

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/12-01/18**

Date: **12 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 with Confidential Ex Parte (Defence, Registry only) Annexes A, B and C

**Defence Reply to ‘Registry Observations on “Defence Application for Review of the
Registry’s Decision on Legal Aid (ICC-01/12-01/18-2577)”’**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

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**Victims Participation and Other
Reparations Section**

I. Introduction

1. On 29 December 2023, the Defence filed ‘Defence Application for Review of the Registry’s Decision on Legal Aid’.¹
2. On 11 January 2024, the Registry filed ‘Registry Observations on “Defence Application for Review of the Registry’s Decision on Legal Aid”’ (Registry Observations),² pursuant to an order by the Single Judge of the Trial Chamber.³
3. Further to the Trial Chamber’s email decision, the Defence for Mr Al Hassan replies to two discrete factual issues arising from the Registry Observations.

II. Submissions

4. The new Legal Aid Policy (‘LAP’) requires the Registry to issue a reasoned opinion as concerns the complexity of the case, taking into account factors that are listed in the LAP. When a case enters the reduced activity phase, the team is then given 50% of the resources related to this complexity level.⁴ The LAP then specifies that before the case proceeds to the next phase, the Registry must then make a new complexity determination.⁵ In case the Registry does not have sufficient information to make such a determination (i.e in case the judgment outcome is unknown), it may consult with the Chamber. The LAP contains no provisions for delaying this assessment.
5. As a result of the fact that the Al Hassan case entered the reduced activity phase before the introduction of the LAP, it was never assigned a complexity level: instead, it was saddled with the former system, where the default policy was to reduce the team to just one Counsel, absent demonstration of a need for additional resources. Such additional resources were determined by reference to the activities to be taken during the reduced activity phase and not the complexity of the case or the likely needs of future proceedings. The level of

¹ [ICC-01/12-01/18-2577](#).

² [ICC-01/12-01/18-2580](#)

³ Email from Single Judge to Defence and Registry dated 29 December 2023 at 13:06.

⁴ ICC-ASP/22/9, para. 73.

⁵ ICC-ASP/22/9, para. 43: “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, when Counsel shall submit a work plan to the Registry, 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.”

resources allocated during this phase does not therefore provide a reliable indicator of the complexity of the case or the requirements of future proceedings.

6. Given the absence of any existing benchmarks concerning the complexity of this case and such requirements, the Defence submitted a detailed work plan (being the correspondence sent 7 and 8 December 2023) setting out the requirements for both the period before the issuance of the judgment and the subsequent phase. As concerns the former aspect, in line with submissions made before the Chamber in June 2023 and prior ICC case law on this point, the Defence emphasized the importance of-re-establishing a core team before the issuance of the judgment.⁶
7. Rather than issuing a reasoned opinion as concerns the complexity of the case, based on the Defence workplace (listing the specific attributes of this case), the Registry has relied on an entirely arbitrary factor concerning existing resources. And while the Registry has averred that such an approach ensures fairness to existing team members and the requirements of fair and effective representation at this juncture, neither objectives are met.

The Registry's interpretation of the 'LAP' is not consistent with the stated objective of maintaining key personnel and ensuring stability, in a fair and effective manner

8. Throughout the Registry Observations, the Registry has averred that the resources currently allocated ensure that the Defence is able to retain existing members, both before and after the judgment is issued.⁷
9. For the pre-judgment phase, the Registry has not provided any clear break down as to who may be appointed and as to what percentage. Before the introduction of the new LAP, the team was composed of Ms Taylor, Ms Sethi, Mr Al Ansary, Ms Abid, Ms Ryan, and Ms Liu. The Defence had also asked the Registry to appoint Ms Marchesi to replace Mr Youssef. While the Registry has averred that existing resources can be retained,⁸ it has also decided that Ms Sethi's maternity leave cannot include annual leave in the calculation, with the result that the Defence loses the maternity leave replacement as of 3 January 2024.⁹ At a critical juncture whether the Defence needs to complete all existing tasks while ensuring

⁶ ICC-01/12-01/18-2495-Conf-Exp-Corr, para. 49.

⁷ [ICC-01/12-01/18-2580](#) paras 5, 16, 18.

⁸ "the CSS considers it justified that the team resources allocated to the Al Hassan defence team for the reduced activity phase can be maintained, thereby taking into account points (3) and (4) of the present decision."

⁹ Confidential ex parte Annex A.

full availability to the client in preparation for the judgment, it only has 1 Counsel, 2 FTEs and 1 language assistant available (for 6 persons, not including Ms Marchesi).

10. Moreover, although the Registry has approved Ms Pradhan's travel to The Hague (departing 16 January 2024 and staying until 20 January) on the basis that it is necessary and reasonable for her to attend the hearing with a view to advising the client and participating in critical team strategic meetings, under the current Registry determination, she will not be paid until 19 January. The Registry thus expects her to conduct such necessary and reasonable tasks, on an unpaid basis, between 16-18 January. The same applies to Dr Gerry who will not be paid until after the issuance of the judgment. Given that the Registry has failed to confirm a starting date with Ms Marchesi, it appears likely that the same approach might apply to her as well, even though she is replacing an existing position. For Ms Liu, the Registry has proposed that she be retained post-judgment on a case manager position rather than as a legal assistant. The Registry's determination of funding therefore fails to ensure a fair and smooth transition in that it is predicated on team member accepting to work unpaid in January (prior to the issuance of the judgment) and accepting a lower position.
11. Whereas the Registry has relied on the text of the LAP to justify its refusal to allocate additional resources before the issuance of the judgment, this approach is not supported by text of the LAP and further ignores the Registry's power to allocate additional resources, where required to ensure effective representation.
12. As concerns the first point, since the LAP requires the Registry to make a complexity determination before the commencement of a phase, it also necessarily empowers the Registry to allocate such resources before the commencement of the phase in question. While the LAP describe and defines certain phases,¹⁰ it does not specify the precise starting point for team members that are appointed for such phases. Indeed, according to paragraph 28 of the LAP, such phases are an 'indicator': they are not, therefore, a hard and fast limitation as concerns the date on which resources can be allocated or withdrawn. As an example, the LAP defines the trial phase as ending with closing submissions,¹¹ whereas in the current case, the Chamber requested the parties to introduce additional written submissions after the closing submissions. It is therefore apparent that to ensure effective representation, the Registrar must allocate resources based on the specific factual

¹⁰ ICC-ASP/22/9, paras. 28 and 31.

¹¹ ICC-ASP/22/9, para. 32.

circumstances of the case before him, taking into account the phase as a relevant but not exclusive indicator.

13. As concerns the second point, in its email of 19 December 2023, the Registry invoked Regulation 83 for the purpose of allocating an additional Associate Counsel position (to be shared between Dr Gerry and Ms Pradhan) from after the issuance of the judgment until 18 February (tied to the deadline to submit a notice of appeal). Although the Registry acknowledged that Regulation 83 could be used to fill in gaps in the LAP as concerns the transition from the reduced activity phase to a potential sentencing/appeal phase, the Registry made no reasoned determination as to why Regulation 83 could not be used to appoint team members on the requested positions before the issuance of the judgment, with a view to ensuring their full capacity to assist Mr Al Hassan as soon as the judgment is issued.
14. Of further concern, whereas the LAP expressly specifies that: “transitional measures may be taken at the discretion of the Registrar to ensure stability of operating teams and to prevent any negative impact of the transition to the new legal aid system on ongoing judicial proceeding”,¹² the Registry’s approach to the post-judgment phase fails to take due account of the need to ensure continuity and retention of core team members, at an appropriate level reflecting their experience and expertise. Part of the logic underpinning the new LAP was to ensure that support staff are paid fairly, in accordance with their qualifications and to stop the practice of splitting positions to recruit more staff at lower pay levels. In its correspondence and observations, the Registry has in fact suggested that the Defence solve budgetary issues by placing staff on lower positions,¹³ even if such positions do not reflect a fair wage for their experience.
15. First, the Registry has proposed that Ms Liu be appointed as a case manager rather than a legal assistant, even though she was appointed in 2023 as a legal assistant and has worked in the specific field of international criminal law since 2013 (including working on the sentencing and appeal phase at the ICC)
16. Second, the Registry has reduced the language assistant allotment from 100% to 50%, at a time when the need for such assistance is greater, not less. While the Defence cannot second guess whether the judgment will be issued in Arabic, it is essential in any case that Mr Al Hassan can communicate with his team in relation to the Chamber’s findings in a language

¹² ICC-ASP/22/9, para. 15.

¹³ ICC-01/12-01/18-2580, para. 29.

he fully understands. The Trial Chamber's prior finding on this point remains apposite: namely, that the "Registrar's discretion in managing legal aid through the application of the LAP is bound to respect the statutory framework, most notably the rights of the accused under Article 67 of the Statute".¹⁴ Rather than assessing, pursuant to Regulation 83 whether it would be appropriate to maintain 1 FTE for language assistant needs, the Registry has proposed that in order to retain individuals previously appointed through the funds linked to the language assistant position, the candidate in question should work, in addition, as a 50% case manager (which is a lower salary). Given that the language needs of the case are likely to be increased after the issuance of the judgment, the likely result of this proposal is that the individual will need to work 100% as a language assistant, while receiving a lower salary and performing additional case management tasks.

17. Third, the Defence has consistently expressed its wish for Ms Beaulieu Lussier to rejoin the team, at an appropriate position, to ensure that the team can continue to benefit from her expertise and case knowledge. Due to the severe resource limitations of the former LAP as concerns the reduced activity phase, Ms Beaulieu Lussier accepted a temporary maternity leave replacement position on the Ngaissona team, while remaining a listed member of the Al Hassan team. This solution was consistent with the best interests of the Al Hassan team, while saving resources for the Registry. Now that her maternity leave position is coming to an end and there is a pressing need to involve her in critical discussions concerning the future strategy of the case, the Registry has refused to allocate such resources due to their stance that they cannot make a determination of the need for her assistance at this point.
18. The Registry have also indicated that since the LAP only refers to '1 assistant to counsel' position for the appeals phase, it would not be possible to appoint her to such a position. This means that if and when resources were to be made available in the future, Ms Beaulieu Lussier would need to be appointed as a legal assistant. Under the previous LAP, the title 'legal assistant' corresponded to the individuals referred to in Regulation 124 of the Regulations of the Registry (Assistants to Counsel), for whom it was necessary to have either 5 years of experience in criminal proceedings or specific competence in international criminal law. Under the new LAP, the position of legal assistant has been changed such that it now refers to a person who requires only 2 years of experience: that is, it no longer refers to the persons described under Regulation 124 of the RoR. If Ms Beaulieu Lussier

¹⁴ ICC-01/12-01/18-2516-Conf, para. 22.

were to join the team as a ‘legal assistant’, she would do so pursuant to a job description that does not reflect her former role in the case (which was more directly analogous to an Assistant to Counsel or even Associate Counsel). If she were to decline this position, the Defence would also be compelled to lose her case knowledge, while being forced to replace her with someone with significantly less experience (since the position is targeted towards lawyers with 2 years’ experience).

The Registry has failed to take account of the work associated with composing a team and preparation required in advance of the judgment/ at the current stage of the proceedings

19. The right to effective representation presupposes that the assistance provided by the Defence must be real and effective and not illusory. In practice, this means that it is not sufficient for a defence team to exist in the abstract or on paper: team members must be appointed in sufficient time that they fully capable of discharging their mandates, in the same manner as their prosecution counterparts. When team members are appointed by CSS, there is a general lag as concerns the establishment of working email addresses, access to databases and remote access. There is also a need to train new team members as concerns ICC systems (and internal Defence organization) and to brief team members who were on stand by during the reduced activity phase as concerns all developments that have transpired in the interim. These critical actions need to take place before and not after the issuance of the judgment, Otherwise, the Defence will be suffer a concrete handicap in that previous time and resources post-judgement will be wasted on such matters, rather than issues more directly centered on Mr Al Hassan’s representation rights.
20. Similarly, the Registry’s suggestion that matters concerning the complexity of the appeal can be deferred to the post-judgment phase ignores first, the workload associated with preparing and litigating matters concerning such determination and second, the time lag associated with allocating resources following the Registry’s complexity determination.
21. As concerns the first point, the Registry has itself acknowledged that certain aspects of the LAP concerning complexity level determinations for the ‘appeal’ phase need to be further fleshed out.¹⁵ Taking into account the workload and time associated with just the preliminary resource determination, it can be predicted that this process is likely to absorb

¹⁵ ICC-01/12-01/18-2580, para 16: “The Registry will further issue in due course a guide on the assessment of parameters which will provide further clarifications”.

a significant amount of time and resources on the part of the Defence, leading to an inequality of arms with the Prosecution, which will suffer no such restraints.

22. Second, even if the Registry were to agree to allocating additional resources, the issuance of such a determination post-judgment will have a negative effect as concerns the ability of the Defence to deploy such resources to essential tasks at this period. Indeed, while the Registry Observations expressly recognize that the workload associated with drafting the notice of appeal starts from the issuance of the judgment,¹⁶ the Registry has not made any proposal as concerns how to remedy the prejudice caused by a delayed determination of the resources required to perform tasks that will have already commenced. As set out above, their approach also cannot be reconciled with the express requirement of the LAP that such determinations should be reached prior to the commencement of the phase.
23. The Registrar's discretion in the field of legal aid must also be tempered by the clear and binding obligations set out in Article 67(1) of the Statute. This includes the right to language assistance, the right to adequate time and facilities to prepare the Defence and the right to examine and call witnesses under the same terms as the Prosecution and the right to be tried without undue delay. These rights amount to a duty, on the part of the Registrar, to take such steps as are necessary (including consulting with the Chamber) to ensure that the Defence is positioned to provide effective and expeditious assistance to Mr Al Hassan, come judgement day.
24. Notwithstanding current ambiguities as concerns the judgment outcome and the amount of resources that may or may not be made available in the future, the Defence has endeavoured to compose a team that satisfies Mr Al Hassan's right to effective representation, considering the linguistic requirements of this case; the need to retain knowledge and experience; and the limitations of the legal aid travel policy. The latest version of this composition, which was transmitted on Friday 5 January 2024,¹⁷ has yet to be approved. In the case of Ms Marchesi, this means that a starting date has yet to be determined, which has consequences as concerns the establishment of email and network accesses. The current ambiguity also means that the Registry has not approved any legal assistant positions (other than Ms Sethi), which is impacting on the ability of the Defence to conduct privileged communications with Mr Al Hassan, at a time when he is particularly anxious.¹⁸ Counsel

¹⁶ ICC-01/12-01/18-2580, para 11: "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".

¹⁷ Confidential Ex Parte Annex B.

¹⁸ Confidential Ex Parte Annex C.

is willing to engage in constructive discussions with the Registry over the coming days as concerns potential solutions, but such a course of actions cannot be pursued as long as the Registry insists that it is premature or impermissible to agree to any additional necessary and reasonable resources for the period pre-dating the judgment or to make a case based complexity determination at this point.

25. Judicial intervention is therefore required to ensure that the Registry:

- Complies with the LAP directive that complexity assessments should be made in advance of the start of a phase;
- Complies with the LAP directive that complexity of the case should be based on the particular circumstances of the case (and not arbitrary criteria such as the amount of resources available under a different legal aid system);
- Interprets the LAP in a manner that ensures no prejudice to existing team members (i.e does not require Ms Liu or Ms Beaulieu Lussier to accept lower positions/positions that do not reflect their former role in the team); and
- Interprets and applies the LAP in a manner that is consistent with Mr Al Hassan's rights under Article 67(1) of the Statute.

III. Relief Sought

26. For the reasons set out above, the Defence for Mr Al Hassan respectfully requests the Trial Chamber to order the Registry to grant the requested additional resources.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 12th day of January 2024
At The Hague, The Netherlands