

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. **ICC-01/12-01/18**
Date: **22 January 2024**

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

Public

Decision on the Defence's request for review of the Registrar's decision on legal aid

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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Judge Kimberly Prost, acting as Single Judge of Trial Chamber X of the International Criminal Court, in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’), Regulation 83(4) of the Regulations of the Court (the ‘Regulations’) and Regulation and Regulation 135 of the Regulations of the Registry, issues the following ‘Decision on the Defence’s request for review of the Registrar’s decision on legal aid’.

I. Background

1. On 6 December 2023, the Chamber announced that it would deliver the trial judgment in the present case on 18 January 2024.¹
2. During the Assembly of State Parties, on 13 December 2023, the new ‘Legal aid policy of the International Criminal Court’ (the ‘New LAP’)² was adopted, for entry into force on 1 January 2024.
3. On 15, 19, and 21 December 2023, the Registry informed the Defence about the funds it would receive pursuant to the Registry’s assessment, as per the new legal aid policy, for the present stage of the case (the ‘15 December Decision’, ‘19 December Decision’, and ‘21 December Decision’, respectively; together, the ‘Impugned Decision’).³
4. On 29 December 2023, the Defence requested the Chamber to review the Registry’s assessment and decisions (the ‘Request’), indicating the following three points of disagreement: i) ‘The overall level of resources that will be allocated in the event of a conviction and the commencement of concurrent phases’; ii) ‘The timing of resource and complexity assessments and access to resources related to active litigation concerning reparations’; and iii) ‘The extent to which prior judicial determinations concerning the need for language

¹ Order scheduling the delivery of the Trial Judgment, ICC-01/12-01/18-2576.

² ICC-ASP/22/9.

³ ICC-01/12-01/18-2577-Conf-Exp-AnxB.

assistance should inform the Registry's assessment of the need for language assistance in connection with future proceedings before the Trial Chamber'.⁴

5. On 11 January 2024, as instructed by the Chamber,⁵ the Registry filed its observations on the Request (the 'Registry Observations').⁶ According to the Registry, the 'appeals stage' is the correct stage for the contested remuneration⁷ and it determined the complexity level 'in line with the provisions of the LAP'.⁸
6. Also on 11 January 2024, the LRVs provided their observations on the Request (the 'LRVs Observations'),⁹ stressing that the Registry i) contrary to the requirement laid down in the New LAP, did not properly motivate its decision;¹⁰ and ii) erred in evaluating the complexity level of the case.¹¹
7. That same day, the Defence requested leave to reply to the Registry Observations.¹² On 12 January 2024, the Chamber, by e-mail, granted the requested leave,¹³ and that same day the Defence replied,¹⁴ submitting that instead of issuing a reasoned decision on the complexity of the case, the Registry relied on 'an entirely arbitrary factor concerning existing resources',¹⁵ thereby failing to meet the stated objective of allowing the Defence to maintain key personnel and ensuring stability,¹⁶ and failing to take into account the need to compose a team and prepare prior to the issuance of the trial judgment.¹⁷

⁴ Defence Application for Review of the Registry's Decision on Legal Aid, ICC-01/12-01/18-2577, para. 15.

⁵ E-mail from the Chamber to the Registry, 29 December 2023, at 13:06.

⁶ Registry's Observations on "Defence Application for Review of the Registry's Decision on Legal Aid" (ICC-01/12-01/18-2577), ICC-01/12-01/18-2580.

⁷ Registry Observations, ICC-01/12-01/18-2580, paras 10-16.

⁸ Registry Observations, ICC-01/12-01/18-2580, paras 17-29.

⁹ Observations des Représentants légaux des victimes sur le requête de la Défense intitulée «Defence Application for review of the Registry's Decision on Legal Aid» (ICC01/12-01/18-2577), ICC-01/12-01/18-2581.

¹⁰ LRVs Observations, ICC-01/12-01/18-2581, paras 8-11.

¹¹ LRVs Observations, ICC-01/12-01/18-2581, paras 12-15.

¹² Defence Request for Leave to Reply to 'Registry Observations on "Defence Application for Review of the Registry's Decision on Legal Aid (ICC-01/12-01/18-2577)', ICC-01/12-01/18-2582.

¹³ E-mail from the Chamber to the Defence, at 9:09.

¹⁴ Defence Reply to 'Registry Observations on "Defence Application for Review of the Registry's Decision on Legal Aid (ICC-01/12-01/18-2577)"', ICC-01/12-01/18-2583 ('Defence Reply').

¹⁵ Defence Reply, ICC-01/12-01/18-2583, para. 7.

¹⁶ Defence Reply, ICC-01/12-01/18-2583, paras 8-18.

¹⁷ Defence Reply, ICC-01/12-01/18-2583, paras 19-24.

8. On 15 January 2024, the Chamber postponed the rendering of the trial judgment due to the health situation of one of the judges.¹⁸

II. Analysis

9. At the outset, the Single Judge notes that the disagreements between the Registry and Defence in large part result from the current uncertainty about what the status of the case will be like following the delivery of the trial judgment. It would therefore have been preferable to render the present decision after the trial judgment, once the outcome of the Article 74 proceedings would be clear, but as the Chamber was forced to postpone the rendering of the judgment, it is appropriate to already issue the present decision now.
10. As another preliminary matter, the Single Judge notes that the Impugned Decision constitutes a decision on the scope of legal assistance paid by the Court, which may be reviewed pursuant to Regulation 83(4) of the Regulations, subject to certain procedural requirements being fulfilled. As it is not in dispute that the relevant requirements of Regulation 135(2) of the Regulations of the Registry are fulfilled, the Single Judge will review the Impugned Decision.
11. Since 1 January 2024, payment of legal assistance for the defence of an accused person is governed by the New LAP. In general, the Registry, which is vested with the primary responsibility of managing the legal aid scheme, enjoys a margin of discretion in deciding on legal aid matters.¹⁹ A judicial review pursuant Regulation 83(4) of the Regulations must, *inter alia*, assess whether: (i) the Registry abused its discretion; (ii) the Registry's decision is affected by a material error of law or fact; or (iii) the Registry's decision is manifestly unreasonable.²⁰

¹⁸ Order vacating the hearing scheduled for the delivery of the Trial Judgment, ICC-01/12-01/18-2584.

¹⁹ Decision on the Defence's urgent request for judicial review of the Registrar's decision on funding during the reduced activity phase, 5 June 2023, ICC-01/12-01/18-2516 (the 'Decision Reviewing Funding During the Reduced Activities Phase'), para. 16 and jurisprudence cited therein.

²⁰ Decision Reviewing Funding During the Reduced Activities Phase, ICC-01/12-01/18-2516, para. 17 and jurisprudence cited therein.

12. The Single Judge recalls the Chamber's previous finding that it is not the judiciary's role to adjust the general policy concerning legal aid.²¹ Indeed, in principle, Regulation 83(4) of the Regulations is not an appropriate vehicle for advocating for such a policy change.²² The Single Judge will therefore restrict herself to an assessment of whether in its decision the Registry has complied with the requirements of the new policy.

Sentencing phase

13. The Single Judge notes that part of the disagreement between the Defence and Registry relates to the how the sentencing phase should be addressed under the New LAP. According to the New LAP, and highlighted by the Registry in its 19 December Decision, the 'trial stage [...] ends with the closing statements'²³ and the 'appeals stage starts with the notice to appeal', filed by either the accused or the Prosecution.²⁴ The Single Judge considers that this language creates some uncertainty as to how the sentencing stage, which forms part of the trial proceedings, is to be addressed in terms of resource allocation. Notably, the period between the rendering of the trial judgment and the filing of any notice to appeal evidently cannot categorically be characterised as a period of 'reduced activity', as the New LAP appears to indicate.²⁵ In case of a full acquittal, a defence team may be awaiting a possible appeal from the side of the Prosecution and in such a situation only has limited tasks, but the situation is very different in case of a (partial) conviction. Then, a defence team will not only have to analyse the trial judgment for any notice to appeal and prepare the appeals brief, but also, concurrently, deal with sentencing matters.

²¹ Decision Reviewing Funding During the Reduced Activities Phase, ICC-01/12-01/18-2516, para. 16; Decision on the Defence's urgent request for judicial review, 15 December 2022, ICC-01/12-01/18-2443, para. 4.

²² Decision Reviewing Funding During the Reduced Activities Phase, ICC-01/12-01/18-2516, para. 16; Decision on the Defence's urgent request for judicial review, 15 December 2022, ICC-01/12-01/18-2443, para. 4.

²³ New LAP, para. 32.

²⁴ New LAP, para. 33.

²⁵ In para. 35 of the New LAP, it is stated that 'the period between closing statements rendered at trial and the decision of the accused whether or not to appeal the trial judgment' is a period of reduced activity.

14. However, the Single Judge observes that the Registry has addressed this interpretation issue with respect to the New LAP in its decisions of 15 and 19 December 2023, by referring to the period from 19 January 2024 (*i.e.* the day after the scheduled rendering of the trial judgment) onwards as the ‘appeals stage’. In light of this, the Single Judge considers that for the purpose of the present proceedings, the Registry has properly 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’.²⁶ The Single Judge would also like to note that, in general, to facilitate the efficiency and effectiveness of proceedings it is imperative for the Registry to prepare in advance of an Article 74 judgment the decision it will render with respect to both scenarios (*i.e.* acquittal or (partial) conviction). This would ensure that no unnecessary delays arise, in particular, when the outcome of such a judgment means that there is a need to advance to sentencing proceedings.

Level of complexity

15. The Defence and the LRVs submit that the Registry did not provide reasons for its decision to set the complexity level of the case at 2. The Single Judge notes the New LAP’s requirement that the Registry ‘shall provide a reasoned decision as to why a complexity level is considered to be applicable to a team, thereby making reference to the applicable parameters and provisions as listed below in paragraphs 49 to 52’.²⁷
16. In the present case, the Registry appears not to have relied on the parameters set out in paras 49 to 52 of the New LAP. No reference is made to any of these parameters and indeed, the Registry itself indicates in its 15 December Decision that it ‘has determined the complexity level on the basis of the existing team resources’ and determined the complexity level on the basis of criteria that cannot be found in the New LAP.²⁸ The Single Judge further notes that the Registry

²⁶ Registry Observations, ICC-01/12-01/18-2580, para. 10.

²⁷ New LAP, para. 48.

²⁸ 15 December Decision. *See also* Registry Observations, ICC-01/12-01/18-2580, para. 19.

indicates that it ‘will issue *in due course* a guide on the assessment of parameters which will provide further clarifications’.²⁹ This guide is not yet available.

17. In these circumstances, the Single Judge considers that for this aspect of the Impugned Decision, the Registry failed to abide by the New LAP requirement to reason its determination of the complexity level by reference to paras 49-52. Moreover, the Registry’s determination of the complexity level appears to have been premature. Both the Defence and the Registry point to paragraph 15 of the New LAP, which provides that for existing defence teams ‘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 proceedings’. It is unclear why the Registry, being aware that the rendering of the trial judgment was announced for 18 January 2024, did not rely on the transitional measures for the period until the trial judgment, instead of entering into a hypothetical assessment of the complexity of the case at this stage.

Language assistance

18. Notwithstanding the Chamber’s previous decision on legal aid in which the Registry was ordered ‘to provide one additional FTE to the Defence during the reduced activity phase for the purpose of linguistic assistance to Mr Al Hassan’,³⁰ the Impugned Decision appears to reduce the compensation for language assistance from 100% to 50% for the period from the Impugned Decision to the rendering of the trial judgment, *i.e.* a period of reduced activity. As no explanation is provided and this reduction is contrary to the Chamber’s aforementioned decision, the relevant part of the Impugned Decision must be reversed.
19. For the period following the trial judgment, the Single Judge observes the following. In case of a full acquittal, there may be less urgency to explain all aspects of the trial judgment to the acquitted person in a language he or she speaks. In such a situation, it may be sufficient to have part-time language

²⁹ Registry Observations, ICC-01/12-01/18-2580, para. 16 (emphasis added).

³⁰ Decision on the Defence’s urgent request for judicial review of the Registrar’s decision on funding during the reduced activity phase, 5 June 2023, ICC-01/12-01/18-2516, p. 16.

assistance. However, in case of a conviction, it would be vital to ensure that the trial judgment is explained to the then convicted person in a swift manner, to ensure that this person and his or her defence can expeditiously set to their tasks for sentencing, as well as work on any notice to appeal.

Conclusion

20. The Impugned Decision lacks sufficient reasoning in accordance with the new LAP for essential parts, making it unclear how the Registry made its decisions and determinations and why it used its discretion in this manner. In addition, the part on linguistic assistance does not comply with a previous order of the Chamber. The Impugned Decision is therefore unreasonable and must be reversed.
21. The trial judgment will provide clarity about any future workload for the Defence and the complexity level of any future stage of proceedings. As the judgment will be rendered in the near future, it is appropriate for the Registry to address the Defence's remuneration during the presently ongoing reduced-activity stage forthwith, but to wait with its assessment of the complexity level of the case until the content of the trial judgment is known. In order for the Defence and Legal Representatives to be in a position to appreciate the Registry's determination, the complexity level assessment then made ought to follow the parameters set out in the New LAP. As referenced above, after the rendering of the trial judgment, the Registry should be in a position to provide the decision on the defence remuneration for the following period.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request;

REVERSES the Impugned Decision; and

ORDERS the Registry to issue new decisions, taking into account the Chamber's directions set out above.

Done in both English and French, the English version being authoritative.

A handwritten signature in grey ink, appearing to read 'K. Prost', is positioned above a solid horizontal line.

Judge Kimberly Prost

Single Judge

Dated this Monday, 22 January 2024

At The Hague, The Netherlands