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No: **ICC-01/05-01/13**
Date: **15 July 2016**

TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Version
with Confidential *Ex Parte* Annex A, available only to the Registry and the Defence

Defence Request to the Trial Chamber for Review of the Registrar's Decision of 10 March 2015 on the Allocation of Resources during Trial Phase

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

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I. INTRODUCTION

1. Jean-Jacques Kabongo Mangenda requests, pursuant to Regulation 83(4) of the Regulations of the Court ("Regulations"), that the Trial Chamber reverse the Registrar's purported decision on trial legal aid funding[1] and order that funding be provided in accordance with the International Criminal Court's established Legal Aid Policy.[2] The Impugned Decision offers no explanation for having disregarded the Policy; identifies no criteria for determining the quantum of funding, while ignoring obvious and important relevant factors; refers repeatedly to irrelevant and improper considerations; and, in its methodology and result, violates Mr. Mangenda's rights under Articles 55 and 67 of the Statute. The Impugned Decision falls so far outside of the framework of proper administrative decision-making, is so devoid of reasons, and prejudices the fairness of the current proceedings to such a degree, that it is entitled to no deference.[3]

II. PROCEDURAL HISTORY OF THE IMPUGNED DECISION

2. After an informal meeting with the Chief of the Counsel Support Section on 10 February 2015, Counsel for Mr. Mangenda wrote to the Registry on 18 February 2015 setting out his views concerning legal aid for the trial phase of this case. The focus of the letter is an insistence that the funding of the defence in the present

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[1] "Legal aid: decision on allocation of resources during trial phase", 10 March 2015 ("Impugned Decision"). This submission is a public redacted version prepared pursuant to the Chamber's direction in its Decision Closing the Submission of Evidence and Further Directions, ICC-01/05-01/13-1859, 29 April 2016.

[2] Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3 ("Legal Aid Policy" or "Policy").

[3] Pursuant to Regulation 23*bis* of the Regulations, the present filing is classified confidential as it relates to a decision that is confidential. The Defence does not object to this request being reclassified public, if the Impugned Decision is also reclassified as public. The Defence requests, however, that the confidential *ex parte* annex remain confidential *ex parte* as it includes reference to matters of Defence strategy and conduct, as well as the personal contact information of members of the present defence team.

case "can be regulated only according to the Legal Aid Policy".[4] The letter explains that the Legal Aid Policy itself, which determines legal aid primarily according to the duration of proceedings, accommodates any alleged differences in complexity between charges based on Article 5 and those based on Article 70 of the ICC Statute.[5] Other Defence teams are believed to have expressed similar views in writing or orally to the Registrar.

3. On 10 March 2015, the Registrar circulated the Impugned Decision purporting to set the quantum of defence funding for the duration of trial proceedings at [REDACTED] per month. The Impugned Decision is said to be within "the framework of the legal aid system", but the quantum is not assessed with reference to the Policy. The Registrar gives no explanation for the non-application of the Policy, even though this had been raised unequivocally in Counsel's 18 February 2015 letter.

III. STANDARD OF REVIEW AND APPLICABLE LAW

4. Regulation 83(4) of the Regulations provides that:

> Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance.

5. The Registrar's discretion in respect of legal assistance, according to previous case law, must be exercised "in conformity with the provisions of the Statute, the Rules *and the framework of the legal aid scheme, as endorsed by the Assembly of States*

[4] Annex A.
[5] *Id*., noting that "any differences in complexity will be reflected in the duration of proceedings which, in turn, is a primary determinant in the Legal Aid Policy of overall funding."

Parties and established by the legal and policy texts of the Court."[6] Any decision within that framework may be invalidated according to three grounds: "(a) whether the Registrar has abused [his] discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable."[7]

6. Decisions that have a substantial and long-term impact on the composition of Defence teams, as opposed to more minor decisions,[8] are scrutinised "more thoroughly":

> [W]hen 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. However, when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or legal representatives and their teams, the Chamber's intervention is more limited.[9]

7. A failure to provide "full and complete" reasons is, in itself, a "compelling reason" for overturning a Registry decision:

> 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 account all aspects of the request. The Chamber

[6] Decision on 'Request for Review of Registrar's Decision' by the Defence of Saif Al-Islam Gaddafi, ICC-01/11-01/11-390-Red, 30 July 2013 ("*Gaddafi* Funding Decision"), para. 28 (italics added).
[7] Decision on the Urgent Requests by the Legal Representatives of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, ICC-01/04-01/07-3277, 23 April 2012 ("*Katanga* Review Decision"), para. 9.
[8] See e.g. 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, ICC-01/04-02/12-159, 11 February 2014, para. 22 (according a "relatively wide margin of discretion" particularly "in relation to the calculation and payment of fees. ")
[9] *Katanga* Review Decision, para. 9.

considers these to be compelling reasons for it to review the Registrar's Decision. In particular, by failing to provide a full and complete justification for his decision and failing to fully consider each of the Defendant's submissions, the Chamber considers that the Registrar's decision was unreasonable, it evinced signs of arbitrariness, and therefore a misuse of its discretion.[10]

IV. SUBMISSIONS

A. THE FAILURE TO APPLY THE LEGAL AID POLICY, AND THE ABSENCE OF REASONS JUSTIFYING THAT FAILURE, ARE ERRORS OF LAW INVALIDATING THE IMPUGNED DECISION

8. Regulation 83(1) of the Regulations, adopted in 2004, provides generally that the Registrar "shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence". The Assembly of States Parties has actively participated in promulgating a more definite and specific legal aid policy under Regulation 83(1).[11] The result, after numerous predecessor policies and years of consultation with a variety of stakeholders,[12] is the "Registry's single policy document on the Court's legal aid system", approved by the Assembly of State Parties in 2013.[13] This document describes itself as "a single policy document on the legal aid system"; that "[f]or all intents and purposes, this document constitutes the legal aid scheme of the Court"; and as "*the* document of reference outlining the Court's legal aid scheme."[14] Nowhere is there any hint that the Policy applies only to certain types of cases; on the contrary, the plain language indicates that it applies to all proceedings before the Court. One

[10] Reasons for Review of Registrar's Decision on Defence resources, ICC-01/04-02/06-389, 29 October 2014 ("*Bosco* Review Decision") para. 41.
[11] Legal Aid Policy, Annex I.
[12] *Id.*, paras. 4-8.
[13] *Id.*, paras. 1 and 2: "[T]he Assembly of States Parties […] requested the International Criminal Court […] to submit […] by 1 March 2013, a single policy document on the legal aid system…[this] Legal Aid Policy is the combined updated effect of relevant resolutions adopted to date by the Assembly on the question of legal aid […] the applicable legal provisions governing legal aid as stipulated in the Court's legal instruments and internal Registry guidelines and standard operating procedures."
[14] *Id.*, paras. 1-3 (emphasis in original).

Chamber has described the Policy as the Court's "comprehensive legal aid scheme" that constrains the Registrar's discretion under Regulation 83(1): "[w]hile 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."[15]

9. The Policy is also the product of a mandatory consultative process, and is not within the sole discretion of the Registrar. The "legal aid system is the by-product of extensive and multiple consultations conducted by the Registry in accordance with rule 20.3 of the *Rules*."[16] The Registrar is not free, according to his own Regulations, to depart from the policy as approved by the State Parties: "[r]emuneration of persons acting within the scheme of legal assistance paid by the Court shall accord with the relevant document adopted or approved by the Assembly of States Parties."[17] The Policy is, of course, not unchangeable, but must be amended in accordance with the same process of consultation with the State Parties and other stakeholders: "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."[18] Until then, by implication, the Policy is binding and must be applied as adopted.

10. The limitation on the Registrar's discretion provided by the Policy is no mere formalism. The interests involved are too broad and important to be decided by the Registrar alone without the guidance of a set policy. As stated in *Lubanga*, "the overarching consideration in this context is the accused's right to a fair trial under Article 67 of the Statute", which is "an indispensible element of

[15] *Bosco* Review Decision, para. 25 (underline added).
[16] Legal Aid Policy, para. 4 (underline added).
[17] Regulations of the Registry, Reg. 133 (underline added).
[18] Legal Aid Policy, para. 3 (underline added)

international justice."[19] Only a written policy can "balance[] the requirements for adequate, effective and efficient legal representation with the budgetary constraints of a publicly funded legal aid scheme."[20] Reconciling the foundational rights enshrined in Articles 55(2)(c) and 67(1)(d) with the legitimate concerns of public expenditure are matters that cannot be left to the sole discretion of the Registrar, let alone a discretion exercised unrestrained and unstructured by any written guidelines whatsoever. Indeed, it was the States Parties who, after review and consultation spanning almost a decade,[21] decided to *add* more resources for the defence teams.[22]

11. The Impugned Decision's circumvention of the Policy is, given all these circumstances, an evident legal error. Even worse, however, is the failure to expressly acknowledge such a departure,[23] let alone justify it. The omission is all the more egregious as it was the object of direct submissions by Mr. Mangenda. Instead of addressing this key issue, the Registrar simply proceeds to make an adverse conclusion, while deliberately failing to give a reasoned decision. The consequence is that Mr. Mangenda has been deprived of the opportunity to make full submissions in the present request as to the nature of the Registrar's error.[24] This deficiency will not be remedied by any *post facto* justifications or

[19] 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 ("*Lubanga* Review Decision"), para. 54.
[20] *Id*. See also Legal Aid Policy, para. 4.
[21] Legal Aid Policy, paras. 4-8.
[22] *Id*., p. 4, fn 5, citing "Report on the operation of the Court's legal aid system and proposals for its amendments", No. ICC-ASP/6/4, 31 May 2007, para. 29.
[23] The only vague reference to the reasons underpinning the Registrar's decision to discard the Policy is the statement that "the Chief of CSS explained [during the informal meetings] that it would be difficult to provide the level of resources as in an article 5 case." Impugned Decision, para. 4. This imprecise statement does not constitute a reason.
[24] ECtHR, *Suominen v. Finland*, Appn. No. 37801/97, Judgement, 1 July 2003, paras. 36-37 ("an authority is obliged to justify its activities by giving reasons for its decisions" and "[i]t is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.")

explanations: a pre-condition of valid administrative decision-making is that the conclusion be properly motived and explained. The failure, above all else, interferes with the Trial Chamber's capacity to exercise its function as the reviewing authority.[25]

12. The Registrar's failure to provide a reasoned explanation for departing from the Policy violated his obligation to "provide a full and complete justification for his decision and […] to fully consider each of the Defendant's submissions."[26] Further, the failure was deliberate and unreasonable both because of its legally dubious nature and because of the Defence's submission to the Registrar. This alone, as in the *Bosco* case, "evince[s] signs of arbitrariness, and therefore a misuse of discretion" for which the only appropriate remedy is to reverse the Impugned Decision and impose the requirements of the Policy in determining the quantum of funding.

B. THE IMPUGNED DECISION IDENTIFIES NO FACTORS RELEVANT TO DETERMINING THE QUANTUM OF FUNDING ACCORDED

13. The Impugned Decision, having disregarded the detailed funding formula established by the Policy, provides no substitute criteria. Indeed, it does not identify even a single factor relevant to assessing the requirements of "an effective and efficient defence," as prescribed by Regulation 83(1).

14. The Impugned Decision justifies the quantum of [REDACTED] per month on three grounds:

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[25] ECtHR, *Hirvisaari v. Finland*, Appn. No. 49684/99, Judgement, 27 September 2001, para. 30 ("A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal" and, by extension, enable the appellate body to properly discharge its functions.)
[26] *Bosco* Review Decision, para. 41.

- One Defence team (not Mangenda) offered contradictory indications of the volume of disclosure;[27]

- A small fraction of the numerous charges and counts were not confirmed;[28]

- The funding accorded is more than double the monthly amount accorded during the Pre-Trial phase.[29]

15. None of these considerations addresses the relevant question: the level of funding "reasonably necessary" for an "effective and efficient" defence. The Registrar identifies none of the obvious relevant indicators of workload, including but not limited to: (i) the size of Prosecution documentary disclosure, which is extremely voluminous;[30] (ii) the expected number of Prosecution exhibits – which is expected to exceed more than one thousand items;[31] (iii) the expected number of Prosecution (and Defence) witnesses; (iv) the number of counts facing the accused (42 counts in the case of Mr. Mangenda); (v) the number of grounds for potential conviction, as reflected in the number of pairings of crimes and modes of liability alleged (which in this case corresponds to the number of counts); (vi) the novelty of the charges and modes of liability alleged; and (vii) the multi-accused context (such as the number of filings to date in the case).

16. The failure to take account of relevant considerations,[32] or to articulate the factors relied upon,[33] is a well-recognised ground for quashing administrative decisions.

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[27] Impugned Decision, para. 4.
[28] *Id.*, para. 5
[29] *Id.*, para. 6.
[30] Prosecution's Observations on the Agenda of the First Status Conference, ICC-01/05-01/13-859-Conf, 20 March 2015 ("Prosecution's Observations") paras. 8-10, noting that, to date, the Prosecution has disclosed to the Defence 3422 items of evidence, and at least a further 750 remain to be disclosed, totalling no less than 4172 identifiable items at present.
[31] *Id.*, para. 20.
[32] *The Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010 (*Karadzic* Review Decision), para. 9 ("Accordingly, an

The above factors were manifestly relevant to assessing the requisite funding level. Not only were these relevant considerations given inadequate weight; they were ignored entirely.

17. Consideration of the foregoing objective indicators would also have prompted the Registrar to justify his unreasoned and unarticulated presumption that Article 5 cases are drastically and categorically more complex than Article 70 cases. Objective indicators show the contrary. The Prosecution in this case has already declared its intention, just by way of its first bar table motion, to tender more than half the total number of exhibits presented and admitted during the entire *Katanga* trial.[34] The total pre-trial disclosure in this case is already a third larger, by number of items, than that in *Bemba*.[35] The number of witnesses projected to be called by the Prosecution is just under half the number called during the *Katanga* trial;[36] given the number of defendants and range of factual allegations, there is a good chance that the total number of witnesses could be similar to the total number heard in *Katanga*.

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administrative decision may be quashed if the Registrar […] failed to take into account relevant material.") The ICC Presidency has similarly found that judicial review is appropriate where "*[i]t involves a consideration of whether the Registrar has:…failed to take into account relevant factors*". *See e.g.* ICC-PresRoC72-02-5, para. 16; ICC-01/04-01/06-731-Conf, para. 24; ICC-Pres-RoC72-01-8-10, para. 20.

[33] *Bosco* Review Decision, para. 41.

[34] *Le Procureur c. Germain Katanga,* Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, 7 mars 2014 ("Katanga Judgement") para. 22 : « *Le Procureur a versé 261 pièces au dossier, la Défense de Germain Katanga en a produit 240 et celle de Mathieu Ngudjolo 132. Cinq pièces ont par ailleurs été versées par la Chambre, qui a autorisé les Représentants légaux des victimes à en produire également cinq, ce qui représente un total de 643 pièces.* » See also Prosecution's Observations, para. 20, indicating on-going preparation of the "first request for the admission from the bar table of approximately 400 items of evidence."

[35] As of 30 July 2014, the Prosecution had disclosed, in connection with the confirmation of charges in this case, approximately 3,161 items of evidence. See Prosecution's Observations, paras. 8–13. In contrast, 2,130 pieces of evidence were disclosed to the defence in ICC-01/05-01/08 for the confirmation of charges hearing. Decision on the Implementation of Disclosure to the Defence, ICC-01/05-01/08-148, 10 October 2008, para. 8.

[36] Prosecution's Observations, para. 19. See also Katanga Judgement, para. 21 (indicating the Prosecution called 24 witnesses).

18. Any difference in workload as reflected in these numbers is accommodated in and reflected by the Policy itself, which is based on *monthly* payments only for as long as proceedings continue. This distinguishes the Policy from the legal aid formulae at the ICTR and ICTY, which are based in part on a "lump-sum" for an entire stage. The Policy accurately differentiates overall funding according to duration, which is an eminently fair, objective and transparent determinant of the level of legal aid funding. Nothing in the objective indicators cited above suggests that there is any justification for a fundamentally different (and wholly undefined) funding scheme.

19. In addition to its built-in measure of complexity, the Policy confers a specific discretion on the Registrar to suspend or reduce payments upon the occurrence of certain conditions, and to decline to provide supplementary resources as might be requested.[37] The Impugned Decision simply rejects this calibrated mechanism by administrative fiat, without explanation and without offering any substitute criteria to explain why its funding formula is appropriate or justified.

20. The Impugned Decision is also internally contradictory as to whether the Policy is applicable or not. Though the Policy is rejected for the purpose of overall funding levels, its strictures in respect of the "total ceilings allowed for each category of team members" are imposed on the Defence.[38] €22,000 per month therefore translates into one counsel, one legal assistant, and one case manager, with essentially no money left over for investigations, translations or any

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[37] Legal Aid Policy, para. 68 (referring to the "considerable fluctuations which may occur during a case"). The Registrar may also, in extreme cases, "set a limit on the variable additional resources which could be allocated." *Id*., para. 73.
Note also that "[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." *Id*., at para. 116.
[38] Impugned Decision, para. 8.

expenses. The *à la carte* application of the Policy is based on no reasons, is arbitrary, and undermines the very certainty and transparency that necessitated the Policy in the first place.

C. THE IMPUGNED DECISION RELIES ON IRRELEVANT FACTORS

21. The Impugned Decision, despite its brevity, cites several irrelevant factors suggesting that the Registrar's mind was animated by immaterial and improper considerations in setting the quantum of legal aid funding. Reliance on irrelevant material is a ground for quashing an administrative decision.[39]

22. The Registrar places particular emphasis on the fact that the funding "will have to be withdrawn from the Contingency Fund."[40] The source of the funding is irrelevant, let alone whether this poses some kind of internal difficulty for the Registrar. Indeed, nothing could be more inappropriate than to suggest that the under-funding of the regular legal aid budget justifies a departure from the legally prescribed Policy. This appears, however, to be a primary consideration in the Impugned Decision.

23. The error by one of the Defence teams as to the quantity of disclosure, as well as the proportion of budget increase relative to the pre-trial phase are also both irrelevant to determining the requirements of an "effective and efficient defence." The former reflects an unnecessarily adversarial posture towards the Defence not in accord with the Registrar's obligations under the Policy. The latter is a self-referential benchmark bearing no relation to an objective assessment of current

[39] ICC-PresRoC72-02-5, para. 16; ICC-01/04-01/06-731-Conf, para. 24; ICC-Pres-RoC72-01-8-10, para. 20; ICC-RoC85-01/08-4 (The Presidency may exercise judicial review when the Registrar "*has taken into account irrelevant factors*"); *Karadzic* Review Decision, para. 9 ("Accordingly, an administrative decision may be quashed if the Registrar […] took into account irrelevant material.")
[40] Impugned Decision, para. 6.

Defence needs. The decisions of the Pre-Trial Chamber (or, in this case, Judge) are not binding on the Trial Chamber and, in any event, concerned only the needs at the pre-trial phase. The unanimous view of all Defence teams is that the level of pre-trial funding was grossly inadequate, compelling the performance of many hundreds of uncompensated hours of work. Relying on that unacceptably low level of funding provides no benchmark or justification for assessing defence needs at the trial phase – which is indisputably the most onerous phase of proceedings. In particular, the Registrar fails to take account of the potential dangers to "efficient" proceedings arising to the appointment of but a single counsel, the illness of whom could cause a trial to come to halt for an extended period.

D. THE IMPUGNED DECISION IS AN ABUSE OF DISCRETION, MANIFESTLY UNREASONABLE, AND VIOLATES MR. MANGENDA'S RIGHTS

24. The Impugned Decision is an abuse of discretion. The Registrar has, without reasons, overturned the carefully constructed Policy governing legal aid funding before the Court. A written policy not only ensures transparency, certainty, and fairness in decision-making, but also guarantees that different accused before this Court are treated equally. The Impugned Decision is not an exercise of lawfully conferred discretion; it is unlawful usurpation of powers that have been specifically withdrawn from the Registrar's discretion by the States Parties on the basis of rule making prescribed by the Rule 20 of the Rules.

25. Even apart from the Registrar's failure to mention any relevant considerations in coming to this amount, and the factors erroneously cited as being relevant, the amount is itself manifestly deficient. The Registrar, unlike in previous decisions

in funding cases,[41] makes no effort to analyse precisely what resources it believes it is making available. Any funding decision lacking such an analysis is inherently unreasonable and irrational. The practical implication of the Impugned Decision, assuming that any team must have a Case Manager and Legal Assistant to function, is : (i) the near or total elimination of any budget for investigations; (ii) the near or total elimination of any budget for expenses; (iii) the near or total elimination of any budget for translations; and (iv) the elimination of any budget for co-counsel. These consequences might be tolerable in respect of straightforward contempt cases involving an isolated incident. This case, however, involves a multitude of incidents; countless conversations; a huge volume of documentary and electronic information; and potentially several dozen witnesses as between the Prosecution and the Defence teams. Investigations are necessary in such circumstances, as the Registrar has previously recognised. [42] Under these circumstances, eliminating the four categories of funding just described is manifestly unreasonable, violates Mr. Mangenda's rights, and actually threatens the efficient disposition of the case.

26. No mention is made in the Impugned Decision of Mr. Mangenda's right to equality of arms embodied in Article 67 of the Statute. No consideration is given, in particular, to the substantial disadvantage relative to the Prosecution[43] that the

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[41] Registration in the record of the case of the "Registrar's Decision on the additional means for the trial phase sought by Mr Thomas Lubanga in his 'Application for additional means under regulation 83(3) of the Regulations of the Court' filed on 3 May 2007", of 14 June 2007, ICC-01/04-01/06-927-tENG, 14 June 2007. See also *Gaddafi* Funding Decision, paras. 19 *et seq*.

[42] ICC-01/04-01/06-927-tENG, paras. 3 and 29, noting that, in light of "the importance of investigations to criminal proceedings", investigators and resource persons are provided for within the limits of the amounts provided in the investigations budget and are allocated *automatically* during the trial phase.

[43] ICTY, *Prosecutor v. Prlić* , Decision on Slobodan Praljak's Appeal of the Trial Chamber's 13 October 2008 Order Limiting the Translation of Defence Evidence, IT-04-74-AR.73.12, 5 December 2008, para. 29 (recalling that "equality of arms does not mean equality of resources, but rather that each party must have a reasonable opportunity to defend its interest under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent"); ICTY, *Prosecutor v. Milutinović* , Decision on Interlocutory Appeal on Motion for Additional Funds, IT-99-37-AR73.2, 13 November 2003, paras. 23-24 (noting that equality of

funding level will cause in terms of investigations, legal resources, ability to travel on mission, and representation by more than a single counsel.

E. THE IMPUGNED DECISION ADOPTS AN ARBITRARY AND UNEXPLAINED START DATE FOR THE TRIAL PHASE

27. Mr. Mangenda hereby joins and supports the submissions of Mr. Arido in respect of the proper start date for according trial legal aid funding.[44] The date on which the trial phase started was 23 January 2015.[45]

V. CONCLUSION AND RELIEF SOUGHT

28. The Impugned Decision is entitled no deference in light of its failure to state reasons, the fundamental legal error on which it is based, and the serious infringement of Mr. Mangenda's fundamental rights that it engenders. Deference is due only when an administrative decision-maker exercises discretion within lawfully prescribed parameters. The Impugned Decision is not exercised within those lawfully prescribed parameters.

29. The Impugned Decision ignores relevant considerations, and takes account of several irrelevant considerations. The Registrar, in effect, gives no reasons at all to

arms does not "necessarily amount to the material equality of possessing the same financial and/or personal resources" but rather "would be violated only if either party is put at a disadvantage when presenting its case").

[44] 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, ICC-01/05-01/13-857-Conf, 19 March 2015, paras. 63-66.

[45] Paragraph 41 of the Legal Aid Policy makes clear that the trial phase begins to run as soon as a definite decision has been taken relating to the confirmation of charges. This occurred on 23 January 2015, the date on which the Pre-Trial Chamber rejected the Defence teams' requests for leave to appeal the decision on the confirmation of charges and ordered the transmission of the Confirmation Decision and the record of the proceedings to the Presidency. Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/05-01/13-801, 23 January 2015.

substantiate the quantum of funding provided to the Defence. The indicators of complexity were, in fact, entirely disregarded. Unsurprisingly, given the lack of regard for any proper and relevant considerations, the level of funding provided is manifestly unreasonable, violates Mr. Mangenda's rights and, paradoxically, threatens the efficient conduct of these proceedings.

30. The foregoing failings, at bottom, stem from the unjustified, unreasoned, and legally erroneous disregard of the established Legal Aid Policy. The Registrar had no legal authority to deviate therefrom and, having done so, he compounded his error by providing no rational explanation for the level of funding stipulated.

31. Mr. Mangenda therefore respectfully requests that the Chamber:

a. Reverse and quash the Impugned Decision;
b. Order the Registrar to accord initial legal aid funding in accordance with the Legal Aid Policy;
c. Make all future legal funding decisions in accordance with the Legal Aid Policy; and
d. Order that the start date for trial legal aid funding is 23 January 2015.

Christopher Michael Gosnell
Lead Counsel for Mr. Jean-Jacques Mangenda Kabongo

Dated this 15 July 2016,

At The Hague, The Netherlands