

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/11-01/11

Date: 23 June 2015

PRE-TRIAL CHAMBER I

Before: Judge Joyce Aluoch, Presiding Judge
Judge Cuno Tarfusser
Judge Péter Kovács

SITUATION IN LIBYA

**IN THE CASE OF
THE PROSECUTOR *v.* SAIF AL-ISLAM GADDAFI**

**URGENT
Confidential**

Ex parte, reserved to Defence of Mr. Gaddafi and Registry only
With Annexes 1 to 8 – Confidential, *ex parte*
reserved to Defence of Mr. Gaddafi and Registry only

**Observations on the “Request for the review of the Registrar’s Decision”
(ICC-01/11-01/11-595-Conf-Exp)**

Source: Registry

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

The Office of the Prosecutor

Counsel for the Defence

Mr. John R.W.D. Jones QC

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Mr. Esteban Peralta Losilla

Ms. Juliet Opira Adyel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT (THE "COURT"),

NOTING the request for review by the Registrar of the fees paid to Counsel's language assistant, Ms. Sarah Bafadhel ("Ms Bafadhel"), for her language and legal research services, submitted by letter dated 11 December 2014 ("Application of 11 December 2014");¹

NOTING the decision of the Registrar of 6 May 2015 amending the method of calculations of fees applicable to Ms Bafadhel ("the Decision");²

NOTING the *Request for review of Registrar's Decision* (the "Request for Review") submitted by Mr Jones on 25 May 2015,³ whereby the Chamber is requested to "reverse and remit the Registrar's Decision of 6 May 2015" and to "order the Registrar to apply the Registry Rate to all of Ms Bafadhel's legal research remuneration from January 2014 onwards";⁴

NOTING the "Decision on the Registrar's Request for an Extension of Time", which was rendered by the Pre-Trial Chamber I on 23 June 2015;⁵

CONSIDERING articles 43 and 67(1)(d) of the Rome Statute, rule 20 of the Rules of Procedure and Evidence, regulations 23*bis*, 24*bis* and 83 of the RoC, and regulations 130, 133 and 135 of the Regulations of the Registry ("the RoR");

CONSIDERING ALSO the Legal Aid Policy of the Court, as codified in the document ICC-ASP/12/3 (the "LAP");⁶

HEREBY SUBMITS to the Chamber the following Observations, in accordance with regulation 24*bis* of the RoC.

¹ Annex A to the Request for Review.

² ICC-01/11-01/11-595-Conf-Exp-AnxB (2015-05-25).

³ ICC-01/11-01/11-595-Conf-Exp.

⁴ Par. 56 of the Request for Review.

⁵ ICC-01/11-01/11-607-Conf-Exp

⁶ *Registry's single policy document on the Court's legal aid system* (2013-06-04).

I. MS. BAFADHEL WAS APPOINTED AS LANGUAGE ASSISTANT

1. On 17 April 2013, the Chamber appointed counsel for Mr. Saif Al-Islam Gaddafi,⁷ following which the Registry allocated to the Defence the level of resources indicated in the LAP before initial appearance⁸ (fees of counsel only) and clarified the conditions of intervention in his letter of appointment.⁹ The applicable resources at the current stage of the proceedings in the case *The Prosecutor v. Saif Al-Islam Gaddafi* do not include therefore the services of a legal assistant, which was requested by counsel and refused by the Chamber in its decision dated 30 July 2013. In this respect, the Chamber was “unconvinced that the list of tasks set out in the Request represents, in principle, a burden of work which warrants an increase in legal aid on the grounds that it cannot be undertaken by counsel acting alone.”¹⁰

2. In view of a temporary lack of in-house interpretation or translation services in Arab, and in an effort to accommodate Counsel’s immediate needs in this regard, the Registrar decided on 19 August 2013 to allocate limited additional means to remunerate a language assistant in order to facilitate communication of Counsel with potential witnesses subject to certain conditions.¹¹ Counsel appointed Ms Sarah Bafadhel for this purpose.¹²

3. Both in the Registrar’s letter and in the electronic message of 27 September 2013, Counsel was invited to estimate the number of hours of language assistance needed as well as details of the remuneration in order to allow the Counsel Support Section (“CSS”) to arrive to a final determination on the applicable payment system.¹³

4. Following the lack of information from counsel regarding the assistance needed, “a maximum of twenty hours per month of language assistance work

⁷ ICC-01/11-01/11-311-Red (2013-04-17).

⁸ Paragraph 39.

⁹ Letter of 2013-04-24 (CSS/2013/230, annex 1).

¹⁰ ICC-01/11-01/11-390-Red, par. 39.

¹¹ Letter of 2013-08-19 (CSS/2013/471, annex 2) and e-mail from Mr. Mbaye of 2013-09-27 (annex 3).

¹² E-mail of 2013-09-10 (annex 4).

¹³ Annex 3.

without previous authorisation" was eventually accorded by CSS on 2 December 2013.¹⁴

5. Upon the submission of her first timesheets on 9 June 2014,¹⁵ the Registry noted that Ms Bafadhel was claiming, as language assistant, payment for activities such as management, organisation of case files, drafting and meetings¹⁶; the Registry did not take those activities into account in the calculation of her fees, as these do not form part of the functions of a language assistant.¹⁷

II. LEGAL RESEARCH IS TO BE PERFORMED ONLY ON *AD HOC* BASIS

6. Following consultations with CSS, Counsel requested that Ms Bafadhel be authorised to simultaneously perform limited legal research with the specific and exclusive purpose to respond to his need of research on Libyan law in the context of the admissibility proceedings in the case, an activity that "was in no way an invitation to supplant activities that should be properly conducted by counsel".¹⁸

7. Ms Bafadhel has neither been admitted to the Court's List of Assistants to counsel¹⁹ nor been appointed as legal assistant. Nevertheless, Counsel's request was approved by CSS on an exceptional basis and conditions of engagement and payment were established on 21 February 2014.²⁰

8. These conditions – "to remunerate Sarah [Bafadhel] up to a cap of €2,500 per month for her services [...] from the savings [accumulated by the defence] – did not include, contrary to the counsel's contention, that the payment for this limited

¹⁴ Annex D to the Request for Review

¹⁵ Annex 5.

¹⁶ Annex 6.

¹⁷ Annex 7.

¹⁸ Request of Review, par. 17, referring to e-mail of 2014-07-23 (annex 7).

¹⁹ See reg. 125 of the Regulations of the Registry.

²⁰ Annex E of the Request for Review, which was sent as a reply to another message from counsel which does not appear there; it can be found as annex 8 to the present observations.

intervention should be done automatically, or that a lump sum of 2,500 euros should be paid monthly, or that the rate should be determined by Mr Jones.²¹

9. On 9 June 2014, Ms Bafadhel provided timesheets covering the period between January and May 2014, claiming a total payment amounting to € 12,182.86, unilaterally calculated on the basis of the hourly rate of € 51.46 applicable to legal assistants.²²

III. THE REGISTRY APPLIED A FAIR CALCULATION METHOD

10. All payments under the legal aid are made in accordance with the same method of calculation, which is applied to all teams depending on their status and the nature of work they perform. Ms Bafadhel, as is the case for Mr Jones, is not paid a monthly lump sum, but on the basis of activities performed and in accordance with the relevant fee calculation method.²³

11. In the case of persons paid up to a ceiling, such as field assistants or resource persons, the calculation of fees is done on the basis of 21.75 working days per month and 7.5 hours per day. This is the rate applied to Ms Bafadhel as *language assistant* (which is not as such at issue here).²⁴

12. For appointments on an *ad hoc* basis, the fee rate was calculated on an *ad hoc* basis, by dividing the applicable ceiling to the number of days in the month to find a daily rate and dividing the latter by 7.5 to obtain the hourly rate. This was the calculation applied in principle to Ms Bafadhel in respect to her legal research services.

²¹ As counsel states in par. 49 of the Request for Review.

²² Annex 5.

²³ *Ibidem*.

²⁴ Letter CSS/2012/13 (2012-01-16).

13. The Registrar's Decision of 6 May 2015 revised the basis for the calculation of Ms. Bafadhel's fees for legal research from 30 or 31 to 21.75 days per month – as fairness imposed basing the calculation on working days only - and reiterated that the alleged hourly rate of € 51.46 applies only to legal assistants admitted to the relevant list and working on a full-time basis, as opposed to her *ad hoc* appointment. Instead, the Registry made a calculation of a new hourly rate for legal research services taking into account the monthly cap of € 2,500 agreed with Mr Jones and the number of hours actually worked by Ms Bafadhel as language assistant. The calculation of this new hourly rate can be summarized as follows:

$$[\text{monthly cap}] / [21.75 - (\text{days worked as language assistant})] / [\text{working hours per day}]$$

which amounts to:

$$2,500 / [21.75 - (\text{days worked as language assistant})] / 7.5$$

14. Because the number of days worked as language assistant varies every month over the period (from 6.5 hours in January 2014 up to 23.5 hours in March 2014, based on the information provided by the Defence team), the resulting new hourly rate is also variable. The rate of € 34,31 mentioned in the Decision is nothing more than the average of monthly hourly rates based on the above calculation over the period running from January until December 2014. As explained in the Decision, this hourly rate is purely indicative as it is the result of a calculation made for each month on the basis of the hours worked as language assistant by Ms Bafadhel. The same calculation will have to be made every month in the future with the same variable, which means that the Registry cannot say in advance what will be the hourly rate for the remuneration of Ms. Bafadhel for legal research services.

15. Mr Jones' assertion that the Registry arbitrarily applies an hourly rate of € 34,31 is therefore inaccurate. The Registry has never been, is not and will never be proposing to remunerate Ms Bafadhel's work as legal assistant on the basis of such hourly rate, as this would not reflect the reality of the conditions of her appointment and of her performed work. Mr Jones' agreement with this hourly rate as a

reasonable remuneration rate for Ms Bafadhel²⁵ therefore serves no purpose. The reasons why the hourly rate for Ms Bafadhel's work as legal assistant is variable were clearly explained in the Decision and are reiterated above.

16. Mr Jones' claim that "Ms Bafadhel is entitled to a predetermined hourly rate for the same type of work completed each month"²⁶ is without basis. The only predetermined hourly rate that could have been considered for the remuneration of her legal research services is the hourly rate of 51.46 € provided for legal assistant in the legal aid policy, on which Mr Jones was relying initially in his claim. However, this hourly rate cannot apply to Ms Bafadhel because she is not registered on the list of legal assistants and she was never appointed as legal assistant in the defence team. The legal aid policy further does not provide for the presence of a legal assistant in the defence team at the current stage of the proceedings in the case *The Prosecutor v. Saif Al-Islam Gaddafi*. In the absence of predetermined hourly rate applicable to her case, the Registry therefore had to calculate her remuneration on an *ad hoc* basis in light of the principles governing the legal aid policy, in particular the principles of Objectivity, Transparency, Flexibility and Economy.²⁷

17. It is submitted that the proposed calculation of Ms Bafadhel's hourly rate is the only one consistent with the abovementioned principles. It provides a practical response to a situation which was not foreseen in the Legal Aid Policy, but which arose as a consequence of the great flexibility demonstrated by the Registry by accepting the fulfilment of legal assistant functions by a language assistant at a stage of the proceedings when defence team are not entitled to rely on the services of a legal assistant. It is therefore the Registrar's respectful submission that the Registry services went very far in the application of the principle of flexibility to accommodate Mr Jones' specific requirements in a way that was fair for all parties, including Ms Bafadhel.

²⁵ Request for Review, par. 32.


²⁶ Request for Review, par. 33.

²⁷ Par.. 9 of the LAP.

IV. LEVEL OF CONFIDENTIALITY

18. Pursuant to regulation 23*bis* (2) of the Regulations, the present document and its annexes are classified as "Confidential, *ex parte* – Defence of Mr. Gaddafi and Registry only" following the classification of the Request for Review. The Registrar has however no objections to its re-classification as public or the release of a redacted version thereof, should the Chamber instruct him to do so.

RESPECTFULLY SUBMITTED,



Marc Dubuisson, Director, Division of Judicial Services
per delegation of
Herman von Hebel, Registrar

Dated this 23 June 2015

At The Hague, The Netherlands