

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 26 November 2009

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

Redacted version of "Decision on legal assistance for the accused"

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Counsel for the Defence

Mr Nwebe Liriss

Mr Aimé Kilolo-Musamba

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Mr Didier Preira

Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of The Prosecutor v. Jean-Pierre Bemba Gombo hereby delivers the following Decision on legal assistance for the accused.

I. Summary

1. The accused is clearly a man of considerable means, in the sense that he appears to 'own', or to have a proprietary interest in, various kinds of property (e.g. buildings, cars, companies), and there are bank accounts held in his sole name, in a number of different countries. [REDACTED].¹
2. A detailed analysis of his known wealth is not the proper subject-matter of this decision; although important elements of it are set out hereafter, from a practical point of view (at this stage in the trial) there is a single, albeit critical, question that this Court must address – whether in the immediate future the accused will have sufficient means to pay for his legal assistance in order to prepare his defence to the charges confirmed by the Pre-Trial Chamber.
3. Notwithstanding Mr Bemba's evident resources, there are serious issues over defence funding that have been considered by the Pre-Trial Chamber, and which were brought to the attention of the trial judges in advance of, and during, the first trial status conference. This history is set out and analysed *in extenso* hereafter, but significantly the members of the accused's defence team have not been paid since March 2009.
4. The accused has a statutory entitlement to adequate time and facilities for the preparation of his defence and to be tried without undue delay (Article 67 of the Rome Statute ("Statute"), see below), and the Trial Chamber has unhesitatingly concluded that given the resources currently available to Mr

¹ Prosecution's Submission on the Immediate Temporary Assistance to the Defence, ICC-01/05-01/08-550-Conf, 9 October 2009, paragraph 7.

Bemba, he is seriously at risk of being denied the opportunity properly to prepare for a timely trial before the ICC. In the Chamber's view, the combined effect of the current lack of access on the part of the Court and the accused to the assets that have been traced and identified, together with the refusal by the Registrar to provide temporary financial assistance, even on a *pro tem* basis (with a mechanism for repayment to the Court once the accused's funds are released), have placed Mr Bemba in this regrettable position.

5. For the reasons rehearsed extensively below, the Trial Chamber now orders an immediate resolution of the current funding impasse so as to enable this case to proceed in a timely and fair manner. Once certain safeguards are in place (as set out at the end of this Decision), the Registrar is to provide funding in the sum of €30,150 a month (as previously identified by her as reasonable for legal assistance); this sum is to be paid retrospectively to March 2009, and ongoing until there is a material change in circumstances (*e.g.* funds from elsewhere become available, the trial ends or a fresh application for funding is decided under Regulation 85 of the Regulations of the Court).
6. The Chamber is not prepared to condone the possibility of a further period (of more than *de minimis* length) during which defence funding is unavailable and uncertain.

II. The History

7. It is the Chamber's understanding that until August 2009 the accused was represented by lead counsel Mr Nkwebe Liriss (acting *pro bono*), co-lead counsel, Mr Karim Khan, two associate counsel, Mr Aimé Kilolo-Musamba

and Mr Pierre Legros, a legal assistant, Mrs Virginia Lindsay, and a case-manager, Mr Jean-Jacques Kabongo Magenda.²

8. The accused is currently represented by Mr Nkwebe Liriss (lead counsel, acting *pro bono*), Mr Aimé Kilolo-Musamba (co-counsel) and Mr Jean-Jacques Magenda (case manager). As explained below, the accused has lost the services of the rest of his team.
9. On 9 May 2008 the Prosecutor filed the "Prosecutor's Application for Warrant of Arrest under Article 58" together with a request to freeze or seize the 'proceeds, property and assets' of the accused.³
10. In May 2008, Pre-Trial Chamber III issued several decisions aimed at freezing and seizing the accused's assets. Requests were issued to [REDACTED],⁴[REDACTED],⁵ [REDACTED],⁶ [REDACTED],⁷ [REDACTED],⁸ and [REDACTED],⁹ to identify, trace, freeze and seize the property and assets of Mr Bemba, subject to the rights of *bona fide* third parties; to advise the Court of any specific requirements of national law; and to advise on any problems which may impede or prevent the execution of the request. As a result of information received from [REDACTED] regarding potential assets belonging to Mr Bemba located in [REDACTED], a request was made to this State Party on 22 September 2008 to identify, trace, freeze and seize any property and assets of Mr Bemba located on [REDACTED].¹⁰ Due to other information received by the Court that Mr Bemba was in possession of property and assets

² Order for Clarification of Defence-Related Issues, ICC-01/05-01/08-456, 21 July 2009, paragraph 5.

³ Annex A to "Prosecution's Submission of the Redacted English and French Versions of Prosecution's Application for Warrant of Arrest and Further Submission against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-128-Conf-AnxA, 30 September 2008, paragraphs 129 – 131.

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]

situated in [REDACTED] and [REDACTED], two separate requests were made to the authorities of those respective countries on 10 February 2009 to identify, trace, freeze and seize the property and assets of Mr Bemba.¹¹

11. Various responses were received [REDACTED]. In broad terms, [REDACTED] and [REDACTED] identified assets in which Mr Bemba had a proprietary interest on their territories and there have been numerous follow-up communications between the Court and these countries.

12. On 9 July 2008 the accused requested legal assistance, to be paid by the Court.¹² Two letters, dated 21 and 22 July 2008, supported his application.¹³

13. On 6 August 2008, the Registrar issued her “Requête urgente aux fins de communication d’informations pour faciliter l’enquête financière en vue de statuer sur l’indigence de M. Jean-Pierre Bemba Gombo”.¹⁴

14. On 25 August 2008, the defence request of 9 July 2008 was rejected by the Registrar in the “Registrar’s Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo”.¹⁵ The refusal included, *inter alia*, the following elements:

- i) the Registrar highlighted certain discrepancies between the content of the Application for legal assistance and various statements the accused had made during a meeting with representatives of the Registry on 3 July 2008;

¹¹ [REDACTED]

¹² ICC-01/05-01/08-62-Conf-Exp-Anx1, 6 August 2008.

¹³ Registrar’s Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/08-76-Conf-Exp-Anx1, 25 August 2008.

¹⁴ ICC-01/05-01/08-62-Conf-Exp-Anx1, 6 August 2008.

¹⁵ ICC-01/05-01/08-76-tENG, 25 August 2008.

- ii) the Application had [REDACTED];
- iii) the accused had failed to provide full and complete answers to specific questions about the Application, set out in letters of 18 and 22 July 2008;
- iv) the Registrar had received particular and relevant information in a document dated 14 August 2008 (mentioned in Annex 2 of the Registrar's Decision);
- v) the Registrar determined that this latter information is reliable, providing objective intelligence on the accused's financial situation;
- vi) the information indicated that the accused [REDACTED];
- vii) the investigation conducted by the Registry showed [REDACTED];
- viii) the Registrar determined that the accused had not provided all the information as required by the Application (particularly part II thereof, the "Statement of Assets", at points 1, 6 and 7) for the purposes of calculating indigence on the basis of the principles and criteria set out in the Report on Indigence and the subsequent documents supplementing and amending that report;
- ix) the Registrar determined that although [REDACTED] and a "minimalist" appraisal of the moveable and immoveable

property already identified enabled her provisionally to make an objective decision on the accused's indigence; and

- x) the sums [REDACTED], could cover his obligations to his six dependants and a legal team acting at least during the entire pre-trial stage of the proceedings (according to the fee schedule under the Court's legal aid scheme).

15. In all the circumstances the Registrar decided on a provisional basis (pending the completion of the financial investigation for the purposes of the accused's suggested indigence) that Mr Bemba is not indigent and accordingly, pursuant to Regulation 85(1) of the Regulations of the Court, he was not to be provided with full or partial legal assistance, paid by the Court.

16. The Registrar indicated her intention to review this decision on the completion of the investigation into the accused's assets. The accused was informed that he may apply to the Presidency of the Court for a review of this decision and that if "he is brought to trial", he may submit a fresh application. The Chamber interpolates to observe that during the status conference on 7 October 2009, it raised the possibility of the accused filing a fresh application at this new stage in the proceedings.¹⁶

17. The Pre-Trial Chamber has helpfully summarised part of the Registrar's findings as regards the projected expenditure of the accused, as follows:

- (i) The Registrar made a calculation of the monthly expenses of Mr Jean- Pierre Bemba's six dependants [REDACTED]. Based on standardised criteria, [REDACTED]
- (ii) Based on the Court's legal assistance scheme, the Registrar also estimated the costs of a Defence team acting during the pre-trial phase and submitted that the monthly cost for a Defence team amounts to €30,150.

¹⁶ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET, page 8, lines 10 – 14.

- (iii) The Registrar provisionally estimated the value of the assets of Mr Jean-Pierre Bemba and calculated the monthly value of those assets at [REDACTED].¹⁷

18. On 26 August 2008 the defence filed an application entitled “Requête en main levée de saisie”¹⁸ in which Mr Jean-Pierre Bemba requested that the Court lift the order seizing his assets, including the “lifting of the seizure of [REDACTED]”.¹⁹ The accused suggested that the freezing order should be revoked to enable him to meet his family’s expenses, including their maintenance and housing, the education of the children and the costs of his defence.²⁰

19. On 9 September 2008 the defence sought [REDACTED].²¹

20. On 19 September 2008 the prosecution filed the [REDACTED].²² The prosecution agreed with the observations of the Registrar and submitted [REDACTED]. The Prosecutor proposed alternative solutions, [REDACTED].²³

21. On 8 October 2008 the Chamber convened an *ex parte* status conference with the defence during which [REDACTED].²⁴

22. On 10 October 2008 the Pre-Trial Chamber issued its “Decision on [REDACTED].”²⁵ The Pre-Trial Chamber particularly highlighted that:

[REDACTED].²⁶

¹⁷ ICC-01/05-01/08-149-Conf, paragraph 8.

¹⁸ Requête en main levée de saisie, ICC-01/05-01/08-81-Conf, 26 August 2008.

¹⁹ Application for the Lifting of the Seizure, ICC-01/05-01/08-81-Conf-tEng, 26 August 2008, page 11.

²⁰ ICC-01/05-01/08-81-Conf-tEng.

²¹ [REDACTED] ICC-RoC85-01/08-1-Conf-tENG, 9 September 2008.

²² [REDACTED] ICC-01/05-01/08-110-Conf, 19 September 2008.

²³ ICC-01/05-01/08-110-Conf, paragraph 14.

²⁴ Transcript of hearing on 8 October 2008, ICC-01/05-01/08-T-7-ENG-ET, page 5, lines 5 – 8.

²⁵ [REDACTED], ICC-01/05-01/08-149-Conf, 10 October 2008.

²⁶ ICC-01/05-01/08-149-Conf, paragraph 14.

23. Having observed that the defence had to undertake preparatory work for the case, and acknowledging the accused has financial obligations to his family, the Chamber partially granted the defence request in that it temporarily authorised [REDACTED] until the decision on the confirmation of charges.²⁷

24. Seemingly accepting that there may be difficulties in implementing this order, the Chamber:

- i) requested “the competent authorities of the [REDACTED] to inform the Court in accordance with Article 96(3) of the Statute of any specific requirements under its national law in order to execute the present request”;
- ii) requested “the competent authorities of the [REDACTED] to consult with the Court in accordance with Article 97 of the Statute on any difficulty encountered in implementing the present decision”; and
- iii) ordered “the Registrar to transmit the present decision to the competent authorities of the [REDACTED] and to report to the Chamber no later than 3 November 2008 on the status of its implementation”.²⁸

25. On 28 October 2008, the defence filed its “Requête en main levée de saisie”, in which it requested that [REDACTED].²⁹

²⁷ ICC-01/05-01/08-149-Conf, paragraph 17.

²⁸ ICC-01/05-01/08-149-Conf, pages 7 – 8.

²⁹ ICC-01/05-01/08-193-Conf, 28 October 2008.

26. On 6 November 2008, the Registry filed its “Observations du Greffier sur la ‘Requête en main levée de saisie’ déposée le 28 octobre 2008 par Maître Kilolo Musamba, conseil associé de M. Jean-Pierre Bemba Gombo”, in which it submitted [REDACTED].³⁰

27. Concurrently, on 6 November 2008, the prosecution filed the “Prosecution's Response to defence ‘Requête en Main Levée de Saisie’ of 28 October 2008”.³¹ The prosecution submitted that [REDACTED].

28. On 14 November 2008, the Pre-Trial Chamber issued its “Decision on the Second Defence’s Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal”.³² The Chamber noted that the defence had not challenged the “mode of calculation” or the monthly figure of €36,260 that were both identified on 25 August 2008 in the “Registrar’s Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo”.³³ As to the request of €78,900 a month, the Chamber observed that no relevant documentation had been provided to justify the request, and there were no indications that the accused’s financial position had changed since 10 October 2008.³⁴ Further, the Chamber considered that in the absence of any evidence demonstrating a change of circumstance justifying the payment of €100,000 for investigation purposes, the sum of €36,260 provided the accused with funding for this undertaking.³⁵

³⁰ Observations du Greffier sur la ‘Requête en main levée de saisie’ déposée le 28 octobre 2008 par Maître Kilolo Musamba, conseil associé de M. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-216-Conf, 6 November 2008.

³¹ Prosecution's Response to Defence 'Requête en Main Levée de Saisie' of 28 October 2008, ICC-01/05-01/08-220-Conf, 6 November 2008.

³² Decision on the Second Defence’s Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal, ICC-01/05-01/08-249, 14 November 2008.

³³ ICC-01/05-01/08-76-tENG.

³⁴ ICC-01/05-01/08-249, paragraph 15.

³⁵ ICC-01/05-01/08-249, paragraph 16.

29. The Pre-Trial Chamber was of “the opinion that the Defence team of Mr Jean-Pierre Bemba, composed of three counsels and a legal assistant, could have reasonably foreseen the costs of its investigation activities and requested financial support at an earlier time, especially since two of the counsels were appointed when Mr Jean-Pierre Bemba was transferred to the Court on 3 July 2008”.³⁶ In reaching this decision, the Pre-Trial Chamber took into consideration the fact that it had been informed by the defence during the status conference on 22 October 2008 that it was properly prepared and available for the hearing on the confirmation of charges “at the first possible date”.³⁷

30. Addressing the request for €234,000 to cover the historic expenses, the Pre-Trial Chamber confined itself to rehearsing the failure on the part of the defence to appeal the decision of 10 October 2008 (see above, paragraph 22), against the background that a particular monthly sum had been authorised to be paid as of 1 October 2008 “as specified in letter (a) of the operative part of the said decision”.³⁸

31. The Pre-Trial Chamber found that the application for release of monies to fund counsel who had acted for the accused from the time of his arrest in Belgium until September 2008 was without merit, for three principal reasons. First, the ICC cannot fund payment for legal fees incurred in other courts (see Rule 117(2) of the Rules of Procedure and Evidence (“Rules”)); second, two members of the bar were appointed to represent the accused “when the latter had declared himself not to be indigent”; and, third, one member of the bar had indicated that as of 29 July 2008 he was acting *pro bono*.³⁹

³⁶ ICC-01/05-01/08-249, paragraph 17.

³⁷ ICC-01/05-01/08-249, paragraph 18.

³⁸ ICC-01/05-01/08-249, paragraph 19.

³⁹ ICC-01/05-01/08-249, paragraphs 20 – 24.

32. The Pre-Trial Chamber added, however:

25. Mindful of the rights of the Defence and of the forthcoming date of the confirmation of charges hearing, the Chamber stresses the importance of its Decision on 10 October 2008 and deems it necessary to request once more that the competent authorities of the Republic of Portugal implement the said decision, if this has not been done yet.

26. With regard to the implementation of the Decision of 10 October 2008, the Chamber is also of the view that the Registry should be in charge of the monitoring process in order to ensure the proper use of the funds released. The Registry, after consultation with the Portuguese authorities, has to receive the monthly amount released and ensure its distribution in conformity with the Decision of 10 October 2008, as follows: € 30,150 for cover the fees for his counsels and € 6,110 to cover the expenses of Mr Jean-Pierre Bemba's family.⁴⁰

33. The defence filed an urgent request on 29 December 2008, in which the Chamber was informed that the Portuguese account from which the Chamber had authorised the monthly payments of €36,260 had insufficient funds to cover the fees and expenses of the defence team as well as the subsistence contribution to Mr Bemba's family. Therefore, the defence sought the removal of the freezing order on an account in [REDACTED].⁴¹

34. On 31 December 2008 the Single Judge issued the "Decision on the Defence Urgent Application for lifting the Seizure dated 29 December 2008 and Request for Cooperation to the Competent Authorities of Portugal" in order to lift the freezing order on the [REDACTED] account [REDACTED].⁴² The single judge indicated:

3. The Defence maintains that, although such amount has been duly transferred for the months of October, November and December 2008, [REDACTED] indicates that the overall current balance of account [REDACTED] amounts to [REDACTED], this making it impossible for it to proceed to further transfers of money in the amount specified by the 10 October 2008 Decision. It further states that Mr Jean-Pierre

⁴⁰ ICC-01/05-01/08-249, paragraphs 25 – 26.

⁴¹ Requête de Mainlevée de la Saisie, ICC-01/05-01/08-337-Conf, 29 December 2008.

⁴² Decision on the Defence's Urgent Application for Lifting Seizure dated 29 December 2008 and Request for Cooperation to the Competent Authorities of Portugal, ICC-01/05-01/08-339-Conf, 31 December 2008.

Bemba equally holds an additional account [REDACTED]. Accordingly, it requests that, with a view to allowing Mr Jean-Pierre Bemba to continue to receive the monthly allowance required for the costs of his defence as well as for the support of his family, the Chamber amend its authorisation, to the effect that the relevant monthly amount be released from account [REDACTED] instead of account [REDACTED], effective 1 January 2009.⁴³

35. [REDACTED]⁴⁴ the Pre-Trial Chamber, on 10 February 2009, [REDACTED].⁴⁵

36. Also on 10 February 2009 the Presidency issued a Decision [REDACTED].⁴⁶

[REDACTED].⁴⁷ [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED,]⁵⁰
[REDACTED].⁵¹ [REDACTED].⁵² [REDACTED].⁵³

37. The Presidency concluded its assessments of the merits of the review, in the context of a suggested violation of the accused's right to a fair trial, as follows:

48. [REDACTED].

38. Critically, it is to be observed that this decision was made at a time when the defence was being funded, in accordance with the Registrar's decision, from the second account. Therefore, when the Presidency conducted its Review there was no suggestion that funds were not forthcoming to pay for his legal assistance (see Article 67(1)(d) of the Statute).

39. Since March 2009, [REDACTED].

⁴³ ICC-01/05-01/08-339-Conf, paragraph 3.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED], ICC-RoC82-01/08-3-Conf, 10 February 2009.

⁴⁷ ICC-RoC82-01/08-3-Conf, paragraph 22.

⁴⁸ ICC-RoC82-01/08-3-Conf, paragraph 23.

⁴⁹ ICC-RoC82-01/08-3-Conf, paragraph 22.

⁵⁰ ICC-RoC82-01/08-3-Conf, paragraph 25.

⁵¹ ICC-RoC82-01/08-3-Conf, paragraph 26.

⁵² ICC-RoC82-01/08-3-Conf, paragraph 31.

⁵³ ICC-RoC82-01/08-3-Conf, paragraph 45.

40. [REDACTED].⁵⁴

41. [REDACTED].⁵⁵

42. On 16 April 2009, the Registrar [REDACTED].⁵⁶ [REDACTED].⁵⁷
[REDACTED].⁵⁸ [REDACTED].⁵⁹ [REDACTED].⁶⁰

43. On 15 June 2009, the Registrar [REDACTED].⁶¹

44. Also on 15 June 2009, the Pre-Trial Chamber (now Pre-Trial Chamber II, following reassignment by the Presidency), issued the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", in which it was decided, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that the accused is criminally responsible under Article 28(a) of the Statute for two counts of crimes against humanity and three counts of war crimes, and to commit him to a Trial Chamber.⁶²

45. On 29 June 2009 the Single Judge convened a confidential hearing pursuant to Rule 118 of the Rules to address certain difficulties that had been encountered in implementing the Pre-Trial Chamber's Decision of 31 December 2008, during which the defence raised concerns about the non-payment of legal fees for some members of the defence team, suggesting there were impediments to the effective representation of Mr Bemba's interests before the Chamber.⁶³

⁵⁴[REDACTED].

⁵⁵[REDACTED].

⁵⁶[REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED]

⁶⁰ [REDACTED]

⁶¹ [REDACTED].

⁶² Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009.

⁶³ Transcript of hearing on 29 June 2009, ICC-01/05-01/08-T-13-CONF-ENG-ET.

46. During this status conference, the Registry informed the Chamber that
[REDACTED]:

[REDACTED].⁶⁴

47. [REDACTED].⁶⁵ [REDACTED].⁶⁶

48. [REDACTED]. The Chamber has been told that the defence currently has no one who is able to research and investigate the evidence on which the prosecution relies to prove these charges.⁶⁷

49. On 17 July 2009 the Single Judge received an application from the defence, which was followed by a corrigendum on 20 July 2009 (see below, paragraph 52), in which it requested suspension of the proceedings until "the resources needed to enable the defence to function effectively and efficiently [...] have been gathered".⁶⁸

50. The defence concluded the filing of 17 July 2009 by requesting the suspension of proceedings.

51. [REDACTED].⁶⁹

52. On 20 July 2009, the defence filed its "Corrigendum Requête aux fins de suspension de toute la procédure en cours", in which it requested the stay of the proceedings because the defence team was reduced in number and in its

⁶⁴ ICC-01/05-01/08-T-13-CONF-ENG-ET, page 61, line 11 to page 62, line 11.

⁶⁵ [REDACTED], ICC-01/05-01/08-459-Conf-Anx3, 23 July 2009.

⁶⁶ Requête aux fins de suspension de toute la procédure en cours, ICC-01/05-01/08-452 and Conf-Annexes 1-4, 17 July 2009.

⁶⁷ ICC-01/05-01/08-T-14-ENG-ET, page 10, lines 12 – 18.

⁶⁸ ICC-01/05-01/08-452.

⁶⁹ [REDACTED]; Annex 3 to Observations du Greffier suite à l'Ordonnance de la Chambre en date du 21 juillet 2009.

effectiveness (*viz.* as regards discharging its duties), following the non-payment of fees.⁷⁰

53. On 21 July 2009, the Pre-Trial Chamber issued the “Order for Clarification of Defence-Related Issues”.⁷¹ The Chamber sought, *inter alia*, further clarification on the composition of the defence team (to be provided by 23 July 2009).

54. On 23 July 2009, the Registrar submitted her “Observations du Greffier suite à la Ordonnance de la Chambre en date du 21 juillet 2009”.⁷²

55. [REDACTED].⁷³

56. Also on 23 July 2009, the defence submitted its “Réponse à l’Ordonnance de la Chambre Préliminaire II du 21 Janvier (*sic*) intitulée ‘Order for Clarification of Defence-Related Issues’”.⁷⁴ In this filing the defence averred that the costs of associate counsel and the case manager had not been paid since March 2009 and the costs incurred by lead counsel who was otherwise acting *pro bono* had not been reimbursed. Further, it was suggested that the defence were unable to recruit an investigator and a military expert because of lack of funds. By the date of this filing, the defence team was reduced to lead counsel, Mr Nkwebe Liriss, engaged on a *pro bono* basis, two associate counsel (Mr Pierre Legros, also acting *pro bono* and Mr Aimé Kilolo-Musamba) and a case-manager, Mr Jean-Jacques Kabongo Magenda.⁷⁵ The Chamber observes that since August 2009, Mr Pierre Legros, for unconnected reasons, has left the defence team.

⁷⁰ Corrigendum Requête aux fins de suspension de toute la procédure en cours, ICC-01/05-01/08-452-Corr, 20 July 2009.

⁷¹ Order for Clarification of Defence-Related Issues, ICC-01/05-01/08-456, 21 July 2009.

⁷² ICC-01/05-01/08-459-Conf-Anx3.

⁷³ [REDACTED]; ICC-01/05-01/08-459-Conf-Anx3.

⁷⁴ Réponse à l’Ordonnance de la Chambre Préliminaire II du 21 Janvier intitulée ‘Order for Clarification of Defence-Related Issues’, ICC-01/05-01/08-460, 23 July 2009.

⁷⁵ ICC-01/05-01/08-460, paragraphs 12 – 15.

57. On 28 July 2009 the Pre-Trial Chamber [REDACTED].⁷⁶ [REDACTED]:

[REDACTED].

[...]

[REDACTED].

[REDACTED].

[REDACTED].

58. On 20 August 2009 the Registrar [REDACTED].⁷⁷ [REDACTED].⁷⁸
[REDACTED].

59. On 25 August 2009, the defence submitted an application for legal assistance to the Registry.⁷⁹

60. On 31 August 2009, the Registrar [REDACTED].⁸⁰

61. On 4 September 2009, the defence filed an application requesting that the Chamber rescind the order seizing Mr Bemba's [REDACTED] and [REDACTED], in order to [REDACTED].⁸¹

62. On 10 September 2009, the Registrar [REDACTED].⁸²

63. [REDACTED].

64. On 11 September 2009 the Chamber [REDACTED].⁸³ [REDACTED]:

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ Requête en main levée de saisie, ICC-01/05-01/08-505-Conf, 4 September 2009.

⁸² [REDACTED].

⁸³ [REDACTED].

[REDACTED].

[REDACTED].

[REDACTED].

65. On 15 September 2009, the Registry [REDACTED].⁸⁴ [REDACTED].⁸⁵
[REDACTED].⁸⁶ [REDACTED].⁸⁷ [REDACTED].⁸⁸ [REDACTED].⁸⁹

66. [REDACTED].⁹⁰ [REDACTED]:

[REDACTED].

[REDACTED].

[REDACTED]

[REDACTED].

67. The Pre-Trial Chamber made its “Decision on the Defence’s Application to Suspend the Proceedings” on 18 September 2009,⁹¹ observing that there were clear indications that “the Registry is in the process of reaching a solution” on the issue of non-payment of the defence, and that “the same holds true of the 31 December 2008 Decision, where every step has been taken so far to ensure its execution at the earliest opportunity”.⁹² The Application to stay proceedings was therefore rejected and the Registrar was ordered to report to the competent Chamber on the progress made to resolve the financial problems encountered by Mr Bemba's defence team. On the same day, the

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ Decision on the Defence’s Application to Suspend the Proceedings, ICC-01/05-01/08-530, 18 September 2009.

⁹² ICC-01/05-01/08-530, paragraph 13.

Pre-Trial Chamber issued its "Decision on Defence Application for Lifting the Seizure on Jean-Pierre Bemba Gombo's Seized Property", and rejected the application [REDACTED].⁹³ The Single Judge indicated [REDACTED]:

- i) [REDACTED]; and
- ii) [REDACTED]

[REDACTED].

68. As set out above, the defence made a request for legal assistance to the Registrar on 25 August 2009 (which, for an appreciable period, was not filed),⁹⁴ and on 24 September 2009, in a written Decision (only filed on 7 October 2009), the Registrar refused to grant legal aid, on the basis, *inter alia*, that the freezing order on one bank account will be lifted in the near future and that the winding up of certain property in which the accused has interest is in progress.⁹⁵ However, no date for either of these events was indicated; nor was there any basis provided for the Registrar's expectation that funds from either source would soon become available. The Chamber interpolates to observe that in the result there are simply no adequate indications as to when, in the near or distant future, the accused will be able to pay his lawyers. Until then the defence team is apparently expected by the Registrar to act unfunded.

69. The Chamber also notes that the Registrar in this Decision – contrary to the position advanced by her representative on 29 June 2009 and her written

⁹³ Decision on Defence Application for Lifting the Seizure on Jean-Pierre Bemba Gombo's Seized Property, ICC-01/05-01/08-531-Conf, 18 September 2009.

⁹⁴ See a reference to the document in ICC-01/05-01/08-505, paragraph 13; see also Annex 1 to the Enregistrement de la « Demande de révision de la "Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Jean-Pierre Bemba" introduite le 25 août 2009 » [REDACTED], ICC-01/05-01/08-546-Conf-Exp-Anx1, 8 October 2009.

⁹⁵ Enregistrement de la décision du Greffier en date du 24 septembre 2009 et du document annexe l'accompagnant, ICC-01/05-01/08-545-Conf-Exp, 7 October 2009.

Report of 15 September 2009 – maintained that she has no power to advance funds to a non-indigent person using the funds allocated by the States Parties.

70. The Chamber held a status conference on 7 October 2009.⁹⁶ The Chamber identified the current problem as follows:

There is a clear impasse as regards the funding of this accused's defence. Although funds and property which are said to belong to the accused or which he is said to have a proprietary interest in have been identified, there are not indications that he presently has the ability to pay his lawyers. [...] There needs to be an immediate solution to this problem which is now at least seven months old, going back to March of this year [...].⁹⁷

71. Having rehearsed the more significant parts of some of the history that is set out extensively above, the Chamber observed:

The Registrar suggested that the seizure order on one account will be lifted soon and that the winding-up of certain property in which the accused has a beneficial interest is in progress. No date for either of these events was indicated, nor was there any basis given for the expectation that funds would soon become available. In the result, there are simply no sufficient indications as to when, in the near or distant future, the accused will be able to pay his lawyers. Until then, the Defence team is apparently expected to act unfunded.

Critically, the Registrar, contrary to the position advanced in Court before the judges on 29 June 2009, now maintains that she has no power to advance funds to a non-indigent person using the funds allocated by the States Parties for this purpose.

We do not currently accept that latter suggestion by the Registrar that she does not have the power to advance funds to the accused on a temporary basis. At present, we can find no prohibition within the Rome Statute framework which prevents her from advancing funds on at least a temporary basis to ensure that the accused receives a fair trial without undue delay, with adequate time and facilities for the preparation of his defence. We consider that the real question is exactly the opposite. Is there anything that positively prevents the Registrar from providing at least temporary assistance and, in part, assistance retroactively? It seems to us that it would be a surprising result indeed if the Registrar is able to fund the multiplicity of undertakings currently paid for in her name, but she was wholly unable to put the accused in the position of being able to fund his lawyers during a period when he apparently has no access to his property, in part, we observe, as a result of the actions of the Court in freezing some of his own assets. Moreover, a number of regulations appear *prima facie* to support the suggestion that the Registrar is able to assist in these circumstances.

⁹⁶ ICC-01/05-01/08-T-14-ENG-ET.

⁹⁷ ICC-01/05-01/08-T-14-ENG-ET, page 3, lines 13 – 21.

When determining the accused's means under Regulation 84, the means of the applicant include all those in respect of which he has a direct or indirect enjoyment or power freely to dispose. With frozen assets, it seems to us on a provisional basis that it would be difficult to describe them realistically as means which he directly or indirectly enjoys or over which he has power freely to dispose. Further, the Registrar has the power to make a provisional decision granting the payment of legal assistance (and that is Regulation 85(1)).

Putting all this together, our current proposal, therefore, which matches the Registrar's own submissions to the Pre-Trial Chamber on 29 June, is that the Registry, on a temporary basis, should meet the shortfall retrospectively since the last payment in March of 2009 and that this should be continued hereafter until sufficient funds from the frozen assets, or other monies, become available to this accused.

As a precondition it will be necessary for the accused to sign an appropriately binding document that any assistance he receives from the Registry in advance of his funds becoming available is to be repaid by way of an enforceable first charge in the Registry's favour on any of the seized or other funds as and when they are released or otherwise become accessible. Subject to any contrary submissions that we accept, the Registry should prepare this document for the accused's signature forthwith.

We propose to give the parties, the participants and the Registry until 4 p.m. on Friday, 9 October 2009, therefore, two days hence, to file submissions on the issue of whether or not there is a statutory or regulatory bar to the Registry providing this immediate temporary assistance which is to be repaid, as we have observed, when adequate funds are released. Immediately thereafter, we will issue a written decision on this issue.

We stress and repeat that in our view the present position is wholly untenable and needs to be resolved immediately. In the meantime, and in any event, the Defence may wish to resubmit a realistic document, and I underline the word "realistic", to the Registry forthwith, setting out all of its anticipated funding needs for the trial part of this case so that there can be a complete and immediate review of the funding needs of Mr Bemba for his trial.⁹⁸

72. On 9 October 2009 the Registrar filed her response to the Oral Order of the Trial Chamber (set out immediately above).⁹⁹ She highlighted the following provisions:

1. Pursuant to Article 4.1 of the Financial Regulations "the appropriations adopted by the Assembly of States Parties shall constitute an authorisation for the Registrar to incur obligations and make payments for the purposes of which the appropriations were adopted and up to the amounts adopted".

⁹⁸ ICC-01/05-01/08-T-14-ENG-ET, page 6, line 11 to page 8, line 14.

⁹⁹ Observations du Greffier en réponse à l'instruction orale de la Chambre de première instance III en date du 7 octobre 2009, ICC-01/05-01/08-553-Conf-Exp, 9 October 2009.

2. Pursuant to Article 4.8 of the Financial Regulations “no transfer between appropriation sections may be made without authorisation by the Assembly of States Parties, unless such a transfer is made necessary by exceptional circumstances, and is in accordance with the criteria to be agreed upon by the Assembly of States Parties”.
3. Pursuant to Article 4.9 of the Financial Regulations, the Registrar, and where appropriate the Prosecutor, “are accountable to the Assembly of States Parties for the proper management and administration of the financial resources for which they are responsible, as set out in Articles 42, paragraph 2 and 43 paragraph 1 of the Rome Statute. They shall prudently manage the appropriations so as to ensure that expenditures can be met from funds available, keeping in view the actual contributions received and the availability of cash balances”.
4. Pursuant to Article 6.6 of the Financial Regulations, a fund for unexpected circumstances (emergency fund) is created.

73. Thereafter, the Registrar set out that in her submission there are regulatory bars to the Registry advancing funds to a person who is not eligible for legal assistance (under Regulations 83 – 85 of the Regulations of the Court). The Registrar argued that this prohibition applies if the accused does not fulfil the indigence criteria in Article 67(1)(d) of the Statute, even if the assistance is temporary and it is advanced subject to the proviso that the monies will be reimbursed.¹⁰⁰

74. The Registrar submitted that if public funds are discretely allocated for those who are indigent, they cannot also be used for someone who does not meet the criteria for legal assistance.¹⁰¹ In this regard, the Registrar prayed in aid her Decision of 25 August 2008 in which she concluded, on a temporary basis, that the accused is not indigent.¹⁰² This Decision, as set out above, was upheld by the Presidency on 10 February 2009,¹⁰³ and it was later confirmed by the Registrar on 24 September 2009 (*supra*). It appears that an appeal has not been filed against that latter Decision, under Regulation 85(3) of the Regulations of the Court.

¹⁰⁰ ICC-01/05-01/08-553-Conf-Exp, paragraph 5.

¹⁰¹ ICC-01/05-01/08-553-Conf-Exp, paragraph 6.

¹⁰² ICC-01/05-01/08-553-Conf-Exp, paragraph 7.

¹⁰³ ICC-RoC85-01/08-3-Conf.

75. The Registrar stressed that the accused accepted that he was only temporarily without access to adequate funds, and she referred to the defence filing of 25 August 2009 (see above) and the "Questionnaire on the Applicant's Financial Situation" and certain items of correspondence.¹⁰⁴

76. The Registrar submitted that the provision enabling temporary legal assistance did not apply in this case, because a decision has been made that the accused is not indigent.¹⁰⁵

77. It was suggested that the Registrar is bound by Rule 4.1 of the Financial Regulations and Rules Adopted by the Assembly of States Parties,¹⁰⁶ and that she is only able to pay monies in accordance with the Court budget; further, she argued that the monies allocated for legal assistance can only be used for the defence of those individuals who are indigent.¹⁰⁷ It was observed that transfer of funds from one fund to another is only possible under Rule 4.8 of the Financial Regulations and Rules if it is authorised by the Assembly of States Parties "unless such a transfer is made necessary by exceptional circumstances and is in accordance with criteria to be agreed upon by the Assembly of States Parties".¹⁰⁸ In this regard, the Registrar does not consider that the circumstances of the accused are exceptional.¹⁰⁹ Further, the Registrar suggested that the Assembly of States Parties would not approve expenditure in these circumstances because, *inter alia*, in its Report on the Workings of the 4th Session, the Committee for Budget and Finance emphasized that:

[T]he delivery of legal aid was an area of considerable risk for the Court. Experience in the *ad hoc* tribunals had shown that administration of legal aid without rigorous controls could result in unreasonably high costs [...]. While recognizing the importance of an effective legal aid system for guaranteeing the rights of indigent

¹⁰⁴ ICC-01/05-01/08-553-Conf-Exp, paragraph 10.

¹⁰⁵ ICC-01/05-01/08-553-Conf-Exp, paragraph 11.

¹⁰⁶ First Session, New York, 3 – 10 September 2002, ICC-ASP/1/3.

¹⁰⁷ ICC-01/05-01/08-553-Conf-Exp, paragraph 12.

¹⁰⁸ ICC-01/05-01/08-553-Conf-Exp, paragraph 13.

¹⁰⁹ ICC-01/05-01/08-553-Conf-Exp, paragraph 14.

accused, the Committee felt that legal aid must be managed very carefully to avoid abuses and contain costs.¹¹⁰

More recently, the same Committee for Budget and Finance

[E]xpressed its concern for the system applied for determining the status of indigence in the case of accused persons, the Court having given examples showing that individuals in possession of significant assets could be considered as indigent. [...] An individual having many millions of Euros in property and assets was considered as partially indigent. Whilst the Committee is agreed that it was correct that the criteria applied to determine indigence took account of the costs of an adequate defence, it considered that it was not reasonable that an individual possessing such assets enjoy legal assistance charged to the budget of the Court.¹¹¹

78. The Registrar accepted that the Financial Regulations and Rules allow for some flexibility, and it was observed that Rules 6.6 and 6.7 establish a fund for unexpected eventualities:¹¹²

6.6

There shall be established a Contingency Fund to ensure that the Court can meet:

- (a) Costs associated with an unforeseen situation following a decision by the Prosecutor to open an investigation; or
- (b) Unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget; or
- (c) Costs associated with an unforeseen meeting of the Assembly of States Parties.

The level of the Fund and the means by which it shall be financed (i.e. by assessed contributions and/or cash surpluses in the budget) shall be determined by the Assembly of States Parties.

6.7

If a need to meet unforeseen or unavoidable expenses arises, the Registrar, by his or her own decision or at the request of the Prosecutor, the President or the Assembly of States Parties, is authorized to enter into commitments not exceeding the total level of the Contingency fund. Before entering into such commitments, the Registrar shall submit a short, supplementary budget notification to the Committee on Budget and Finance through its Chairperson. Two weeks after having notified the Chairperson of the Committee on Budget and Finance, and taking into consideration any financial comments on the funding requirements made by the Committee through its Chairperson, the Registrar may enter into the corresponding commitments. All

¹¹⁰ Report of the Committee for Budget and Finance on the Workings of the 4th Session, ICC-ASP/4/2, paragraph 49.

¹¹¹ ICC-01/05-01/08-553-Conf-Exp, paragraph 15.

¹¹² ICC-01/05-01/08-553-Conf-Exp, paragraph 15.

funding obtained in this way shall relate only to the financial period(s) for which a programme budget has already been approved.¹¹³

79. It is suggested that none of these exceptions or eventualities apply in this case.¹¹⁴ The Registrar particularly submitted that the present situation does not constitute “unavoidable expenditure” due to the evolution of an existing situation that could not have been foreseen and which could not have been estimated precisely at the time of the adoption of the budget.¹¹⁵

80. The Registrar rehearsed her responsibilities, as she defines them, to the Assembly of States Parties for the good management and administration of the funds in her power. In those circumstances when the relevant criteria are not met, she declines to take the initiative to advance funds for Mr Bemba’s defence.¹¹⁶

81. The Registrar noted that given her duty to report every Chamber decision to the Assembly of States Parties that is likely appreciably to affect the Court’s budget, the payment of the arrears of fees from March 2009 and future funding to March 2010 will amount to €500,000.¹¹⁷

82. It was suggested that the Registrar was not assured of reimbursement once the accused’s funds become available because there may be other charges on his property that will take priority.¹¹⁸

83. Finally, the Registrar argued that the solution lay solely with the Chamber, and she suggested that the Court could vary the existing orders to enable the accused to fund his defence.¹¹⁹

¹¹³ Resolution ICC-ASP/3/Res.4 *Adopted at the 6th plenary meeting, on 10 September 2004, by consensus.*

¹¹⁴ ICC-01/05-01/08-553-Conf-Exp, paragraph 16.

¹¹⁵ ICC-01/05-01/08-553-Conf-Exp, paragraphs 16 – 20.

¹¹⁶ ICC-01/05-01/08-553-Conf-Exp, paragraph 21.

¹¹⁷ ICC-01/05-01/08-553-Conf-Exp, paragraph 22.

¹¹⁸ ICC-01/05-01/08-553-Conf-Exp, paragraph 23.

84. On 9 October 2009 the prosecution submitted the "Prosecution's Submission on the Immediate Temporary Assistance to the Defence".¹²⁰ The Chamber noted that this filing was made as a public filing and immediately contacted the Registry in order to request reclassification to "confidential" in light of the sensitive and personal nature of the information contained therein. In essence, the prosecution submitted that provisional assistance could be provided if the accused has no assets other than frozen property, to be repaid once funds are released, but only if the accused:

- Provides a sworn declaration and all information available to him on all means to which he has direct or indirect enjoyment or power to freely dispose;
- Provides a declaration about his patrimony, including the inheritance of his father;
- Signs the binding repayment document, to be prepared by the Registrar, as directed in the status conference.¹²¹

85. Also, on 9 October 2009 the defence filed the "Defence Submissions on funding".¹²² In essence, the defence submitted that the accused is unable to access any of his funds, and in the event he should be provided with immediate financial assistance, implemented retroactively.

86. On 12 October 2009, [REDACTED].¹²³

87. [REDACTED].¹²⁴

88. [REDACTED].¹²⁵ [REDACTED].¹²⁶

¹¹⁹ ICC-01/05-01/08-553-Conf-Exp, paragraphs 17 and 28.

¹²⁰ Prosecution's Submission on the Immediate Temporary Assistance to the Defence, ICC-01/05-01/08-550-Conf, 9 October 2009.

¹²¹ ICC-01/05-01/08-550-Conf, paragraph 8.

¹²² Observations de la Défense conformément à l'ordonnance de la Chambre de Première Instance III sur le financement de la Défense, ICC-01/05-01/08-551, 9 October 2009.

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

89. [REDACTED].¹²⁷ [REDACTED].¹²⁸ [REDACTED]:

[REDACTED].

[REDACTED].

90. [REDACTED].¹²⁹ [REDACTED].¹³⁰ [REDACTED].¹³¹ [REDACTED].¹³²
[REDACTED].

91. [REDACTED]¹³³ [REDACTED].¹³⁴ [REDACTED].¹³⁵

92. On a general note in relation to the recent filings made by the Registry, the Chamber observes that no factual or legal basis is advanced justifying the confidentiality level of the filings, in accordance with Regulation 23*bis*(1) of the Regulations of the Court (see, by way of example, the Registry's filings set out above dated 24 September 2009, 9 October 2009, and [REDACTED]).¹³⁶ In addition the Chamber has noted that the Registrar does not always follow the format required by Regulation 36(3) of the Regulations of the Court. The Registry must apply these Regulations (and others that are relevant) in future filings, not least because as the custodian of the record, the Registry should be setting a true example.

III. The Relevant provisions

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ ICC-01/05-01/08-545-Conf-Exp; ICC-01/05-01/08-553-Conf-Exp; [REDACTED].

93. The main relevant provisions are:

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...].

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to Article 63, paragraph 2, to be present at the trial, to conduct the defence [...] through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and 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;

Section 4 of the Regulations of the Court

Legal assistance paid by the Court

Regulation 83

General scope of legal assistance paid by the Court

1. Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in Regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.

3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.

4. Decisions 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.

Regulation 84

Determination of means

1. Where a person applies for legal assistance to be paid by the Court, the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance.

2. The 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, including, but not limited to, direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held, but excluding any family or social benefits to which he or she may be entitled. In assessing such means, account shall also be taken of any transfers of property by the applicant which the Registrar considers relevant, and of the apparent lifestyle of the applicant. The Registrar shall allow for expenses claimed by the applicant provided they are reasonable and necessary.

Regulation 85

Decisions on payment of legal assistance

1. In accordance with the procedure set out in the Regulations of the Registry, the Registrar shall decide within one month of the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry, whether legal assistance should be paid by the Court. The decision shall be notified to the applicant together with the reasons for the decision and instructions on how to apply for review. The Registrar may, in appropriate circumstances, make a provisional decision to grant payment of legal assistance.

2. The Registrar shall reconsider his or her decision on payment of legal assistance if the financial situation of the person receiving such legal assistance is found to be different than indicated in the application, or if the financial situation of the person has changed since the application was submitted. Any revised decision shall be notified to the person together with the reasons for the decision and instructions on how to apply for review.

3. Persons as referred to in sub-regulations 1 and 2 may seek review of the decisions described in those provisions by the Presidency within 15 days of notification of the relevant decision. The decision of the Presidency shall be final.

4. Subject to Rule 21, sub-rule 5, where legal assistance has been paid by the Court and it is subsequently established that the information provided to the Registrar on the applicant's means was inaccurate, the Registrar may seek an order from the Presidency for recovery of the funds paid from the person who received legal assistance paid by the Court. The Registrar may seek the assistance of the relevant States Parties to enforce that order.

IV. Analysis

94. The relevant factual conclusions from the history extensively rehearsed above are as follows. Notwithstanding the credible, indeed powerful, indications, coming from a number of different countries that the accused is a man of considerable – possibly very considerable – wealth, there is no evidence from any source that in the immediate or relatively near future he will have access

to any of his property or other assets, such as to enable him to fund his defence team or to discharge his immediate obligations to his dependents. In other words, no source has been identified (or combination of sources) that will fund, for the foreseeable future, the monthly amount currently approved by the Pre-Trial Chamber (€36,260) for these twin purposes, or rectify the non-payment of counsel's fees since March 2009.

[REDACTED]

95. [REDACTED].

[REDACTED]

96. [REDACTED].

[REDACTED]

97. [REDACTED].¹³⁷

[REDACTED]

98. [REDACTED].

[REDACTED]

99. [REDACTED].

100. In these circumstances the Chamber is unable to agree with the Registrar that the solution to the accused's funding problems is for the Court to vary or rescind one or more of the present orders relating to Mr Bemba's property: there are no extant orders which, if altered or withdrawn, would result in the release of funds in the immediate or medium-term future. Indeed, the opposite is the case. [REDACTED]. On the evidence, external,

¹³⁷ [REDACTED].

non-Court funding for the accused can only be described as being a long-term objective, given the number of potential obstacles.

101. It is critical to stress that the factors set out above do not constitute a comprehensive survey of the accused's assets, but instead the Chamber has identified those items that will, in all likelihood, lead first to realisable funds, because of their potential availability. The Chamber has, therefore, not addressed in this Decision items of property [REDACTED] because there are no indications that they are likely in the near or medium-term to become a source of funds, available for Mr Bemba's defence.

102. The words *indigence* and *indigent* – terms that 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. The definition in the Oxford English Dictionary of the word *indigent* refers, *inter alia*, to such concepts as "destitute", "void of", "characterised by poverty" and "poor".

103. Under Article 21(1)(a) of the Statute, the Court shall apply "in the first place" the Statute, the Elements of the Crimes and its Rules of procedure and evidence. Bearing that in mind, it is to be stressed that the concept of "indigence" does not constitute an element of Article 67. Instead, this statutory provision stipulates that an accused shall 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". 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 accused immediately or in the near future. Otherwise, this important statutory provision would be stripped of real purpose and utility.

104. This approach has been carried into Regulation 84 of the Regulations of the Court (“Determination of Means”). The means of the accused “[...] shall include means of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose [...]”. This provision clearly focuses on the applicant’s circumstances at the time that the funding decision is made. There is no doubt that since March 2009 this accused has had no power to dispose freely of his assets, and similarly he has had no direct or indirect “enjoyment” in any substantive, purposive or useful sense over any of his assets.

105. Since October 2008, the Pre-Trial Chamber and latterly the Trial Chamber have been concerned with the inability on the part of the accused to access his property and assets in order to fund his defence and support his family. Save for funds that were made available [REDACTED] between October and December 2008 until they were exhausted, [REDACTED], no significant advance has been achieved in the attempt to make the accused’s funds available in order to fund his defence and to support his family. In the Chamber’s unequivocal view this means that the accused now lacks sufficient means to pay for his defence. The immediate and critical consequence is that his rights, first, to “have adequate [...] facilities for the preparation of the defence”; second, “to be tried without undue delay”; and, third, “to legal assistance of the accused’s choosing” are each seriously imperilled if this situation is permitted to continue. Put bluntly, under the present arrangements the accused cannot take any meaningful steps to prepare for his trial.

106. Whilst the Chamber recognises that it is for the Registrar under Regulation 84 to determine the accused's means, with a right of appeal to the Presidency against adverse decisions under Regulation 85 on the payment of legal assistance, the Trial Chamber has a fundamental and overarching statutory responsibility under Article 64 (2) of the Statute:

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...].

107. In the present circumstances in which there is a wholesale lack of available means, these proceedings currently are not fair, and if they endure the trial will not be expeditious. The Chamber has a statutory duty under Article 67 to rectify this state of affairs.

108. Irrespective of the considerations as to "indigence" that influenced the Registrar when she made her Decisions on legal assistance (25 August 2008, paragraph 14 and 15 above and 18 September 2009, paragraph 67 above), the accused since March 2009 has lacked sufficient funds to pay for his defence, and in the Chamber's judgment the Registrar is under an obligation (pursuant to Regulation 85 of the Regulations of the Court) to pay the figure (€30,150) she previously identified as reasonable for legal assistance retrospectively to that date, and ongoing until there is a material change in circumstances (*e.g.* funds from elsewhere become available, the trial ends or a fresh application for funding is decided under Regulation 85 of the Regulations of the Court). At present, the Chamber is unpersuaded that it has jurisdiction over payments by the Court for the living expenses of the accused's dependents. However, it is stressed that the Chamber has not heard submissions on this issue.

109. It is to be emphasised that when the [REDACTED], the ambit of the Review was limited by the circumstances then relevant, and it was in consequence essentially focussed on the detail of the calculation (the “indigence formula” *et al.*) rather than the wider issue of whether the accused had sufficient funds to pay for this defence; as rehearsed above, at the time of that decision funds were available to meet the approved amount for legal assistance and support of the accused’s dependents (€36,260).

110. The Chamber is well aware that the Court generally, and the Registrar individually, have an onerous responsibility not to waste the scarce resources of this institution. Further, there is the risk of an unfortunate public perception if the Court is seen to fund an apparently wealthy accused. For those reasons, the Chamber emphasizes that it has every expectation that any monies advanced to the accused at this stage will be reimbursed to the Court if the Registrar fully discharges her obligations, with the Chamber’s assistance. The Chamber wholly supports the pre-conditions for legal assistance suggested by the prosecution in its filing of 9 October 2009, and the Chamber will issue a second Decision in the near future (following an *ex parte* status conference) as to the steps that it considers should be taken immediately to ensure that the available sources of funding are secured. These are extremely important issues that should be pursued resolutely and resolved speedily.

V. Conclusions

111. For these reasons, **the Registrar is ordered immediately:**

- i) To secure an up-to-date sworn declaration from the accused setting out the current position as regards the means over which he has direct or indirect enjoyment or the power freely to

dispose, together with all the relevant information (printed or otherwise) available to him on this issue;

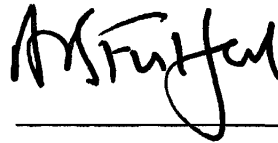
- ii) To secure a declaration from the accused on his patrimony, including any inheritance from his father;
- iii) To secure a legally binding power of attorney and a power of sale in favour of the Registrar over the villa in Portugal (in accordance with the applicable national law), which is to be sold, *inter alia*, to refund the accused's legal assistance (to the extent that this is funded by the Court);¹³⁸
- iv) To secure an appropriate, legally enforceable document, signed by the accused enabling the Court to be repaid out of the funds of the accused, as and when they become available; **and only when i), ii), iii) and iv) above have been complied with**
- v) To provide funding in the sum of €30,150 a month (this sum is to be paid retrospectively to March 2009, and ongoing until there is a material change in circumstances).

If these orders have not been implemented in their entirety by Monday 1 November 2009 at 16.00, the Chamber is to be provided with written notification, together with reasons.

The Chamber will fix a trial date once it has been notified that this Decision has been implemented.

¹³⁸ If there are other identifiable items of property which should sensibly be included in this provision, the Registrar is to make an immediate application to the Chamber to include them.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 26 November 2009

At The Hague, The Netherlands