

Original : **English**N°: **ICC-01/12-01/18**Date: **12 December 2022****TRIAL CHAMBER X**

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR *v.* AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD**

**Public
With Public Annex**

**Registry's Observations on "Urgent Request for Judicial Review"
(ICC-01/12-01/18-2431)**

Source : Registry

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

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I. INTRODUCTION

1. The Registrar hereby submits its observations on the “Urgent Request for Judicial Review” (“Request”), as invited by Trial Chamber X (“Chamber”) in its email of 5 December 2022 at 14.42. The Registry observes that the Request is inadmissible as it contests a Registrar’s decision, which is not an appealable decision before the Chamber and the Chamber is not the appropriate forum to address said Request.

II. PROCEDURAL HISTORY

2. On 10 November 2022, the Registrar received individual letters of different team members of the *Al Hassan* Defence, including counsel and support team members (“Defence Letter”), in which said requested the Registrar to “a) [i]mmediately abolish the limit of professional charges in relation to any tax paid on [their] salary; b) [i]mmediately adjust [their] net monthly salary [...]; and c) [e]nsure that any future adjustment made to [the] Prosecution counterpart’s salary is reflected in [their] own salary.” It was further “demand[ed] to be immediately provided with appropriate work security and entitlements which are both not yet provided for in the current [Legal Aid Policy].”
3. On 21 November 2022, the Registrar received an email by Counsel for Mr Al Hassan to follow up in relation to their correspondence of 10 November and urging the Registrar to respond to the matters in the Defence Letter.
4. On 22 November 2022, the Registrar received another letter by Defence team members, in which the Registrar was requested to hold a meeting with team members between 23 November and 2 December to explain what concrete steps [the Registrar plans] to take or have taken in response to [the Defence Letter].

5. On 24 November 2022, the Registrar responded to the Defence Letter (“Impugned Decision”). Therein, the Registrar noted that the Defence letter does not relate to the application or implementation of the Legal Aid Policy but to the terms of it. On this basis, the Registrar informed the Defence that he is bound by the provisions of the Registry’s single policy document on the Court’s legal aid system (“Legal Aid Policy”)¹ and may therefore not deviate from the current legal framework, including with regard to remuneration schemes set out in there, without prior approval of such by the Assembly of States Parties (“Assembly”) in accordance with regulation 133 of the Regulations of the Registrar (“RoR”). In the Impugned Decision, the Registrar further reminded the Defence of the ongoing review and reform process of the Court’s legal aid system, as mandated by the Assembly.²
6. On 28 November 2022, the Registrar received a notice by a group of support team members (“Defence Notice”), including members of the *Al Hassan* Defence, in which they informed the Registrar of labour actions taken by defence team members from 5 to 9 December 2022, including strikes, protests, and/or work stoppages, as a result of the perceived inactivity on the side of the Registrar in offering “concrete steps to address the issues that are currently faced by the Defence Support Staff”. In the Defence Notice, the respective support team members *inter alia* requested the Registry to use its “creat[ivity] in interpreting its legal framework when it seeks a particular outcome” for example by “publishing a series of dependable entitlements available upon request under the ‘additional means’ regime of the L[egal Aid Policy]”.

¹ ICC-ASP/12/3.

² “In producing [the reform] proposals to take account of costs constraints and ensure that all options presented can be funded within existing resources, and within that context, to continue to explore constructive options conducive to a viable way forward to improve the conditions of service of external defence and victims’ teams members”, ICC-ASP/20/Res.5, para. 90; Annex I, para. 8.

7. On 29 November 2022, the Registrar responded to the Defence Notice, acknowledging support team members' concerns regarding their working conditions. The Registrar further clarified that additional means are for the purpose of granting additional team members to a team if the circumstances of the case so require and therefore separate from the determination of the remuneration of individual team members identified in the Legal Aid Policy. It was further emphasized that the use of public funds is earmarked and subject to the approval of the Committee on Budget and Finance and the Assembly.
8. On 30 November 2022, the Registrar held a meeting with all interested defence and victims' team members, in which the Registrar informed all participants about the status of discussions of the ongoing reform process of the Court's legal aid system; and addressed individual questions raised by participants. As a follow up to the meeting, the Registrar further circulated among all practicing defence and victims' team members an explanatory note on the status of the legal aid reform process.³

III. APPLICABLE LAW

9. The Registry observations are made on the basis of article 67(1)(d) of the Rome Statute ("Statute"), rules 20(2) and 21(2) of the Rules of Procedure and Evidence ("Rules"), regulation 83(4) of the Regulations of the Court ("RoC"), regulation 135(2) of the Regulations of the Registry ("RoR"), and the Legal Aid Policy.⁴

³ Public Annex.

⁴ ICC-ASP/12/3.

IV. SUBMISSION

The Request is inadmissible as it does not fall within the scope of judicial review by the Chamber

10. In requesting the Chamber to review and reverse the decision of the Registrar, the Defence refers to the letter by the Registrar dated 24 November 2022 in response to a collective action by a number of defence team members about the general contestation of the working conditions applicable to said team members under the Legal Aid Policy⁵ (“Impugned Decision”). In the Impugned Decision, the Registrar explains that he cannot deviate from the current legal framework, including with regard to remuneration schemes set out in there, without prior approval of such by the Assembly in accordance with regulation 133 of the RoR. In this regard, there seems to be a divergence of views between the Defence and the Registrar. While the Defence submits that the adjustment of remuneration is subject to the interpretation of the Registrar, the Registrar is submitting to the contrary that the Request amounts to a request for a change of the underlying legal framework, i.e. the Legal Aid Policy itself.

A. Legal basis for judicial review

11. In accordance with regulation 83(4) of the RoC, decisions by the Registrar in respect of the scope of legal assistance paid by the Court are subject to review by the relevant Chamber on application by the person receiving legal assistance. Regulation 135(2) of the RoR further specifies that decisions taken by the Registrar on disputes regarding the calculation, payment of fees, or the reimbursement of expenses under regulation 135(1) of the RoR are subject to review by the relevant Chamber upon request by counsel.

⁵ Reference is made to the Defence Letter as per para. 2 of the present observations.

12. Further, as acknowledged by the jurisprudence of the Court, decisions taken by the Registrar in accordance with the responsibilities as outlined in article 43(1) of the Statute in conjunction with rules 20(3) and 21(1) of the Rules and regulation 130 of the RoR enjoy a wide margin of discretion in determining what is reasonable and necessary under established jurisprudence of the Court.⁶ It therefore requires compelling reasons for a Chamber to interfere with the Registrar's discretion in the area of legal assistance.⁷ Concerning the use of judicial proceedings as a platform "to pursue financial and labour law related agendas"⁸ or to make "broader statement[s] about the employment system and advoca[cy] for a policy change in general"⁹, it has been acknowledged that a request for an order by a Chamber is not the appropriate vehicle to further these objectives and should be kept out of the courtroom.¹⁰

B. Absence of an appealable decision pursuant to regulation 83(4) of the RoC or regulation 135(2) of the RoR

13. The Request is not aimed at reviewing a specific decision by the Registrar relating to disputes regarding the calculation, payment of fees, or the reimbursement of expenses. In fact, there is no appealable decision present by the Registrar whose legality can be assessed by the Chamber.

⁶ *Prosecutor v. Bemba Gombo et al*, ICC-01/05-01/13-955, Decision on the Defence Application for Judicial Review of the Decision of the Registrar on the Allocation of Resources during the Trial Phase, 21 May 2015, para. 33 ("Bemba 2015 Decision"); *Prosecutor v. Gaddafi*, ICC-01/11-01/11-613, Decision on the Defence Request for Review of the Registrar's Decision on Legal Aid, 24 August 2015, para. 25 ("Gaddafi Decision"); *Prosecutor v. Ntaganda*, ICC-01/04-02/06-389, Reasons for Review of Registrar's Decision on Defence Resources, 29 October 2014, para. 28 ("Ntaganda Decision"). *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-159, 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, para. 22 and fn. 40 ("Ngudjolo Decision").

⁷ *Prosecutor v. Bemba Gombo et al*, ICC-01/05-01/13-2301, Decision on Bemba Defence Request regarding the Employment Conditions of Defence Staff, 17 July 2018, para. 8 ("Bemba et al Decision").

⁸ *Prosecutor v. Yekatom and Ngaïssona*, Decision on the Urgent Joint Defence Motion for an Adjournment and a Suspension of Deadlines, ICC-01/14/01/18-1684, 2 December 2022, para. 5 ("Yekatom and Ngaïssona Decision").

⁹ Bemba et al Decision, para. 8.

¹⁰ Yekatom and Ngaïssona Decision, para. 5; Bemba et al Decision, para. 8.

14. Firstly, for contesting a calculation under regulation 135(2) of the RoR, it must relate to a specific fee for a specific team member. This is not the case here. The Impugned Decision is a response to a general contestation of the conditions and the remuneration scheme of the Legal Aid Policy by a group of defence team members of different defence teams practicing before the Court. As such, the Impugned Decision is not individualised to a concrete dispute regarding the calculation, payment of fees, or the reimbursement of expenses of a team member of the *Al Hassan* Defence. Instead, the Impugned Decision is such relating to a request by different defence teams for a change of the conditions in the Legal Aid Policy in general.
15. Secondly, if a calculation is contested under regulation 13 (2) of the RoR, the contestation is on the mode of calculation and not on the limit of the maximum amount already given to the defence. Hence, a decision by the Registrar relating to the calculation of fees is only appealable when it refers to the way fees are calculated *within the limit* of the maximum fees. In this case, the Defence already receives the maximum remuneration per allocated team members as per the remuneration scales for defence and victims' team members as well as a maximum percentage for compensation of charges paid upon proof of payment of taxes.¹¹ Any remuneration lower than the maximum fees is subject to the decision by Counsel through the exercise of the flexibility principle.¹²
16. Consequently, what the Defence requests the Chamber is not to order the Registrar to interpret provisions in the Legal Aid Policy in a manner consistent with the principles, but to order the Registrar to implement propositions for legal aid at the Court *de lege ferenda*.¹³ As expressed in

¹¹ As per ICC-ASP/12/3, table 3.

¹² ICC-ASP/12/3, para. 44.

¹³ Cf. Request, paras 11, 51.

paragraph 12, the Chamber is not the appropriate decision maker in this respect.

17. Instead, the adequate avenue to seek a change of the current remuneration scheme is to address the Assembly. Notably, in accordance with regulation 133 of the RoR, the Registrar may not use funds allocated to the Registry within the legal aid budget for another purpose than the one originally foreseen in the Legal Aid Policy without the prior approval by the Assembly through a resolution.
18. The Registrar's analysis in this regard is supported by two developments. Firstly, there is an ongoing Legal Aid Policy reform process, which strictly follows the terms defined in the mandate received by the Assembly.¹⁴ The reform process and its restriction to the mandate received by the Assembly has been transparent to the Defence and took place in consultation with all relevant stakeholders, including defence and victims' teams.¹⁵ In the Reform Proposal for the Court's legal aid system,¹⁶ the Registrar has *inter alia* proposed an adjustment of the remuneration of all team members of defence and victims' teams as well as a range of different contract type options for an employment relationship between support team members and the Court providing support team members with social support and access to mechanisms against discrimination and harassment.
19. Secondly, defence team members have pursued a request for adjustment of remuneration before the Assembly during 5 and 10 December 2022. The Assembly has, as a result, agreed to "consider interim measures, within existing resources in the legal aid budget, to the benefit of members of

¹⁴ ICC-ASP/20/15, Annex I, para. 8.

¹⁵ The continued efforts of the Registrar to reform the legal aid policy throughout the years 2021 and 2022 are shared in the Annex.

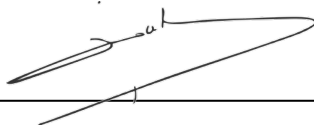
¹⁶ The proposal for a reform of the legal aid system has been shared with all relevant stakeholders on 31 August 2022.

defence and victims' teams", pending the finalisation of the legal aid policy reform.

20. As the Request is not based on a legal basis for judicial review by the Chamber, the Request should be declared inadmissible and be rejected *in limine*.

V. CONCLUSION

Accordingly, the Request for Review should be rejected in its entirety.



Marc Dubuisson
Director, Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 12 December 2022

At The Hague, The Netherlands