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Internationale**



**International
Criminal
Court**

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Date: **04 December 2022**

TRIAL CHAMBER V

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with confidential Annex A and B

**Request for review of the Registrar's 24 November 2022 Decision titled
"Registrar's reply to the request for 'Salary adjustment'" pursuant to
regulation 83(4) of the Regulations of the Court and regulation 135(2) of the
Regulations of the Registry**

Source: Defence for Mr. Alfred Rombhot Yekatom and Mr. Patrice-Édouard
Ngaissona

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

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INTRODUCTION

1. The Defence teams for Mr. Yekatom and Mr. Ngaïssona (“Defence”) hereby jointly seek review of the Registrar’s 24 November 2022 decision on salary adjustment (“Decision”) pursuant to regulation 83(4) of the Regulations of the Court (“RoC”) and 135(2) of the Regulations of the Registry (“RoR”).
2. The Defence respectfully requests the Chamber to review the Registrar’s application of the Registry’s single policy document on the Court’s legal aid system (“LAP”) and order that Defence remuneration be adjusted as an interim measure until pending adoption of a new legal aid policy.
3. The request is classified as “urgent” given the impact of the Defence’s unequal treatment, lack of financial resources and basic labour protections on trial proceedings, and the inaction of the Registry despite active efforts by the Defence to resolve this urgent issue.

PROCEDURAL HISTORY

4. On 5 January 2017, Mr. Richard J. Rogers, an expert appointed by the Registry of the International Criminal Court to assess the ICC’s Legal Aid System published its findings (“Rogers Report”).¹
5. On 3 December 2018, a Consultation Meeting on the Legal Aid Policy was held in the Court’s premises by the Registrar. Although four principles were said to govern the Registry’s approach to legal aid - *i.e.* equality of arms, transparency, flexibility and economy – the Registrar indicated that Defence team members fees would not be augmented as the Registry wanted to conduct a reform of the Legal Aid without modifying its budget.²

¹ Assessment of the ICC’s Legal Aid System, Richard J. Rogers, 5 January 2017, available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>.

² Minutes of the Consultation Meeting on Legal Aid Policy, 3 December 2018, page 4, lns 1-5, see p. 1: “The basic approach we have taken in approaching this task is to find a way to see if within the envelope of existing resources we have for legal aid whether it is nevertheless still possible for us to reform the system.” (available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/181203-transcript-consultation-meeting-LegalAid_ENG.pdf).

6. On 30 September 2020, the Final Report of the “Independent Expert Review of the International Criminal Court and the Rome Statute” (‘Expert Review’) was published.³

7. On 7 July 2022, a joint letter was sent by several Defence Counsel to the Registry, in the context of the reform of the Court’s legal aid system. In that letter, six Lead Counsel on active cases at the Court strongly endorsed and advocated for Support Staff to be placed on staff contracts and to be given equivalent employment protections as their Prosecution counterparts.⁴

8. On 31 August 2022, the Registry sent to all Defence Team Members a Draft Legal Aid Policy in the context of its consultation process ahead of the Assembly of State Parties,⁵ setting the earliest implementation date of the Policy for team members already working on active cases to January 2025.⁶

9. On 2 September 2022, a letter signed by 33 support members of Defence teams was sent to the Office of the Public Counsel for the Defence (“OPCD”) for transmission to the Registrar, the Presidency, the International Criminal Court Bar Association, and the Legal Aid Focal Point setting out the hardship of work conditions at the Defence and the strong need to have their employment status changed to Staff so as to have an enhancement of their overall work conditions.

10. On 30 September 2022, the Defence Team of Mr. Ngaissona sent a letter to the Legal Aid Reform of the Registry and communicated its concern on the Draft Legal Aid Policy that the option of making Support Staff formal staff of the Court, which would afford them the same basic protections as their Prosecution counterparts, was not maintained; that the draft LAP failed to address the disparity in pay associated with the taxation issue; that the resources envisaged in the draft LAP for Defence teams, based on the new “complexity” scheme, are grossly insufficient; that there is no additional budget for paid internships within Defence teams; and that the draft LAP failed to introduce a much needed “minimum living wage” for Support Staff. Also of concern was that, the entry into force of any potential reform would

³ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report - 30 September 2020, 09 November 2020, ICC-ASP/19/16, (available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-16-ENG-IER-Report-9nov20-1800.pdf).

⁴ Joint letter from Lead Counsel for Msrs. Al Hassan, Yekatom, Ngaïssona, Ntaganda, Ongwen and Abd-Al-Rahman, 7 July 2022.

⁵ Email from the Registry (Legal Aid Reform) to all ICCEPN addresses, on 31 August 2022, at 16:01.

⁶ Submissions to the Committee on Budget and Finance on the Full Reform of the Registry’s Single Policy Document on the Court’s Legal Aid System (ICC-ASP/12/3).

perhaps be early 2025, at the very earliest, which fails to address the urgent need for an immediate remuneration adjustment, the resolution of the taxation issue, and work security for Defence Support Staff members.⁷

11. On 7 October 2022, the Al Hassan, Yekatom and Abdel-Rahman Defence teams sent a joint letter to the Legal Aid Reform of the Registry commenting on the Draft Legal Aid Policy, requesting immediate closing of the remuneration gap and legal protection gap between the Defence and the Prosecution.⁸

12. On or around 10 November 2022, in the absence of any response of the Registry following its consultation process, Defence Team Members of the Ngaïssona and Yekatom Teams including counsels and support staff sent individual letters to the Registry's Counsel Support Section ('CSS') requesting to be remunerated in accordance with the principles agreed in the LAP (the "Applicants").⁹ Team members requested, *inter alia*, the immediate adjustment on their net monthly salary;¹⁰ the immediate abolishment of the limit on their professional charges in relation to any tax paid on their salary; and the future adjustment of their salaries in accordance with the adjustment of their Prosecution counterparts' salaries.

⁷ Email from the Ngaïssona Defence to the Registry (Legal Aid Reform Policy) on 30 September 2022 at 16:07.

⁸ Joint Letter from Al Hassan, Yekatom and Abdel-Rahman Defence Teams to the Registry (Legal Aid Reform) sent on 7 October 2022 at 14:16.

⁹ See for example email sent from Mr Pages-Granier Florent to Mr Pieter Vanaverbeke & CSS on 10 November 2022, at 17:00; Email sent from Yousra Lamqaddam to Pieter Vanaverbeke & CSS on 10 November 2022 at 17:21; Email sent from Lena Casiez to Pieter Vanaverbeke & CSS on 10 November 2022 at 17:12; Email sent from Sabine Bayssat to Pieter Vanaverbeke & CSS on 10 November 2022 at 17:01; Email sent from Gyo Suzuki to Pieter Vanaverbeke & CSS on 10 November 2022 at 17:09; Email sent from Despoina Eleftheriou to CSS on 10 November 2022 at 17:23; Email from Barbara Szmatala to CSS on 10 November 2022, at 18:12; Email from Laurence Hortas-Laberge sent to Pieter Vanaverbeke & CSS on 10 November 2022, at 16:36; Email from Anta Guissé to Pieter Vanaverbeke & CSS on 22 November 2022 at 21:04; Email from Chiara Giudici to Pieter Vanaverbeke & CSS sent on 10 November 2022 at 5:48; Email from Marie-Hélène Proulx to CSS on 23 November 2022, at 10:27; Email from Jean-Michel Kola to Pieter Vanaverbeke sent on 11 November 2022; Email from Micheal Rowse to Pieter Vanaverbeke sent on 10 November 2022; Email from Mylène Dimitri to Pieter Vanaverbeke & CSS sent on 10 November 2022.

¹⁰ See Annex A, in accordance with the Impugned Decision, a case manager in a Defence Team can touch a taxable maximum salary of 3,974 euros per month (plus 15% professional charges), while a P1 step V touches an tax-exempted net salary of 5,331.06 euros per month (plus advantages and benefits) - therefore with a before tax discrepancy of 34%; a legal assistant in a Defence Team can touch a maximum gross salary of 4,889 euros per month (plus 15% professional charges), while a P2 Step V touches a tax-exempted net salary of 6,759.68 - therefore a before tax discrepancy of 38%; an associate counsel in a Defence Team can touch a maximum taxable 6,956 euros in fees per month (plus 30% professional charges), while a P4 step V touches a tax-exempted net salary of 10,155.53 euros per month (plus advantages and benefits) - resulting in a before tax discrepancy of 46%; a Lead-Counsel in a Defence team touches a maximum taxable fees of 8,221 euros per month (plus 30% professional charges), while a P5 step V touches a tax-exempt net salary of 11,925 (plus advantages and benefits) – resulting in a discrepancy of 45%. Kindly note that the 'net' salary refers to the salary of Court staff after deduction of the pension; a linguistic assistant at the Defence is paid 22 hours per hours, while a G-5 Step V is paid 34,75 euros per hour resulting in a discrepancy of 57%.

13. On 22 November 2022, following the absence of a response from CSS, Support Staff individually sent a second letter, notifying it of their intention “to publicize this situation within the ICC, to the general public, and to diplomatic representations which will soon convene for the ASP”. The letter further mentioned that “awareness-raising efforts regarding the situation of Defence support staff will take place both outside and inside the courtrooms”.¹¹

14. On 24 November 2022, the Registry responded in a single letter addressed to all the Defence Team Members and refused to adjust any fees or salary paid, dismissing several urgent concerns raised. The Registry argued, *inter alia*, that “the ‘mirroring principle’ between members of the defence and victims’ teams and those of staff members of the Court (...) has been put aside by the States Parties since their decision to reduce the remunerations of team members in 2012”.¹²

15. On 30 November 2022, the Registry held a meeting “to address the concerns raised by defence and victims’ team members regarding their working conditions and to have an exchange between the Registry and said team members on this matter”. The Registry clearly stated that although Court staff had received a salary increase of 8% to conform with the United Nations Common System requirements in August 2022, and that another 5% salary increase for Court staff was expected in March 2023, no concrete proposal to address the cost of inflation was envisaged for the Defence team members.¹³ In other words, the Registry made it clear that it would take no other action with regard to Defence team members’ work conditions other than presenting the Draft Legal Aid Policy during the Assembly of State Parties, not for adoption but merely for consultation. It clearly indicated that no interim measures would be presented to the States Parties to address this urgent matter at the upcoming ASP in 2022; nor did the Registry provide any alternative meaningful solution in this regard.

APPLICABLE LAW

16. Article 43(1) of the Rome Statute:

¹¹ The Defence can provide this letter to the Chamber upon request.

¹² Annex B.

¹³ Meeting organised by the Registry on 30 November 2022, held at the ICC HQ, first draft of the minutes sent on 2 December 2022 to all Defence Team Members, available upon request.

The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

17. Article 67(1) of the Rome Statute provides:

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

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

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; [...]

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

18. Rule 14(1) of the Rules of Procedure and Evidence:

In discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry. In preparing or amending these regulations, the Registrar shall consult with the Prosecutor on any matters which may affect the operation of the Office of the Prosecutor. The regulations shall be approved by the Presidency.

19. Rule 20(1) of the Rules of Procedure and Evidence:

In accordance with article 43, paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, inter alia: [...]

(b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional

investigators necessary for the efficient and effective conduct of the defence;
[...]

(e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;

20. Regulation 83(1) of the Regulations of the Court:

Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances. Upon request, associate counsel may also be covered by legal assistance paid by the Court after the first appearance pursuant to rule 121 of a person subject to a warrant of arrest or a summons to appear under article 58.

21. Regulation 133 of the Regulations of the Registry:

Remuneration of persons acting within the scheme of legal assistance paid by the Court shall accord with the relevant documents adopted or approved by the Assembly of States Parties.

22. Regulation 135 of the Regulations of the Registry:

1. The Registrar shall take a decision on any dispute concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly.

2. Within 15 calendar days of notification, counsel may request the Chamber to review any decision taken under sub-regulation 1.

SUBMISSIONS

23. At the outset, the Defence recalls the standards through which the Registrar's decision can be reviewed and which is acknowledged with the Legal Aid Policy:

It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or

reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.”¹⁴

24. The Defence respectfully submits that the Impugned Decision is materially affected by fundamental errors of law and procedure, took into account irrelevant factors, and is unreasonable, in that ‘no sensible person who has properly applied his or her mind to the issue could have reached’ the conclusion. The Chamber’s intervention is merited because: the Registrar’s resort to the LAP is untenable, places him in violation of his legal obligations, and undermines the inviolable rights of Mr. Yekatom and Mr. Ngaïssona to equality of arms and a fair trial through an efficient and effective defence (A.); the use of the Policy in the Decision is based on legal mischaracterisations and irrelevant considerations (B.); and finally that the Registrar erred in law in denying his power to give right to the requests (C.).

25. The Chamber is the competent body to settle the present matter. Regulations 83(4) RoC and 135(2) RoR firmly establish the Chamber’s authority over the present request. Regulation 135(2) RoR places responsibility upon the Chamber to “to review any decision taken” “on any dispute concerning the calculation and payment of fees or the reimbursement of expenses”¹⁵. These provisions concretise the Chamber’s obligations to ensure the full respect for the rights of the accused and that the Court provides the accused with the means for an efficient and effective defence. Overarchingly, the fairness of the trial further compels it to seize the issues raised here. These obligations are indeed of such primordial importance that past Chambers have recognized their duty to intervene, even in cases not formally under their competence.¹⁶

A. The Registrar’s resort to and use of the Policy is unreasonable

26. The legal foundations of the Registrar’s decision are erroneous, as neither Regulation 133 nor the LAP have the legal primacy to relieve the Registrar of its duties and obligations set in the Rome Statute, the Rules of Procedure and Evidence (“RPE”) and the RoC. The Decision proceeds upon this basis and this is a foundational error in law. Therefore, the Decision is also unreasonable due to broader considerations which affect the accused’s right to equality of arms,

¹⁴ Decision of the Presidency of 20 December 2005, ICC-PresRoC72-02-5, para. 16; see also, ICC Presidency, Decision on the request to review the decision of the Registrar denying the inclusion of Ms Ana Cristina Rodriguez Pineda in the list of counsel, [ICC-RoC72-01/18-6](#), 20 April 2018, para. 17.

¹⁵ Regulation 135(1) RoR.

¹⁶ *Prosecutor v. Bemba*, TC VII, Decision on Bemba Defence Request for Provisional Legal Assistance, ICC-01/05-01/13-1977, 30 August 2016, para. 7.

which in turn jeopardize the fairness of the trial, the cardinal principle of the entire Court and of any ideal of Justice.

i) The Registrar is entrusted with duties and obligations to ensure equality of arms

27. Article 43(1) of the Statute confers the responsibility for all non-judicial aspects of the administration and servicing of the Court to the Registry.¹⁷ Extending this obligation, Rule 20(1) RPE requires the Registrar to “organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute.” Finally, Regulation 83(1) RoC, requires the Registrar to ensure that legal assistance covers “all costs reasonably necessary” for an effective and efficient defence. In order to discharge its responsibilities, the Statute tasks the Registry, through the RPE, to put in place regulations to govern its own internal workings.¹⁸

28. The combined effect of these responsibilities and obligations placed upon the Registry requires that in its internal organisation and application of the Court’s legal framework it must ensure equality of arms during proceedings.

29. These obligations fall upon the Registry.¹⁹ The Assembly of State Parties (‘ASP’) can, at most, provide counsel when required to do so on the issue of the management of legal assistance²⁰ and provide general managerial oversight,²¹ in addition to the adoption of the Court’s budget²² as submitted to it by the Registrar.²³ Moreover, the ASP has an obligation to perform its “other” functions “consistent with [the Rome Statute] [and] the Rules of Procedure and Evidence.”²⁴ Rules 20(3) and 21(1) RPE gives the Registry alone the mandate to establish and manage the legal assistance programme.²⁵

¹⁷ Article 34 of the Rome Statute establishes the Registry as one of the four core organs of the Court,

¹⁸ Rule 14(1) RPE.

¹⁹ Article 43(2) of the Rome Statute specifies that the Registry exercises its functions under the authority of the President of the Court.

²⁰ Rule 20(3) RPE.

²¹ Article 112(b) of the Rome Statute.

²² Article 112(d) of the Rome Statute.

²³ Regulation 3.1 of the Financial Regulations and Rules.

²⁴ Article 112(2)(g) of the Rome Statute “The Assembly shall: [...] (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; [...] (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.”

²⁵ *Prosecutor v. Lubanga*, 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", ICC-01/04 01/06-937, 29 June 2007, para. 16.

ii) *The Policy does not have the legal primacy to justify breaches of the Registrar's duties*

30. The cornerstone of the Registrar's decision is:

The Registry remains bound by the provisions of the current Legal Aid Policy, which – as indicated above – do not foresee an automatic increase of the remuneration of defence and victims' team members. Indeed, the Legal Aid Policy does not foresee a possibility to deviate from the current legal framework, including with regard to remuneration schemes, without prior approval of such an adjusted remuneration scheme and the providing of the required resources by the Assembly of States Parties in accordance with regulation 133 of the Regulations of the Registry. Therefore, I am not in a position to accommodate your Request. Doing so would equate to unlawfully amending the fee levels or the limit of professional charges envisaged under the LAP that were approved and confirmed by the Assembly of States Parties. [we underline]

31. This, the Defence submits, is a fundamental legal error, which permeates and materially affects the Decision.

32. The Registry has the obligation to ensure fair trials,²⁶ and is mandated to do so by establishing and managing²⁷ a legal assistance programme covering all costs reasonably necessary for an effective defence²⁸ so as to uphold the principle of equality of arms, essential for fair trials for those individuals found to be indigent and unable to pay for their defence.

33. Those obligations supersede Regulation 133. Indeed, the Regulations of the Registry, established by the Registrar himself pursuant to Rule 14(1) RPE, state in their first article that all three of the Statute, the RPE and the RoC supersede its provisions. This is in accordance with Article 21(1)(a), which sets out the Rome Statute and the RPE as primary sources of law in the hierarchy of sources of the Court.

34. Furthermore, the Registrar has argued in Court:

The Registrar's obligation to determine the costs that are reasonably necessary for an effective and efficient defence, enshrined in regulation 83(1) of the Regulations of the Court, is the standard by which resources are allocated to every defence team operating under the legal assistance scheme

²⁶ Article 43(1) and 67 of the Rome Statute; Rule 20(1) RPE.

²⁷ Rule 20(3) and 21(1) RPE; see also *Prosecutor v. Lubanga*, 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", ICC-01/04 01/06-937, 29 June 2007, para. 16.

²⁸ Regulation 83(1) RoC.

of the Court. The LAP is, in this regard, a “reference document” whose application is not automatic.²⁹

35. Therefore, in keeping with Article 21(1)(a) of the Statute, the obligation of the Registrar to guarantee fair trials, to uphold the rights of the defence, and to allow equality of arms through his management of the legal aid system take overarching precedence over constraints set in the RoR and *a fortiori* the Legal Aid Policy.

36. Furthermore, the framework of the Court is such that it is solely the Registrar’s duty to establish and manage the legal assistance regime of the Court. Indeed, it is not a responsibility the Registrar is entitled to delegate to the ASP.³⁰ Any document produced by ASP bodies on this issue must be understood as principally consultatory within the meaning of rules 20(3) and 21(1) RPE. The Registrar’s application of policies such as the Legal Aid Policy is within his volition and discretion through his adoption and maintaining of Regulation 133 RoR. This, in itself, is perfectly legitimate, as long as the Registry’s keeping to the LAP does not put it in breach of its overarching obligation to guarantee fair trials, which it does in the present case.

37. As set out by the Trial Chamber in *Bemba et al.*:

The Chamber is, however, not of the view that the Registrar is bound to follow the [Policy] 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 [Policy], 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[.]³¹

38. The Registrar thus also errs in law in describing himself bound by the decisions of the ASP on these matters, as there is no legal ground for such a claim, nor is any cited. To the extent that the ASP could theoretically grant itself the power to determine all legal aid policy, it has taken a restrained approach having only issued one resolution squarely on the matter since 2012.

39. As such, provisions of the LAP should not be interpreted in an overly ridged manner, since they are not ‘specifically provided’ per Article 113 of the Statute. It is not legally coherent

²⁹ *Prosecutor v. Bemba et al.*, 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, 8 September 2016, para.3.

³⁰ See for instance H.G. Schermers & N.M. Blokker, *International Institutional Law; Sixth Revised Edition*, (2018) Brill Nijhoff, para. 225, 227C.

³¹ *Prosecutor v. Bemba et al.*, TC VII, Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015, para. 37.

to claim that Regulation 133 RoR is the mechanism through which the ASP has authority over legal assistance. That very rule is adopted pursuant to the power of the Registrar to adopt its own Regulations. This power is meant to enable it to fulfil its obligations under the Rome Statute and the RPE and cannot limit its ability to do so.

40. Where there is a conflict between norms with different priorities, the Chamber must apply those with higher priority and those with less must bend or be set aside. The hierarchy of norms set by article 21 of the Rome Statute is unambiguous. Irrespective of prior decisions on the application for judicial review, the Registry's reference to the LAP cannot simply override the obligations to ensure an effective and efficient defence.

iii) The Registrar's Decision places him in further breach of his obligations

41. The Policy, as adopted in 2012, has been thus far applied in a static way, effectively freezing the salaries of defence staff members since 2013. Several consultations on the matter were held since 2016.³²

42. The calculations of fees as requested by the Applicants are perfectly aligned with the recommendations of the Rogers Report which was issued as far back as 2017.³³ Further, in 2018 the Registrar told Defence staff members they were hopeful of adopting a new legal aid policy in January 2020 although it was not "capable" of addressing the issues of the fees.³⁴

43. In 2020, legal aid was once again flagged as a primordial issue to the Court's functioning in Expert Review, flagging it as a matter that needed to be "urgently addressed before it can truly be said that the Defence is accorded the respect and fair treatment that its important role in the Court merits."³⁵ It recommended that the working group on the reform "should not begin its work within confined limits (e.g. budgetary limitations)".³⁶ Highlighting the cornerstone role of legal aid to the functioning of the ICC, the Expert Review found:

Legal aid for the Defence accounted for only 2.2% of the total budget request of the Court for 2020, compared to 32% of resources allocated to the OTP. Even when the size of the respective units may be different, there should be some sort of balance in the remuneration of Defence counsel and staff of

³² See for example, IBA Comments on ICC Draft Legal Aid Policy, December 2018; IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System', 9 June 2017.

³³ Rogers Report, p. 60.

³⁴ Minutes of the Consultation Meeting on Legal Aid Policy, 3 December 2018, page 5.

³⁵ Expert Review, para. 821.

³⁶ Expert Review, para. R328.

Defence teams, as well as in the access to resources with a view to conducting investigations that are essential to preparing and conducting an effective defence. The Experts believe Defence teams ought to be provided with the resources required to ensure a fair trial.³⁷

44. These pressing issues identified in 2020 have further been substantially aggravated during the past year due to the prevailing economic conditions. According to Statistics Netherlands, the Consumer Price Index (“CPI”) has risen by almost 34% between 2012 and October 2022. Most importantly, the derived CPI calculated for October 2022 marked an almost 17% year-on-year increase.³⁸ The impact of high inflation of consumer and housing prices during the past year was such that Staff members of the Court whose salaries are aligned with the International Civil Service Commission received a salary increase of 8% in August 2022 and will likely receive another salary increase of 5% in March or April 2023.³⁹ This is in addition to the yearly increase Staff of the Court have benefitted from since 2013.

45. Meanwhile, the pay freeze for professionals working for Defence teams persists as not only the Registrar rejected the Applicants’ request in its Impugned Decision but it also announced during the Consultation meeting that it would do nothing in the immediate term. It is however to be noted that the current reform in consultation acknowledges the need to include an adjustment of the remuneration of Defence team members, while the implementation is at the earliest in 2025, it refers to it as the “adjusted remuneration scale (2023)”.

46. Needless to say, the resulting financial situation of defence staff members and counsel is untenable. This reality negatively affects the capacity of the Defence to perform its function, and places it in a stark disadvantage to the OTP, thus adversely impacting the equality of arms available to the Defence, as well as its effectiveness and efficiency. Both of these rights are essential components of the right to the fairness and equality of the proceedings and their further deterioration brings the Court ever closer to an irremediable violation of the accused’s fair trial rights; the urgency of the matter should be considered accordingly.

47. Rapidly worsening living and working conditions demoralize Defence Support Staff and reduce their productivity. The high rate of inflation in the past year pushes towards the departure of more Defence Support Staff in order to obtain acceptable working conditions,

³⁷ Expert Review, para. 831.

³⁸ Statline, available at <https://opendata.cbs.nl/statline/#/CBS/en/dataset/83131eng/table?dl=73F92>.

³⁹ 30 November 2022 Meeting.

which is a major concern for Defence teams, who have little to no means to prevent this phenomenon from aggravating.

48. While turnover carries some costs for every organisation, it is harmful to the Defence above most. Indeed, Defence teams are small groups working for years on a single case, seeing it through trial. Contrary to the OTP whose staff is numerous and organised into specialised tasks and divisions, Defence teams have to become proficient at every part of the process, from investigation to procedure, from outreach to drafting, from protective measures for witnesses to examinations, from cooperation to evidence analysis, and have to gain an in-depth knowledge of the case to become efficient. Individual team members also develop over time a trust relationship with their respective clients, with whom they are in frequent contact. Not only does a single departure represent a much larger proportion of the team, but it also implies an even greater increase in time and effort allotted by remaining members to take on the unaccounted work, find a replacement and train them. As recognised by the Registry, Defence teams have to take into account the fact ICC cases are much more complex and larger than most national criminal proceedings, and thus require a high degree of competence and special expertise.

49. As the Appeals Chamber of the ICTR held in *Kayishema*, the principle of equality of arms does not entail material equality in possessing the same overall financial or personal resources, but “obligates a judicial body to ensure that no party is at a disadvantage when presenting its case.”⁴⁰ Furthermore, it is the foremost principle set by the Policy for the application of the legal aid system by the Registrar, as stated in paragraph 9, which states that “The payment system must contribute to maintaining a balance between the resources and means of the accused and those of the prosecution”. While equality of arms does not require the Prosecution and Defence staff to benefit from the exact same working conditions, the current situation faced by the Defence falls well outside of that margin, and actively and strongly disadvantages the Defence in their work. As the Court stated in *Lubanga* on the issue of adequate facilities to the Defence, equality of arms will still require comparison to the OTP so to rectify significant disparities.⁴¹ This was acknowledged by Director DJSS who stated that from all the international tribunals the ICC had the lowest remuneration scale for Defence team members.⁴²

⁴⁰ *Prosecutor v. Kayishema & Ruzindana*, ICTR AC, Judgment, ICTR-95-1-A, 1 June 2001, para. 69, citing *Prosecutor v. Tadic*, ICTY AC, Judgment, IT-94-1-A, 15 July 1999, para. 48.

⁴¹ *Prosecutor v. Lubanga*, TC I, Decision on defence's request to obtain simultaneous French transcripts, ICC-01/04-01/06-1091, 14 December 2007, para. 19.

⁴² 30 November 2022 Meeting.

iv) The Decision's failure to uphold fundamental rights makes it unreasonable

50. An accused's inviolable rights to a full defence and a fair trial must be the overarching consideration when balanced against the Registrar's duties towards financial economies, as fair trial rights are the indispensable element of international justice.⁴³ An accused's fundamental rights to be afforded with time and facilities to conduct his defence and to examine witnesses in the same conditions as the Prosecution are essential components of an effective defence. Considering the profound harm that the current situation brought about by the Registrar's recourse to an unduly strict interpretation of the Policy causes to Mr. Yekatom and Mr. Ngaïssona's rights to an effective defence, the Defence submits that this interpretation cannot be considered reasonable.

51. The Decision shows no attempt on the part of the Registrar at using any other recourse in the Policy or in the Registrar's broad discretionary powers to uphold his obligations towards the accused's rights.⁴⁴ The Court has recognized in other situations discussing the right to a fair trial that a "fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties".⁴⁵ The Defence thus submits that even if the errors explained in the following sections were absent from the Decision, and the LAP had the authority the Registrar asserts it has, the Impugned Decision would still have to be considered an abuse of discretion solely by its outcome. Through its refusal to meaningfully look for alternatives, the Registry in the Impugned Decision places the literal wording of the Policy over its fundamental purpose, *i.e.* article 67 of the Rome Statute, and internationally recognized human rights.

52. Therefore, the Defence strongly believes that any decision that arrives at such a result – despite the presence of alternative means of alleviating the situation that would ensure that these rights remain respected – must be understood to be an abuse of discretion; and as such should be reversed by the Chamber.

⁴³ *Prosecutor v. Lubanga*, TC I, Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011, para. 53-54.

⁴⁴ An example of which will be explained in section C.

⁴⁵ *Prosecutor v. Lubanga*, TC I, Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011, para. 54.

B. The ‘mirroring principle’ has always been fundamental to the Court’s legal assistance system

53. The Defence further submits that the Registrar erred in fact, partly by considering irrelevant factors in stating that the ‘mirroring principle’ between members of the defence teams and staff of the Court had been set aside and was thus no longer pertinent in his application of the LAP.

54. The ‘mirroring principle’, as originally set in the 2007 Legal Aid Policy,⁴⁶ was meant to allow a large degree of financial equivalence between the defence staff and that of the OTP so as to uphold the principle of equality of arms. In 2012, during the process in which the Legal Aid Policy was reviewed and ultimately replaced, the Bureau on legal aid adopted the decision on legal aid, in which it decided that the system, which until then was made to match gross salary to gross salary, should be revised in order to match net, post-charges salary instead.⁴⁷ This would allow for a more meaningful equivalency, as “the relevant criteria in contributing to equality of arms between counsel for the defence or victims and counsel in the Office of the Prosecutor is not the cost to the Court of their monthly remuneration – in other words, the gross salary - but the final amounts received each month by the persons concerned, namely, the net salary”.⁴⁸ However, and importantly, it was expressly confirmed that the reform was not meant to change the philosophy and principles of the former legal aid policy.⁴⁹

55. Therefore, the Registrar erred in stating that paragraphs 45 to 49 of the decision of the Bureau on legal aid amounted to an abandonment of the ‘mirroring principle’. Rather, the Bureau on legal aid modified it, to produce a more tangible equivalency of means – indeed, arguably strengthening it.

56. Moreover, the absence of a formal review provision emphasises that the matched OTP-Defence net salaries were meant to adapt to inflation together. By means of comparison, the remuneration of ICC Judges was originally set at an annual net rate of 180 000€ and was to be reviewed by the ASP “as soon as practicable”.⁵⁰ In comparison, the Policy bears no mention of any process through which remuneration will be updated or reviewed, which would further

⁴⁶ See ICC-ASP/11/2/Add.1, Appendix II, para. 45.

⁴⁷ ICC-ASP/11/2/Add.1, Appendix II, para. 45-49.

⁴⁸ ICC-ASP/11/2/Add.1, Appendix II, para. 46.

⁴⁹ ICC-ASP/11/2/Add.1, Appendix II, para. 11.

⁵⁰ ICC-ASP/3/Res.3, Annex, sections III and XIII.

indicate that it was originally intended to match inflation-related increases of the cost of living, while remaining otherwise stable.

57. The arguments raised by the Registrar to support his claim that the ‘mirroring principle’ was no longer in effect are equally unfounded. While the Registrar claims that placing remuneration at step V from the outset was meant as a replacement, this ignores that this was already the case from the very first Legal Aid Policy in 2007.⁵¹ Further, while the Registrar argues in its decision that external team members have the possibility to be remunerated for additional cases, this glosses over the fact that these levels of remuneration are grounded in the assumption of full-time work as per paragraph 81 and 115 of the Policy. Moreover, observation of the practical realities of current defence work demonstrates the utter lack of merit of this argument, given that the limited resources at the disposal of defence teams all but oblige both counsel and support staff to work overtime on a daily basis – which the Registry is aware of as the sole entity that gives final approval of every Defence team member’s timesheet before proceeding to the payment of fees or salaries. Indeed, the very fact that the Registrar sees fit to rely on such an argument betrays a deeply concerning failure to grasp the reality of Defence work at the Court that he is responsible for administering.

58. This is even more the case given that the CAR II evidence collection is one of the largest of any Situation at the Court.⁵² The reality of cases involving armed conflicts in the last decade now implies analyzing not only witness statements but also Facebook material, satellite imagery, audio and video material collected from smart phone devices or social media, call data records, etc. This involves time and resources essential to properly mount a meaningful defence.

59. Therefore, the Defence submits that through every consultative work with the ASP in order to establish policies for legal assistance, the idea that remuneration should be broadly equal between the OTP and the Defence was always held as an important part of the principle of equality of arms.⁵³ Indeed, an adequate and functioning system must allow the defence to attract and keep candidates of similar quality and competence to the Prosecution.

60. The Defence thus submits that the decision of the Registrar to not to apply this important principle despite its essential contribution to both equality of arms and the fairness of the trial, which the Registrar is duty-bound to uphold and protect, is wholly unreasonable. This is

⁵¹ ICC-ASP/11/2/Add.1, Appendix II, para. 45.

⁵² ICC-01/14-01/18-474-Red, para. 23.

⁵³ See for instance ICC-ASP/19/16, para. 831.

especially true when considering the substantial increases made in the budget to accommodate the rise of OTP and Court staff salaries and the fact these could be accommodated, whereas critical necessary adjustments nearly a decade in waiting for the Defence are deemed strictly impossible.

C. The Registrar erred in law in stating he has no lawful means to act

61. Lastly, the Registrar further erred in law in stating that he has no lawful means to accede to the request without direct approval of the ASP. In fact, such a lawful avenue for the Registrar to accede to the requested was discussed on 30 November 2022.

62. Indeed, one (of potentially several) way that the Registrar is empowered to grant the request of his own accord is through the Contingency Fund. Through regulations 6.6 and 6.7 of the Financial Regulations and Rules, the Registrar has the power to use the Contingency Fund's resources in order to meet unavoidable expenses for developments in existing situations up to the extent of these resources. Naturally, the Registrar and the Chamber also have discretionary access to the Contingency Fund when allocating additional resources to defence teams pursuant to paragraph 69 of the Policy.

63. When asked about the Registrar's refusal to use the Contingency Fund to address the situation, Director DJSS admitted it was possible, but would be impracticable due to the need to calculate the costs of the remuneration adjustments, and compare it to the resources available in the Contingency Fund.

64. Yet both facets of this work appear to have already been done, and can be found in the publicly available documentation prior to the 21st session of the ASP. Indeed, in the Report of the Committee on Budget and Finance on the work of its thirty-ninth session, the CBF presents a comparison of the costs of defence support staff using the 2013 and 2023 salary scale to their estimate in the event the proposed 2024 Legal Aid Policy is adopted. Therein, it can be seen that defence support staff cost 3 796 608€ yearly under the current 2013 salary scale, while adjusting this scale to the 2023 one would increase these costs to 4 132 896€, for an augmentation of 336 288€. ⁵⁴ As for the Contingency Fund reserves, they can be seen in the Report of the Committee on Budget and Finance on the work of its thirty-eighth resumed

⁵⁴ ICC-ASP/21/15/AV, para. 262, tables 10 and 11.

session, in which it is stated that the Fund has a notional level of 7 million € and actual reserves of 5,2 million €. ⁵⁵

65. This is one of several avenues through which the Registrar could have accommodated the request, using the resources, flexibility and discretion that was notably on display in the Registry's response to the Covid-19 crisis and most recently, in their ability to fit inflation-related pay rises of 8% and an additional 5% for all of the Court's Staff – with the exception of defence support staff. The Registrar's statement of impossibility thus can only reasonably be understood as a statement of unwillingness. In any event, it is simply factually incorrect that the Registrar possesses no legal option to address this situation without prior ASP approval and oversight.

CONCLUSION

66. The Court is the permanent figure that holds international criminal trials. The image it portrays to national jurisdictions and hybrid courts has, and should be one that applies, the highest standards of a fair system and of equality of arms. The Defence is impaired as it is left 10 years behind.

67. The Registrar's use of the LAP in the Impugned Decision is untenable, and is taken contrary to his legal obligations, while undermining the inviolable rights of Mr. Yekatom and Mr. Ngaiissona to equality of arms and a fair trial through an efficient and effective defence. The Impugned Decision is further based on legal mischaracterisations and irrelevant considerations, and the Registrar erred in law in denying his power to give right to the requests.

68. Likewise, and mindful of the numerous claims made by Registry that the budget envelope for legal aid made any endeavour impossible, the Defence asserts that any such claim cannot preclude the Chamber from exercising its power. In much the same way it can order additional means to be provided to defence teams,⁵⁶ the Chamber can add to the expenses of the Court under article 114 of the Statute in review of the Registrar's decision,⁵⁷ which the ASP will have to provide for in their adoption of the budget⁵⁸ under reserve of article 115 of the Statute. After all, the budget of the Court is made to allow it to fulfill its designs and meet

⁵⁵ ICC-ASP/21/5/Add.1, para. 26.

⁵⁶ Regulation 83(4) RoC.

⁵⁷ See ICJ *Certain Expenses*; see also ICJ *Effects of Awards* on the powers of secondary organs towards a primary plenary organ.

⁵⁸ Article 112(2)(d) of the Rome Statute.

its obligations; the ASP does not have the discretion to selectively fulfill the mandates of the Court. The Chamber's power to intervene was also recognised by the Prosecution when it stated that it "considers that the Chamber has the authority to intercede in a matter where, taking into consideration the competing interests and rights, it considers that its capacity to ensure the fair and expeditious conduct of the proceedings may be adversely affected."⁵⁹

RELIEF SOUGHT

69. In light of the above, the Defence respectfully requests Trial Chamber V to:

SET ASIDE the Impugned Decision;

ORDER the Registry to urgently review its calculations of the Applicants' remuneration including the net remuneration and the professional charges in conformity with its superseding obligations to ensure equality of arms and an efficient and effective Defence;

ORDER the Registry to use the contingency fund in order to provide the adequate resources to the Applicants as necessary.

RESPECTFULLY SUBMITTED ON THIS 04th DAY OF DECEMBER 2022⁶⁰



Ms Mylène Dimitri, Lead Counsel for Alfred
Rombhot Yekatom



Mr Knoop, Lead Counsel for Patrice-
Edouard Ngaissona

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⁵⁹ Email from the OTP to the Chamber and Parties, 2 December 2022, at 9:25.

⁶⁰ The Defence is grateful to Legal Intern Mr. Tobie Raphael Godue for his precious assistance in the drafting of this filing.