

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 29 October 2014

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).

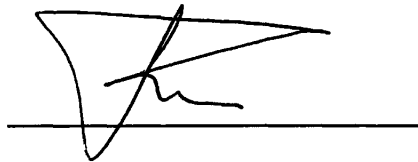
⁸⁸ Request, ICC-01/04-02/06-369-Conf-Exp-Corr, para. 6.

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.

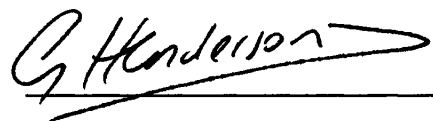
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Judge Robert Fremr, Presiding Judge

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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