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**International
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Court**

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No.: **ICC-01/05-01/13**

Date: **19 March 2015**

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

**Confidential with Confidential Annex A and Confidential *Ex-Parte* Annex B, only
available to the Registry and the Defence**

URGENT

**Narcisse Arido's Request for Review of the Scope of the Registry's Decision on the
Allocation of Resources during Trial Phase dated 10 March 2015 Pursuant to
Regulation 83 (4) of the Regulations of the Court**

Source: Counsel for Narcisse Arido

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

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I. INTRODUCTION

1. On 10 March 2015, the Registry informed the Defence teams of Mr. Kilolo, Mr. Mangenda, Mr. Babala and Mr. Arido that it had decided to provide a monthly budget of 22 000 euros to each Defence team for the trial phase, starting from the date of the decision.¹

2. In accordance with Regulation 83 (4) of the Regulations of the Court (hereinafter 'RoC'), the Defence for Narcisse Arido hereby requests the Trial Chamber VII to review and overturn the Registry's decision for the reasons stated below.

II. CLASSIFICATION

3. Pursuant to Regulation 23*bis* of the RoC, this request is submitted as confidential as it relates to a decision issued confidentially by the Registrar. The Arido Defence does not oppose this filing becoming public, should the Trial Chamber decide it is in the interest of justice.

4. Annex A is classified as confidential as it contains a confidential decision. Annex B is classified as confidential *Ex Parte* only available to the Registry and the Defence as it contains information related to Defence strategy which should not be made available to the Prosecution.

5. The request is filed on an urgent basis in light of the impact that the question of the Trial Budget has on the fair trial rights of Mr. Arido, and particularly on his ability to prepare for trial.

III. PROCEDURAL HISTORY

6. On 17 April 2014, the Registrar temporarily declared Mr Arido indigent and granted him 8 542 euros per month as legal assistance to be paid by the Court.² An additional 1 000 euros a month were granted in order to cover travel expenses.

7. The next day, the Arido Defence submitted a request for clarification and a request for reconsideration, on the basis that the legal aid decision failed to take into account the workload faced by the Defence.³ The Arido Defence also requested the Registrar to reconsider its decision on legal aid. It was noted that the total budget allotted to the Arido Defence (excluding the travel costs budget) was half that of the monthly net base salaries (excluding professional charges)

¹ See Confidential Annex A.

² ICC-01/05-01/13-396-Conf-Exp-AnxA.

³ ICC-01/05-01/13-396-Conf-Exp-AnxB.

under paragraph 85 of the Registry's Single Policy Document on the Court's Legal Aid System (hereinafter 'LAP')⁴ for a team composed of one counsel, one legal assistant and one case manager – which is considered a “core team” under the LAP. The request noted that the Court's rules did not appear to permit any divergence from the net base salary as listed in the LAP. Further, the Arido Defence underlined the amount of work to be done in preparation of the confirmation hearing, the fact that this case was the first one under Article 70 to be prosecuted, and that it was a multiple-suspects case. The Arido Defence concluded by stating that additional means were required in order to ensure an effective defence and equality of arms. As a result, the Arido Defence requested the Registrar to reconsider its decision and provide Mr Arido with the full budget to hire a full-time counsel, legal assistant and case manager at the rates stated under paragraph 85 of the LAP.⁵

8. On 24 April 2014, Mbaye Abdoul and Juliet Adyel from the Counsel Support Section of the Registry ('CSS') orally denied the Arido Defence's request for reconsideration. During the meeting, Counsel for Mr Arido accepted as sufficient the oral rejection of the request. In light of CSS's workload and in the interests of judicial economy, he did not insist on a written decision.

9. On 2 May 2014, the Arido Defence filed a request for review of the Registry's legal aid decision before the Presidency, pursuant to the procedure listed in Regulation 85 (3) of the RoC. On 12 May 2014, the Presidency stated that it did not have jurisdiction on the request as it related to the scope of legal assistance paid by the Court, and that therefore should be submitted to the relevant Chamber pursuant to Regulation 83 (4) of the RoC.⁶

10. On 13 May 2014, the Arido Defence requested Pre-Trial Chamber II to review the Registry's Decision of 17 April 2014.⁷ On 21 May 2014, the Single Judge rejected the Arido Defence's request in a 5 pages decision, stating that the Registry had given an exhaustive and factual motivation for its determination. He further found that the legal assistance scheme was established for those suspected of crimes under Article 5 of the Statute and not for those suspected of crimes under Article 70 of the Statute. He concluded by stating that the Registry did not commit an error of law by unreasonably departing from the LAP and did not fail to take into account relevant information.⁸

⁴ ICC-ASP/12/3.

⁵ ICC-01/05-01/13-396-Conf-Exp-AnxB.

⁶ ICC-RoC85-02/14-2-Conf-Exp.

⁷ ICC-01/05-01/13-396-Conf-Exp.

⁸ ICC-01/05-01/13-415-Conf-Exp.

11. On 11 November 2014, Pre-Trial Chamber II confirmed parts of the Article 70 charges against Mr. Bemba, Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido, and committed the case for trial.⁹ The Defence teams all sought leave to appeal the Decision.¹⁰ On 23 January 2015, the Pre-Trial Chamber rejected the Defence team's leave to appeal.¹¹ On 30 January 2015, the Presidency constituted Trial Chamber VII and assigned it to the present case.¹² Judge Chile Eboe-Osuji was appointed presiding judge on 13 February 2015.¹³

12. On 2 February 2015, CSS contacted the Defence teams on the Article 70 case in order to schedule a meeting to discuss the work to be carried out during the trial phase and the necessary resources. On 17 February 2015, counsel for Mr. Arido met with Mr. Peralta from CSS. Counsel informed CSS that he thought that the Defence team should be granted a budget in accordance with what is stated in the LAP, starting from the date at which a Trial Chamber was assigned to the case. Mr. Peralta informed Counsel that CSS was "thinking" of a 22 000 euros monthly budget, including all expenses, investigations and professional fees. He suggested that Counsel for Mr. Arido submit his views in writing.

13. On 17 February 2015, Counsel for Mr. Arido restated his position regarding the legal aid budget for the trial in an email to the Registry.¹⁴ In particular, he emphasised the following:

- i. The team is entitled to the full budget for one counsel, one associate counsel, one legal assistant and one case manager, as listed in the LAP;
- ii. The Article 70 proceedings cannot be distinguished from Article 5 cases, which is clear when a comparison is done between those types of cases in terms of workload, whether be it in terms of length of the confirmation of charges procedure, the number of filings or the amount of disclosure;
- iii. There are clear indications that the Trial phase will be complex and challenging, particularly as this is the first multi-Accused trial and since a large number of documents are yet to be disclosed by the Prosecution;
- iv. The equality of arms demands that the Defence be provided with sufficient resources.¹⁵

⁹ ICC-01/05-01/13-749.

¹⁰ Kilolo: ICC-01/05-01/13-771; Bemba: ICC-01/05-01/13-768; Babala: CC-01/05-01/13-769; Mangenda: ICC-01/05-01/13-755; Arido: ICC-01/05-01/13-772.

¹¹ ICC-01/05-01/13-801.

¹² ICC-01/05-01/13-805.

¹³ ICC-01/05-01/13-817.

¹⁴ See Confidential and *Ex Parte* Annex B.

¹⁵ *Ibid.*

14. Counsel for Mr. Arido attached a detailed nine pages document supporting his position, which included detailed information regarding the case load and direct references to the relevant provisions of the LAP.¹⁶

15. On 10 March 2015, the Registry informed the Defence teams of Mr. Kilolo, Mr. Mangenda, Mr. Babala and Mr. Arido that it had decided to provide a monthly budget of 22 000 euros to each Defence team for the trial phase, starting at the date of the decision ("Trial Budget Decision").¹⁷

16. Noting that he had invited all the Defence teams to meet with the Section Chief of the Counsel and Support Section ("CSS") of the Registry, in order to enquire about the "needs felt by defence counsel regarding the work to be undertaken during the trial phase and the resources needed to guarantee an effective and efficient defence of their respective client",¹⁸ the Registrar held that "[a]ll counsels stressed the high degree of work required in the case, its complexity even compared to other cases under article 5, its multi-accused character coupled with the high likelihood that the defendants will enter into conflicting defenses".¹⁹

17. The Registry noted that the workload "must be weighed against the reduction of the charges" by the Pre-Trial Chamber,²⁰ and found that the Confirmation of Charges decisions "shows a net decrease for all defendants, excluding several modes of liability proposed by the Prosecutor, for four of them excluding also the charge consisting in "presenting documentary evidence in the Bemba case [they] knew was false or forged" and, for Mr. Narcisse Arido, confirming only twelve of the 43 proposed counts, that is a reduction of more than seventy per cent of the charges".²¹

18. The Registry concluded that, in view of the submissions of the Defence, the rights of all defendants to an effective and efficient defence, the need to ensure the expeditiousness of the proceedings, and the Registrar's obligation to judiciously manage the funds placed at his disposal,

¹⁶ The document constitutes confidential information related to future Defence strategy and is therefore not being made available to the Trial Chamber or the parties. Should the Trial Chamber find it necessary to have access to this document, the Arido Defence will provide a redacted version.

¹⁷ See Confidential Annex A.

¹⁸ *Ibid.*, para. 2.

¹⁹ *Ibid.*, para. 4.

²⁰ *Ibid.*, para. 5.

²¹ *Ibid.*

a monthly budget of 22 000 euros “should ensure in principle that these concerns are met at the current stage of the proceedings.”²²

19. The Registry held that the monthly budget shall cover “all costs of each team, including fees and professional charges of all appointed members, any travel costs and all costs related to investigations required in the framework of the case”.²³ Finally, the Registry stated that the funds “will have to be withdrawn from the Contingency Fund”²⁴ and will be made available from the date of the Decision.²⁵

IV. APPLICABLE LAW

20. Pursuant to Regulation 83 (4) of the RoC, decisions by the Registrar on the scope of legal assistance paid by the Court may be reviewed by the relevant Chamber on application by the person receiving legal assistance. When undertaking a judicial review of a decision by the Registrar, the Trial Chamber must assess whether the decision of the Registrar was materially affected by an error of law or fact or whether the decision was as unfair and unreasonable as to constitute an abuse of discretion.²⁶ At all times, the Trial Chamber must act in accordance with Article 64 (2) of the Statute, and ensure that the trial is fair and expeditious, and conducted with full respect for the rights of the Accused.

21. The right to legal assistance by the Court forms part of the fundamental fair trial rights of an Accused. Article 67 (1) (d) of the Statute provides that an Accused is entitled, as a minimum and in full equality, to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment by the Accused if he/she lacks sufficient means to pay for it. The procedure for deciding on a legal assistance request is set out in the Regulations of the Court and the Regulations of the Registry (‘RoR’). The principles underlying the legal aid system include the rights to fair trial and equality of arms as well as objectivity, transparency, economy, continuity, and flexibility.²⁷

²² Confidential Annex A, para. 6.

²³ *Ibid.*, para. 8.

²⁴ *Ibid.*, para. 6.

²⁵ *Ibid.*, para. 7.

²⁶ ICC-01/05-01/13-365-Conf, p. 4.

²⁷ Resolution of the Assembly of State Parties adopted at the 12th Plenary Meeting on 27 November 2013, ICC-ASP/12/Res.8, para. 35, referring to the Report to the Assembly of State Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons, 17 August 2004, ICC-ASP/3/16, para. 16.

22. Section 3 of the RoR²⁸ covers the provision of legal assistance paid by the Court, which the Registrar is in charge of managing.²⁹ Regulation 133 provides that 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. The Registry's Single Policy Document on the Court's Legal Aid System constitutes the legal aid scheme of the Court "for all intents and purposes".³⁰

23. Section 4 of the RoC deals with legal assistance paid by the Court.³¹ Regulation 83 (1) covers the scope of legal aid and states that legal assistance paid by the Court should 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". Regulation 84 (1) provides that the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance. Regulation 85 (1) states that the Decision on payment of legal assistance is to be made by the Registrar, and should contain the reasons for the decision as well as instructions on how to apply for review. It also permits the Registrar to make a provisional decision on payment of legal assistance.

V. SUBMISSIONS

24. The Arido Defence submits that the Registry committed errors of law, errors of facts, and abused its discretion in rendering its Decision. In particular, the Arido Defence submits that the Registry committed an error of law in failing to follow the applicable law, namely the LAP, and by violating Mr. Arido's fair trial rights. In the alternative, the Arido Defence submits that the Registry abused its discretion by providing a budget which does not permit to give full effect to Mr. Arido's fair trial rights. In addition, the Registry committed an error of fact by giving undue weight to the reduction of the charges at the confirmation stage. Finally, the Arido Defence argues that the Registry also erred in law by stating that the trial budget was to start as of the date of its Decision on the trial budget.

²⁸ RoR, Regulations 130 to 139.

²⁹ *Ibid.*, Regulation 130.

³⁰ LAP, para. 2.

³¹ RoC, Regulations 83-85.

A. The Registry committed an error of law by failing to follow the Legal Aid Policy

25. The Arido Defence submits that the Registry committed an error of law by failing to follow the law applicable to the determination of the scope of the legal assistance to be paid by the Court - the LAP. In addition, the Registry acted *ultra vires*, and by doing so, also abused its discretion. As a result of these errors, the Trial Budget Decision is materially affected and must be overturned.

1. The Legal Aid Policy constitutes the applicable law

26. The Arido Defence notes that the Registry failed to provide a legal basis for its decision. There is no reference to any part of the Statute, the RPE, the RoC, the RoR or to the LAP in its Decision. Regulation 133 of the RoR states clearly that the “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.”

27. The sole document related to the legal assistance paid by the Registry is the LAP, adopted by the Assembly of States Parties on 4 June 2013.³² It is stated unequivocally therein that, **for all intents and purposes**, it constitutes the legal aid scheme of the Court.³³ This language shows clearly that the LAP also applies to the legal aid to be provided in Article 70 offences cases.

28. The only provision permitting a departure from the LAP is stated in paragraph 3 of the LAP, which provides that:

[T]he 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. That is, while the ICC Legal Aid Policy is in force as *the* document of reference outlining the Court's legal aid scheme, future reviews may implement new amendments to the policy.

29. As far as the Arido Defence is aware, there has not been such amendments made to the Policy. As a result, the LAP is the sole document regulating any decision related to the Legal Aid.

2. The LAP does not provide for a separate standard for Article 70 cases

30. The LAP does not provide for a separate legal aid scheme applicable to Article 70 offences. The only “exception” to the salaries under the Legal Aid Policy is when the Registrar consider certain phases to be a “situation of reduced activity” - for instance the period between closing

³² ICC-ASP/12/3.

³³ LAP, para. 2.

statements rendered at trial and the decision of the Chamber, stays of proceedings, etc. In those situations, the remuneration of the team is determined on the basis of hours actually worked, and can go up to a monthly ceiling equal to the payment for each category under the Court's legal aid system. The present situation cannot qualify as a period of reduced activity since the case is going to trial.³⁴

31. Article 70 has been part of the Statute from the time of its adoption, and the legal aid system of the ICC has been the subject of extensive discussions and debate over the years. Had the drafters of the LAP intended to distinguish between Article 5 and 70 cases, they would have done so. Yet, there is no provision in the LAP permitting a departure from the listed budgets in case of Article 70 offences. The fact that no provision can be found anywhere in the Court's regulatory framework permitting to depart from the LAP in Article 70 cases shows that the LAP applies in all cases before the Court.

3. The Registry significantly departed from the LAP and the RoC

32. The LAP states that a defence team operating under the Court's legal aid scheme is provided resources for a "core team", composed of one counsel, one legal assistant and one case manager.³⁵ In addition, it provides that "[a]n additional resource in the form of funds to remunerate an associate counsel is automatically provided during the trial phase [...] as soon as a definite decision has been taken relating to the confirmation of charges".³⁶

33. Pursuant to the LAP, a Defence team during trial is therefore composed of one counsel, one associate counsel, one legal assistant and one case manager.³⁷ It provides the following monthly salaries for each team member (including professional charges): Lead Counsel: 10 687 euros,³⁸ Associate Counsel: 9 043 euros,³⁹ Legal Assistant: 5 622 euros,⁴⁰ Case Manager: 4 570 euros,⁴¹ or a total of 29 922 euros per month. It also provides for a 3 000 euros monthly budget to cover administrative expenses.⁴²

³⁴ See LAP, para. 117.

³⁵ *Ibid.*, paras 39-40.

³⁶ *Ibid.*, para. 41.

³⁷ *Ibid.*, para. 43.

³⁸ *Ibid.*, para. 85.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*, para. 139.

34. In sum, the total monthly budget of a Defence team at the trial stage, excluding investigations, is of 32 922 euros according to the LAP. In addition, the LAP provides that an investigation budget of 73 006 euros should be provided to each Defence team for the entirety of the case.⁴³

35. Regulation 83 (1) of the RoC covers the scope of legal aid, stating that it should 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”.

36. The Registry provided the Arido Defence (and the other Defence teams under the legal assistance scheme) with a total monthly budget of 22 000 euros. According to the Registry, this monthly budget shall “over all costs of each team, including fees and professional charges of all appointed members, any travel costs and all costs related to investigations required in the framework of the case”.⁴⁴

37. As a result, the Arido Defence submits that the Registry committed an error of law by failing to respect the LAP as well as the RoC, and acted *ultra vires*. The Decision should be overturned and the Registry ordered to provide the Article 70 Defence teams with the budget provided for in the LAP.

4. Alternatively, the rules on legal aid must be interpreted and applied in a way that is consistent with the fair trial of the Accused

38. In the alternative, should the Trial Chamber find that the LAP is not applicable in the present case, the Arido Defence submits that the amount of legal assistance to be provided for the trial phase to the Article 70 Defence teams should be interpreted in a way that fully respects the fair trial rights of Mr. Arido. The fair trial rights affected by the Registry’s Decision are discussed more in details in paragraphs 42 to 55 below.

39. Article 21 (3) of the Statute obliges any organ of the Court to apply and interpret any source of applicable law, as set out in Article 21, consistently with internationally recognised human rights. The Arido Defence recalls that the ICC Statute is an international treaty, and as

⁴³ LAP, para. 46.

⁴⁴ Confidential Annex A, para. 8.

such its interpretation is subjected to the Vienna Convention on the Law of Treaties ('VCLT').⁴⁵ Article 31 of the Vienna Convention of the Law of the Treaties provides for the internationally recognised rule on interpretation of treaties, and states that "[a] treaty shall be interpreted in good faith in accordance **with the ordinary meaning** to be given to the terms of the treaty in their context and in the light of its object and purpose".⁴⁶

40. The Arido Defence submits that Mr. Arido's right to be given adequate time and facilities for the preparation of his Defence should be interpreted in this light. As a result, the legal assistance to be provided by the Court should ensure that his team can include a lead counsel, an associate counsel, one legal assistant, one case manager, one investigator, as well as enough budget for investigations. Anything less than this would result in an effective violations of his fair trial rights.

41. Taking into account the salaries provided for in the LAP, it is clear that the budget provided by the Registry would only permit the payment of the two counsels and that only 2 210 euros would remain every month for investigative purpose. As is discussed in further details in the following part, this effectively denies Mr. Arido his fair trial rights.

B. The Registry committed an error of law by violating the fair trial rights of Mr. Arido

42. In addition to being deprived of any legal basis, the Registry's Decision further effectively results in a violation of Mr. Arido's right to adequate facilities to prepare his defence, his right to an expeditious trial and his right to equality of arms. As a result, the Arido Defence submits that the Registry committed an error of law by failing to render a decision that was consistent with ensuring Mr. Arido's right to a fair trial.

1. The Registry committed an error of law by violating the right of Mr. Arido to have adequate time and facilities for the preparation of his Defence and to present evidence

43. Article 67 (1) of the Statute provides for the right of any Accused before the Court to have adequate time and facilities to prepare his/her Defence,⁴⁷ and to examine or have examined the witnesses against him/her as well as to present evidence in his/her Defence.⁴⁸ The Arido

⁴⁵ "The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention of the Law of the Treaties (23 May 1969)" ICC-01/04-168, para. 33.

⁴⁶ Vienna Convention on the Law of Treaties, Art. 31 (1), available at:

<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (emphasis added).

⁴⁷ ICC Statute, Art. 67 (1) (b).

⁴⁸ *Ibid.*, Art. 67 (1) (e).

Defence submits that as a result of the Registry's Decision, these rights are effectively violated. As stated above, the budget provided by the Registry is supposed to cover the totality of the costs associated with Mr. Arido's legal representation, including investigations.⁴⁹

44. The Arido Defence submits that having one lead counsel, one associate counsel, one legal assistant, one case manager and one investigator is required in order to ensure Mr. Arido's effective Defence. An associate counsel is required to represent Mr. Arido during court hearings, should lead counsel be unable to attend at times; he/she is also necessary in order to assist lead counsel in determining the creation and implementation of the Defence strategy, and to assist with investigations while lead counsel attends hearings (or vice versa). Similarly, support staff forms a core component of a Defence team. A full time legal assistant is required in order to draft legal pleadings, undertake legal research and analyse evidence, and to assist both counsels during Court hearings. A full time case manager is necessary in order to organise the case file, keep track of filings and disclosure, and assist in the preparation and presentation of evidence in Court. This role is particularly important in light of the complex electronic system used at the Court and requires an individual with excellent technical, organisational and legal skills. Finally, the use of a professionally trained investigator is essential. In light of the charges that Mr. Arido faces, the investigations must be done with the highest level of professionalism and ethical integrity. This requires the Defence team to have, at the very minimum, a professional investigator, whose salary is 8 965 euros according to the LAP.⁵⁰ In addition, it is also necessary for the trial budget to provide for investigative trips by counsels to supervise investigations and meet with witnesses.

45. The ICC framework states clearly that certain requirements have to be met by associate counsel and legal assistants in order to work in a Defence team. Associate counsel must have a relevant experience of at least eight years.⁵¹ Legal assistants must have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure.⁵² Such criteria were put into place to ensure that the rights of the Accused to an effective Defence are given meaning in practice. The Registry itself indicates in its decision that such requirements are applicable to the present proceedings⁵³ - an untenable cherry picking

⁴⁹ RoC, Regulation 83 (1).

⁵⁰ LAP, para. 80.

⁵¹ RoC, Regulation 67 (1).

⁵² RoR, Regulation 124.

⁵³ Confidential Annex A, para. 4: "applying the current management rules, in particular that all legal assistants appointed must previously be admitted to the relevant list and that all expenses must be previously authorised by the CSS."

approach when one considers that the Registry has unilaterally decided to depart from the LAP regarding the amount of trial budget to be provided. Finally, in light of the fact that both French and English are used in the proceedings, it is necessary for most team members to be fluent in both languages.

46. According to the LAP, the monthly salary for an associate counsel is 10 832 euros, including professional costs, and 6 113 euros (including professional costs) for a legal assistant. As a result of the Registry's Decision, to hire both an associate counsel and a legal assistant would leave 4 719 euros to finance a lead counsel, a case manager, an investigator, and to cover all administrative costs and expenses as well as any investigative trips. This simple calculation shows that with the budget provided by the Registry, Mr. Arido is effectively deprived from the right to have a properly functioning Defence team, and as a result, will be unable to effectively defend himself.

47. Instead, the 22 000 euros trial budget requires the lead counsel to undertake a "selection" of which team members to appoint, and to choose between effective courtroom preparation and presentation or investigations. It would require a cautious determination of priorities, and may result in certain tasks not being done as a result of the limited budget, such as, for instance, the preparation of public redacted versions of filings. As a direct result of the Registry's Decision, Mr. Arido is effectively denied the right to the minimum adequate facilities to prepare his defence - as listed in the LAP - and therefore prevented from putting forward an effective Defence. The Arido Defence therefore submits that the Registry committed an error of law by violating Article 67 of the Statute.

2. The Registry's Decision violates Mr. Arido's right to an expeditious trial

48. As stated above, the only option under the Trial Budget provided for by the Registry is that a selection will have to be made regarding the workload of the Defence. In addition, it will be impossible to appoint an associate counsel. As a result, should lead counsel be unable to attend court, the proceedings will have to be adjourned in order to ensure that Mr. Arido is given legal representation. During trial, investigations will not be undertaken in light of the limited budget and will have to be left until the end of the Prosecution case, which will cause further delay. The Defence team - even working overtime, as it has been during the confirmation of charges phase - may not be able to keep up with the workload, particularly disclosures, all of which may result into delays in the proceedings.

49. It is clear, when looking back at the Confirmation of Charges stage, that the article 70 proceedings cannot be distinguished from the “main” article 5 cases, whether be it in terms of length, number of filings or disclosures. Indeed, the Confirmation of Charges stage lasted short of 12 months. That is comparable to most Article 5 cases: for instance, the *Lubanga* confirmation of charges phase lasted 10 months; the *Katanga* one, 11 months and the *Bemba* one, 12 months. An average of 63 filings were made every months during the confirmation stage: this is an average of three filings per day. It is more than almost all the Article 5 proceedings: it is three times more filings than the *Gbagbo* case, arguably the biggest cases before the Court.⁵⁴ It is also more than three times than the number of filings in the *Blé Goudé*,⁵⁵ *Ntaganda*⁵⁶ and *Abu Garda cases*,⁵⁷ and twice as much as the number of filings in the *Mbarushimana*,⁵⁸ the *Bemba*⁵⁹ cases, the *Ruto & al.*⁶⁰ and *Kenyatta and al.*⁶¹ Finally, a total of 3 527 documents were disclosed at the confirmation stage alone. That is an average of 69 documents a week, and it included about 1 000 video/audio files. The Prosecution had 1 424 items on its List of Evidence for the confirmation stage alone.⁶²

50. In addition, there is every indication that the trial stage will be complex and challenging, not only because this is the first large multi-suspects trial and the first Article 70 case, which means a lot more work in order to prepare for and respond to co-suspects’ filings and Defence cases, but also because a large number of documents are yet to be disclosed since they are currently under review by the Independent Counsel. In addition, while Mr. Arido is not charged as a member of the alleged common plan, the charges against him include aiding and abetting and soliciting. His liability emanates from the acts allegedly committed by others. As a result, in addition to linkage evidence, he must also defend against the main elements of the offence.

51. As a result, by providing the Defence with a budget that does not permit Mr. Arido to appoint an associate counsel, an investigator as well as properly qualified support staff, the Registry effectively violates Mr. Arido’s right to be tried without undue delay. It would also end up costing more money to the Court, as the proceedings would last longer. It is therefore

⁵⁴ *Gbagbo*: 22 filings/month (at time of the first confirmation of charges Decision: 432 filings in 19 months).

⁵⁵ *Blé Goudé*: 21 filings/month (at the time of the confirmation of charges Decision: 186 filings in 8½ months).

⁵⁶ *Ntaganda*: 17 filings/month at the time of the confirmation of charges Decision: 309 filings in 18 months).

⁵⁷ *Abu Garda*: 27 filings/month (at the time of the confirmation of charges Decision: 243 filings in 9 months).

⁵⁸ *Mbarushimana*: 33 filings/month (at the time of the confirmation of charges Decision: 465 filings in 14 months).

⁵⁹ *Bemba*: 35 filings/month (at the time of the confirmation of charges Decision: 424 filings in 12 months).

⁶⁰ *Ruto & al.* (3 suspects): 37 filings/month (at the time of the confirmation of charges Decision: 373 filings in 10 months).

⁶¹ *Kenyatta & al.* (3 suspects): 38 filings/month (at the time of the confirmation of charges Decision: 382 filings in 10 months).

⁶² ICC-01/05-01/13-526-Conf-AnxE.

submitted that providing the Defence with a proper budget, as listed in the LAP, would permit to prevent such delays. As a result, the Arido Defence respectfully the Trial Chamber to act in accordance with its duty to ensure that the trial is fair and expeditious under Article 64 (2) of the Statute and to reverse the Registry's Decision.

3. The Registry's Decision violates the principle of equality of arms

52. Equality of arms is the first principle of the LAP.⁶³ While the Arido Defence is aware that the question of equality of arms "cannot be equated to a mathematical exercise", it is nonetheless a relevant consideration.⁶⁴ At the very minimum, the Arido Defence submits that the same salaries should be paid to Defence team members for equal level of qualifications.

53. In the past, the Prosecution has indicated that "A prosecution team involved in an active trial must be composed of a minimum of **14 staff**: two investigators per accused [...], 11 Prosecution Division staff; and one International Cooperation Adviser."⁶⁵ In 2014, the Prosecution had asked for more than 2½ millions euros in the 2015 budget related to the Article 70 proceedings and the "unforeseen developments in CAR situation".⁶⁶ On 31 July 2014, it requested 1 880 400 euros for the Article 70 case from the contingency fund.⁶⁷

54. The Prosecution has also indicated, in July 2013, that "[a]n Article 70 team would consist of one P-3 and one P-2 investigator and one P-2 analyst for investigative resources only."⁶⁸ It amounts to a total of 25 424 euros a month for the Prosecution's investigative team alone.⁶⁹ This

⁶³ LAP, Principle 1, p. 4: The payment system must contribute to maintaining a balance between the resources and means of the accused and those of the Prosecution.

⁶⁴ See e.g. ICC-01/04-02/06-389, para. 43.

⁶⁵ See Report on the Anticipated Financial Impact of the New Strategy of the Office of the Prosecutor, 28 October 2014, ICC-ASP/13/25, para. 16, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-25-ENG.pdf.

⁶⁶ "At the time of the submission of this report, as mentioned in paragraph 4 above, a new notification had been submitted to the Committee on 28 July, in the total amount of €2,593,400, for the need to cater for investigative and prosecutorial activities related to offences against the administration of justice under article 70 of the Rome Statute and the provision of services related to unforeseen developments in the situation in the Central African Republic." In Report on Budget Performance of the International Criminal Court as [of] 30 June 2014, 20 August 2014, ICC-ASP/13/8, para. 36, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-8-ENG.pdf.

⁶⁷ "Further unforeseen and unavoidable costs in the case of *The Prosecutor v. Jean-Pierre Gombo* in the situation in the Central African Republic, namely the need to cater for prosecutorial activities related to offences against the administration of justice under article 70 and to the provision of services related to the unforeseen developments, including legal aid, detention, witness, relocation and assisted moves" in Report of the Committee on Budget and Finance on the Work of its Twenty-Third Session, 18 November 2014, p. 32, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-15-ENG.pdf.

⁶⁸ Proposed Programme Budget for 2014 of the International Criminal Court, 29 July 2013, ICC-ASP/12/10, para. 241, available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-10-ENG.pdf.

⁶⁹ P3 investigator: 9 708 e/month (87 375 e/9 months); P2 investigator: 7 858 e/month (70 725 e/9 months); P2 analyst: 7 858 e/month (70 725 e/9 months), in Proposed Supplementary Budget of the International Criminal

is more than the totality of the budget attributed to one Defence team for all trial-related activities, and cannot be said to respect the principle of equality of arms.

55. In light of this violation of the principle of equality of arms, the Arido Defence requests the Trial Chamber to overturn the Registry's decision and to order it to provide the Arido Defence with the regular budget, in accordance with the relevant provisions of the LAP.

C. The Registry committed an error of fact by misappreciating the weight to be given to the diminution of the charges

56. The Arido Defence further submits that the Registry committed an error of fact by giving too much weight to the reduction of the charges by the Pre-Trial Chamber. While it is correct that the Pre-Trial Chamber declined to confirm the charges related to the presentation of false documents and only retained the modes of liability under Article 25 (3) (a) (direct commission) and 25 (3) (c) (aiding and abetting and soliciting), the Registry's statements that there is a "net decrease [in the charges] for all defendants"⁷⁰ and that there is a "reduction of more than seventy per cent of the charges"⁷¹ against Mr. Arido is factually incorrect.

57. Mr. Arido was originally charged under Article 70 (1) (a), (b) and (c), under four different modes of liability (Article 25 (3) (a), (b), (c) and (d)).⁷² These charges were based upon two sets of actions: allegedly providing false documents to the Bemba Defence team, and identifying and coaching false witnesses.⁷³ While the Prosecution characterised each charge under each mode of liability as a separate count in the DCC, something to which the Arido Defence objected,⁷⁴ the reality is that the charges were based on two sets of facts, and that the ones related to the provision of the false documents were of a much more limited scope than those related to the alleged corruption of witnesses.

58. A simple look at the DCC and the Decision on the Confirmation of Charges shows clearly that the charges which were not confirmed only related to one action by Mr. Arido, allegedly providing false/forged documents to Mr. Kilolo in February 2012 in Douala, Cameroon. In the

Court for 2015, 20 October 2014, ICC-ASP/13/10/Add.1, p. 3, Table 2 "GTA requirements for the Office of the Prosecutor", available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-10-Add1-ENG.pdf.

⁷⁰ Confidential Annex A, para. 5.

⁷¹ *Ibid.*

⁷² ICC-01/05-01/13-526-Conf-AnxB1, p. 82.

⁷³ *Ibid.*

⁷⁴ ICC-01/05-01/13-2-551, para. 27: "The Arido Defence wishes to also point out to the table contained at the end of the Prosecution's DCC, wherein it appears that Mr. Arido is charged with 43 counts. Clearly, the Arrest Warrant was requested and issued for two counts only, and a count can only correspond to one offence under Article 70 of the Statute. The Prosecution's fanciful creation is unprecedented and unfounded and should not be permitted."

DCC, out of the 43 “counts”, only one was related to the false documents.⁷⁵ To the contrary, the charges related to the witnesses’ alleged false testimony run from January to November 2013 (the date at which the witnesses testified), relate to four persons, and include several allegations of meetings that Mr. Arido alleged had with the prospective witnesses.⁷⁶

59. In the DCC, with regards to false documents, the Prosecution cited to 48 unique pieces of evidence while with regards to witnesses, 198 pieces of evidence were cited. Thus, the false document evidence makes up 19%.⁷⁷ Only two pages discuss the false documents charges, as opposed to 23 pages related to witnesses’ related offences. In the Prosecution’s submissions on the confirmation of the charges, with regards to false documents, the Prosecution cited to 58 unique pieces of evidence, as opposed to 180 pieces of evidence in relation to witnesses. Thus, the false document evidence makes up 24% of the Prosecution’s case. Only three pages refer to the charges of the false documents,⁷⁸ as opposed to 46 pages for the witnesses-related offences.⁷⁹

60. The Arido Defence observes that case complexity is a notoriously difficult quality to assess. Complexity can occur at both an evidential and legal level. Legal complexity can occur in quantitative terms - as in the number of charges, but also in qualitative terms - which is to say that the law is difficult to ascertain, unclear, or highly technical and difficult to apply. Likewise, evidence can be quantitatively high or alternatively technically difficult to assess, as for example with the complications associated with translation. These two types of complexity can also interact creating a sum greater than the parts. Where such difficulty exists in assessing complexity, in the interests of ensuring an effective defence, it seems that the fairest course of action would be to stick to the surest possible metric which is to say the legal aid policy. Clearly, it cannot be said that the charges related to the false documents constituted 70 % of the charges against Mr. Arido, and in finding so, the Registry committed an error of fact which materially affected its Decision.

61. In this respect it must be borne in mind that also other confirmation charges decisions have resulted in the reduction of charges.⁸⁰ In none of these cases has the Registrar cut back legal aid because of such reduction. It would undermine the LAP in all cases if a reduction of charges was to be used as a ground to cut the amount of legal aid.

⁷⁵ ICC-01/05-01/13-526-Conf-AnxB1, p. 82.

⁷⁶ See ICC-01/05-01/13-749, paras 86-96, pp. 53-54.

⁷⁷ ICC-01/05-01/13-526-Conf-AnxB1.

⁷⁸ ICC-01/05-01/13-597-Conf-AnxB, pp. 20-23.

⁷⁹ ICC-01/05-01/13-597-Conf-AnxB, pp. 13-20 and pp. 35-74.

⁸⁰ See e.g. *Katanga & Chui*, ICC-01/04-01/07-717, para. 465; *Gbagbo*, ICC-02/11-01/11-656-Red, para. 265.

62. The Arido Defence therefore submits that, by basing its decision on the reduction of the charges, the Registry committed an error of fact and abused its discretion. Since the Registry's decision is largely based on this, the Arido Defence submits that the Decision is invalid and must be overturned.

D. The Registry committed an error of law by failing to follow the LAP regarding the start date of the trial budget

63. The Arido Defence finally submits that the Registry committed an error of law by stating that the new trial budget will be available from the date of its decision, namely 10 March 2015.⁸¹ It is without controversy that the Registry's Decision concerns the trial phase. The title of the Decision itself refers to the "resources during trial phase".⁸²

64. The LAP clearly states that the trial phase starts at the time where a definite decision on the confirmation of the charges is rendered. The diagram contained in paragraph 43 of the LAP, entitled "Composition of the core defence team for each phase of the proceedings" shows clearly that the trial phase starts once the confirmation of charges proceedings is finalised. Paragraph 41 of the LAP further states that an associate counsel is eligible "as soon as a definite decision has been taken relating to the confirmation of charges", in order to provide him/her with sufficient time to become acquainted with the case before the commencement of the trial.

65. In the present case, the confirmation of charges proceeding was finalised on 23 January 2015, the date at which the Pre-Trial Chamber rejected the Defence teams' requests for leave to appeal the confirmation of charges decision.⁸³

66. The Arido Defence submits that the Registry committed an error of law by failing to follow the LAP. It further submits that it abused its discretion by failing to provide a justification for departing from the LAP and by finding that the start of the trial legal aid budget was the date of 10 March 2015. As a result, the Arido Defence requests the Trial Chamber to overturn the Registry's decision insofar as it relates to the start date of the trial budget, and order that the trial phase, for Legal Aid budget purposes, starts as of 23 January 2015, when the confirmation of charges was finalised. At the very least, it should order that the trial phase started on 30 January 2015, when the Trial Chamber was assigned to the present case.

⁸¹ Confidential Annex A, para. 7.

⁸² *Ibid.*, p. 1, heading.

⁸³ *See supra*, para. 11.

VI. CONCLUSION

67. In light of the above, the Arido Defence respectfully requests the Trial Chamber to find that the Registry:

- i. Erred in law by failing to follow the LAP;
- ii. Erred in law by failing to respect the fair trial rights of Mr. Arido;
- iii. Erred in fact by misappreciating the weight to be given to the reduction of the charges;
- iv. Erred in law by finding that the trial budget was to start as of 10 March 2015;

68. It further requests the Trial Chamber to overturn the Registry's Decision on the Trial Budget and to order that:

- i. The trial phase, for legal aid purposes, started on 23 or 30 January 2015, when the confirmation of charges proceedings were finalised;
- ii. The Arido Defence team be provided with the full budget provided for in Paragraph 85 of the LAP for a full time lead counsel, an associate counsel, a legal assistant and a case manager;
- iii. The Arido Defence team be provided with the expenses budget listed in Paragraph 139 of the LAP, to cover its administrative costs;
- iv. The Arido Defence team be provided with the full investigative budget as listed in Paragraph 46 of the LAP, or, in the alternative, with sufficient budget to hire a full time professional investigator and to undertake investigative trips.



Göran Sluiter, Counsel for Mr. Arido

Dated this 19th Day of March 2015

At Amsterdam, The Netherlands.