

DISSENTING OPINION OF JUDGE OZAKI

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

Standard of Review

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

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

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

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

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

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

Issue for Determination

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

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

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

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

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

Analysis

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

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

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

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

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

¹⁰ Majority Decision, para. 41.

¹¹ See Majority Decision, para. 33.

¹² See Majority Decision, para. 33.

¹³ See Majority Decision, para. 33.

¹⁴ See Majority Decision, para. 33.

12. In respect of the third matter,¹⁵ which was raised only during the status conference on 1 October 2014 and not in the Request, I observe that the Chamber was presented with a mere assertion on the part of the Defence.¹⁶ It has not been established at what stage resources for second legal assistants during trial may have been granted in other cases, or on what terms the other legal assistants may have been engaged. We also do not know the broader context in which any such decisions may have been taken by the Registrar at the relevant time. Additionally, each case presents its own unique complexities and demands, warranting individual consideration. I consider the Majority's comparison of the number of counts and modes of liability in this case, as opposed to previous cases,¹⁷ to be overly-simplistic.¹⁸
13. In respect of the first Defence submission identified by the Majority, in my view, it is merely an expression of opinion regarding the probability of future resource requirements.¹⁹ Any response to such a submission could only consist of a similar assessment of probabilities. In the circumstances, and as considered further in the following paragraphs, I do not consider that to be a useful or appropriate exercise in this context.
14. Second, turning to the finding that the Registrar has inadequately justified his decision, the Majority Decision reasoning relies heavily on its interpretation of the Single Policy Document. The Majority asserts that the

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

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

¹⁷ Majority Decision, para. 34.

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

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

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

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

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

²² Majority Decision, para. 37.

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

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

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

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

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

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

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

²⁷ Majority Decision, para. 38.

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

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

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

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

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

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

²⁹ Majority Decision, paras 39-40.

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

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

³² Majority Decision, para. 41.

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

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

³⁴ Majority Decision, paras 42-43.

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

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

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

Judge Kuniko Ozaki

Dated 29 October 2014

At The Hague, the Netherlands