

**Cour
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**International
Criminal
Court**

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Date: **11 January 2024**

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

**Registry's Observations on "Defence Application for Review of the Registry's
Decision on Legal Aid" (ICC-01/12-01/18-2577)**

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 Registry hereby submits its observations on the “Defence Application for Review of the Registry’s Decision on Legal Aid”¹ (“Request”), as invited by Trial Chamber X (“Chamber”) in its email of 29 December 2023.²

II. PROCEDURAL HISTORY

2. On 13 December 2023, the Assembly of States Parties (“ASP”) adopted the “Draft Legal aid policy of the International Criminal Court”³ (“LAP”), “effective 1 January 2024, [...] thereby superseding the Registry’s single policy document on the Court’s legal aid system (ICC-ASP/12/3) and any interim measures taken by the Court in accordance with ICC-ASP/21/Res. 2, paragraph 92.”⁴
3. On 15 December 2023, the Registry announced to the Defence team of Mr Al Hassan (“Defence”) that as per the transitional measures taken at the discretion of the Registrar, it applies complexity level 2 to the Defence at the reduced activity phase prior to the judgment issued pursuant to article 74 of the Rome Statute (“Statute”), and complexity level 2 at the appeals stage, upon the issuance of the trial judgment pursuant to article 74 of the Statute (“15 December 2023 Decision”). In this regard, the Registry, *inter alia*, requested the Defence to send an overview of the team composition as of 1 January 2024 with all team members having been approved beyond 31 December 2023 including their assigned position as in line with the composition per table 1 of the LAP. The Registry also asked the Defence, where applicable and justified, to consult with the Counsel Support Section (“CSS”) on measures to ensure team stability in line with the transitional measures. Further, the Registry informed the Defence that the announcement of the

¹ Defence, “Defence Application for Review of the Registry’s Decision on Legal Aid”, 29 December 2023, ICC-01/12-01/18-2577 (“Request”).

² Email from Trial Chamber X to Registry on 29 December 2023 at 13.06.

³ ICC-ASP/22/9.

⁴ ICC-ASP/22/Res.3, para. 89.

complexity level and further clarifications about the available resources and information on how team members could be extended for the transitional period if not falling within the allocated resources, responds to the Defence's outstanding requests. It therefore asked the Defence to inform the CSS should any other request based on the previous legal aid policy⁵ still be valid for the year 2023, and base any request for resources as of 1 January 2024 on the provisions of the reformed LAP, thereby keeping in mind the clarifications provided in the 15 December 2023 Decision.⁶

4. On 18 December 2023, the Defence informed the CSS about the intended team composition as of 1 January 2024, and requested, *inter alia*, to: (1) consider the sentencing phase part of the trial stage for the purpose of allocating legal aid resources; and (2) assign the team members to the Defence.⁷
5. On 19 December 2023, the Registry responded to the Defence's email by clarifying, *inter alia*, that pursuant to the LAP,⁸ the sentencing phase falls under the appeals stage, which starts with the preparation of the notice of appeal by either the Defence or the Office of the Prosecutor ("Prosecution"), irrespective of other activities ongoing through that stage. It further informed the Defence that "[a]ctivities ongoing at this stage besides the preparation of the notice of and/or grounds for appeal, such as the preparation of the sentencing may be factors taken into account for the determination of the complexity level or may be honoured by a request for additional means."⁹ Concerning the team composition, the Registry applied transitional measures until the issuance of the trial judgment by granting resources allowing the Defence to keep all team members for the reduced activity phase as opposed to 50% of the trial resources as indicated in the LAP. For the Defence resources after the issuance of the trial judgment, the Registry proposed

⁵ ASP, Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3.

⁶ Defence, "Defence Application for Review of the Registry's Decision on Legal Aid", 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from Registry to the Defence on 15 December 2023, at 16.09 ("15 December 2023 Decision").

⁷ Defence, "Defence Application for Review of the Registry's Decision on Legal Aid", 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from the Defence to Registry on 18 December 2023, at 10.40.

⁸ LAP, para. 33.

⁹ 15 December 2023 Decision.

a team composition to the Defence that allowed to keep all requested team members under complexity level 2 at the appeals stage, and granted additional means for the purpose of keeping resources for one full-time associate counsel (used for two part-time associate counsel) until the deadline for submission of the notice of appeal.¹⁰

6. On 20 December 2023, the Defence requested to appoint Ms Mélissa Beaulieu Lussier as Assistant to Counsel within the available resources under complexity level 2 of the appeals stage through the use of remaining resources from the team composition (25%) combined with resources from programme 1 and 2 and eventual “savings” through the delayed appointment of one team member.¹¹
7. On 21 December 2023, the Registry informed the Defence that resources under the LAP are earmarked for the purpose indicated therein. In that regard, it clarified, *inter alia*, that resources for programme 1 can be used to “cover all costs associated with investigation or analysis activities” and programme 2 “to cover costs for experts, translation and other miscellaneous expenses other than that assumed by the Court”. The Registry emphasised that the resources for programmes 1 and 2 may only be used for the purpose as indicated and may not be used for the appointment of team members on a long-term basis. Similarly, the LAP does not foresee savings through delayed appointments of team members.¹²
8. On 29 December 2023, the Defence submitted the Request to the Chamber to order the Registrar to: 1) “classify the case as ‘level 3’ rather than ‘level 2’”; 2) “[i]n the event of a conviction, allocate resources based on the scheme applicable to trial, for the duration of the sentencing phase”; 3) “[i]n the event of a conviction, allocate resources for reparations

¹⁰ Defence, “Defence Application for Review of the Registry’s Decision on Legal Aid”, 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from Registry to the Defence on 19 December 2023, at 09.50 (“19 December 2023 Decision”).

¹¹ Defence, “Defence Application for Review of the Registry’s Decision on Legal Aid”, 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from the Defence to Registry on 20 December 2023, at 07.50.

¹² Defence, “Defence Application for Review of the Registry’s Decision on Legal Aid”, 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from Registry to the Defence on 21 December 2023, at 13.43 (“21 December 2023 Decision”).

immediately following the issuance of the judgment”; and 4) “[p]rovide resources for a full-time language assistant for the duration of active litigation before the Trial Chamber.”¹³

III. APPLICABLE LAW

9. The following provisions are of particular relevance to the present submissions: article 67(1)(d) of the 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”), regulations 133 and 135(2) of the Regulations of the Registry (“RoR”), and the LAP.

IV. SUBMISSIONS

A. **The Registry applied the correct stage of the proceeding to the Defence in line with the provisions of the LAP**

In the Request, the Defence argues that: 1) the Registry erroneously applied the reduced activity phase to the Defence after the issuance of the judgment pursuant to article 74 of the Statute; 2) resources for the sentencing phase should be allocated under the trial stage; and 3) resources for the reparations phase should be allocated in addition to the resources for the applicable stage of the proceedings.

1. *The appeals stage is the applicable stage of proceedings after the issuance of the trial judgment*

10. The LAP defines the stages of the proceedings for the purposes of allocating “sufficient resources to defence and victims’ teams representing the interests of their indigent

¹³ Request, para. 31.

clients, and to ensure the effective and efficient representation in proceedings before the [Court]’’.¹⁴ The scope of the Court’s legal aid system is limited to the stages of the proceedings, phases and cases identified in this Policy and its annexes, unless otherwise deemed necessary by the Chamber or the Registrar.¹⁵ The Defence considers that the period between the trial judgment pursuant to article 74 of the Statute and the notice of appeal is not covered by the LAP. The Registry notes that the LAP specifies that the trial stage ends with the closing statements.¹⁶ The appeals stage starts with the notice of appeal pursuant to article 81(1)(b) of the Statute where the accused intends to appeal the trial judgment. Where the accused does not intend to appeal the trial judgment, the appeals stage starts with the Prosecution’s notice of appeal pursuant to article 81(1)(a) of the Statute.¹⁷

11. In that regard, it is further clarified that the definition of the appeals stage is to be understood as starting with the preparation of the notice of the appeal, not the issuance of the notice of appeal itself, *i.e.* it may commence as soon as the trial judgment pursuant to article 74 of the Statute has been issued.¹⁸ The application of the appeals stage as of the issuance of the trial judgment pursuant to article 74 of the Statute is also in line with the Court’s jurisprudence.¹⁹ As such, any claim that the Registry decided to continue the reduced activity phase beyond the trial judgment is unfounded.

¹⁴ ICC-ASP/22/9, para. 2

¹⁵ ICC-ASP/22/9, para. 9.

¹⁶ ICC-ASP/22/9, para. 32.

¹⁷ ICC-ASP/22/9, para. 33.

¹⁸ The Registry notes that this has been clarified to the Defence when stating in the 19 December 2023 Decision that the appeals stage starts when the Defence “starts to prepare the notice of appeal”.

¹⁹ Trial Chamber VII, “Decision on Defence Request to Review and Vary the Registry’s Scope of Legal Assistance Decision”, 25 November 2016, ICC-01/05-01/13-2063, para. 11.

2. *Resources required for activities related to the sentencing and reparations are reflected in the available resources at the appeals stage*

12. The Defence argues that the allocation of resources under the appeals stage as defined in the LAP “contravenes the Statute and Rules and related ICC case law”.²⁰ In that regard, the Registry clarifies that the definitions of the stages of proceedings as stipulated in the LAP are not complementing or replacing any provisions in the statutory framework of the Court, but are only for the purpose of the legal aid system,²¹ *i.e.* to establish a framework that provides for the allocation of sufficient resources to defence and victims’ teams.²² As such, when applying resources according to the appeals stage under the LAP, this does not mean that resources are only provided for the purpose of activities related to the notice of appeal. Rather, the appeals stage as defined in the LAP provides for resources for all activities related thereto from the notice of appeal on,²³ including the resources allowing the Defence to prepare for sentencing.²⁴
13. The Defence further claims that there is no procedural link between preparing sentencing hearings, reparations and a notice of appeal²⁵ and requests that resources for the litigation phase of the reparations should already be applied after the issuance of the judgment pursuant to article 74 of the Statute.²⁶ As the Defence states itself, this is not foreseen in the LAP as it defines “the litigation phase of the reparations phase [as starting] with the *final* decision on conviction, *i.e.* either with the announcement of the trial judgment pursuant to article 74 of the [...] Statute, or, where the trial judgment is appealed, after the

²⁰ Request, paras. 17, 18.

²¹ ICC-ASP/22/9, para. 29.

²² *Ibid.*, para. 2.

²³ ICC-ASP/22/9, para. 33.

²⁴ Trial Chamber VII, “Decision on Defence Request to Review and Vary the Registry’s Scope of Legal Assistance Decision”, 25 November 2016, ICC-01/05-01/13-2063, paras. 12 and 14: “a sentencing determination is a more limited inquiry than the determination on the innocence or guilt of the accused, and for this reason does not consider that the defence teams require for sentencing the further resources allocated between the definite decision relating to the confirmation of charges and the conclusion of the closing statements.”

²⁵ ICC-ASP/22/9, para. 33.

²⁶ Request, para. 21.

announcement of the appeals judgment”.²⁷ The LAP further clarifies that resources for the litigation phase of the reparations are only provided “when *no other resources* are allocated to a defence team under the [LAP].”²⁸

14. Accordingly, the Registry observes that the Request in that regard is not aimed at reviewing a specific decision of the Registrar on the scope of legal assistance paid by the Court as defined in regulation 83 of the RoC. As such, it “does not concern an individualised and concrete dispute on the scope of legal assistance as defined in Regulation 83 of the [RoC], the calculation and payment of fees or the reimbursement of expenses within the remuneration regime established in the LAP”,²⁹ but rather requests a review of the definitions in the LAP as adopted by the ASP. The Registry notes that in accordance with regulation 133 of the RoR, “[r]emuneration 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.”³⁰
15. For these reasons, the Registry respectfully submits that this aspect of the Request falls outside the scope of a request for review under regulation 83(4) of the RoC and regulation 135(2) of the RoR.³¹
16. Notwithstanding the above, in the Registry’s view, the fact that work to be performed at a specific stage of the proceedings is overlapping with other tasks (for example, activities related to the appeals proceedings and reparations) does not justify providing resources as scheduled in the LAP for both stages in parallel. Rather, the complexity level system provides for a larger team composition and other resources at the beginning of each stage of the proceedings, thereby taking into account different parameters, including the non-

²⁷ ICC-ASP/22/9, para. 34, emphasis added.

²⁸ *Ibid.*, emphasis added.

²⁹ Trial Chamber V, “Decision on the Joint Defence Request for Review of the Registrar’s 24 November 2022 Decision on Salary Adjustment”, 21 December 2023, ICC-01/14-01/18-1711, para. 5.

³⁰ Regulation 133 of the RoR.

³¹ Trial Chamber V, “Decision on the Joint Defence Request for Review of the Registrar’s 24 November 2022 Decision on Salary Adjustment”, 21 December 2023, ICC-01/14-01/18-1711, para. 5, See also Trial Chamber X, “Decision on the Defence’s urgent request for judicial review”, 15 December 2022, ICC-01/12-01/18-2443, para. 4.

exhaustive list specified in paragraphs 50 and 51 of the LAP. As such, the workload required for sentencing and reparations is already taken into account when assessing the resources required for the appeals stage and the assignment of complexity levels is made on that basis. The Registry will further issue in due course a guide on the assessment of parameters which will provide further clarifications. Pending the issuance of this guide, the Registry has been transparent and flexible in discussing the needs of teams already operating in ongoing cases before the Court in order to ensure team stability in line with paragraph 15 of the LAP as apparent from the Registry's decisions on 15, 19 and 21 December 2023. In that regard, the Registry emphasises that the Defence from the issuance of the trial judgment on has been granted the following team composition: 1 Counsel, 1 Assistant to Counsel, 2 Legal Assistants, 2 Case Manager; 1 Language Assistant (50%). In addition, the Defence benefits from one Associate Counsel position until the end of the filing of the notice of appeal (used for the appointment of two part-time associate counsel) through the additional means budget.

B. The Registry applied the complexity level in line with the provisions of the LAP

1. *The assessment of the complexity level was in line with the transitional measures for already operating teams in ongoing proceedings before the Court*

17. Legal aid resources for proceedings under article 5 of the Statute are allocated on the basis of the complexity of the work and the stage of the proceedings.³² As the LAP entered into force on 1 January 2024, thereby superseding ICC-ASP/12/3,³³ "the complexity level of the work to be performed by a defence or victims' team is assessed prior to the beginning of each stage of the proceedings"³⁴ on the basis of a work plan submitted by Counsel to the

³² ICC-ASP/22/9, para. 28.

³³ ICC-ASP/Res.3, para. 89, and ICC-ASP/22/9, para. 3

³⁴ LAP, para. 43.

Registry, including information on the applicable parameters listed in paragraphs 50 to 52 of the LAP.³⁵

18. To prevent any negative impact of the transition to the new legal aid system on ongoing judicial proceedings or defence and victims' teams already operating in an ongoing case before the Court, the Registrar can exercise his discretion to apply transitional measures in order to ensure team stability for already operating teams.³⁶
19. Therefore, in assigning the complexity level to teams operating in ongoing cases before the Court, the Registry took into account that: a) submissions on the complexity level can only be received upon adoption of the reformed legal aid policy (*i.e.* after adoption on 13 December 2023) as otherwise lacking a legal basis; b) the assessment of the complexity level is made on the basis of a work plan submitted by Counsel for which he or she would only have had a limited time period considering the short time period between adoption of the LAP and entering into force; c) the work plan is to be submitted prior to the beginning of a stage of the proceedings and whether proceedings are at an ongoing stage of the proceedings as of 1 January 2024; and d) resources allocated to a team in ongoing cases have been based on a legal basis applicable at that point of time.
20. In the present case, the Registry assessed the complexity level taking into account the objective parameters with reference to resources allocated to the Defence under ICC-ASP/12/3. It took thereby into account: (a) the *de facto* team composition, *i.e.* the resources allocated as part of the core-team composition per stage of the proceedings (per diagrams 1 or 2 of ICC-ASP-12-3) and the Full-Time Equivalent ("FTE") allocated to a team per the additional means system; c) the time-period for which FTE have been approved by the Registry based on a justified request, particularly whether FTE had been allocated for a specific purpose and whether this purpose would still be applicable after 31 December 2023; and d) the working arrangements of team members (*i.e.* whether team members work up to a full-time or part-time position).

³⁵ ICC-ASP/22/9, para. 45.

³⁶ ICC-ASP/22/9, para. 15.

2. *The Defence failed to submit a work plan with parameters that can be assessed at this stage*

21. Notwithstanding the above, in its decision dated 21 December 2023, the Registry invited the Defence to submit a work plan.³⁷ The submissions made by the Defence *via* email on 7 and 8 December 2023 were premature as, in absence of the trial judgment, the Registry could not make a meaningful determination of the resources needed for an effective and efficient representation of Mr Al Hassan at the appeals stage. In that regard, the Registry informed the Defence that they can submit a work-plan for a re-assessment of the complexity level at the appeals stage once the trial judgment pursuant to article 74 of the Statute has been issued and clear indicators as to the resources required could be assessed.³⁸
22. With regard to the Defence's assessment as to when a work plan can be submitted, the Registry observes that a work plan may be submitted at the beginning of each stage of the proceedings.³⁹ In line with the explanations provided above on the initiation of the appeals stage,⁴⁰ the Defence has the opportunity to submit such work plan immediately after the announcement of the judgment for the Registry to consider. In that regard, it is to note that the Registry can only base its assessment on the parameters applicable at the time of the submission of the work plan in line with paragraphs 50 and 51. Particularly paragraph 51 indicates clear parameters applicable to the appeals stage.
23. In addition, the Registry notes that pursuant to regulation 83(3) of the RoC, the Defence has the opportunity to submit a request for additional means for a limited time period (such as for preparing sentencing hearings) where the (re-)assessment of complexity level

³⁷ Defence, "Defence Application for Review of the Registry's Decision on Legal Aid", 29 December 2023, ICC-01/12-01/18-2577-Conf-Exp-AnxB, Email from Registry to the Defence on 21 December 2023 at 13.43.

³⁸ *Ibid.*

³⁹ ICC-ASP/22/9, para. 45.

⁴⁰ See above paras. 10-11.

is exhausted, *i.e.* when a final decision has been made by the Registry, and in line with the applicable threshold.⁴¹

3. *The Registry is the organ responsible for the management and oversight of the legal assistance scheme of the Court, including the assessment of the complexity levels*

24. The Defence argues that the Registry was obliged to consult the Chamber prior to the assessment of the complexity level.⁴² In this respect, the Registry submits that pursuant to article 43(1) of the Statute, the Registry is the organ responsible for the non-judicial aspects of the administration and servicing of the Court, including the management and oversight of the legal assistance scheme of the Court. Under the reformed legal aid system, this includes the assessment of the complexity level per stage of the proceedings. As such, the LAP clarifies that the complexity level is assessed on the basis of a workplan, which “alongside further litigation with Counsel where required, shall form the basis of the Registry’s assessment on the complexity level of the work to be performed. In this context, the Registry *may* consult the Chamber to receive any additional information required to assess the complexity level of the case.”⁴³
25. The Registry notes that the possibility to consult the Chamber does not form an obligation as such, but rather aims to allow the Registry to consult the Chamber, where it deems relevant and necessary on the basis of the information provided by a team. Indeed, in the Registry’s view, an active involvement of the Chamber in the decision making process in assigning the complexity levels to a team could prejudice the Chamber’s role in later reviewing such assessment pursuant to a request for review under regulation 83(4) of the RoC.
26. Further, the reference to the Court’s jurisprudence where the Chamber pronounced that “[the Registry] should consult with the Chamber prior to taking measures which may

⁴¹ ICC-ASP/22/9, paras. 74-76.

⁴² Request, para. 28.

⁴³ ICC-ASP/22/9, para. 43, emphasis added.

result in dissolving a defence team during the deliberations phase”,⁴⁴ is misconceived. The Registry notes that the Defence is not ‘dissolved’ and in fact was allocated resources allowing to keep all requested team members under complexity level 2 at the appeals stage. The Defence was also granted additional means for the purpose of keeping resources for one full-time associate counsel (used for two part-time associate counsel) until the deadline for submission of the notice of appeal.⁴⁵

27. Furthermore, the Registry notes that the Defence seems to indicate that the Registry should have requested the Chamber on the outcome of the judgment. In that regard, the Registry wishes to emphasise that it is mindful of the decision making process of the Trial Chamber and notes that any consultation on the outcome of the judgment pursuant to article 74 of the Statute and the announcement thereof to the Defence, in the Registry’s view, would have risked to interfere or prejudice the confidentiality of this decision making process.
28. Finally, requesting the Registry to consult the Chamber for every administrative decision on the complexity level would run against the functions of the Registry, and add a significant bureaucratic burden on both the Chamber and the Registry as well as the Defence delaying the assessment.

4. *Resources provided in the LAP provide a margin to appoint team members according to the needs of the case*

29. In the Request, the Defence further states that the Registry had cut the resources for a language assistant in contradiction to a previous decision by the Chamber. The Registry observes that pursuant to the LAP, resources provided per table 1 form maximum amounts per applicable stage of the proceedings and complexity level. In that regard, all

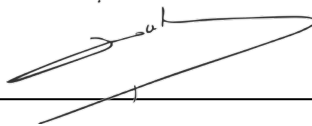
⁴⁴ Trial Chamber I, “Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry”, 30 August 2011, ICC-01/04-01/06-2800, paras. 57, 58. Trial Chamber VII, “Decision on Bemba Defence Request for Provisional Legal Assistance”, 30 August 2016, ICC-01/05-01/13-1977, para. 14.

⁴⁵ See above para. 5.

defence teams are entitled to a minimum of one language assistant working up to a part-time commitment of 50%. However, upon a justified request in light of the specific needs of the case, Counsel can request the Registry to replace an allocated position under table 1 with a position at a lower remuneration level.⁴⁶ In line with this provision, it is Counsel's responsibility to ensure that the composition of the team reflects the needs of the case within the maximum resources available to the team. Therefore, Counsel is at liberty to supplement the allocated 50% language assistant position with 50% of the resources allocated for a position at a higher remuneration level.

C. Conclusion

30. For the reasons set out above, the Registry is of the view that the Request should be rejected in its entirety.



Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Osvaldo Zavala Giler, Registrar

Dated this 11 January 2024

At The Hague, The Netherlands

⁴⁶ ICC-ASP/22/9, para. 60.