Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-RoC85-01/13**
Date: **6 February 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 version of
Decision on the "Defence application to the Presidency for judicial review of the Registrar's Decision on legal assistance of 20 December 2013"
Dated 6 February, ICC-RoC85-01/13-7-Conf-Exp

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

The Office of the Prosecutor
Fatou Bensouda
Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo
Nicholas Kaufman

REGISTRY

Registrar
Herman von Hebel

Defence Support Section
Esteban Peralta-Losilla

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 article 67(1)(d) of the Rome Statute and regulation 85(3) of the Regulations of the Court, of the decision of the Registrar of 20 December 2013 denying the Suspect's application for legal assistance paid by the Court.

I. PROCEDURAL HISTORY

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").[1]
2. On 27 November 2013, the Suspect made his initial appearance in the Case and was represented by duty counsel.[2]
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.[3]
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 decision au sujet de l'aide judiciaire".[4] The Court registered Counsel's acceptance of that instruction on 10 December 2013.[5] 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.[6]
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" ("Impugned Decision"), in which he provisionally rejected the Suspect's application for legal assistance, stating that the Suspect "n'est pas indigent

[1] ICC-01/05-01/13-1-US-Exp-tENG. Redacted to ICC-01/05-01/13-1-Red2, 28 November 2013.
[2] Application, paragraph 3 (cited at footnote 9 below).
[3] Application, paragraph 4 (cited at footnote 9 below).
[4] Enregistrement de la désignation de Maître Nicholas Kaufman par M. Jean-Pierre Bemba Gombo comme son conseil et de l'acceptation de la désignation, accompagnée de la prestation de serment du conseil, ICC-01/05-01/13-36-AnxI, 10 December 2013.
[5] ICC-01/05-01/13-36-Anx-I.
[6] Supplementary Information, Annex B, ICC-RoC85-01/13-4-Conf-AnxB, page 1 (cited at footnote 10 below).

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".[7]

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".[8]
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").[9]
8. On 8 January 2014, Counsel filed supplementary information relating to the Application before the Presidency ("Supplementary Information").[10]
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").[11]
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.[12]

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[7] Supplementary Information, Annex A, ICC-RoC85-01/13-4-Conf-AnxA, page 6 (cited at paragraph 10 below).
[8] Supplementary Information, Annex B, ICC-RoC85-01/13-4-Conf-AnxB, page 2 (cited at paragraph 10 below).
[9] Defence application to the Presidency for judicial review of the Registrar's Decision on legal assistance of 20 December 2013, ICC-RoC85-01/13-2-Conf.
[10] Supplementary Information to the Defence application for judicial review of the Registrar's Decision on legal assistance of 20 December 2013, ICC-RoC85-01/13-4-Conf.
[11] Observations du Greffier sur la demande de la Défense portant "Defence application to the Presidency for judicial review of the Registrar's Decision on legal assistance of 20 December 2013" introduite le 6 janvier 2014, ICC-RoC85-01/13-5-Conf-Exp, paragraph 3.
[12] Defence Request pursuant to Regulation 24(5) of the Regulations of the Court, ICC-RoC85-01/13-6-Conf-Exp.

II. SUBMISSIONS OF COUNSEL FOR THE SUSPECT

11. Counsel submits that he is currently working unpaid in the Case "with no legal assistant or case manager".[13] He argues that he is facing considerable obstacles in ensuring an effective defence for the Suspect and that there is no equality of arms.[14] Counsel notes that the Single Judge of Pre-Trial Chamber II has abstained from ordering the Office of Public Counsel for the Defence ("OPCD") to assist him in the defence of the Suspect, in contrast to the policy previously adopted in the *Mbarushimana* case where Pre-Trial Chamber I recognized that "pursuant to regulation 77(5) of the Regulations [of the Court], the OPCD shall provide to the defence counsel, if so requested by him or her, support and assistance".[15] Furthermore, it is submitted that whereas the Registry is bound to "[p]rovide support, assistance, and information to all defence counsel appearing before the Court", pursuant to rule 20(1)(b) of the Rules of Procedure and Evidence ("Rules"), the Registry has refused to provide legal assistance to ensure the Suspect's representation.[16]
12. Counsel submits that the Application is made against the background of the Suspect's struggle for, and ultimate success in obtaining, legal assistance paid for by the Court on a reimbursable basis in case ICC-01/05-01/08. The Application is brought pursuant to regulation 85(3) of the Regulations of the Court alleging a violation of the Suspect's fair trial rights enshrined in article 67(1)(d) of the Rome Statute ("Statute") and a "discernable error committed by the Registrar in his analysis of the Suspect's indigent status".[17]

A. Failure to Take into Account Previous Awards of Legal Assistance

13. Counsel argues that legal assistance was awarded to the Suspect under superior financial circumstances in 2009 in case ICC-01/05-01/08.[18] He maintains that the Suspect, who has been held in the detention centre of the Court since 3 July 2008, has

[13] Application, paragraph 12.
[14] Application, paragraph 12.
[15] Application, paragraph 12, citing the Decision on the "Defence Request for OPCD Support", ICC-01/04-01/10-115, 21 April 2011, page 4.
[16] Application, paragraphs 13 and 14.
[17] Application, paragraph 23.
[18] Application, paragraph 24.

had no access to his funds, assets, or property since that time.[19] Counsel notes that when the Suspect's application for legal assistance was previously refused by the Registrar in 2009 on the ground that he was not indigent, Trial Chamber III, in the context of an application by the Suspect for the release of funds in order to pay for expenses including legal expenses, decided that the Suspect was entitled to legal assistance under article 67 of the Statute and regulation 85 of the Regulations of the Court. The Chamber then ordered the Registrar "to pay the figure (€30,150)... previously identified as reasonable for legal assistance retrospectively to [March 2009], and ongoing until there [was] a material change in circumstances".[20]

14. Counsel argues that any changes in the Suspect's financial circumstances since his detention have been for the worse, such as the depreciation of his property and his accrual of debts on account of loans taken out by his immediate family to fund daily subsistence. He submits that "[w]hatever monies the Suspect had in bank accounts and were not frozen have now been exhausted",[21] and that the Suspect is now "indebted to the Court for almost 4 years of legal fees arising out of [case] ICC-01/05-01/08".[22] In the circumstances, Counsel argues that the Registrar erred in law and/or acted unreasonably by: failing to factor the 2009 Trial Chamber III Decision into account; and failing to award the Suspect full legal assistance or, at the very least, the same reimbursement regime set out in the 2009 Trial Chamber III Decision, adjusted to reflect the current monthly cost of running a case at the Court at the pre-trial stage.[23]

B. Error of Law - Violation of Article 67(1)(d) of the Statute

15. Counsel submits that the "refusal by the Registrar to provide legal assistance to the Suspect because [he] allegedly failed the 'indigence test', when the Suspect has no real means at his disposal to pay for his own legal assistance, is a breach of [a]rticle

[19] Application, paragraph 25.
[20] Application, paragraphs 32, 36 and 37, citing the Decision on legal assistance for the accused, ICC-01/05-01/08-567-US-Exp, 20 October 2009, ("2009 Trial Chamber III Decision"), paragraph 108. Redacted to ICC-01/05-01/08-567-Red, 26 November 2009.
[21] Application, paragraphs 25 and 38.
[22] Application, paragraph 38.
[23] Application, paragraph 38.

67(1)(d) of the Statute, as well as [r]egulations 83 through to 85 of the Regulations of the Court".[24]

16. It is submitted that the Registrar erred in law by failing to appreciate: "(1) that indigence is not a criteri[on] for determining legal assistance under the Rome Statute and its legal aid framework [and] (2) that legal assistance is predicated upon whether an applicant has the 'means' at his 'disposal' to pay for his own legal representation". In light of the foregoing, Counsel argues that the Registrar must advance the costs of legal assistance to the Suspect in the Case.[25]

1. Indigence is not a criterion in determining legal assistance

17. Counsel notes that, under article 21(1)(a) of the Statute, the Court shall apply "in the first place" the Statute, the Elements of the Crimes, and the Rules.[26] Counsel cites articles 67(1)(d) and 55(2)(c) of the Statute, which provide that the accused shall be entitled to conduct his defence in person or through legal assistance of his choosing and *inter alia* to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.[27] It is argued that nowhere in these primary texts is the word "indigence" mentioned.[28] Counsel refers to the 2009 Trial Chamber III Decision, in its review of the Suspect's application for the release of frozen funds in case ICC-01/05-01/08, which stated that "[t]he words *indigence* and *indigent* – terms which have been used as a form of shorthand in the submissions and the Registrar's Decisions on these issues – do not appear anywhere in the Rome Statute framework, and in this context they have the capacity seriously to mislead".[29] Trial Chamber III subsequently ordered payment of legal fees to the Suspect "[i]rrespective of the considerations as to 'indigence' that had influenced the Registrar when she made her Decisions on legal assistance".[30]

[24] Application, paragraph 41.
[25] Application, paragraph 42.
[26] Application, paragraph 43.
[27] Application, paragraphs 44 and 45.
[28] Application, paragraph 46.
[29] Application, paragraph 46, citing the 2009 Trial Chamber III Decision, paragraph 102 (emphasis in the original).
[30] Application, paragraph 48, citing the 2009 Trial Chamber III Decision, paragraphs 103 and 108.

2. The Rome Statute framework requires that such "means" be "disposable"

18. In determining whether the accused lacks sufficient means to pay for legal assistance in accordance with articles 55 and 67 of the Statute, Counsel refers to regulation 84(1) of the Regulations of the Court which provides that such analysis shall be made by "determin[ing] the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance".[31] Regulation 84(2) provides that "[t]he means of the applicant shall include means of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose".[32] Counsel submits that the only means to be considered for the purposes of the legal assistance scheme are those that are at the disposal of the applicant.[33] In sum, Counsel argues that "the indicator for whether legal assistance shall be paid by the Court is not '*indigence*' but, in fact, whether the applicant has the *means* available to him to pay for his legal representation at the time of the application or in the near future".[34] It is argued that the Suspect currently lacks those means.[35]

3. The Registrar must advance the costs of legal assistance to the Suspect

19. Counsel argues that whereas it falls to the Registrar to maintain strict budgetary control, he is not permitted to act as the legal arbiter who determines adherence to the Court's primary texts pursuant to article 21(1)(a) of the Statute or to the Court's secondary operational texts.[36] Counsel submits that, in the Suspect's financial circumstances, the Registrar is obliged to provide him with legal assistance paid for by the Court pursuant to articles 55 and 67 of the Statute and regulations 84 and 85 of the Regulations of the Court,[37] and has the flexibility within the Financial Regulations and Rules of the Court to meet unforeseen or unavailable budgetary expenses.[38] Counsel thus requests the Presidency to order the Registrar to provide the Suspect with legal assistance in the monthly amount of €32,933 retrospectively to 9 December

[31] Application, paragraphs 51 and 52.
[32] Application, paragraph 51.
[33] Application, paragraphs 53 and 55.
[34] Application, paragraph 57, emphasis added.
[35] Application, paragraph 61.
[36] Application, paragraphs 59 and 60.
[37] Application, paragraphs 61 and 63.
[38] Application, paragraph 59.

2013 (the commencement of his instruction as Counsel), to be reimbursed to the Court.[39]

C. Error in the Calculation of Indigence

20. In the event that the Presidency decides that use of the "indigence test" is proper in the Case, Counsel submits that the Impugned Decision must be overturned due to its miscalculations and errors which significantly prejudice the Suspect.[40] It is submitted that there are miscalculations and errors in both the Registrar's determination as to the Suspect's means, and in the Registrar's determination of whether the Suspect should be provided with full or partial payment of legal assistance, pursuant to regulations 84(1) and 85(1) of the Regulations of the Court.[41]
21. In evaluating the Suspect's means, Counsel submits that the Registrar miscalculated the monthly value of his assets by erroneously applying an "inaccurate and unreasonable" depreciation period of 60 months[42] and erroneously calculating the Estimated Monthly Rent ("EMR") of the Suspect's principal residence.[43] Further, it is submitted that the Registrar inexplicably departed from the policy documents of the Court concerning legal assistance by failing to consider assets other than the properties in [REDACTED].[44]
22. In determining the Suspect's entitlement to legal assistance, Counsel argues that the Registrar, when calculating the monthly obligations of the Suspect to his dependants, should have applied the United Nations Daily Subsistence Allowance ("DSA") and not the cost of living statistics determined by the [REDACTED] government. Counsel argues that the latter figure is unrealistic.[45]
23. Counsel argues that the figures concerning the Suspect's means and entitlement to legal assistance would yield a different result if properly calculated and applied, and, as such, the Suspect was prejudiced by the Registrar's errors.[46]

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[39] Application, paragraph 64.
[40] Application, paragraph 66.
[41] Application, paragraph 67.
[42] Application, paragraph 83.
[43] Application, paragraphs 75 and 85 to 87.
[44] Application, paragraphs 89, 90 and 93.
[45] Application, paragraphs 94 to 96.
[46] Application, paragraph 98.

D. Relief Sought

24. In relief, Counsel prays that the Presidency:
    - Overturns the Impugned Decision on judicial review pursuant to article 67(1)(d) of the Statute and regulations 84 and 85 of the Regulations of the Court;[47]
    - Finds that the Registrar erred in law and/or acted unreasonably or unfairly by failing to fulfil his statutory obligations to provide full legal assistance without any expectation of reimbursement;[48]
    - Alternatively, finds that the Registrar erred in law and/or acted unreasonably or unfairly by failing to offer legal assistance in the monthly amount of €32,933 to be reimbursed by the Suspect at a later date, thereby applying the scheme adopted by the Court in 2009 "when the Suspect's financial situation was at least as good (or bad) as it is now"; and[49]
    - In the further alternative, finds that the Registrar erred in law and/or acted unreasonably or unfairly in calculating whether the Suspect met the threshold for legal assistance in the application of the indigence test.[50]

III. OBSERVATIONS OF THE REGISTRAR

A. The Context of the Impugned Decision

25. Recalling that he found that the Suspect could not benefit from the legal assistance scheme on the ground that the Suspect was not indigent, following his first application for legal assistance, the Registrar submits that the Suspect's current application for legal assistance contains no new information which would cause him to come to a different conclusion.[51] The Registrar further argues that the Suspect was not exhaustive or indeed candid when it came to submitting his financial information for consideration.[52] As such, it is submitted that the Suspect has not taken the minimum steps required of him as an applicant for legal assistance paid for by the Court.[53]

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[47] Application, paragraph 99.
[48] Application, paragraph 100.
[49] Application, paragraph 101.
[50] Application, paragraph 102.
[51] Observations, paragraphs 5 to 7.
[52] Observations, paragraph 7.
[53] Observations, paragraph 7.

B. The Suspect Does Not Meet the Conditions to Benefit From the Legal Assistance Scheme of the Court

26. It is incontestable, the Registrar submits, that the Suspect fails to meet the conditions to benefit from the legal assistance scheme of the Court, and there are no valid reasons put forward in the Application to reverse this conclusion.[54] It is submitted that the arguments regarding the deterioration of the financial situation of the Suspect are unsubstantiated.[55] The Registrar submits that there are documents in case ICC-01/05-01/08 in which the Suspect has expressly recognised that he is not indigent. It is further submitted that the Suspect has attempted to conceal a significant part of his wealth and mislead the Court;[56] and that only a financial investigation led to the Registrar discovering the full picture of the Suspect's wealth.[57]

27. In the exercise of his responsibilities which confer on him the management of the legal assistance scheme in accordance with article 43 of the Statute, rules 20 to 21 of the Rules, and regulations 83 to 85 of the Regulations of the Court, the Registrar submits that an examination of means must be effected to determine whether a person can benefit in whole or in part from the legal assistance scheme. Such examination includes all means referred to in regulation 84 of the Regulations of the Court.[58] The Registrar further submits that basing his decision solely on the properties in [REDACTED] did not violate the relevant provisions of the Court.[59]

28. Moreover, the Registrar submits that the calculations in the Impugned Decision were in line with the criteria outlined in the "Registry's Single Policy Document on the Court's Legal Aid System" ("Legal Aid Policy"), and Recommendation 5 at paragraph 38 of the "Report of the Court on Legal Aid: Alternative Models for Assessment of Indigence".[60] The Registrar explains that although approved and adopted by the Assembly of States Parties, Recommendation 5 was unfortunately not included in the Legal Aid Policy document which sought to compile all of the documents pertaining to the legal assistance scheme into one single document and

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54 Observations, paragraph 9.
55 Observations, paragraphs 9 and 18.
56 Observations, paragraph 10.
57 Observations, paragraph 10.
58 Observations, paragraph 11.
59 Observations, paragraphs 11 and 12.
60 Observations, paragraph 14, citing, ICC-ASP/12/3, 4 June 2013, and, ICC-ASP/8/24, 5 October 2009, respectively.

notes that measures are being taken to submit a corrigendum to the Assembly of States Parties to rectify this error.[61] The Registrar argues that, nevertheless, the omission of Recommendation 5 from the Legal Aid Policy does not deprive this Recommendation of its applicability, nor does it represent a modification of the scheme or a repeal of the Recommendation.[62]

29. The Registrar submits that should the calculations adopted in the Impugned Decision be revisited, the financial situation of the Suspect must be re-examined so as to take into account: the information contained in Annex I of the Registrar's Decision of 25 August 2008 in response to the Suspect's first application for legal assistance; the declaration of the Suspect in Annex III to the Registrar's Observations dated 21 January 2014; and all of the information discovered as a result of the abovementioned financial investigation.[63] The Registrar argues that any such recalculation will not affect the ultimate outcome of the Impugned Decision which is that the Suspect is not indigent and so cannot benefit in whole or in part from the legal assistance scheme of the Court.[64] The Registrar submits that this position is corroborated by Annexes V and VI, the latter confirming that the Suspect has non-declared means which could be used to fund the costs of his defence in the Case.[65]

C. Alleged Violations of the Rights of the Defence

1. The indigence test

30. In response to Counsel's argument that the Impugned Decision failed to take into account the 2009 Trial Chamber III Decision and that the application of the indigence test violates article 67(1)(d) of the Statute and regulations 83 to 85 of the Regulations of the Court when the Suspect does not have the real resources to fund the costs of his defence, the Registrar submits that none of the texts confer on the accused an absolute right to legal assistance paid for by the Court.[66] The Registrar maintains that, pursuant to article 67(1)(d) of the Statute, access to the legal assistance scheme is strictly

[61] Observations, paragraph 14.
[62] Observations, paragraph 14.
[63] Observations, paragraph 15.
[64] Observations, paragraph 16.
[65] Observations, paragraph 17.
[66] Observations, paragraphs 19, 20 and 21.

conditional on whether the person concerned lacks the means to meet the costs of his defence, a condition that is not met in the instant Case.[67]

2. *Lack of legal basis for the retrospective advance payment of funds*

31. The Registrar submits that, contrary to the arguments of Counsel, his request that a monthly sum of €32,933 be advanced on a reimbursable basis for the payment of the legal fees of the Suspect retrospectively from 9 December 2013, cannot be supported by invoking the Contingency Fund pursuant to regulations 6.6 and 6.7 of the Financial Regulations and Rules.[68] The Registrar submits that the finances of the defence, in a case where the Suspect has been found not to be indigent, cannot be considered as an unforeseen or unavoidable expense of the Court to be funded from the Contingency Fund.[69] The Registrar also argues that such a request for the granting of retrospective or future advances from the Contingency Fund does not fall within the jurisdiction of the Presidency.[70] If, in the alternative, this argument is to be examined by the Presidency, the Registrar submits that Counsel has not put forward any credible legal basis for his request on this point and as such his request should be dismissed as ill-founded.[71]

3. *Pro bono instructions, retrospective payment, and the rights of the defence*

32. The Registrar argues that Counsel agreed to act in a *pro bono* capacity on 9 December 2013 which remained the case at the time of the Application and, as such, no retroactive payment can be justified.[72] The Registrar recalled the circumstances under which Counsel was instructed, and maintains that they demonstrate that his mandate was accepted freely and in full knowledge of both parties. Thus, the Registrar submits that by accepting the *pro bono* instructions, Counsel cannot request retrospective payment in the event that the Suspect receives a positive response to his application

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[67] Observations, paragraph 21.
[68] Observations, paragraphs 25 and 29.
[69] Observations, paragraph 31.
[70] Observations, paragraph 26.
[71] Observations, paragraphs 26 and 27.
[72] Observations, paragraph 33.

for legal assistance.[73] The Registrar further submits that a request for retrospective payment is contrary to the solemn undertaking made by Counsel pursuant to article 5 of the Code of Professional Conduct for Counsel.[74] Any payment for legal assistance in the instant Case may only be made for future expenses and on the condition that Counsel revokes his *pro bono* instructions.[75] The Registrar also notes that regulations 76 and 77(4) of the Regulations of the Court provide for mechanisms to protect the rights of the defence should counsel withdraw from a case, for example the designation of counsel from the OPCD as counsel in the case.[76]

4. The unjustifiable amount of Counsel's requested fees

33. Regarding the sum of legal assistance requested by Counsel, the Registrar notes that, pursuant to regulation 83 of the Regulations of the Court, it is for the Registrar and the Chamber to determine the scope of legal assistance to be paid by the Court.[77] The Registrar observes that the requested minimum amount of €32,933 for Counsel's defence fees is not justified in light of the framework of the instant Case.[78] The Registrar argues that the legal assistance scheme was established for those suspected of crimes under article 5 of the Statute, and not for those suspected of crimes under article 70 of the Statute which concerns offences against the administration of justice.[79] The Registrar submits that there are many considerations taken into account when determining the reasonable and necessary resources to allocate to the defence of indigent persons suspected of crimes under article 5 of the Statute.[80] The Registrar argues that the same level of resources should not be allocated to the defence of those suspected of crimes under article 70 of the Statute, which are far removed from crimes under article 5 of the Statute and, in principle, are significantly less complex in their nature and in the way in which they are treated judicially.[81]

[73] Observations, paragraph 35.
[74] Observations, paragraph 33.
[75] Observations, paragraph 33.
[76] Observations, paragraph 36.
[77] Observations, paragraph 37.
[78] Observations, paragraph 38.
[79] Observations, paragraph 39.
[80] Observations, paragraph 40.
[81] Observations, paragraph 41.

5. *Financial implications*

34. The Registrar notes that up until the end of November 2013, the Suspect had received the total amount of €2,185,683.05 in advance payments for legal assistance in case ICC-01/05-01/08. The Registrar further notes that, to date, the Court has recovered only €164,120.74 as a result of a lack of full and frank cooperation on the part of the Suspect and his defence team. Currently the outstanding amount to be recovered is €2,021,562.31 and the Registrar argues that there is no guarantee that this amount will be recovered.[82] The Registrar submits that if the Presidency grants the payment of legal assistance retrospectively from 9 December 2013 to 31 December 2014 in the instant Case, it will result in a further payment of €428,129 from Court funds.[83] If the same payment of legal assistance is provided in case ICC-01/05-01/08, which currently remains at the trial stage, it will result in a further payment of €512,412 from Court funds. The total amount of legal assistance advanced for both cases by the end of December 2014 would therefore amount to approximately €3,000,000.[84]

D. Conclusion

35. In view of the foregoing, the Registrar submits that the Impugned Decision is: in compliance with the relevant documents of the Court; in the interest of justice; equitable; within his competence; based solely on relevant facts; and reasonable. As such, the Registrar submits that the Application should be rejected in its entirety as ill-founded.[85]

IV. RELEVANT PARTS OF THE IMPUGNED DECISION

36. In the Impugned Decision, the Registrar provisionally rejected the Suspect's application for legal assistance. In reaching his decision, the Registrar took into account article 67(1)(d) of the Statute; regulations 83 to 85 of the Regulations of the Court; regulations 130 to 132 of the Regulations of the Registry; and a number of

[82] Observations, paragraph 46.
[83] Observations, paragraph 47.
[84] Observations, paragraph 47.
[85] Observations, paragraph 49.

policy documents concerning legal assistance submitted to the Assembly of States Parties by the Court since 2004.[86]

37. In calculating the Suspect's Monthly Disposable Means ("MDM"), the Registrar estimated the monthly value of the Suspect's assets, and subtracted the Suspect's monthly obligations, i.e. the amount deemed necessary for the Suspect's and his dependants' living expenses.[87] When doing so, the Registrar focused only on the value of the Suspect's real estate assets, and divided this value by 60.[88] The figure of 60 was obtained from the "Report of the Court on Legal Aid: Alternative Models for Assessment of Indigence", and represents "a conservative estimate for the purposes of depreciation of the assets, as well as corresponding to the likely length of proceedings before the Court.[89] The Registrar took into account the full value of the Suspect's main residence situated at [REDACTED]; and the full value of his second residence at [REDACTED] with a combined total value of €4,200,000, and a combined total monthly value of €70,000.[90] The Registrar found that the Suspect's monthly obligations or Monthly Subsistence Allowance ("MSA"), based on 2012 [REDACTED] government statistics in accordance with the Legal Aid Policy,[91] came to €6,846 (€1,141 for each of his six dependants).[92] The Registrar therefore found that the Suspect's MDM came to €63,154.[93]

38. By adding up the total monthly defence costs incurred during a trial phase, in accordance with the Legal Aid Policy,[94] the Registrar estimated the Suspect's monthly defence costs to be €32,922.[95]

39. As the Suspect's MDM of €63,154 exceeded his monthly defence costs of €32,922, the Registrar found that the Suspect was not indigent.[96]

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[86] Impugned Decision, pages 1 and 2.
[87] Impugned Decision, page 4.
[88] Impugned Decision, page 4.
[89] ICC-ASP/8/24, paragraph 27.
[90] Impugned Decision, pages 3 and 4.
[91] Legal Aid Policy, ICC-ASP/12/3, paragraph 27.
[92] Impugned Decision, page 4.
[93] Impugned Decision, page 4.
[94] Legal Aid Policy, ICC-ASP/12/3, paragraphs 43, 85, 95 and 139.
[95] Impugned Decision, page 5.
[96] Impugned Decision, page 5.

V. DETERMINATION

40. 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.[97]

A. Eligibility for the Legal Assistance Scheme under the Statute – Sufficient Means

1. *The indigence test*

41. Counsel argues that the indigence test should not be employed by the Registrar to determine a person's eligibility for legal assistance paid for by the Court under the Statute and its legal aid framework.
42. Article 67 of the Statute sets out the rights of the accused in relation to the "determination of any charge". The relevant provision concerning the payment of legal assistance is set out under article 67(1)(d) which provides for the accused "to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it".
43. Article 55 of the Statute sets out the "Rights of persons during an investigation". The relevant provision concerning the payment of legal assistance is set out under article 55(2)(c) which stipulates that a person shall "have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it".
44. Article 43 of the Statute provides that the Registrar is charged with the management of the non-judicial aspects of the administration and servicing of the Court, including the management of the legal assistance scheme of the Court.
45. The above legal grounds contained in the Statute concerning the provision of legal assistance are elaborated upon further in the Rules. Rule 21 entitled the "Assignment

[97] 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.

of legal assistance", indicates under sub rule 1 that "[s]ubject to article 55, paragraph 2(c), and article 67, paragraph 1(d), criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3".

46. Rule 20(3) of the Rules provides that "[f]or purposes such as the management of legal assistance in accordance with rule 21...the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties".

47. The criteria and procedures concerning the determination of means, pursuant to article 67(1)(d) of the Statute, are addressed in regulation 84 of the Regulations of the Court entitled "Determination of means", further considered in regulation 132 of the Regulations of the Registry entitled "Proof of indigence" and detailed in a number of policy documents on the legal assistance scheme submitted by the Court to the Assembly of States Parties since 2004, which have been referred to and relied upon by both the Suspect and the Registrar in this matter. These documents include the "Report of the Court on Legal Aid: Alternative Models for Assessment of Indigence"[98] and the "Legal Aid Policy".[99]

48. In light of the foregoing, the Presidency finds that the Registrar was entitled to set out criteria and procedures for the assignment of legal assistance, including a means test. In order to determine whether an applicant for legal assistance lacks sufficient means to fund the costs of his defence and would therefore be a suitable recipient of legal assistance paid for by the Court in accordance with article 67(1)(d) of the Statute, it is necessary for the Registrar to evaluate the means of the person concerned. The so called "indigence test" adopted by the Registrar is "based on a fair and objective assessment of the total assets of the claimant compared with the total amount of his/her liabilities, and whether any resulting surplus can be used in partial or full settlement of the cost of legal assistance".[100] Pursuant to rule 21(3) of the Rules, the Registrar is granted considerable discretion not only in relation to the management of the legal assistance scheme, but also as regards the proposal of the criteria and

[98] ICC-ASP/8/24.
[99] ICC-ASP/12/3.
[100] Report on Different Legal Aid Mechanisms before International Criminal Jurisdictions, ICC-ASP/7/23, 31 October 2008, paragraph 58.

procedures relating to the assignment of legal assistance. The Presidency has previously confirmed that "[i]t is the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance paid by the Court".[101]

49. Further, it is noted that the criteria and procedures relating to the assignment of legal assistance, including the means test, were the subject of "extensive and multiple consultations" conducted by the Registrar in accordance with rules 20(3) and 21(1) of the Rules.[102] As such, the Registrar acted both reasonably and within his powers in establishing a means test, to determine the eligibility of an applicant for legal assistance.

2. *Inability to directly or indirectly enjoy or dispose of one's means*

50. Counsel argues that the Suspect lacks the means to pay for the cost of his defence since his assets have been frozen, and therefore rendered inaccessible. Counsel argues that the Registrar should have taken this factor into account in considering whether the Suspect possessed "sufficient means" to pay for his legal assistance pursuant to article 67(1)(d) of the Statute.

51. The Presidency has found above that a means test, or the so called "indigence test", is a valid criterion for the determination of eligibility for legal assistance paid by the Court pursuant to article 67(1)(d) of the Statute. However, the Presidency notes 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.

52. The Registry has expressly recognised that the unavailability of means due to freezing of assets may lead to a person being granted legal assistance and that such assistance may be granted on a reimbursable basis within the legal assistance scheme of the

[101] Decision on the 'Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves' and on the 'Urgent Request for the Appointment of a Duty Counsel' filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, ICC-01/04-01/06-937, paragraph 16.
[102] Legal Aid Policy, ICC-ASP/12/3, paragraph 4.

Court. In light of the alleged circumstances of the Suspect in this Case, the below assessment of the Registry in a report to the Assembly of States Parties is noteworthy:

> 83. If in future cases, a Chamber, for any reason, refuses to release the frozen assets of the accused, thus rendering the assets non-disposable, then the Registry will be unable to take those assets into account in assessing that defendant's means. This notion seems to be implicit in regulation 84.2 of the Regulations of the Court, through its provision that the means of an applicant shall be "of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose."
>
> 84. In such cases, the Registry would be forced to treat defendants as provisionally indigent and to provide the requisite funding, since:
> (a) The freezing order will prevent them from realizing (freely disposing of) their assets; and
> (b) Given that the accused are defending themselves against allegations of grave crimes in complex criminal proceedings, the interests-of-justice test is met in all cases, warranting legal assistance paid by the Court.
>
> 85. Where funding is provided without the ability properly to assess the applicant's means, the accused could be obliged to sign an undertaking without which no legal aid is granted, guaranteeing that, should they be found innocent or have their case dismissed for any reason, the Registry will then be entitled to conduct an assessment of their indigence on the totality of their frozen assets (now released) ex post facto, and, if found partially indigent or non-indigent, they will be under an obligation to reimburse the Court for the costs of their defence in proportion to the moneys received. In this case, the Registrar might, according to regulation 85.4 of the Regulations of the Court, seek:
> (a) An order from the Presidency for recovery of all funds paid; and
> (b) The assistance of the relevant States Parties to enforce that order. ..."[103]

53. The Presidency further notes that, in the context of an application by the Suspect for the release of frozen funds in order to pay for expenses including legal expenses in case ICC-01/05-01/08, Trial Chamber III in 2009 found that the Suspect was unable to access his property and assets and thus lacked sufficient means to pay for his defence and support his family.[104] In this context, the Chamber examined the accused's right to legal assistance without payment under article 67(1)(d) of the Statute, and found that this right "is not dependent on an assessment of whether or not an accused may at some stage in the future have access to significant funds or whether in a general sense he is to be considered 'wealthy'; it is, instead, focussed solely on whether or not the accused has sufficient means to pay for his legal assistance. In order to give substantive effect to this provision, the 'means' must be available to the

[103] ICC-ASP/7/23, paragraphs 83 to 85. Footnotes omitted.
[104] 2009 Trial Chamber III Decision, paragraph 105.

accused immediately or in the near future. Otherwise, this important statutory provision would be stripped of real purpose and utility".[105]

54. The Presidency finds 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, thereby concurring with the 2009 Trial Chamber III Decision in this particular respect. 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. It is noted that in the Impugned Decision, the Registrar, having calculated the value of the Suspect's properties in [REDACTED], found that the Suspect was not indigent. Further, in his Observations the Registrar generally submitted that the Suspect has non-declared means which could also be used to fund the costs of his defence in the Case. However, it is not clear whether the Registrar made an assessment of the availability of the Suspect's means at the time of the Impugned Decision. Therefore the Presidency is not in a position to assess whether the Registrar erred in law and quashes the Impugned Decision. The Registrar is ordered to make a new decision on the Suspect's "Questionnaire sur la situation financière du Demandeur" requesting legal assistance, dated 5 December 2013, taking into account the findings of the Presidency in this Decision and the relevant financial information before him.

B. Failure to Take into Account the Decision of the Trial Chamber

55. Counsel argues that the Registrar failed to take into account the 2009 Trial Chamber III Decision as set out above. He submits that the Suspect should continue to benefit from the legal assistance scheme put in place by that Chamber in 2009 under which legal assistance would be advanced to the Suspect on a reimbursable basis and ongoing until a material change in circumstances (e.g. funds from elsewhere becoming available, the trial ending or a decision on a fresh application for funding taken under regulation 85 of the Regulations of the Court).[106] In response, the Registrar argues that the Suspect has sufficient means to fund the costs of his defence.

[105] 2009 Trial Chamber III Decision, paragraph 103.
[106] Application, paragraph 37 citing 2009 Trial Chamber II Decision, paragraph 108.The Presidency notes that the 2009 Trial Chamber III Decision was confirmed by Trial Chamber III in its 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-US, 4 November 2009 (redacted to ICC-01/05-01/08-596-Red, 19 November 2009) and in its

56. The Presidency finds that, in reaching his decision on the eligibility of the Suspect for legal assistance, the Registrar was not bound to follow the decision of Trial Chamber III in the specific circumstances as it was a fresh application for funding under the legal assistance scheme in a new case, thereby entailing an assessment of the current financial circumstances of the Suspect which may have changed since 2009. As correctly indicated in the 2009 Trial Chamber III Decision, it is "for the Registrar under [r]egulation 84 to determine the accused's means, with a right of appeal to the Presidency against adverse decisions under [r]egulation 85 on the payment of legal assistance".[107] Moreover, it has been noted by the Committee on Budget and Finance, in a report to the Assembly of States Parties, that the Registrar has an important role in upholding the integrity of the legal assistance scheme against a background of *ad hoc* judicial decisions of Chambers on the scope of legal assistance pursuant to regulation 83(4) of the Regulations of the Court.[108] The Presidency finds that the Registrar did not err in law by not following the 2009 Trial Chamber III Decision.

C. Calculation of Indigence

57. The applicable formulae, procedures, and rules for the calculation of indigence for legal assistance purposes are specified in the Legal Aid Policy which is "the combined updated effect of relevant resolutions adopted to date by the Assembly [of States Parties] on the question of legal aid...the applicable legal provisions governing legal aid as stipulated in the Court's legal instruments and internal Registry guidelines and standard operating procedures".[109]

58. As noted previously by the Presidency, when considering applications for judicial review concerning decisions taken by the Registrar on legal assistance, "[the Presidency] will examine the possibility of a mathematical miscalculation in full".[110] Both the International Criminal Tribunal for the former Yugoslavia and the

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, 12 November 2010 (redacted to ICC-01/05-01/08-1007-Red, 7 December 2010).

[107] 2009 Trial Chamber III Decision, paragraph 106.

[108] Report of the Committee on Budget and Finance on the work of its eighth session, April 2007, ICC-ASP/6/20, paragraph 82.

[109] Legal Aid Policy, ICC-ASP/12/3, paragraph 2.

[110] Decision on the "Request of the Registrar's Decision of 25 August 2008 on the Application for Legal Assistance Paid by the Court", ICC-RoC85-01/08-3-Conf, 10 February 2009, ("Decision on Legal Assistance"), paragraph 20. Redacted to ICC-RoC85-01/08-4-Anx, 25 February 2009.

International Criminal Tribunal for Rwanda have stated that these judicial reviews "[are] concerned initially with the propriety of the procedure by which Registrar [sic] reached the particular decision and the manner in which he reached it".[111] The Presidency reiterates that "[t]he calculation process constitutes a special part of [the] decision-making procedure in the legal assistance context. A failure to correctly apply the indigence formula could constitute an error of law by the Registrar".[112]

59. Moreover, as indicated in previous jurisprudence dealing with the eligibility for legal assistance, "the Presidency notes that it would be greatly assisted in its task of judicial review of legal assistance decisions if the Registrar provides further details of [the] calculation of indigence. Such details would enable the Presidency to more easily identify any errors and would also help applicants for legal assistance to understand the process which has been undertaken. At minimum, the calculation process...should identify:

   (i) The relevant principles or rules from the applicable reports which the Registrar is applying;
   (ii) An explanation of any departures from the principles or rules established in these reports;
   (iii) A step-by-step demonstration of the manner in which these principles, rules and any relevant formulae are applied to an applicant's circumstances; and
   (iv) The value of any individual assets (e.g. the value of individual bank accounts) which are included within the sum total value for asset[s] of that type".[113]

60. The Presidency notes that there may be situations where the Registrar cannot disclose the full reasons for a decision. In the instant Case, it is understood that Annexes III, IV, V and VI were filed with an *ex parte* "Registrar only" classification on the ground that the Suspect's knowledge of their content would defeat the Registrar's aim of

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[111] See Decision on Legal Assistance, paragraph 21 citing *Prosecutor v Kvocka et al*, Case No IT-98-30/1-A, "Decision on Review of Registrar's Decision to Withdraw Legal Aid From Zoran Zigic", 7 February 2003, paragraph 13; *Prosecutor v Krajisnik*, Case No IT-00-39-PT, "Decision on the Defence's Motion for an Order Setting Aside The Registrar's Decision Declaring Momcilo Krajisnik Partially Indigent for Legal Aid Purposes", 20 January 2004, paragraph 16; *Nahimana et al v Prosecutor*, Case No ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel", 23 November 2006, paragraph 9.
[112] Decision on Legal Assistance, paragraph 21.
[113] Decision on Legal Assistance, paragraph 27.

ascertaining a reliable picture of the totality of his assets following the financial investigation. However, the Presidency recalls its previous finding that "[w]here the Registrar is unable to disclose the full reasons for any given decision to a...person due to issues of confidentiality, [he] must disclose sufficient information to enable [the person] to understand the basic reasons informing the decision taken. In such cases, the Registrar should consider whether the reasons could be provided to the detained person in summary or redacted form".[114]

61. Having considered in full the Impugned Decision, Counsel's submissions in the Application, and the Observations of the Registrar, the Presidency finds that the Registrar has not adequately explained how he applied the indigence formula in calculating the Suspect's monthly value of assets and the Suspect's monthly obligations. In particular, it is not clear how the Registrar calculated the monthly value of the Suspect's principal residence at [REDACTED] and how much of this value, if any, was excluded from the Suspect's total monthly value of assets "to the extent considered reasonable in light of the needs of the dependants living in it".[115] Further, it is unclear whether the Registrar took into account the Suspect's own living expenses as alluded to in the Impugned Decision[116] and set out in the Legal Aid Policy,[117] as well as those of his dependants. Moreover, noting the submissions of the Registrar regarding the difference in the scope of resources allocated for legal assistance in proceedings under article 5 and article 70 of the Statute, it is unclear, even if it is to the benefit of the Suspect, why the Registrar based his calculations of the Suspect's indigence on the total monthly defence costs incurred during the trial phase of proceedings under article 5 of the Statute as opposed to proceedings under article 70 of the Statute.

62. In light of the fact that the Registrar has not adequately explained the calculation process that he used, which "constitutes a special part of [his] decision-making procedure",[118] the Presidency is not in a position to decide on the accuracy of the calculations and so quashes the Impugned Decision. The Registrar is ordered 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

[114] ICC-RoR221-01/09-5-Conf-Exp-Corr, 17 September 2009, paragraph 56, footnotes omitted.
[115] Legal Aid Policy, ICC-ASP/12/3, paragraph 24, sub-paragraph 1.
[116] Impugned Decision, page 3.
[117] Legal Aid Policy, ICC-ASP/12/3, paragraph 24.
[118] Decision on Legal Assistance, paragraph 21.

the calculations and taking into account the findings of the Presidency in this Decision and the relevant financial information before him.

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63. In light of the above findings the Presidency sees no need to deal with the remaining submissions of Counsel for the Suspect and the Registrar.

VI. APPLICATION FOR LEAVE TO REPLY

64. Counsel for the Suspect requested leave to reply to the Observations of the Registrar, pursuant to regulation 24 of the Regulations of the Court. He submitted that there existed good cause to permit a reply to the Observations especially where those observations touched on issues not discussed in the Application and given that the Application is of crucial importance to the continuation of an effective defence for the Suspect. In light of the Presidency's above findings quashing the Impugned Decision and remitting the issue to the Registrar, that application is denied.

65. As regards Counsel for the Suspect's further informal communication addressed to the Office of the Presidency on 5 February 2014, containing a submission relating to a substantive issue under the Presidency's consideration, Counsel is respectfully reminded to continue to adhere to the appropriate procedural requirements for filing responses and replies.

VII. CLASSIFICATION

66. The Presidency notes that the instant Application and the Supplementary Information were filed confidentially as they deal with the Suspect's "sensitive financial information".[119] Pursuant to regulation 23*bis* of the Regulations of the Court, the Observations and its Annexes I and II were filed confidentially and *ex parte*, available to Counsel for the Suspect and the Office of the Prosecutor. Pursuant to regulation 24*bis* sub-regulation 2 of the Regulations of the Court, Annexes III, IV, V and VI of the Observations were filed confidentially and *ex parte*, "Registrar only".[120]

67. However, there appears to be no *prima facie* reason to justify withholding Annexes III and IV from Counsel for the Suspect. The Registrar is ordered to make submissions

[119] Application, paragraph 21.
[120] Observations, paragraph 48.

on what information, if any, contained in Annexes III and IV should remain confidential and *ex parte* "Registrar only" by 24 February 2014.

68. This decision maintains the confidential and *ex parte* classification of the majority of the abovementioned filings. With respect to filing a public redacted version of this decision, Counsel for the Suspect and the Registrar are ordered to make submissions on what aspects of the decision should remain confidential *ex parte*, available only to Counsel for the Suspect and the Office of the Prosecutor by 24 February 2014.

The Impugned Decision is quashed.

The Registrar is ordered to make a new decision on the Suspect's "Questionnaire sur la situation financière du Demandeur" requesting legal assistance, dated 5 December 2013.

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

Judge Sang-Hyun Song

President

Dated this 6 February 2014

At The Hague, The Netherlands