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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD
NGAISSONA**

**Public
With Public Annex**

**Registry's Observations on "Request for review of the Registrar's 24 November
2022 Decision titled 'Registrar's reply to the request for Salary adjustment'
pursuant to regulation 83(4) of the Regulations of the Court and regulation 135(2)
of the Regulations of the Registry"
(ICC-01/14-01/18-1688)**

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 his observations on the “Request for review of the Registrar’s 24 November 2022 Decision” (“Request”), as invited by Trial Chamber V (“Chamber”) in its email of 6 December 2022 at 17.05. 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 *Yekatom and Ngaïssona* Defence, including counsel and support team members (“Defence Letter”), in which they 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 22 November 2022, the Registrar received another joint letter by Defence team members, in which the Registrar was requested to hold a meeting with team members to explain what concrete steps [the Registrar plans] to take or have taken in response to [the Defence Letter].
4. On 24 November 2022, the Registrar responded to the Defence Letter (“Impugned Decision”). In doing so, 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 is not in a position 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

5. On 28 November 2022, the Registrar received a notice by a group of support team members ("Defence Notice"), including members of the *Yekatom and Ngaïssona* 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 requested the Registry, *inter alia*, 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]".
6. 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. Additional means are therefore to be

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.

used for the remuneration of team members other than the one of individual team members being already part of the core team as identified in the Legal Aid Policy.³ 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.

7. 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. Following the meeting, the Registrar further circulated an explanatory note on the status of the legal aid reform process⁴ among all practicing defence and victims' team members.

III. APPLICABLE LAW

8. 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.⁵

IV. SUBMISSIONS

A. The Request is inadmissible as it does not fall within the scope of judicial review by the Chamber pursuant to regulation 83(4) of the RoC or regulation 135(2) of the RoR

9. In requesting the Chamber to review and reverse the decision of the Registrar, the Defence refers to the letter by the Registrar dated 24

³ For the team composition, see ICC-ASP/12/3, paras 39-45, including diagram 1; for additional means, see ICC-ASP/12/3, paras 66-76.

⁴ Public Annex.

⁵ ICC-ASP/12/3.

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 Policy⁶ (“Impugned Decision”).⁷ 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 falls within the Registrar’s discretion,⁸ 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), for which the Registrar requires the approval of the Assembly.

1. Legal basis for judicial review

10. 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. Such 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 indeed enjoy a wide margin of discretion in determining what is reasonable and

⁶ Reference is made to the Defence Letter as per para. 2 of the present observations.

⁷ Request, para. 1.

⁸ Request, paras 36-39.

necessary under established jurisprudence of the Court.⁹ It therefore requires compelling reasons for a Chamber to interfere with the Registrar's discretion in the area of legal assistance.¹⁰

11. In contrast, concerning the use of judicial proceedings as a platform "to pursue financial and labour law related agendas"¹¹ or to make "broader statement[s] about the employment system and advoca[cy] for a policy change in general"¹², it has been acknowledged *inter alia* by this Chamber 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.¹³ As such, the Request amounts to a request for reconsideration of the previous Chamber's decision on 2 December 2022 with no new circumstances submitted by the defence warranting the Chamber to revisit the matter of the defence team members remuneration in question.

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

12. The Registrar observes that the Request is not aimed at reviewing a specific decision by the Registrar relating to disputes regarding the scope of legal assistance or the calculation, payment of fees, or the reimbursement of

⁹ *Prosecutor v. Bemba Gombo et al*, Decision on the Defence Application for Judicial Review of the Decision of the Registrar on the Allocation of Resources during the Trial Phase, ICC-01/05-01/13-955, 21 May 2015, para. 33 ("Bemba 2015 Decision"); *Prosecutor v. Gaddafi*, Decision on the Defence Request for Review of the Registrar's Decision on Legal Aid, ICC-01/11-01/11-613, 24 August 2015, para. 25 ("Gaddafi Decision"); *Prosecutor v. Ntaganda*, Reasons for Review of Registrar's Decision on Defence Resources, ICC-01/04-02/06-389, 29 October 2014, para. 28 ("Ntaganda Decision"). *Prosecutor v. Ngudjolo Chui*, Decision on Mr Ngudjolo's request for review of the Registrar's decision regarding the level of remuneration during the appeal phase and reimbursement of fees, ICC-01/04-02/12-159, 11 February 2014, para. 22 and fn. 40 ("Ngudjolo Decision").

¹⁰ *Prosecutor v. Al Hassan*, Decision on the Defence's urgent request for judicial review, ICC-01/12-01/18-2443, 15 December 2022, para. 4 ("Al Hassan Decision"); *Prosecutor v. Bemba Gombo et al*, Decision on Bemba Defence Request regarding the Employment Conditions of Defence Staff, ICC-01/05-01/13-2301, 17 July 2018, para. 8 ("Bemba et al Decision").

¹¹ *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").

¹² Bemba et al Decision, para. 8.

¹³ Yekatom and Ngaïssona Decision, para. 5; Bemba et al Decision, para. 8; Al Hassan Decision, para. 4.

expenses. In fact, there is no appealable decision by the Registrar warranting the Chamber to review its legality.

13. Where the calculation of the remuneration of team members is affected, a difference must be made between i) requests for review of decisions on the mode of calculation of fees *within* an available maximum amount as per the Legal Aid Policy, subject to the Registrar's discretion and judicial review by the Chamber; and ii) requests aiming to review the applicable maximum fees of the Legal Aid Policy, for which the Registrar is bound by the decisions of the Assembly.
14. For contesting a calculation under regulation 135(2) of the RoR, it must relate to a specific fee for a specific team member.¹⁴ This requirement is not met 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 team members in different defence teams practicing before the Court. This is ascertained by the Defence itself.¹⁵ As such, the Impugned Decision is not individualised and sufficiently defined to a concrete dispute regarding the calculation, payment of fees, or the reimbursement of expenses of a team member of either the *Yekatom* or *Ngaïssona* Defence. Instead, the Impugned Decision relates to a general request by different defence teams for an overall change of the conditions in the Legal Aid Policy in general.
15. Further, if a calculation is contested under regulation 135(2) of the RoR, the contestation must be 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. The

¹⁴ See, for example, Gaddafi Decision, para. 5.

¹⁵ This is evidenced by the series of letters received from a number of defence team members of different defence teams as well as a joint letter by a group of support team members, see, for example, Request, paras 12-13.

maximum remuneration scales for defence and victims' team members as well as a maximum percentage for compensation of charges which is paid upon proof of payment of taxes¹⁶ has been approved by the decision of the Bureau of the Assembly.¹⁷ 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.¹⁸ Any remuneration lower than the maximum fees is subject to the decision by Counsel through the exercise of the flexibility principle.¹⁹

16. Notably, contrary to the Defence's claim,²⁰ 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. In accordance with regulation 133 of the RoR, 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. The Legal Aid Policy is the combined updated effect of all relevant resolutions adopted to date by the Assembly on the question of legal aid.²¹ Therefore, the Registrar cannot adjust remuneration unilaterally without the approval of the Assembly.

17. Consequently, what the Defence requests the Chamber is not to order the Registrar to use his discretion in applying the provisions in the Legal Aid Policy, but to order the Registrar to implement propositions for legal aid at the Court *de lege ferenda*. As expressed above, the Chamber is not the appropriate decision maker in this respect. The cited jurisprudence of the

¹⁶ ICC-ASP/12/3, table 3.

¹⁷ ICC-ASP/12/3, para. 85.

¹⁸ As per ICC-ASP/12/3, table 3.

¹⁹ ICC-ASP/12/3, para. 44.

²⁰ Cf. Request, paras 26, 33.

²¹ ICC-ASP/12/3, para. 2. A list of these decisions may be found in Annex I to ICC-ASP/12/3.

Defence does not support the contrary, as judicial review in cases formally not falling under the competence of the Chamber, was only affirmed in a case relating to the *scope of legal assistance*,²² i.e. not the change of remuneration scales.

18. Instead, the adequate avenue to seek a change of the current remuneration scheme is to address the Assembly.

B. The Request is already addressed in the applicable political forum

19. The Registrar further observes that the Request has already been addressed, with some success, in the adequate political forum. This observation is supported by two developments. Firstly, defence team members have pursued a request for adjustment of remuneration before the Assembly during 5 and 10 December 2022. The Assembly has – by way of resolution – as a result, agreed that the Registrar may “consider interim measures, within existing resources in the legal aid budget, to the benefit of members of defence and victims’ teams”,²³ pending the finalisation of the legal aid policy reform.

20. Secondly, the Assembly requested the Court “to continue its efforts in the reform of the legal aid system and to present, based on further consultations with States Parties and all relevant stakeholders, another proposal for reform of the legal aid policy for external defence and victims’ teams, in accordance with the mandate [...]”²⁴ As the Registry earlier stated in the Impugned Decision, the Legal Aid Policy reform process as per the mandate received by the Assembly will continue to take place in consultation with all relevant stakeholders, including defence and victims’

²² *Prosecutor v. Bemba*, Decision on Bemba Defence Request for Provisional Legal Assistance, ICC-01/05-01/13-1977, 30 August 2016, para. 10.

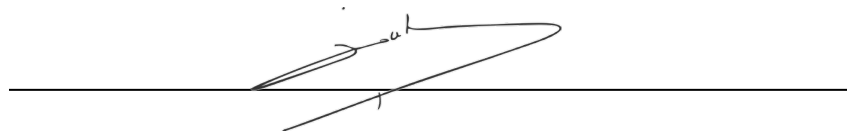
²³ ICC-ASP/21/Res.2, para. 92.

²⁴ ICC-ASP/21/Res.2, Annex I, para. 8(a).

teams.²⁵ As per the mandate by the Assembly, “full attention [will] be paid to the status of the members of the defence and victims’ teams, in order to address their conditions of service, taking into account the current economic realities.”²⁶

V. CONCLUSION

21. Lacking any legal basis for the judicial review of the Impugned Decision by the Chamber, the Request ought to be considered inadmissible and rejected in its entirety.



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

Dated this 15 December 2022

At The Hague, The Netherlands

²⁵ The continued efforts of the Registrar to reform the legal aid policy throughout the years 2021 and 2022 are shared in the Annex.

²⁶ ICC-ASP/21/2, Annex I, para. 8(a).