the necessary steps to maintain her residence in her home country. Such a policy would undermine the fairness of the legal aid system because it would incentivise Counsel to remain away from The Hague to the potential detriment of their client's representation. Again it would discriminate against Counsel who come from far away countries while rewarding Counsel who live close enough to be able to more easily travel back and forth between The Hague and their normal place of residence.
53. For instance, Judges and staff members, while staying in the Host State during their period of employment, are not considered residents and can retain their residency from where they are normally from. However, they enjoy benefits such as home leave to and from their permanent residency. They do not lose this benefit because they reside in The Hague for the duration of their employment. Similarly, Counsel should be able to benefit from programme 3 of the Reformed LAP to reimburse their travel and accommodation costs between The Hague and their permanent residence. Stripping Counsel of this reimbursement entitlement simply because they are temporarily carrying out their duties in the Host State for longer periods during trials would be improper.

⁴³ Impugned Decision, para. 35.

54. Defence Counsel further observes that the court framework has consistently promoted equal geographical recruitment and a multicultural image. Therefore, by concluding that “in balance, Counsel’s actual place of stay, at least for the period of the current judicial proceedings is The Hague, the place where she lives for the purpose of the application of the Reformed LAP”⁴⁴ the Registrar is setting a dangerous precedent.
55. Hopefully, Counsel will not be the last non-European Counsel with young children appointed by the Court to represent an accused. If such Counsel chooses to temporarily stay in The Hague to effectively and meaningfully represent their client and provide the necessary time and facilities, it would be discriminatory to strip them of the right to claim transport and accommodation under the Reformed LAP for that reason. Unlike European counsel, who can travel to and from their residence without incurring high costs, long travel time, different time zones, non-European Counsel face significant transportation and accommodation expenses, which should be reimbursed if not within commuting distance to the court. Counsels who live too far to travel frequently, unlike their European counterparts, would be negatively and unfairly impacted.
56. Additionally, the Registrar’s approach unfairly impacts Counsel with young children who face significant expenses not covered by benefits, unlike their counterparts. These Counsel should be able to opt for a temporary relocation in the Hague to be close to their family while representing their client effectively before the Court. They should not be deprived of a provision under the Reformed LAP as a result of such a decision. Such practices risk promoting discrimination based on family and geographical status, potentially leading to a scenario where only European Counsel represent indigent accused individuals before the court.
57. If the Registrar had correctly determined that programme 3 was available to Counsel, she would have received €1,200 per month. The flawed reasoning of the Registrar in the Impugned Decision puts Counsel in a difficult position, as she would need to consider moving back to Canada if she wanted to access programme 3 in order to cover her living costs in the Hague. This move would negatively impact Mr Yekatom's rights, as he is entitled to remain with Counsel of his choice, who has acquired extensive knowledge of the case facts and strategy. Maintaining this Counsel is crucial to ensuring that there is no negative impact on the time and facilities available for the preparation of his defence, as she temporarily relocated to The Hague for this purpose.

⁴⁴ Impugned Decision, para. 32.

58. Counsel had relied on additional funds to cover all accommodation-related costs, which [REDACTED]. Now being told that the [REDACTED] is no longer in place, [REDACTED] to access Program 3 or use her own income to cover the difference, jeopardizes Counsel's position. This directly affects Mr Yekatom, who wants to maintain his team's operation through the facilities and communication methods provided by Counsel, ensuring no negative impact on field and court duties. This situation underscores the importance of paragraph 15 adopted by the ASP: "to ensure the stability of operating teams and to prevent any negative impact".

CLASSIFICATION

59. This request is filed *Ex Parte* only available to the Yekatom Defence and Registry due to the classification of the Decision and the information contained in the Request, which has always been *ex parte* between Counsel and the Registrar. A redacted version will be filed shortly.

RELIEF SOUGHT

60. In light of the above, the Defence respectfully requests that Trial Chamber V:

REVERSE the Impugned Decision; and,

INSTRUCT the Registrar to uphold the [REDACTED] with Counsel, continuing to reimburse her monthly travel and accommodation claims [REDACTED]; or, in the alternative;

INSTRUCT the Registrar to determine that Counsel is not resident in The Hague and reimburse her accommodation expenses up to €1,200 a month according to programme 3 of the Reformed LAP.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF FEBRUARY 2025



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

Dated this 21 February 2025

At The Hague, the Netherlands