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**International
Criminal
Court**

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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO

Public

**Decision on the Defence applications for judicial review of the decision of the
Registrar on the allocation of resources during the trial phase**

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

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the 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

Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘Case’), having regard to Article 67 of the Rome Statute (the ‘Statute’) and Regulations 24 and 83 of the Regulations of the Court (the ‘Regulations’), issues the following Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase.

I. PROCEDURAL HISTORY

1. In February 2015, the Registry obtained the views of the defence teams for the four Accused receiving legal aid in the Case (Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido) as to their needs for the trial phase.¹
2. Thereafter, on 10 March 2015, the Registrar issued a decision on the legal aid budget for the trial phase of the Case (the ‘Impugned Decision’).²
3. On 18 March 2015, the defence for Mr Babala (the ‘Babala Defence’) requested the Chamber to review the Impugned Decision pursuant to Regulation 83(4) of the Regulations.³ On 19 March 2015, the defence for Mr Arido (the ‘Arido Defence’) made a similar request for review.⁴ On 25 March 2015, the defence for Mr Mangenda (the ‘Mangenda Defence’) did the same.⁵ Together the three applications are referred to as the ‘Applications’ and three defence teams as the ‘Defence’.

¹ Defence Request to the Trial Chamber for Review of the Registrar’s Decision of 10 March 2015 on the Allocation of Resources during Trial Phase, 25 March 2015, ICC-01/05-01/13-867-Conf, para. 2; Narcisse Arido’s Request for Review of the Scope of the Registry’s Decision on the Allocation of Resources during the Trial Phase dated 10 March 2015 Pursuant to Regulation 83 (4) of the Regulations of the Court, 19 March 2015, ICC-01/05-01/13-857-Conf, para. 12; Observations on the Request ICC-01/05-01/13-855-Conf, 8 April 2015, ICC-01/05-01/13-891-Conf, para. 4; ICC-01/05-01/13-857-Conf-AnxB, para.13; ICC-01/05-01/13-867-Conf-AnxA, para. 2.

² ICC-01/05-01/13-857-Conf-AnxA.

³ *Recours de la Défense de Monsieur Fidèle Babala Wandu en vue d’obtenir la révision de la Décision du Geffe datée du 10 mars 2015 intitulée « Case The Prosecutor v. Jean-Pierre Bemba Gombo et al. (ICC-01/05-01/13) Legal aid: decision on allocation of resources during trial phase»*, 18 March 2015, ICC-01/05-01/13-855-Conf.

⁴ ICC-01/05-01/13-857-Conf.

⁵ ICC-01/05-01/13-867-Conf.

4. On 25 March 2015, the Prosecution filed a joint response to the Applications.⁶
5. Pursuant to instructions of the Chamber,⁷ on 8 April 2015, the Registrar responded to the Babala Defence application (the 'Registrar's First Observations').⁸
6. On 13 April 2015, the defence for Mr Kilolo (the 'Kilolo Defence') responded to the Registrar's First Observations in support of the Applications.⁹
7. Pursuant to further instructions of the Chamber,¹⁰ on 17 April 2015, the Registrar filed a joint response to the applications from the Arido Defence and the Mangenda Defence (the 'Registrar's Second Observations').¹¹ Together, the Registrar's First Observations and the Registrar's Second Observations are referred to as the 'Registrar's Observations'.
8. On 23 April 2015, the Mangenda Defence applied for leave to reply to the Registrar's Second Observations (the 'Application for Leave to Reply').¹²

⁶ Consolidated Prosecution's Response to ICC-01/05-01/13-855-Conf, ICC-01/05-01/13-857-Conf and ICC-01/05-01/13-867-Conf, 25 March 2015, ICC-01/05-01/13-868-Conf, para. 2.

⁷ Email from a Legal Officer of the Chamber on 23 March 2015 at 18:56.

⁸ Observations on the Request ICC-01/05-01/13-855-Conf, 8 April 2015, ICC-01/05-01/13-891-Conf.

⁹ Observations de la Défense de monsieur Aimé Kilolo relatives aux écritures du Greffe ICC-01/05-01/13-891-Conf, 13 April 2015, ICC-01/05-01/13-905-Conf.

¹⁰ Email from a Legal Officer of the Chamber on 26 March 2015 at 11:00; Email from a Legal Officer of the Chamber on 8 April 2015 at 12:42 (granting an extension of time).

¹¹ Observations of the Registrar on requests ICC-01/05-01/13-857-Conf and ICC-01/05-01/13-867-Conf, 17 April 2015, ICC-01/05-01/13-913-Conf.

¹² Mangenda Defence Request for Leave to Reply to the "Observations of the Registrar on Requests ICC-01/05-01/13- 857-Conf and ICC-01/05-01/13-867-Conf" (ICC 01/05 01/13 913), 23 April 2015, ICC-01/05-01/13-923-Conf.

II. PRELIMINARY PROCEDURAL MATTERS

9. In the interest of judicial economy, the Chamber has considered the Applications jointly and hereby delivers a single decision thereupon. The Applications raise the same or similar substantive issues and challenge the same decision of the Registrar, albeit in relation to different Accused. Moreover, issuing a single decision upon the Applications does not prejudice the Accused, nor does it prevent the Chamber from considering the merits of each application separately, if necessary.
10. In respect of the Application for Leave to Reply, the Chamber hereby rejects that request. The Application for Leave to Reply does not identify any new issue which arises from the Registrar's Second Observations and the Chamber has sufficient information before it in the Applications submitted by the three defence teams and the Registrar's Observations to enable it in rendering a decision.
11. As a further preliminary matter, the Chamber notes that the Applications and all related submissions are classified as 'confidential'. However, the Chamber does not consider that the information in this decision warrants that classification. In the interests of publicity and transparency, it is therefore classified as 'public'.

III. RELEVANT PARTS OF THE IMPUGNED DECISION

12. In his decision, the Registrar indicated an approval of €22,000 in monthly legal aid funding (the 'Approved Amount') for each defence team, to commence from the date of the decision. The Approved Amount is to be used at counsel's discretion, to cover all costs, including fees and professional charges of all appointed team members (not exceeding the total ceiling for the occupational category in the Legal Aid Policy (the 'LAP') to which the relevant team

member belongs), as well as all travel and investigations costs.¹³ The Approved Amount varies from that set out in the LAP.

IV. SUBMISSIONS

Defence Applications

Error of law – Failure to apply the LAP

13. The Defence submit that the Registrar erred in law in failing to apply the LAP and, further, failed to provide reasoned justification for departing from the LAP.¹⁴ It is argued that the legal aid scheme of the Court is governed solely by the LAP, in accordance with Regulation 133 of the Regulations of the Registry, which states that remuneration within the legal aid scheme ‘*shall* accord with the relevant documents adopted or approved by the Assembly of State Parties’ (the ‘ASP’).¹⁵ As such, it is argued that the Registrar is not free to depart unilaterally from the LAP, which was submitted by the Court to the ASP and subject to extensive and multiple consultations.¹⁶

14. The Defence argue that contrary to the interpretation of the Registrar, the LAP does not distinguish between Article 70 and Article 5 cases, and the only departures permitted from the scheme are during phases of ‘reduced activity in proceedings,’ which the current trial phase of the Case does not constitute.¹⁷

15. It is further submitted that the Registrar erred in triggering the applicable trial budget from the date of the Impugned Decision only, as well as in providing no justification therefor. It is argued that, according to the LAP, the applicable trial budget should run from the commencement of the trial phase, which

¹³ ICC-01/05-01/13-857-Conf-AnxA, paras 6 and 7.

¹⁴ ICC-01/05-01/13-867-Conf, paras 7, 11-12; citing Trial Chamber VI, Reasons for Review of Registrar’s Decision on Defence resources, 29 October 2014, ICC-01/04-02/06-389, para. 41.

¹⁵ Emphasis added. ICC-01/05-01/13-857-Conf, paras 26-28; ICC-01/05-01/13-867-Conf, paras 8-9.

¹⁶ ICC-01/05-01/13-867-Conf, para. 9

¹⁷ ICC-01/05-01/13-867-Conf, para. 8; ICC-01/05-01/13-857-Conf, paras 30-31.

began upon the finalisation of the confirmation of charges on 23 January 2015 (when the Pre-Trial Chamber rejected the Defence requests for leave to appeal the decision on the confirmation of charges and transmitted the record of the proceedings to the Presidency).¹⁸ In the alternative, it is submitted that at the very least the budget should run from the date of the assignment of the Case to the Chamber, on 30 January 2015.¹⁹

Error of law - violating fair trial rights

16. The Defence submit that the Approved Amount provided in the Impugned Decision is manifestly insufficient for a real and effective defence²⁰ and violates the rights of the accused to adequate time and facilities for the preparation of their defence and the presentation of evidence, as provided for in Article 67(1) of the Statute.²¹ It is stated that the Registrar significantly departed from the LAP, which at the trial phase allows for lead counsel, associate counsel, a legal assistant and a case manager, as well as expenses, at a total monthly budget of €32,922, and an investigation budget of €73,006 for the entirety of the case. Instead the Registrar provided a monthly budget of only €22,000 to cover all costs, including investigations,²² which it is argued allows neither for the appointment of the above team nor the services of an investigator.²³

17. It is further submitted that the Impugned Decision violates the rights of the accused to an expeditious trial contrary to Article 64(2) of the Statute, due to: delays that may stem from the absence of associate counsel to stand in for lead counsel; the suspension of investigations; and, the potential inability to simply keep up with workload.²⁴ It is submitted that the Registrar's decision violates

¹⁸ ICC-01/05-01/13-857-Conf, paras 63-64; ICC-01/05-01/13-867-Conf, para. 27.

¹⁹ ICC-01/05-01/13-857-Conf, para. 66.

²⁰ ICC-01/05-01/13-855-Conf, paras 27-32; ICC-01/05-01/13-867-Conf, para. 25.

²¹ ICC-01/05-01/13-857-Conf, paras 39-47.

²² ICC-01/05-01/13-857-Conf, paras 33-36.

²³ ICC-01/05-01/13-867-Conf, para. 20.

²⁴ ICC-01/05-01/13-857-Conf, para. 48.

the principle of equality of arms, given that the Prosecution's investigation budget alone in an Article 70 case exceeds the entire monthly legal aid budget allocated to the defence in the Case.²⁵ It is maintained that the practical implication of eliminating funding for an associate counsel, investigations, expenses, and translations renders the Impugned Decision manifestly unreasonable.²⁶

18. It is alternatively submitted that, should the Chamber find that the LAP does not apply, the amount allotted for legal aid should, in any event, be assessed in line with the fair trial rights of the Accused.²⁷

Error of fact - Giving undue weight to the reduction of charges

19. It is contended that the Registrar's reliance, in setting the Approved Amount, on a 'net decrease [in the charges] for all defendants' and a 'reduction by more than seventy per cent of the charges against Mr Arido' as a result of the Confirmation of Charges Decision²⁸ is factually incorrect.²⁹ It is submitted that the factual basis of the charges relating to the provision of false documents (which were not confirmed) was of a much more limited scope than that relating to the corruption of witnesses (which were confirmed).³⁰ It is further argued that, given the difficulty of assessing the complexity of the case, it cannot be said that the charges relating to false documents constituted 70% of the charges against Mr Arido.³¹ The Defence argue that rather than simplifying

²⁵ ICC-01/05-01/13-857-Conf, paras 52-54; citing Proposed Programme Budget for 2014 of the International Criminal Court, 29 July 2013, ICC-ASP/12/10, para. 241, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-10-ENG.pdf; ICC-01/05-01/13-867-Conf, para. 26.

²⁶ ICC-01/05-01/13-867-Conf, para. 25.

²⁷ ICC-01/05-01/13-857-Conf, para. 38.

²⁸ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, ICC-01/05-01/13-749.

²⁹ ICC-01/05-01/13-857-Conf, para. 56.

³⁰ ICC-01/05-01/13-857-Conf, para. 57.

³¹ ICC-01/05-01/13-857-Conf, para. 60.

the case, the reduction of the charges entailed a modification of defence strategy.³²

20. It is suggested that other confirmation of charges decisions have resulted in corresponding reductions of charges without affecting the provision of legal aid,³³ and that using such an argument as a ground for cutting legal aid would undermine the LAP.³⁴

Abuse of discretion - Failure to rely on relevant factors

21. It is submitted that having abandoned the funding formula set out in the LAP, the Registrar failed to identify any substitute criteria or formula for determining the requirements of an effective and efficient defence and instead placed emphasis on irrelevant factors (a recognised ground for quashing an administrative decision),³⁵ such as the necessity of a withdrawal from the Contingency Fund, contradictory disclosure indications, as well as the comparative budgetary increase relative to the pre-trial phase.³⁶

22. The Defence argue that an Article 70 case cannot be categorically and significantly distinguished from an Article 5 case, whether in terms of the volume of filings or disclosure or in terms of the length of proceedings.³⁷ The Defence submit that the Registrar failed to consider: the size of the Prosecution

³² ICC-01/05-01/13-855-Conf, para. 16.

³³ ICC-01/05-01/13-857-Conf, para. 61.

³⁴ ICC-01/05-01/13-857-Conf, para. 61; ICC-01/05-01/13-855-Conf, para.16.

³⁵ ICC-01/05-01/13-867-Conf, para. 21; citing Presidency, Decision on the application to review the Registrar's decision denying the admission of Mr. Ernest Midagu Bahati to the list of Counsel, ICC-PresRoC72-02-5, para.16; Presidency, Decision on the application to review the decision of the Registrar denying Mr Balembo privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, ICC-01/04-01/06-731-Conf, para. 24; Presidency, Reasons for the "Decision on the 'Application for review of decision of the Registrar's division of victims and counsel dated 2nd January not to admit Prof. Dr. Sluiter to the list of counsel'", ICC-Pres-RoC72-01-8-10, para. 20; *The Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, para. 9; Trial Chamber VI, Reasons for Review of Registrar's Decision on Defence resources, ICC-01/04-02/06-389, 29 October 2014, para. 41.

³⁶ ICC-01/05-01/13-867-Conf, paras 22-23; ICC-01/05-01/13-855-Conf, para.24.

³⁷ ICC-01/05-01/13-867-Conf, para. 17. It is submitted that the confirmation stage of the case lasted 12 months in comparison to Lubanga (10 months), Katanga (11 months) and Bemba (12 months) and averaged more filings per day at the confirmation stage than the majority of the Article 5 cases, ICC-01/05-01/13-857-Conf, paras 51-52.

documentary disclosure, number of exhibits, witnesses and counts; the number of grounds for potential conviction; the novelty of the charges; the multi-accused context; and, that any workload differences may be accommodated through the LAP itself which is based on the duration of the proceedings.³⁸ The Defence question the Registrar's 'à la carte' application of the LAP, which on the one hand rejected the funding levels in the LAP but applied it for disbursement purposes.³⁹ The Defence also contest the Registrar's alleged trivialisation of the Case, which it is submitted concerns serious allegations and serious professional consequences, pointing to the necessity of ensuring that each defence team has an effective defence.⁴⁰

Relief sought

23. The Defence request the Chamber to:⁴¹

- a. Overturn the Impugned Decision;
- b. Order the Registrar to provide: the budget set out in paragraph 85 of the LAP (affording lead counsel, associate counsel, a legal assistant and a case manager);⁴² the expenses budget (of a monthly allowance of €3,000.70 per team) listed in paragraph 139 of the LAP;⁴³ and the investigation budget (of €73,006 per team to be used for the entirety of the case) provided for in paragraph 46 of the LAP, or, in the alternative, a sufficient budget to hire a full-time professional investigator and to undertake investigative trips.⁴⁴

³⁸ ICC-01/05-01/13-867-Conf, paras 2, 15 and 18.

³⁹ ICC-01/05-01/13-867-Conf, para. 20.

⁴⁰ ICC-01/05-01/13-855-Conf, para. 14.

⁴¹ ICC-01/05-01/13-857-Conf, para. 68; ICC-01/05-01/13-867-Conf, para. 31.

⁴² ICC-01/05-01/13-857-Conf, para. 68.

⁴³ ICC-01/05-01/13-857-Conf, para. 68.

⁴⁴ ICC-01/05-01/13-857-Conf, para. 68.

c. Order that the trial phase, for legal aid purposes, commenced on 23 January 2015 or, in the alternative, 30 January 2015 and

d. Make all future legal aid decisions in accordance with the LAP.⁴⁵

Prosecution Response

24. The Prosecution, expressing support for the right of the Defence to have all means reasonably necessary for an effective and efficient defence, in accordance with Regulation 83(1) of the Regulations, deferred to the Chamber's discretion regarding the relief sought.⁴⁶

Registrar's Observations

Fulfilment of duties under the Rome Statute

25. The Registrar submits that in determining legal aid costs he enjoys a wide discretion in relation to the calculation and payment of fees, and is mandated to ensure that the Court's limited resources are managed carefully.⁴⁷ He submits that his obligation to determine the costs reasonably necessary for an effective and efficient defence, enshrined in Regulation 83(1) of the Regulations is the standard by which resources are allocated to every defence team within the legal aid scheme.⁴⁸ The Registrar submits that in this regard the LAP is a 'reference document' which does not apply automatically.⁴⁹ It is stated that an Article 70 case does not have the same parameters for the allocation of legal aid funds as an Article 5 case and that the LAP only applies to the latter.⁵⁰

⁴⁵ ICC-01/05-01/13-867-Conf, para. 31.

⁴⁶ ICC-01/05-01/13-868-Conf, para. 2.

⁴⁷ ICC-01/05-01/13-891-Conf, para. 3; citing 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; ICC-01/04-02/06-389, para. 28; Trial Chamber I, Decision reviewing the Registrar'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, paras 53-54.

⁴⁸ ICC-01/05-01/13-913-Conf, para. 3.

⁴⁹ ICC-01/05-01/13-913-Conf, para. 3.

⁵⁰ ICC-01/05-01/13-891-Conf, para. 12.

Resources have been allocated based on 'actual work needs'

26. The Registrar submits that the current level of resources is sufficient, representing a 131% increase from the pre-trial phase, and is equivalent to the full-time monthly payment of one counsel, one legal assistant and one case manager, with more than €1,000 of expenses.⁵¹ Arguing that the services of full-time associate counsel are unwarranted,⁵² the Registrar maintains that counsel may use the available resources flexibly for optimal results. The Registrar attached a tabulated chart, for the purpose of demonstrating how to accommodate (within the Approved Amount) an enlarged team in different part-time scenarios.⁵³

27. The Registrar submits that whereas the LAP includes a mechanism for requesting additional resources, the Applications do not identify actual needs, but rather request resources to face every non-excludable circumstance, and raise speculative issues which are not sufficient grounds to justify the allocation of additional resources.⁵⁴ The Registrar submits that whilst he took into account all relevant material, the pre-trial activity level in the Case did not constitute an indicator of the expected trial workload since a high portion of those issues were procedural and no longer relevant.⁵⁵ Moreover, the information on disclosed material did not indicate a substantive surge in disclosure or litigation at trial requiring a higher scope of legal aid.⁵⁶

28. It is maintained that the Defence benefit from the assistance of the Office of Public Counsel for the Defence, the Internship and Visiting Professional

⁵¹ ICC-01/05-01/13-891-Conf, para. 16.

⁵² ICC-01/05-01/13-913-Conf, para. 12.

⁵³ ICC-01/05-01/13-913-Conf, para. 11; ICC-01/05-01/13-891-Conf, para. 17. Scenario 1 - legal assistant and case manager at 100% with counsel and associate counsel at 50%; Scenario 2 - counsel, legal assistant and case manager at 75% with associate counsel at 50%; Scenario 3 - legal assistant and case manager at 75%, counsel and associate counsel at 50%; and Scenario 4 - counsel at 100%, case manager at 80%, associate counsel at 65% and legal assistant at 20%.

⁵⁴ ICC-01/05-01/13-891-Conf, paras 14-15 and 21.

⁵⁵ ICC-01/05-01/13-913-Conf, para. 6.

⁵⁶ ICC-01/05-01/13-913-Conf, para. 6.

programme, and the Registry's *pro bono* membership system.⁵⁷ In relation to translation and interpretation, the Registrar argues that the Defence are assisted by the Court's Interpretation and Translation Section without any effect on their budget.⁵⁸

29. The Registrar further argues that the Mangenda Defence raises issues which came to light subsequent to the issuance of the Impugned Decision and therefore could not have been taken into account in that decision. As such, the Registrar argues that a request should have been made for additional resources in accordance with Regulation 83(3) of the Regulations, rather than an application for judicial review.⁵⁹

V. APPLICABLE LAW

30. Article 67(1)(b) of the Statute provides that, as a minimum guarantee, an accused is, *inter alia*, entitled to have adequate time and facilities for the preparation of his or her defence, and Article 67(1)(d) of the Statute provides that if an accused does not have legal assistance he or she is entitled to have such assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

31. Article 43(1) of the Statute, Rules 20 and 21 of the Rules, and Regulation 83(1) of the Regulations charge the Registrar with the management of the legal assistance scheme of the Court. Regulation 133 of the Regulations of the Registry states that the '[r]emuneration of persons acting within the scheme of

⁵⁷ ICC-01/05-01/13-891-Conf, para. 22; ICC-01/05-01/13-913-Conf, para. 16.

⁵⁸ ICC-01/05-01/13-913-Conf, para. 14.

⁵⁹ ICC-01/05-01/13-913-Conf, para. 10.

legal assistance paid by the Court shall accord with the relevant documents adopted or approved by the [ASP]'.⁶⁰

32. According to Regulation 83(1) of the Regulations, '[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence'. Pursuant to Regulation 83(4) of the Regulations, the Chamber has the authority to review decisions of the Registrar on the 'scope of legal assistance paid by the Court'. In conducting such reviews, the Chamber shall take into account that 'it is the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested [...]'.⁶¹ The Registry is the organ of the Court best placed to oversee the available financial resources and the needs involved in the cases. The Registrar, therefore, enjoys a relatively wide margin of discretion in the management of the legal aid scheme and the determination of the costs which are 'reasonably necessary' for an 'effective and efficient defence' in accordance with Regulation 83(1) of the Regulations.⁶²

33. As such, the Chamber should only interfere with the exercise of the Registrar's discretion in the area of legal assistance where there are compelling reasons for doing so, taking into consideration the rights of the defence as enshrined in the Statute.⁶³ In reviewing the Registrar's decisions, the Chamber must not

⁶⁰ The 'Registry's single policy document on the Court's legal aid system', which was submitted to the ASP at its twelfth session in 2013 codifies and constitutes the LAP, ICC-ASP/12/3, para. 2, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf

⁶¹ Presidency, Decision on the "Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves" and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, 29 June 2007, ICC-01/04-01/06-937, para. 16. See also Presidency, Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007, 2 May 2007, ICC-01/04-01/06-874, para. 17. As confirmed in Presidency, Decision on the "Defence application to the Presidency for judicial review of the Registrar's Decision on legal assistance of 20 December 2013" ICC-RoC85-01/13-7-Conf-Exp redacted to ICC-RoC85-01/13-7-Red, para. 48.

⁶² See also Presidency, Decision on the "Defence application to the Presidency for judicial review of the Registrar's Decision on legal assistance of 20 December 2013" ICC-RoC85-01/13-7-Conf-Exp, para. 48.

⁶³ 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.

consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess, *inter alia*: whether the decision of the Registrar was materially affected by an error of law or fact; whether the Registrar abused his discretion;⁶⁴ the propriety of the procedure by which the Registrar reached a particular decision; or whether the Registrar could not rationally have reached a given conclusion.⁶⁵ Furthermore, ‘when...review[ing] 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’.⁶⁶

VI. ANALYSIS

34. In the instant case, the Registrar appears to have predicated his decision on the understanding that the right to legal aid in the Statute does not apply equally to Article 70 cases and Article 5 cases.⁶⁷

35. However, the basis for such a distinction is not readily apparent from a close examination of the Statute. It is noted, in that regard, that Articles 55(2)(c) and 67(1)(d) of the Statute are the key provisions establishing the entitlement to legal aid and are cited in the LAP⁶⁸ as the main provisions governing the

⁶⁴ Trial Chamber II, 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; Pre-Trial Chamber I, 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; Trial Chamber VI, Reasons for Review of Registrar’s Decision on Defence resources, 29 October 2014, ICC-01/04-02/06-389, para. 27, referring to ICC-01/04-01/06-2800, paras 53 to 54.

⁶⁵ Presidency, Decision on the “Defence application to the Presidency for judicial review of the Registrar’s Decision on legal assistance of 20 December 2013” ICC-RoC85-01/13-7-Conf-Exp, para. 40.

⁶⁶ Trial Chamber II, 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 2014, ICC-01/04-01/07-3277, para. 9; Trial Chamber VI, Reasons for Review of Registrar’s Decision on Defence resources, 29 October 2014, ICC-01/04-02/06-389, para. 27.

⁶⁷ Registrar’s decision of 10 March 2015 on allocation of resources during trial phase, ICC-01/05-01/13-857-Conf-AnxA, para. 3; ICC-01/05-01/13-891-Conf, para. 12 ; ICC-01/05-01/13-913-Conf, para. 3.

⁶⁸ ICC-ASP/12/3, para. 13.

Court's legal aid scheme. Article 55(2)(c) contemplates legal aid '[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court ...', and Article 67(1) contemplates legal aid '[i]n the determination of any charge ...'. These provisions do not make apparent any distinction between Article 70 and Article 5 offences.

36. Whilst the Registrar retains a relatively wide margin of discretion in the management and application of the legal aid scheme, as noted above, this must be exercised in accordance with the Statute. The aforementioned provisions do not support an argument that there is inevitably a difference in the entitlement to legal aid between the accused in Article 5 and Article 70 proceedings.

37. Nor does it appear that the LAP, for its part, makes such a distinction. The Chamber is, however, not of the view that the Registrar is bound to follow the LAP in what may be an over-rigid manner, without taking into consideration the individual circumstances of the case before him. The essence of the Registrar's discretion is to follow the guidelines laid down in the LAP, but without a complete elimination of his margin of appreciation of the peculiar circumstances of the particular case. In that regard, the actual needs of the legal aid applicant and the interest of justice in the given case must be fully taken into account in the required decision of the Registrar, regardless of whether they concern Article 5 or Article 70 proceedings.

38. In exercising his legal aid allocation powers, the Registrar must ensure that the resources allotted allow for an effective and efficient defence in accordance with Regulation 83 of the Regulations. In the instant case, this includes the need to appoint full-time associate counsel, so as to secure the proceedings against interruptions that may result from permanent or temporary unavailability of lead counsel to proceed with the case, thus minimising the incidence of avoidable delays.

39. Finally, the Chamber observes that the LAP provides for a defence team of lead counsel, a legal assistant and a case manager 'throughout the proceedings', from first appearance at the pre-trial stage to closing statements at the trial stage, and that the 'additional resource' of an associate counsel, which is 'automatically provided during the trial phase', is eligible to intervene 'as soon as a definite decision has been taken relating to the confirmation of charges' in order to ensure him or her 'sufficient time to become acquainted with the case before the commencement of the trial'.⁶⁹ The Registrar did not provide any reasons for his decision to make allocation for the trial budget only from the date of the Impugned Decision.

40. The Chamber also notes the argument of the Registrar that the Mangenda Defence brought new elements before it in their application for judicial review which he did not previously have the opportunity to consider.⁷⁰

41. For the foregoing reasons, the matter is remitted to the Registrar to take a new decision. In reconsidering his decision, the Registrar should take into account both the considerations indicated above, as well as the following factors:

- a. The necessity of ensuring English-French bilingual competence within the teams in the person of either the lead counsel or associate counsel; in order to minimise, as much as possible, avoidable difficulties arising from the language demands of the Case.
- b. The necessity of allocating adequate investigation budgets for each defence team, albeit in a manner that retains in the Registrar, budgetary controls over the investigation expenses. This may be achieved by way of maintaining a regime of closely monitored investigation work order approvals, in order to avoid unnecessary investigation costs.

⁶⁹ ICC-ASP/12/3, para. 41.

⁷⁰ ICC-01/05-01/13-913-Conf, paras 8-10.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the Application for Leave to Reply;

REVERSES and **REMITTS** the Registrar's Decision; and

ORDERS the Registrar to take a new decision on the allocation of legal aid funds, without delay in accordance with the factors described above.

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

A handwritten signature in black ink, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji, Presiding

A handwritten signature in black ink, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.
Judge Olga Herrera CarbuccionA handwritten signature in black ink, appearing to be 'Bertram Schmitt', written over a horizontal line.
Judge Bertram Schmitt

Dated 21 May 2015

At The Hague, The Netherlands