

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Reasons for Review of Registrar's Decision on Defence resources

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Ms Paolina Massidda

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2), 64 (6)(f) and 67 of the Rome Statute ('Statute') and Regulations 83 of the Regulations of the Court ('Regulations'), issues by Majority, Judge Ozaki dissenting, the following 'Reasons for Review of Registrar's Decision on Defence resources'.

I. Procedural history

1. On 12 April 2013, the Registry issued a decision declaring Mr Ntaganda indigent and therefore entitled to legal assistance paid by the Court.¹
2. On 14 May 2013, the defence team for Mr Ntaganda ('Defence') submitted a request to the Registry seeking additional resources to hire a second legal assistant for the duration of the proceedings.² On 6 June 2013, the Registry granted the Defence the necessary resources to hire a second legal assistant, but only until the issuance of the Confirmation Decision.³
3. On 9 June 2014, Pre-Trial Chamber II issued its 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda', in which it confirmed the charges against Mr Ntaganda ('the Accused').⁴

¹ Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Bosco Ntaganda, ICC-01/04-02/06-48-Anx.

² Annex 1 to Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Anx1, p. 12.

³ Annex 2 to Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Anx2, pp 6-7.

⁴ Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309.

4. On 11 June 2014, the Defence submitted a second request to the Registry, seeking additional resources in order to hire a second legal assistant for the duration of the proceedings,⁵ which was again rejected on 4 July 2014.⁶
5. On 16 July 2014, Pre-Trial Chamber II authorised the then lead counsel, Mr Desalliers, to withdraw from the case.⁷ On 15 August 2014, Mr Bourgon was appointed as the new lead counsel representing the Accused.⁸
6. During the consultation relating to his appointment, Mr Bourgon twice requested that the Defence be granted the necessary resources to hire a second permanent legal assistant.⁹ While denying both requests, the Registrar authorised the composition of a Defence team which would include a second legal assistant, but only for a period of six months ('Registrar's Decision').¹⁰ In relevant parts the Registrar's Decision held that it was

to remunerate an additional legal assistant for a period of, in principle, six months, at the end of which an extension could be considered. This is done in order to ensure that you are able to familiarise yourself with the case and avoid any delays in the proceedings. [...] I deem it premature at this point to make commitments and compromise the budget of the Court beyond the proposed six months where there is insufficient clarity about the resources which will be necessary at that stage. I must insist that this decision should

⁵ Annex 3 to Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Anx3.

⁶ Annex 4 to Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Anx4.

⁷ Decision on the "Requête de Me Marc Desalliers afin d'être autorisé à se retirer du dossier en qualité de Conseil principal de M. Bosco Ntaganda", 17 July 2014, ICC-01/04-02/06-333.

⁸ Registration in the record of the case of the appointment of Mr. Stéphane Bourgon as Lead Counsel of Mr. Bosco Ntaganda, ICC-01/04-02/06-353.

⁹ Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Corr ('Request'), para. 19; and ICC-01/04-02/06-369-Conf-Exp-Anx5, page. 3.

¹⁰ Reference 2014/3368/IOR/HvH, 12 August 2014, ICC-01/04-02/06-369-Conf-Exp-Anx6, page. 2; see also Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 20 and 24.

not be considered as a negative answer to your request, but rather a temporary measure pending further clarity on the resources that will be required for the effective defence of Mr Ntaganda.¹¹

7. On 8 September 2014, the Defence submitted its '*Observations de la Défense concernant l'ordre du jour provisoire pour la Conférence de mise en état du 11 septembre 2014*',¹² in which it requested that an *ex parte* Status Conference, Defence and Registry only, be convened on the issue of the Defence's resources.
8. On 15 September 2014, after having been directed to do so by the Chamber,¹³ the Defence filed written submissions whereby it requested the Chamber to:
 - i) issue a decision granting the Defence additional resources for the purpose of hiring a second permanent legal assistant for the entire duration of the proceedings, and/or
 - ii) convene a status conference on the matter ('Request').¹⁴
9. Pursuant to a Chamber instruction to file observations by 24 September 2014,¹⁵ the Registry filed its observations on the Request ('Registry's Observations').¹⁶ The Chamber notes that the Registry's Observations were filed after the time limit, and neither an explanation for the delay nor an application seeking an extension was filed within the time limit.

¹¹ Registrar's Decision, ICC-01/04-02/06-369-Conf-Exp-Anx6, p. 3.

¹² ICC-01/04-02/06-364.

¹³ Order Setting the Agenda for the 11 September 2014 Status Conference, 10 September 2014, ICC-01/04-02/06-366, para. 3.

¹⁴ Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 53.

¹⁵ E-mail from Legal Officer of the Chamber to Registry, 18 September 2014, at 19:15, instructing the Registry to file observations on the Request by 23 September 2014.

¹⁶ Observations du Greffier relatives aux écritures déposées par la Défense de M. Bosco Ntaganda le 15 septembre 2014, 23 September 2014, ICC-01/04-02/06-376-Conf-Exp.

10. On 1 October 2014, an *ex parte* status conference was held with the Defence and the Registry ('Status Conference').¹⁷ During the Status Conference, the Registry conceded that the loss of Mr Desalliers, who led the Defence team during the proceedings at the Pre-Trial stage and the recent departure of the most senior legal assistant had resulted in a significant loss of capacity in and knowledge about the case, therefore justifying the employment of a second legal assistant for a period of twelve months, and not the six months initially granted.¹⁸ The Registry explained that '[t]he proposal is [...] to allocate right now the resources for 12 months of legal assistant and then when the end [...] of those 12 months is near, to reassess the need for this second legal assistant, and if it is justified, we would extend that [...] appointment'.¹⁹
11. On 9 October 2014, the Chamber set the commencement date of the trial for 2 June 2015, and imposed a series of deadlines in relation to disclosure and negotiations on protocols.²⁰
12. During the status conference held on 17 October 2014, the Chamber issued an oral decision on the Request, informing the parties and participants that the reasons would be issued the week thereafter.²¹

II. Submissions

Defence

13. The Defence avers that the present case is the largest and the most complex case before the Court.²² It submits that the minimum resources required in

¹⁷ Transcript of hearing of 1 October 2014, ICC-01/04-02/06-T-14-CONF-EXP-ENG ET ('T-14'). The Chamber scheduled the status conference by way of e-mail (E-mail from Legal Officer of the Chamber to Registry and Defence, 26 September 2014, at 16:43).

¹⁸ T-14, page 4, line 12 to page 5, line 1 and page 5, line 19 to page 6, line 2.

¹⁹ T-14, page 13, lines 15-19.

²⁰ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382, paras 8-9.

²¹ Transcript of hearing of 17 October 2014, ICC-01/04-02/06-T-15-ENG ET, page 3, line 14 to page 4, line 9.

order to be ready for trial at the date set by the Chamber are: one lead counsel, one associate (or co-) counsel, two permanent legal assistants, one case manager, two interns, as well as *ad hoc* legal resources.²³ According to the Defence, the need for two legal assistants was well established during the confirmation stage of the proceedings, for which the Registry granted the Defence resources for two legal assistants.²⁴ It submits that there are no indications that fewer resources are now needed. Instead, it considers that more resources are required during the period leading up to trial, as well as for the trial proceedings itself.²⁵

14. The Defence notes that the two members of the team, who had detailed knowledge of the case, are no longer with the team²⁶ and submits that it is looking for continuity in relation to the newly comprised team.²⁷ It submits that 'recruiting highly qualified and committed jurists is simply not possible without the ability to offer some kind of employment security'.²⁸ Specifically, the Defence submits that the '[e]quality of arms also requires that the Defence possess the ability to recruit highly qualified jurists who will remain with the team until the end of the proceedings'.²⁹

15. Besides the changes in the composition of Defence team, the Defence submits that in light of 'the extensive work which must be performed before the commencement of trial [...] the resources required are both very reasonable and as well as wholly justified'.³⁰

²² Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 33 ; T-14, page 14, lines 2-4.

²³ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 34-36 and 40.

²⁴ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 51; T-14, page 6, lines 10-18.

²⁵ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 51-52; T-14, page 6, lines 10-18.

²⁶ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 15-16 ; T-14, page 7, lines 1-13 and page 14, lines 5-8.

²⁷ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 41.

²⁸ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 42.

²⁹ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 44.

³⁰ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 36.

16. The Defence further stresses that, as opposed to what was argued by the Registry, recruitment of an associate counsel does not alleviate the type and volume of work to be performed by the legal assistant, as these two positions are entirely different by nature.³¹ It also submits that it is not appropriate to use the Defence Monthly Allowance to hire a legal assistant, as suggested by the Registry, as it does not address the need for stability of the team composition and the Defence plans to use that allowance to hire 'supplementary legal personnel' (i.e. a third legal assistant on a temporary basis).³²

17. The Defence considers that the Registry's proposal to provide resources to hire a second legal assistant for six months, or twelve months (as proposed during the Status Conference),³³ falls short of what is necessary to avoid delays in the preparation for trial.³⁴ It notes that, in the event of a stay of proceedings or other situation in which fewer resources would be required, pursuant to the Registry's single policy document on the Court's legal aid system ('Single Policy Document'),³⁵ it would have to justify the resources needed.³⁶

Registry

18. The Registry submits that, at this stage, the reasonable need for the appointment of a second *permanent* legal assistant has not been established.³⁷ The Registry emphasises that the decision not to grant resources for the duration of the trial should not be seen as a negative answer to the request, but as a temporary measure pending more clarity about the resources

³¹ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 46 ; T-14, page. 6, lines 19-25.

³² Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras. 47-49.

³³ T-14, page 5, line 22 to page 6, line 2.

³⁴ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 39 ; T-14, page. 13, line 21 to page 14, line 25.

³⁵ 4 June 2013, ICC-ASP-12/3.

³⁶ T-14, page 14, lines 11-24.

³⁷ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 17.

reasonably needed for the effective defence of the Accused.³⁸ It submits that the legal aid system works on the basis of a flexible mechanism, which can adapt to the needs in cases to avoid a paralysing procedure, and that prudence in creating obligations on the part of the Court, in relation to defence resources, is required.³⁹

19. The Registry further submits that at the present stage of the proceedings the hiring of a second legal assistant on a temporary basis would enable the Defence to avoid possible negative consequences resulting from the recent change of lead counsel.⁴⁰

20. The Registry further notes that an allowance of 3,000 euros is available to the Defence on a monthly basis, in addition to the total investigations' budget of 48,000 euros. According to the Registry, the resulting 72,000 euros would enable the employment of a Legal Assistant for more than one year.⁴¹ As to the Defence's intention to use this monthly allowance to pay for temporary and specific legal assistance, the Registry makes an assurance that the legal aid system allows for such an arrangement.⁴²

21. According to the Registry, ensuring the continuity of the Defence team is not in itself a justification to grant additional resources.⁴³ In its view, granting the necessary resources to hire a legal assistant for a period of one year allows the Defence to recruit highly qualified people⁴⁴ and to be ready to start the trial at the date set by the Chamber.⁴⁵

³⁸ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 11; referring to the Registrar's Decision, ICC-01/04-02/06-369-Conf-Exp-Anx6, p. 3.

³⁹ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, paras 9-10.

⁴⁰ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 5.

⁴¹ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, paras 6-7.

⁴² Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 8.

⁴³ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 16.

⁴⁴ T-14, page 7, line 19 to page 8, line 19.

⁴⁵ T-14, page 9, line 25 to page 10, line 23.

22. Finally, the Registry notes that granting resources to hire a second legal assistant for the duration of the proceedings is premature, as the trial can proceed for many years.⁴⁶

III. Applicable law and standard of review

23. Article 67(1) of the Statute provides that an accused, as a minimum guarantee, among other things, is entitled to have adequate time and facilities for the preparation of his defence,⁴⁷ and if the accused does not have legal assistance, to have it 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.⁴⁸

24. According to Regulation 83 (1) of the Regulations, '[l]egal assistance paid by the Court' is 'determined by the Registrar' and where such assistance is paid by the Court, the Defence 'may apply to the Registrar for additional means which may be granted depending on the nature of the case'.⁴⁹ Decisions by the Registrar relative to the scope of legal assistance paid by the Court are subject to review by the relevant Chamber on application by the person receiving such legal assistance.⁵⁰

25. While the Regulations provide little elaboration on the principles governing the Court's legal aid system, the more detailed procedural structure is to be found in the Single Policy Document. As background, the Single Policy Document acknowledges that the Court has in place a comprehensive legal aid scheme, which balances the requirements for adequate, effective and

⁴⁶ T-14, page 8, line 20 to page 9, line 24.

⁴⁷ Article 67(1)(b) of the Statute.

⁴⁸ Article 67(1)(d) of the Statute.

⁴⁹ Regulation 83(3) of the Regulations.

⁵⁰ Regulation 83(4) of the Regulations.

efficient legal representation with the budgetary constraints of a publicly funded legal aid scheme.⁵¹

26. The Court's legal aid system and decisions by the Registrar are governed by five principles, the first of which – significantly – provides for 'equality of arms': 'The payment system must contribute to maintaining a balance between the resources and means of the accused and those of the prosecution.'⁵² The other principles relate to objectivity, transparency, continuity and flexibility, and economy. The latter principle states that, on extent of legal aid, such assistance paid by the Court must cover all costs reasonably necessary, as determined by the Registrar, for an effective and efficient defence.⁵³ While the aforementioned Regulations do not set out the applicable standard of review in assessing decisions of this nature, the Court's jurisprudence provides some guidance on this point.

27. Trial Chamber II, in a decision in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (as it then was) held that 'when Chambers are asked to review crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation'.⁵⁴ A similar approach was taken by Trial Chamber I when it reviewed a decision by the Registrar on the size of the defence team

⁵¹ Single Policy Document, ICC-ASP-12/3, para. 4.

⁵² Single Policy Document, ICC-ASP-12/3, para. 9.

⁵³ Single Policy Document, ICC-ASP-12/3, para. 9; see also the General Administrative Law Act of the Netherlands, articles ...

⁵⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, 23 April 2012, ICC-01/04-01/07-3277, para. 9.

of Mr Lubanga.⁵⁵ The Chamber agrees with the approach taken by Trial Chambers I and II.

28. As to the standard of review, in *Prosecutor v. Mathieu Ngudjolo Chui*, the Appeals Chamber, noting the approach taken in relation to the applicable standard of review by Trial Chamber II in the aforementioned decision, considered that ‘the Registrar enjoys a relatively wide margin of discretion’ and ‘that it should interfere with decisions of the Registry in this area only if there are compelling reasons for doing so’.⁵⁶ Such compelling reasons exist, *inter alia*, if the accused’s right to an effective defence is infringed.⁵⁷

IV. Analysis

Preliminary matters

29. As noted above, the Registry’s Observations were filed after the time limit set by the Chamber. Exceptionally, the Chamber will consider these observations. However, in the future, where the Chamber has not granted an extension of the time limit, the discretion of the Chamber may not be exercised as favourably as it was in this case.

30. The Chamber notes that the Request falls within the scope of Regulation 83(4) of the Regulations and that the Registry has not contested the admissibility of the Request.

⁵⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, 20 August 2011, ICC-01/04-01/06-2800.

⁵⁶ *Prosecutor v. Mathieu Ngudjolo Chui*, Appeals Chamber, Decision on Mr Ngudjolo’s request for review of the Registrar’s decision regarding the level of remuneration during the appeal phase and reimbursement of fees, 11 February 2014, ICC-01/04-02/12-159, para. 22, referring to ICC-01/04-01/07-3277, para. 9.

⁵⁷ See ICC-01/04-01/06-2800, paras 53-54.

Review of the Registrar's Decision

31. At the outset, the Chamber clarifies that it will consider the terms as set out by the Registry during the Status Conference. The 'Registrar's Decision' that is subject to review thus makes available to the Defence the necessary funds to hire a second legal assistant for a period of twelve months.⁵⁸ The Chamber notes that modification of the Registry's Decision was made as a result of a meeting between the Registry and the Defence five days prior to the Status Conference. The Chamber would have expected the Registry to have informed the Chamber and the party concerned⁵⁹ of this relevant change before the start of the Status Conference.
32. It is not in dispute between the Defence and Registry that a second legal assistant is warranted at this stage. However, the Defence contends that resources for a second legal assistant are needed for the entire trial proceedings, whilst the Registry appears to be of the view that it is unclear at this stage whether the Defence's workload in twelve months, or at a later point of the trial proceedings, will still justify these additional resources.
33. The Defence has argued that the Registrar's Decision to only grant resources for a fixed period of (now) twelve months, after which a reassessment of the need for the additional resources would take place, is unreasonable. According to the Defence, based on past experience during the confirmation stage in the current case and the apparent need for a second legal assistant for defence teams in previous cases before the Court, 'the need for a second permanent legal assistant is well established'.⁶⁰ It contends that '[t]here are no indications that less resources will be required during the [...] trial

⁵⁸ T-14, page 4, line 12 to page 5, line 1 and page 5, line 19 to page 6, line 2.

⁵⁹ The Chamber notes the Defence's response that it was not aware of the Registry's change in position until it was expressed during the Status Conference (T-14, page 6, lines 7-9).

⁶⁰ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 50-51; and T-14, page 13, line 22 to page 14, line 4.

proceedings’.⁶¹ The Registry has not engaged this argument, nor has it disputed the Defence’s claims that the current case, compared to earlier cases before the Court, is larger and more complex,⁶² and that the defence teams in these cases had been entitled to two legal assistants for the duration of the trial proceedings.⁶³ Moreover, the Registry argued that additional resources are not automatically granted, but need to be requested by counsel by way of a ‘substantiated request’,⁶⁴ but it did not address the Defence’s attempt to substantiate its request. Although the Registry had provided additional resources during the pre-trial stage, it now held that the same numbers that the Defence relied on in relation to its request for additional resources during the pre-trial proceedings⁶⁵ were not appropriate to consider, as they are not yet clear.⁶⁶

34. The Chamber agrees with the Defence that it is unlikely that the Defence’s workload would diminish during the trial stage. Moreover, it is not clear why the Defence would need fewer resources than previous defence teams, when the workload of a case, as accepted by the Registry, is larger than, for example, the *Prosecutor v. Thomas Lubanga Dyilo* case. Without going into details, the Chamber observes that based on, for example, the number and

⁶¹ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 51.

⁶² Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 33; and T-14, page 14, lines 2-4.

⁶³ T-14, page 13, line 24 to page 14, line 1.

⁶⁴ Registry’s Observations, ICC-01/04-02/06-376-Conf-Exp, para. 13, referring to the Single Policy Document, ICC-ASP-12/3, paras 66-67.

⁶⁵ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 37-38; referring to the *Requête urgente de la Défense de M. Bosco Ntaganda aux fins d’obtention de ressources supplémentaires*, ICC-01/04-02/06-369-Conf-Exp-Anx3.

⁶⁶ Registry’s Observations, ICC-01/04-02/06-376-Conf-Exp, para. 13. The Registry did state that one of the Defence’s calculations pertaining to the additional full time equivalent to which it is entitled, reveals an error, as – according to the Registry – the parameters used should be 0.04 instead of 0.005 (Registry’s Observations, ICC-01/04-02/06-376-Conf-Exp, para. 14). However, noting the parameters related to victims, contained in the Single Policy Document, the Chamber observes that the parameter used by the Defence appears to be based on this document, whereas the one proposed by the Registry is clearly incorrect (see Single Policy Document, paras 69-70). If the latter number provided by the Registry was to be used for calculating the additional means, the Defence would, in fact, be entitled to a significantly higher number of full time equivalents.

type of counts and modes of liability charged, the current case appears significantly larger and more complex than the aforementioned case.⁶⁷

35. Even if due to some unexpected event, the need for additional resources were to reduce, it appears that the Court's legal aid system has a safeguard in place for such a situation. The Registry's submissions in this regard are unconvincing. In rejecting the Defence's request for a legal assistant for the entirety of the trial proceedings, the Registrar determined that he could not '*make commitments and compromise the budget of the Court beyond the proposed six months where there is insufficient clarity about the resources which will be necessary at that stage*'.⁶⁸ This consideration was repeated in the Registry's Observations, when it was stated that '*[l]a sécurité dans l'emploi ne peut pas justifier la création d'une obligation à long terme pour la Cour*'.⁶⁹ In addition, the Registry quoted the fourth principle listed in the Single Policy Document and stated that paralysis of the payment system needed to be avoided and that control of the financial system by the Court was needed.⁷⁰ The Registry cautioned against placing additional obligations on the Court beyond the current operational needs of the Defence.⁷¹ However, the Chamber observes that the Single Policy Document provides a safeguard against paralysis of the Court's budget for legal aid and ensures that no unreasonable long-term obligations are placed on this budget. It provides as follows:

⁶⁷ In the current case there are 18 counts of war crimes and crimes against humanity and six modes of liability (see Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, ICC-01/04-02/06-309, pages 14-15, 27 and 35-37). By contrast, in *Lubanga*, Pre-Trial Chamber I confirmed six counts of war crimes and one mode of liability (*The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 27 January 2007, ICC-01/04-01/06-803-tEN).

⁶⁸ Registrar's Decision, ICC-01/04-02/06-369-Conf-Exp-Anx6, p. 3 (emphasis added).

⁶⁹ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 15.

⁷⁰ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 9.

⁷¹ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, para. 10.

[I]n instances where activity in the proceedings of the Court is considerably reduced, the default position is that the payment of lump-sum remuneration of team members under the Court's legal aid system ceases.

Non-exhaustive examples of periods where activities are reduced include the period between closing statements rendered at trial and the decision of the Chamber; stay, suspension or other protracted delays in the proceedings; and the waiting period after an appeal against the confirmation of charges by a Pre-Trial Chamber.

In instances of reduced activity in the proceedings, remuneration of counsel and each team member in all situations is determined on the basis of hours actually worked up to a monthly ceiling equal to the payment for each category under the Court's legal system.⁷²

36. It therefore appears that offering a longer term employment perspective to members of a defence team, who are considered to be part of the necessary resources in circumstances that the trial runs its normal course, for the duration of the trial proceedings, would not create long-term obligations, or paralysis, of the Court's budget. Any further member of the Defence team, whose addition is considered necessary in light of the workload of the Defence, would be subject to the same system as set out in the Single Policy Document. Such additional resources would therefore similarly not create long-term obligations or paralysis in situations where the additional resources are no longer warranted. It is further observed that the legal aid system applicable to these additional resources is devised along the lines of the very principles on which the Registry justifies its rejection of the Request.

37. It is not clear to what extent the Registry took the above quoted section of the Single Policy Document into account, but the Chamber notes with concern that when asked what consequences a period in the proceedings

⁷² Single Policy Document, ICC-ASP-12/3, paras 116-118.

during which the Defence would be almost inactive, such as a stay of proceedings, would have for the additional resources,⁷³ the Registry, represented by the heads of the section in charge of legal aid, was not able to provide the Chamber with a clear answer. The Registry did mention that it would then assess the Defence's justification of the need for resources,⁷⁴ but it was the Defence that correctly set out the situation as described in the Single Policy Document.⁷⁵

38. In addition, the Defence highlighted the need to offer a 'secure' and longer-term position in order to be able to recruit qualified legal assistants.⁷⁶ The Chamber considers the Registry's response in this regard to be unconvincing. The Chamber does not consider the Registry's comparison between contracts offered to those working in the Registry or Chambers⁷⁷ to be of any relevance, because staff members of the Court are subject to substantially different working conditions and remuneration than persons working for the defence.⁷⁸

39. In light of the above, the Chamber considers that the Registry has not provided any satisfactory reasoning in which it justifies why resources for a second legal assistant can only be granted for twelve months following which it would re-assess the request. Furthermore, the Registry has failed to explain why a re-assessment of the need for a second legal assistant is necessary pending the trial proceedings, when pursuant to the applicable rules on legal aid, the need for resources is reassessed in periods of reduced activity.

⁷³ T-14, page 10, line 25 to page 11, line 4; and page 12, lines 13-19.

⁷⁴ T-14, page 11, line 5 to page 12, line 12; and page 12, line 22 to page 13, line 6.

⁷⁵ T-14, page 14, lines 11-19.

⁷⁶ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 41-42 and 44.

⁷⁷ T-14, page 15, lines 6-18.

⁷⁸ See Single Policy Document, ICC-ASP-12/3, pp 17-22.

40. Moreover, the Chamber considers that the Registrar did not properly explain why only a period of six months was initially warranted, let alone why it then considered that twelve months would be adequate. While the Registry referred to ‘new elements’ that allowed it to ‘consider the Defence’s request from a different light and give a much more favourable response’,⁷⁹ most of the ‘new elements’ referred to by the Registry had already been raised either in the Request or were public knowledge since 2012.⁸⁰ According to the Registry, the departure of members of the team who worked on the *Lubanga* case played ‘a major part’ in the revision of its position.⁸¹ Yet this had been clearly stated by the Defence prior to the Registry rendering its initial decision⁸² and was repeated prior to the Registry’s filing of its observations.⁸³ In the view of the Chamber, the revised Registrar’s Decision still did not provide any satisfactory justification for granting resources for a second legal assistant for only twelve months, instead of the requested duration of the trial proceedings.

41. The Chamber finds that a decision on the resources provided to the Defence requires a more reasoned approach, as well as – in case of a rejection of the requested resources – a clear demonstration that the decision took into

⁷⁹ T-14, page 4, line 24 to page 5, line 1.

⁸⁰ The Registry mentions that ‘since there is a second warrant of arrest now with more important charges’ (T-14, page 4, line 16), whilst the ‘Decision on the Prosecutor’s Application under Article 58’ (ICC-01/04-02/06-36-Red) was issued publicly by Pre-Trial Chamber II on 13 July 2012. In addition, the impact of the second arrest warrant was mentioned in the *Requête urgente de la Défense de M. Bosco Ntaganda aux fins d’obtention de ressources supplémentaires*, ICC-01/04-02/06-369-Conf-Exp-Anx3, para. 16-19.

⁸¹ T-14, page 4, lines 9-11.

⁸² ICC-01/04-02/06-369-Conf-Exp-Anx5, p. 3, stating that ‘following the departure of Mr. Ntaganda’s counsel of record and Mr. Ntaganda’s experienced legal assistant (Ms. Caroline Buteau who left the team some five weeks ago [...]), there is no one left on the team having detailed knowledge of the facts of the case’. The Chamber observes that whilst the Defence did not specify that the ‘counsel of record’ and Ms Buteau worked on the *Lubanga* case, there cannot have been any misunderstanding as to their prior involvement in that case, given that the same Counsel Support Section (‘CSS’) dealt with the legal aid for Mr Lubanga.

⁸³ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 15-17, stating that ‘Mr Ntaganda’s senior Legal Assistant – who had detailed knowledge of the case due inter alia to her prior involvement on the Defence team of Mr Lubanga, Case No. ICC-01/04-01/06 – resigned’ and that ‘[o]n 16 July 2014, Pre-trial Chamber II authorized Mr Ntaganda’s Counsel to withdraw from the case’. As with the previous mentioning of Mr Desalliers withdrawal, a fact that the CSS was well aware of, the Chamber considers that there can be no doubt that the Registry was aware of the fact that Mr Desalliers had previously been a member of the defence team of Mr Lubanga.

account all aspects of the request. The Chamber considers these to be compelling reasons for it to review the Registrar's Decision. In particular, by failing to provide full and complete justification for his decision and failing to fully consider each of the Defence's submissions, the Chamber considers that the Registrar's Decision was unreasonable, it evinced signs of arbitrariness, and therefore a misuse of its discretion. For the foregoing reasons, pursuant to Regulation 83(4) of the Regulations, the Chamber reverses the Registrar's Decision.

42. Being seised of the matter, the Chamber must consider whether it may decide on the merits of the request. In this respect, the Chamber considers that it is best placed to assess the size and complexity of the case before it, the impact of the trial schedule it has set, as well as the impact of the time limits imposed by the Chamber, on the preparation of the Defence.⁸⁴

43. Although the principle of equality of arms, which is listed in the Single Policy Document as the first principle underlying the legal aid system,⁸⁵ cannot be equated to a mathematical exercise, the Chamber considers it to be a relevant consideration. Guided by the principle of equality of arms, and in light of the size of the case and the right of the accused to an effective defence, the Chamber decides that the Defence is to be granted the necessary resources to recruit a second legal assistant for the trial phase, up until closing statements.⁸⁶ The conditions applicable to the employment of this legal assistant shall be equal to those of the first legal assistant and shall thus

⁸⁴ In this regard, the Chamber notes the Defence's submission that 'commencing the trial on 2 June 2015 is only realistic in so far as [...] the Defence is provided with the necessary resources to prepare and develop the case for the Defence' (Written Submissions on Behalf of Mr Ntaganda 9 October 2014 Status Conference, 14 October 2014, ICC-01/04-02/06-384, para. 12).

⁸⁵ Single Policy Document, ICC-ASP-12/3, para. 9.

⁸⁶ This is without prejudice to the Chamber's view on the composition of the Defence team for the period between closing statements and the rendering of the Article 74 judgment.

be subject to the Single Policy Document, including the effect of 'phases of reduced activity' on remuneration.⁸⁷

44. The Chamber observes that the filings underlying this decision have been filled *ex parte*, Defence and Registry only. The Chamber considers that the present decision can appropriately be classified as public. The Chamber notes that the Request's *ex parte*, Defence and Registry only, classification has been justified by the Defence because it 'concerns sensitive issues regarding the composition of the Defence team',⁸⁸ and that the Registry's Observations were only filed *ex parte* as a result of the Defence's classification of the Request.⁸⁹ The Chamber therefore instructs the Defence to inform the Chamber before 5 November 2014 whether it considers that the Request, Registry's Observations or transcript of the Status Conference contain any information that should not be made public, and if so, to provide a redacted version of the Request, and proposals for redactions to the Registry's Observations and/or transcript, by that same date.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS the Request;

REVERSES the Registrar's Decision;

ORDERS the Registry to make available to the Defence, without delay, the funds for of a second legal assistant for the duration of the trial phase, up until closing statements; and

⁸⁷ See Single Policy Document, paras 115-121. It is noted that the Single Policy Document 'is in force as *the* document of reference outlining the Court's legal aid scheme, future reviews may implement new amendments to the policy', and that 'the Court's legal aid scheme is not set in stone and is a living system, which is constantly monitored, scrutinized and moulded or perfected, to reflect the experience gained from the application of the system in practice' (Single Policy Document, ICC-ASP-12/3, para. 3).

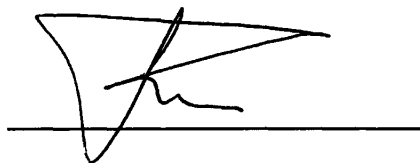
⁸⁸ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 6.

⁸⁹ Registry's Observations, ICC-01/04-02/06-376-Conf-Exp, p. 4.

INSTRUCTS the Defence to make observations on the need for redactions to filings ICC-01/04-02/06-369-Conf-Exp-Corr and ICC-01/04-02/06-376-Conf-Exp and the transcript of the hearing of 1 October 2014, ICC-01/04-02/06-T-14-CONF-EXP-ENG ET, by 5 November 2014.

Judge Ozaki appends a dissenting opinion.

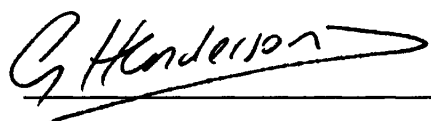
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

A handwritten signature in black ink, appearing to be 'G. Henderson', written over a horizontal line.

Judge Geoffrey Henderson

Dated 29 October 2014

At The Hague, The Netherlands

DISSENTING OPINION OF JUDGE OZAKI

1. For the reasons outlined below, I respectfully disagree with the decision of the Majority to reverse the Registrar's Decision ('Majority Decision').

Standard of Review

2. As acknowledged in the Majority Decision, the Appeals Chamber has affirmed that 'the Registrar enjoys a relatively wide margin of discretion in the area of legal assistance' and that a Chamber should only intervene with decisions of the Registry in this area 'if there are compelling reasons for doing so'.¹ I note that this is a differential standard and a Chamber should not intervene just because it might have reached a different decision to the Registrar on a particular issue.²
3. Consequently, the standard of review for most decisions of the Registrar on such matters should, as articulated by various Pre-Trial and Trial Chambers, be whether the decision is: (i) affected by a material error of law of fact; or (ii) so manifestly unreasonable as to constitute as abuse of discretion.³ However, I note that crucial decisions, which may impact the rights of the accused and the fairness of the proceedings, might warrant a more thorough review by the Chamber.⁴

¹ Majority Decision, para. 28 citing to *The Prosecutor v Mathieu Ngudjolo Chui*, Decision on Mr Ngudjolo's request for review of the Registrar's decision regarding the level of remuneration during the appeal phase and reimbursement of fees, 11 February 2014, ICC-01/04-02/12-159, para. 22.

² See e.g. *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on 'Request for Review of Registrar's Decision' by the Defence of Saif Al-Islam Gaddafi, 30 July 2013, ICC-01/11-01/11-390-Red, para. 31; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, 23 April 2012, ICC-01/04-01/07-3277, para. 9.

³ See e.g. ICC-01/11-01/11-390-Red, para. 31; ICC-01/04-01/07-3277, para. 9.

⁴ ICC-01/04-01/07-3277, para. 9. See also *The Prosecutor v Thomas Lubanga Dyilo*, Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, 30 August 2011, ICC-01/04-01/06-2800, paras 53-54.

4. In my opinion, the standard of review applied by the Majority has not been clearly articulated. Nonetheless, despite the relevant test as set out by prior Chambers neither being referred to nor distinguished in the Majority Decision, it appears that the Majority have reviewed the Registrar's Decision on the basis of a standard of review akin to that outlined above.⁵ I consider that the Majority also do not make a clear finding as to whether or not they consider the specific matter at issue in this case to constitute a 'crucial decision' warranting more thorough review by the Chamber.⁶ In light of the discrete issue for determination, as noted below, I do not consider this to be one of those circumstances. However, in my view, even were a more thorough review of the Registrar's Decision conducted, intervention by the Chamber would still not be warranted on this occasion.

Issue for Determination

5. In the present case, it is important to emphasise at the outset that what is in dispute between the Defence and the Registrar is not whether the provision of additional resources has been justified at this time. The Registry has agreed that the provision of additional funding for a second legal assistant is warranted and is consequently willing to provide funding that would enable such assistance to be secured for a period extending up to, and beyond, the currently scheduled trial commencement date.⁷

⁵ See Majority Decision, para. 41 (finding 'compelling reasons [...] to review the Registrar's Decision' and the Registrar's Decision to be 'unreasonable, [to have] evinced signs of arbitrariness, and therefore [to be] a misuse of its discretion').

⁶ See Majority Decision, para.27 (where the Majority express their agreement with the principle that 'more thorough' review may be appropriate in certain circumstances but do not indicate whether they consider such a circumstance to apply in the instant case).

⁷ It is noted that a significant number of the Defence's submissions were directed only towards the need for additional resources to facilitate preparation for trial and, in light of the Registrar's revised decision to provide funding on a one year renewable basis, are no longer relevant to the question at issue (*see e.g.* Written Submissions on Behalf of Mr Ntaganda on the Issue of Resources Available to the

6. The point of disagreement is simply whether, at this stage, it is necessary for the allocation of that funding to be granted for the duration of the case, as opposed to on a renewable one year basis. Therefore, the discrete issue to be determined is whether the distinction between a one year renewable contract and a contract for the duration of the case is such as warrants the intervention of the Chamber. In my view, and for the reasons elaborated below, it does not.

Analysis

7. As a preliminary matter, I note that, in seeking judicial review of the Registrar's Decision, the burden is on the Defence to demonstrate that the standard for review has been met and that intervention by the Chamber is necessary. Yet, the Defence made no submissions regarding the applicable standard of review or how it has been met in this case.⁸
8. Relatedly, I consider that the approach, throughout the Majority Decision, of considering the sufficiency of the Registry's responses to submissions made by the Defence, misplaces the requisite burden. The duty is not on the Registry to provide 'convincing'⁹ rebuttals to each submission, rather it is on the Defence to establish that there are 'compelling reasons' to intervene in the Registrar's exercise of discretion, on the basis of the standard of review set out above.

Defence to Prepare for Trial and the need for an *Ex Parte* Status Conference, 15 September 2014, ICC-01/04-02/06-369-Conf-Exp-Corr ('Request'), paras 33-40).

⁸ The Defence simply submits that its requests have been denied by the Registry and 'it is thus necessary for the Trial Chamber to review the Registry's decisions with a view to resolving the present *impasse*', (Request, ICC-01/04-02/06-369-Conf-Exp-Corr, paras 29-30). *See also* the heading to Section B of the Request (which reads 'The Registry's Arguments Are Not Convincing') and para. 50 where it is submitted that the Registrar's Decision to postpone assessment of future resource needs is 'unreasonable'.

⁹ *See e.g.* Majority Decision, para. 38 (where the Majority finds the Registry's response 'to be unconvincing').

9. I note that the Majority base their finding of unreasonableness, and 'misuse of [...] discretion', on a perceived failure by the Registrar to: (i) 'fully consider each of the Defence's submissions'; and (ii) 'provide full and complete justification for his decision'.¹⁰ I will consider each in turn.
10. First, I have concerns regarding the Majority's basis for finding that the Registry failed to fully consider each of the Defence's submissions. From the reasoning, it appears that the Majority only specifically makes this finding in respect of four matters: (i) the submission that there are no indications the Defence resource requirements will decrease during the trial;¹¹ (ii) the submission that the current case is 'larger and more complex' than previous cases;¹² (iii) the submission that the Defence teams in previous cases were given a second legal assistant;¹³ and (iv) the Defence's substantiation of the need for additional resources.¹⁴
11. Yet, the Majority has failed to consider the relevance of these Defence submissions to the issue in question. For example, in respect of the second and fourth matters, that the case is currently large and complex to a degree which justifies additional resources, and that the calculations presented by the Defence justify the provision of additional resources at this stage, are not in dispute. Moreover, these submissions do not demonstrate why a decision to grant a one year renewable contract, rather than a permanent one, would be unreasonable. Consequently, for the purposes of the issue to be determined, there was no reason why the Registry would have needed to address them.

¹⁰ Majority Decision, para. 41.

¹¹ See Majority Decision, para. 33.

¹² See Majority Decision, para. 33.

¹³ See Majority Decision, para. 33.

¹⁴ See Majority Decision, para. 33.

12. In respect of the third matter,¹⁵ which was raised only during the status conference on 1 October 2014 and not in the Request, I observe that the Chamber was presented with a mere assertion on the part of the Defence.¹⁶ It has not been established at what stage resources for second legal assistants during trial may have been granted in other cases, or on what terms the other legal assistants may have been engaged. We also do not know the broader context in which any such decisions may have been taken by the Registrar at the relevant time. Additionally, each case presents its own unique complexities and demands, warranting individual consideration. I consider the Majority's comparison of the number of counts and modes of liability in this case, as opposed to previous cases,¹⁷ to be overly-simplistic.¹⁸

13. In respect of the first Defence submission identified by the Majority, in my view, it is merely an expression of opinion regarding the probability of future resource requirements.¹⁹ Any response to such a submission could only consist of a similar assessment of probabilities. In the circumstances, and as considered further in the following paragraphs, I do not consider that to be a useful or appropriate exercise in this context.

14. Second, turning to the finding that the Registrar has inadequately justified his decision, the Majority Decision reasoning relies heavily on its interpretation of the Single Policy Document. The Majority asserts that the

¹⁵ See also Majority Decision, para. 34 (where the Majority expresses its agreement with this Defence position).

¹⁶ See Transcript of hearing on 1 October 2014, ICC-01/04-02-06-T-14-CONF-EXP-ENG, page 13, line 24 – page 14, line 1.

¹⁷ Majority Decision, para. 34.

¹⁸ It does not logically follow that a case which contains more charges is *necessarily* larger in an evidentiary sense. Moreover, it is clear that the number of modes of liability charged in this case arises primarily from the decision of the Pre-Trial Chamber to permit alternative charging (see Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para.100).

¹⁹ See also the Majority's statement that they consider it 'unlikely that the Defence's workload would diminish during the trial stage', Majority Decision, para. 34.

provisions of this document provide 'a safeguard' for any situation in which the need for additional resources by the Defence were to unexpectedly reduce.²⁰ I do not consider this assertion to be well founded. The applicable provisions of the Single Policy Document apply in cases where 'activity in the proceedings [...] is considerably reduced', with the non-exhaustive examples of stays or protracted delays in proceedings being provided.²¹ Indeed, the Majority themselves appear to equate the circumstances envisaged by the Single Policy Document as being a period where the Defence is 'almost inactive'.²² It is therefore not at all apparent that these provisions would apply in circumstances where the proceedings in the case continue in the normal course but the scope or complexity of the case becomes significantly reduced, as might, for example, result from the Prosecution withdrawing certain charges, or the accused entering a guilty plea on certain charges,²³ or a partially successful 'no case to answer' motion being brought (should such a motion be permitted in this case).²⁴ It is additionally noted that in the absence, at this stage of proceedings, of the Prosecution's final lists of evidence and witnesses, the evidentiary scope of the case remains undefined. I consequently find the Majority's conclusion that the allocation, at this stage, of funding for a second legal assistant for the entire duration of the case would not create 'long-term obligations' for the Court to be doubtful, and based on a narrow consideration of the possible directions in which proceedings may

²⁰ Majority Decision, paras 35-36. *See also* paras 37, 39 and 43 where this interpretation is repeatedly relied upon.

²¹ Majority Decision, para. 35 citing to Single Policy Document, paras 116-118. The other examples provided in the Single Policy Document are the period after closing statements and before the Article 74 decision and any period during which a decision on the confirmation of charges is appealed, neither of which are relevant to the current stage of proceedings in this case.

²² Majority Decision, para. 37.

²³ It is noted that at this early stage of proceedings the accused has not yet even been required to enter a plea on the charges.

²⁴ It is noted that such motions have been permitted in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847-Corr; Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), 3 June 2014, ICC-01/09-01/11-1334.

develop. In my view, the Majority's analysis also inadequately reflects the early stage of current proceedings, in which the evidentiary and legal scope of the case that will actually be brought to trial remains undetermined.

15. It is this precise unpredictability that underlies the Registry's submissions that prudence is required in creating long term financial obligations. The essence of the Registry's Decision is that future resource requirements should be determined in the future, when there is greater clarity and certainty as to continuing need. If, as the Defence and Majority predict, the proceedings in this case continue in the normal course and the scope of the case is not significantly reduced, then there should be every expectation that the one year contract would be renewed,²⁵ and such renewal would amount to little more than a formality. Indeed, I observe that if, in such circumstances, the Registrar were *not* to renew the contract, that might amount to exactly the sort of decision for which intervention by the Chamber by way of judicial review would be an appropriate remedy. However, the Defence's submission that consequently, as a matter of efficiency, a permanent contract should be provided now, rather than requiring justification in a year's time,²⁶ fails to meet the requisite standard.

16. The Majority state that they consider the Registry's response to the Defence submission that a certain job security is necessary in order to attract and retain highly qualified legal staff to be 'unconvincing'.²⁷ However, they give no independent consideration to the question of

²⁵ See Observations du Greffier relatives aux écritures déposées par la Défense de M. Bosco Ntaganda le 15 septembre 2014, 23 September 2014, ICC-01/04-02/06-376-Conf-Exp, ('Registry's Observations'), para. 11; ICC-01/04-02-06-T-14-CONF-EXP-ENG, page 8, lines 6-9; page 9, lines 15-22; page 13, lines 11-19 (where the Registry expressly say that if the need for a second legal assistant remained justified after one year the allocation of resources would be extended).

²⁶ ICC-01/04-02-06-T-14-CONF-EXP-ENG, page 14, lines 20-24; page 16, line 23 – page 17, line 2.

²⁷ Majority Decision, para. 38.

whether or not, in the circumstances, a one year renewable contract provides such adequate job security.²⁸ In light of the expectation expressed by both the Defence and the Majority that the Defence workload would continue to justify the provision of additional assistance, comfort could be taken in a high probability of contract renewal. I additionally note that renewable fixed term contracts of this nature are a standard reality in international legal, and other professional, fields.

17. I fully recognise the central importance of striving for continuity in the composition of legal teams, including the Defence team, for the duration of the case. Such continuity ensures the retention of case specific knowledge in a manner favourable to the rights of the accused, and the smooth conduct of the proceedings more generally. However, in my view, the renewability of a contract for so long as the additional resources are justified, adequately enables such continuity to occur. There is unfortunately no guarantee that the allocation now, on the part of the Registry, of additional funding for the duration of the case would ensure that the legal assistant recruited by the Defence remains with it until the conclusion of the case. There are obviously a multiplicity of other, personal and professional, factors which may influence such decision-making.

18. In the Registrar's Decision, in the Registry's Observations and in oral submissions, the reason for allocating additional resources only on a temporary, but renewable basis, has been clearly indicated. However, the

²⁸ It is noted that even before the Registrar had revised his decision upwards from 6 months to one year, the Defence was significantly advanced in the recruitment process, having managed to identify a shortlist of suitably qualified candidates for interview (see ICC-01/04-02-06-T-14-CONF-EXP-ENG, page 16, lines 15-19). Although not revealed by the Defence until after the Chamber had issued its ruling on this matter, and therefore not forming part of the consideration for either the Majority Decision, or this opinion, it is noted on an *obiter* basis that the Defence has in fact already been able to proceed to recruit one additional legal assistant and identify a second who would be in a position to join the team within a short timeframe (see Transcript of Hearing on 17 October 2014, ICC-01/04-02-06-T-15-ENG, page 20, lines 10-15).

Majority appear to suggest that the Registry would have been additionally required to specifically justify its selection of a 12 month renewable contract, as opposed to some other term.²⁹ I consider that this again misapprehends the respective burdens as between the Registry and the Defence. I do note that there is likely to be a lower limit below which the contract duration provided for may become unreasonable in the circumstances. However, that determination is not an exact science and the Majority have not specifically explained why the selection of a one year renewable contract by the Registrar, as opposed to a contract for the duration of the trial, was in fact unreasonable. In my view, the most that the Majority have established is that they might have come to a different conclusion; and this is not an adequate basis for intervention.

19. I consider that a renewable one year contract, or indeed a contract for the duration of the proceedings, or for some period falling in between the two, are all potentially reasonable timeframes falling within the Registrar's discretion. Moreover, and importantly, I consider them to be consistent with full respect for the rights of the accused and the requirements of an efficient and effective defence in this case, and at this stage of proceedings.³⁰ I cannot agree with the Majority that the Registrar's reasoning in favouring a one year timeframe, which would enable review of Defence resource requirements following the scheduled commencement of trial,³¹ evinces 'arbitrariness'.³²

²⁹ Majority Decision, paras 39-40.

³⁰ See Articles 64(2) and 67(1) of the Statute and Regulation 83(1) of the Regulations.

³¹ It is noted that although the Chamber had not yet issued a decision regarding the trial commencement date at the time that submissions were received on this matter the parties had already indicated the trial preparation timeline they considered realistic.

³² Majority Decision, para. 41.

20. I also note that although the Chamber may be well placed to consider the scope and demands of the case,³³ it is the Registrar, and not the Chamber, who is best placed to factor in potentially relevant broader considerations. These may include such financial planning considerations as the available and forecasted budgets, other financial obligations and the competing needs of other stakeholders, including other defence teams.
21. In ultimately determining to reverse the Registrar's Decision the Majority refers specifically to 'the size of the case', the impact of the trial schedule and time limits imposed by the Chamber, and the 'right of the accused to an effective defence'.³⁴ However, again, no attempt is made to explain why a one year renewable contract is unreasonable in light of those factors. For example, I observe that the only schedule and deadlines so far set by the Chamber are those leading up to the trial commencement date of 2 June 2015,³⁵ a time period for which there is no dispute that additional resources should be provided to the Defence. Therefore, I consider the Majority's reasoning to be inadequate as a basis for intervening in, what the Majority themselves acknowledge to be, the 'relatively wide margin of discretion' enjoyed by the Registrar in this area.

³³ However, see my concerns in the following paragraph regarding the degree to which the Majority has explained how the demands of the case relate to its finding that a permanent contract is necessitated.

³⁴ Majority Decision, paras 42-43.

³⁵ Order scheduling a status conference and setting a commencement date for the start of trial, 9 October 2014, ICC-01/04-02/06-382.

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

A handwritten signature in black ink, appearing to read 'K. Ozaki', is positioned above a horizontal line.

Judge Kuniko Ozaki

Dated 29 October 2014

At The Hague, the Netherlands