

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **02 December 2022**

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 Annexes A, B, C, D and E

Public redacted version of “Urgent Request for Judicial Review”

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:

The Office of the Prosecutor

Karim A. A. Khan KC
Nazhat Shameem Khan
Mame Mandiaye Niang

Counsel for the Defence

Melinda Taylor
Felicity Gerry KC

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

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
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation and
Reparations Section**

Other

I. Introduction

1. This is an application for judicial review of the Registrar's refusal to apply the fee formula set out in the 2013 Single Legal Aid Policy ('the Single LAP') in a manner that is consistent with the formula itself and the principles of equivalence and equality of arms, as defined and endorsed by the Assembly of State Parties.
2. In making this application, the Defence for Mr Al Hassan is fully aware that he is a vulnerable client who is facing a trial on extremely serious allegations for which he is presumed innocent. The Defence is dedicated to ensuring his rights to a fair, equitable and speedy trial are honoured. The Defence is doing its utmost to ensure that a fair, equitable and speedy trial occurs.
3. The manner in which the Registrar has interpreted and applied the 2013 Single Legal Aid Policy ('the Single LAP') to this case has erected a significant barrier as concerns the ability of the Defence to do so.
4. Defence team members accepted their appointment to this case on the understanding that the Defence would be remunerated in a manner that would ensure Mr Al Hassan's effective representation. The notion of effective representation is both numerical and qualitative. The exact requirements of effective representation will also depend on the volume of workload, the deadlines set to complete this workload, and equivalent means available to the Prosecution for the purpose of performing equivalent tasks. In real terms, 'equivalent means' concerns the ability of the Defence to appoint and retain qualified, suitably skilled and motivated staff.
5. This notion of equivalence speaks directly to the principle that justice must not only be done, it must also be seen to be done. This principle extends to all aspects of advocacy and litigation inside and outside the courtroom, including equal qualifications and equal pay for equal work. The work of the Defence must be valued. As emphasised by the International Bar Association, "the quality of legal representation has an impact on the fairness of the judicial process (...)" ; the principle of equivalence is therefore necessary "to ensure fairness and an effective defence ... inequality is not only unfair, but will over time materially impact the quality of

representation and proceedings, if the ICC is unable to attract and retain highly-skilled counsel for Defence and victims”.¹

6. This principle is not exclusive to Counsel – it extends equally to support staff. All members of the defence team are required to “meet certain qualifications to ensure that they can assist the defendant effectively and efficiently at the highest international standards” , while certain members of the support staff, such as legal assistants, must also be admitted to rosters maintained by the ICC Registry. These persons, or the support staff, are thus an extension of the fundamental right to legal assistance and are part of the accused’s “effective representation”.
7. The cardinal principle of equivalence has not been respected. The Registry has artificially and unfairly based the fees for Defence team members on outdated and irrelevant 2012 figures. These figures no longer reflect accurate rates for equivalent positions in the Prosecution nor do they reflect the daily living requirement of being based in The Hague during a period of extraordinary inflation and cost increases. This error has resulted in a situation where Defence team member, who have the same qualifications as the Prosecution, are paid a considerably lower amount for performing the same tasks, within the same time period, in the same physical location and context. This gap is widening on a daily basis.
8. In real terms, whereas the salary of a Prosecution staff member will stay the same in terms of real purchasing power or increase (due to step increases), the salary of the Defence equivalent which actually decrease over the course of the case. Rather than being incentivized to stay (notwithstanding the absence of job security and entitlements), Defence support staff are effectively saddled and disincentivized with diminishing returns. Rather than valuing the institutional expertise of Defence team members, the legal aid system devalues it.
9. The Defence is not requesting the Registry to fundamentally modify or change the Legal Aid Policy: it is simply requesting the Registry to apply the principles which have been approved by the Assembly of State Parties, in every legal aid policy iteration, including the current policy. This principle is that defence fees are ‘pegged’ to an equivalent Prosecution position: if the equivalent Prosecution net salary is increased, then it follows that Defence fees, which are pegged to this net salary,

¹ [IBA Comments on ‘Concept Paper: Review of the International Criminal Court Legal Aid System’](#) (9 June 2017)

should also be increased. This principle forms a fundamental condition of willingness of Defence team members to commit several years of their life to ensuring that justice is done, on the understanding that the Court and the international community consider the work and quality of the Defence to be of equal value and worth as that of the Prosecution.

10. Conversely, by failing to apply this principle, the Registrar has :

- Erred by misapplying the principles and terms of the legal aid policy approved by the ASP; and
- Failed to take into consideration relevant factors, while taking into account irrelevant factors, leading to a manifestly unreasonable and unfair result.

11. Defence Counsel have a positive duty to take such steps as are necessary to ensure that the Defence has sufficient funds and facilities to ensure the effective representation of the defendant.² As the gatekeeper and guarantor of fair trial rights, the Defence therefore requests the Trial Chamber to reverse the Decision of the Registrar, and order the Registrar to apply the equivalence principle to the rates of Defence team members in this case.

II. Submissions

A. Relevant facts and procedural developments

12. In 2004, the Registry promulgated its ‘Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons’.³ Paragraph 16 sets out the following guiding principles:

- *Equality of arms: The payment system must contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution. In this respect, the fees of the members of the defence team are based on the salaries paid in the Office of the Prosecutor (OTP) of the ICC and at the ad hoc Tribunals, increased by 40% to compensate for the increment in professional charges resulting from an appointment.*

² See for example, ABA, [Fourth Edition \(2017\) of the Criminal Justice Standards for the Defense Function](#):” (c) Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload. Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief”.

³ [ICC-ASP/3/16](#)

- *Objectivity: The payment system must allocate resources on the basis of the requirements of the case and not the individual requirements of the members of the defence team.*
- *Transparency: The payment system must be structured and operated in such a way that it complies with the requirements of budgetary oversight and auditing in the management of public funds without interfering with the confidentiality of defence work or the autonomy of defence teams.*
- *Continuity: The payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice.*
- *Economy: Legal aid must cover only necessary and reasonable expenditure arising from the defence of the person against whom proceedings are directed*

13. In line with these principles, salaries of Defence team members were pegged to an equivalent position in the Prosecution – i.e. Counsel was pegged to the “salary of a (UN/ICC) P5 level official – senior legal officer/senior prosecutor”, with Associate Counsel being a P4, legal assistants being P2 et cetera.⁴

14. After the start of the *Lubanga* case, the Registry reviewed the legal aid policy and in 2007, issued an updated policy, in which it clarified that the fees of team member would be set by reference to “the gross pensionable salary of a staff member of the appropriate grade, at step V (see para. 56 above), taken from the United Nations system salary tables approved in the autumn of 2006.”⁵

15. In 2012, the Registry submitted a proposal revision of the legal aid policy. The Registry reconfirmed its commitment to apply the principles set out in the 2004 policy as concerns equality of arms.⁶ This review concluded that the objective of equality of arms, as set out in the 2004 and 2008 policies, was best served by focussing on how much the Defence actually received as a net salary (once tax and professional charges were reimbursed) rather than how much the Defence cost the Court. The proposal thus enshrined the principle that the net salary of the Defence (after reimbursement of tax/charges) should be the same as the net salary of the Prosecution.⁷ Thus, rather

⁴ [ICC-ASP/3/16](#), Annex 2, p. 11.

⁵ [ICC-ASP/6/4](#), p. 18, fn. 2

⁶ [ICC-ASP/11/2/Add.1](#), para. 6: “The fundamental principles which should govern the provision of legal aid by the Court, and which were already recognized in 2004, are equality of arms, objectivity, transparency, continuity and economy:”

⁷ [ICC-ASP/11/2/Add.1](#), “45. The level of payment for team members was set in the 2007 amendments, in particular by calculating for each post the gross pensionable remuneration of a staff member of the appropriate grade within the Office of the Prosecutor²⁰ at step V. Taking gross salary as a basis — which was not meant to be a definitive solution — was justified in order to take into account imperatives related to, inter alia, taxation of counsel and/or pension contributions, and was intended to ensure a degree of equivalence between counsel and members of the Office of the Prosecutor, so as to help uphold the principle of equality of arms. 46. However, practice at the Court has shown that the reference to gross remuneration was not justified, and duplicated the

than tying Defence salaries to the gross pensionable salary of UN staff members, it was decided to base them on the net salary (at step 5) – and then to reimburse any taxes up to 30%. This was supposed to result in Counsel taking home the same amount of money as a Prosecution senior trial attorney (ignoring additional benefits).⁸ This proposal also expressly recognised that the Chamber could review and reverse this calculation.⁹

16. This formula for equivalence was then endorsed by Hague Working Group on Legal Aid,¹⁰ and approved by the Bureau on Legal Aid,¹¹ and the Assembly of State Parties.¹²

17. The 2013 Single Legal Aid Policy ('the Single LAP') did not modify these resolutions as concerns the formula for calculating the rates for Defence and Victims team members: this document was issued in order to consolidate the various resolutions that had been adopted up until that point.¹³ The Single LAP reconfirmed the Court's commitment to apply the principles set out in paragraph 16 of the 2004 policy,¹⁴ and further explained that the 2008 policy had not respected the principle of equivalence, as it had resulted in the Defence receiving more than the Prosecution, due to the

compensation of charges as described above. Thus one of the relevant criteria in contributing to equality of arms between counsel for the defence or victims and counsel in the Office of the Prosecutor is not the cost to the Court of their monthly remuneration – in other words, the gross salary - but the final amounts received each month by the persons concerned, namely, the net salary. The difference between the gross salary and the net salary of a staff member employed by the Court is accounted for by the total deductions applicable to Court officials, which are irrelevant and duplicate the regime applicable to independent counsel. The amount of tax paid by counsel on their remuneration under the legal aid system has moreover proven to be recoverable through the compensation scheme described above. Hence it is clear that gross salary is no longer a relevant criterion and must be replaced in future situations and cases by reference to net salary only. 47. In view of these parameters, it is proposed to consider that net base salary be set in accordance with the table below, plus a global amount to cover the totality of taxes or similar additional charges payable by the relevant team members. The percentage for professional charges mentioned above would be included in this global amount (see attachment)."

⁸[ICC-ASP/11/2/Add.1](#), para. 48: "This percentage would then represent a weighting which should ultimately provide counsel at a minimum with the equivalent of the gross salary of the corresponding category within the Office of the Prosecutor"

⁹ [ICC-ASP/11/2/Add.1](#) "54. Two important factors will of course have to be taken into account when assessing the effective savings generated in the legal aid budget, namely any decisions by the Registrar under regulation 83 (3) of the Regulations of the Court, and/or by the Chambers pursuant to paragraph 4 of that regulation".

¹⁰[ICC-ASP/11/2/Add.1](#), para. 20.

¹¹[ICC-ASP/11/2/Add.1](#), p. 8.

¹² Resolution ICC-ASP/11/Res.1 ([ICC-ASP/11/20](#), p. 19).

¹³ [Single Legal Aid Policy](#), para. 2: "The ICC Legal Aid Policy is the combined updated effect of relevant resolutions adopted to date by the Assembly on the question of legal aid as listed in annex I, the applicable legal provisions governing legal aid as stipulated in the Court's legal instruments and internal Registry guidelines and standard operating procedures. For all intents and purposes, this document constitutes the legal aid scheme of the Court."

¹⁴[ICC-ASP/12/3](#), para 9, fn3, citing to ICC-ASP/3/16, 17 Aug. 2004, para.16.

payment of a gross salary and the additional payment of professional charges.¹⁵ The Court therefore adopted the net salary scheme, as set out in the 2012 proposal,¹⁶ in order to respect the principle of equivalence.

18. Subsequent ASP resolutions have confirmed that the adoption of this scheme did not erode or alter the Court's commitment to applying the principles set out in the 2004 policy. For example, in a December 2014 ASP resolution, the ASP expressed the understanding that the LAP, adopted in 2013, was fully consistent with the principles set out in paragraph 16 of the 2003 policy.¹⁷ In a December 2020 ASP resolution, the ASP once again cited and endorsed the continued application of the principles set out in paragraph 16 of the 2003 policy.¹⁸

19. This means that the Court has consistently committed to paying Defence team members in accordance with a formula that:

- Is pegged to the salary of a Prosecution counterpart;
- Should ensure that the take home salary is the equivalent of the Prosecution counterpart.

20. Although the 2012 and 2013 documents do not explain how the Registry calculated the net salary rate, a 2017 legal aid report commissioned by the Registry explains that

¹⁵ [ICC-ASP/12/3](#), paras. 83-84: : “83. The gross fees under the Adjustment Report were set taking into account imperatives related to, inter alia, taxation of counsel and/or pension contributions, as well as to ensure a degree of equivalence between counsel and members of the Office of the Prosecutor, so as to further uphold the principle of equality of arms. 84. However, the implementation of the Court's legal aid system in practice demonstrated that the reference to gross remuneration was not justified, as payment was duplicated by the granting of compensation for professional charges as described below. The difference between the gross salary and the net salary of a staff member employed by the Court is accounted for by the total deductions applicable to Court officials, which are irrelevant and duplicate the regime applicable to independent counsel. The amount of tax paid by counsel on their remuneration under the legal aid system has moreover proven to be recoverable through the compensation for professional charges scheme described above. The gross fee basis was hence no longer considered to be a relevant or reasonable criterion and is to be replaced in future situations and cases by a net fee payment scheme according to the conditions set out in the Decision of the Bureau.

¹⁶ [ICC-ASP/12/3](#), para 85: “Table 3 below details the revised system of remuneration on the basis of a net fee scheme” citing to footnote 53, which cites to ““Proposal for a review of legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011” dated 15 February 2012, in Report of the Hague Working Group on legal aid, 23 March 2012, Appendix II

¹⁷ [ICC-ASP/13/Res.5](#), “49. Acknowledges the Court's efforts to continue implementing the revised legal aid remuneration policy as adopted by the Bureau on 23 March 2012, takes note of the fulfilled reporting obligation in this regard, and stresses the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility;12” citing to footnote 12: ICC-ASP/3/16, para. 16: https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res5-ENG.pdf

¹⁸ Acknowledges the Court's efforts to continue implementing the legal aid remuneration policy and stresses the need for continuous monitoring of the efficiency of the legal aid system to uphold and strengthen the principles of the legal aid system, namely fair trial, objectivity, transparency, economy, continuity and flexibility;23” fn23 citing to ICC-ASP/3/16, para. 16

the rate was calculated by deducting staff assessment costs from a UN gross salary (step V): the idea being that this amount was roughly the same as taxation/the professional charges element (i.e 30%).¹⁹ Under the UN salary system, once staff assessment has been deducted from the ‘gross’ salary, the remaining ‘net salary’ is comprised of the net base salary plus post adjustment.²⁰ ‘Post adjustment’ take into account costs of living increases in the duty station in key areas, such as rental/housing, medical insurance, pension contributions et cetera (i.e costs that are incurred by Defence team members).²¹ It is not static: it is a percentage that changes in order to reflect changes in inflation. For example, in August, the ICSC concluded that due to increased inflation – the 5% rule should apply to stations in The Netherlands. The ICC incorporated this into its 2023 budget and applied it as of 1 August 2022.²² The 5 per cent means that the multiplier is now 43.1 per cent.²³ As explained by the United Nations Administration Tribunal, the post adjustment multiplier is also a mechanism for ensuring compliance with the principle of equal pay for equal work.²⁴

21. More than ten years have now elapsed since the 2012 figures were approved and adopted. In that time, there have been significant increases in the ‘net salary’ for Prosecution staff members due to both wage increases (reflected in increases in the net base salary) and increases in post adjustment. When the agreed net formula is applied to current Prosecution salaries, it is apparent that the foundational principle of equivalence is no longer respected. By fixating on an overly formulistic figure (the rate calculated in 2013), the Registry’s interpretation and application of the Single LAP has produced a result that undermines the cardinal equivalence principle

¹⁹ This is reflected by a report prepared by a consultant hired by the Registrar, which explains that the net rate was calculated by removing the staff assessment element from a gross UN salary: R. Rogers, [Assessment of the ICC’s Legal Aid System](#), 2017, (‘the Rogers Reports’) (fn 17): “17 The net salary is the gross salary minus ‘staff assessment’ and the staff members pension contribution. Staff assessment is a form of internal income tax: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>

²⁰ ‘Review of the Post Adjustment Operational Rule’, p.2 https://ficsa.org/fileadmin/user_upload/FICSA_Presentation_to_PSA.pdf

²¹ <https://icsc.un.org/Home/PostAdjustment>

²² 2. The Court’s proposed programme budget for 2023 was submitted on 28 July 2022. On 15 August 2022, the International Civil Service Commission (“ICSC”) issued its Consolidated Post Adjustment Circular in which it informs that due to increasing inflation, the five per cent rule became applicable in the Netherlands, with a consequent revised post adjustment multiplier for Professional staff and higher categories, effective as of 1 August 2022.: <https://asp.icc-cpi.int/sites/asp/files/2022-09/ICC-ASP-21-10-Add1-AV-ENG.pdf>

²³ <https://icsc.un.org/Home/GetDataFile/7231>

²⁴ [Judgment No. 2012-UNAT-225](#) para. 4: “ Furthermore, the principle of equal pay as a standard review applies to the main composition of salary for post adjustment and does not prevent eventual differences concerning salary accessories or social benefits as the one under claim on file”.

approved by the ASP. This can be illustrated by the following: a P2 step 5 UN staff member receives a base salary of 54,701 (net) us dollars,²⁵ which is 54,798 euros. When post adjustment related to The Hague is applied, this results in an additional amount of 23,617.93 euros. The salary is therefore the equivalent of 78,415.98 euros. This equates to 6,534.66 euros per month as a take home salary. The take home salary of a Defence legal assistant (nominally pegged to the P-2, Step 5 rate is currently 3956,35 euros each month.²⁶ This means that a Defence legal assistant is currently being paid 2578.31 euros less than the pegged Prosecution counterpart, each month: effectively **they are paid 40% less for performing the same tasks.** If benefits and allowances are taken into consideration, the difference between the Prosecution and the Defence increases to **50%.**²⁷

Given this gross disparity, Defence teams requested the Registry to immediately increase Defence salary rates in order to reflect wage increases and changes to the post adjustment modifier.²⁸

22. The Defence explained to the Registry that it was not seeking the amendment of the LAP: it was simply asking the Registry to apply the formula that was agreed in 2012 rather than outdated figures. This is because it is a clear and manifest error to apply a formula – that seeks to achieve equivalence – using salary figures that was calculated more than ten years ago. Since the net salary figures in the LAP no longer reflect actual net salary figures, the Registry was obliged to recalculate these figures in order to comply with the foundational principles of the LAP, and to avoid a manifestly unreasonable result.
23. The Registry provided no response. On 10 November 2022, each Defence team member directed a letter to the Registry asking for their fees to be adjusted to take

²⁵ <https://icsc.un.org/Home/GetDataFile/7002>

²⁶ The current net salary is 4 889 euros. If it is assumed that taxation is around 30%, a legal assistant will pay 1466, 70 euros. They will be reimbursed 733, 35 euros. They then have to pay 30% on the 733, 35 reimbursement, which is 220 euros. This is not reimbursed as the 15 maximum is already exceeded. This means that the legal assistant pays 1666 euros in tax but is only reimbursed 733.35 euros. This means that there is a shortfall of 932, 65 euros. The actual net take home pay is there before **3956, 35 euros**.

²⁷ Rogers Report, para. 145: “An ICC lead counsel working full time with maximum uplift will be paid a monthly fee of €10,687, plus 1000 expenses = €11,687. From this he or she must pay professional costs at, say, 20%. He is left with €9,349. From this he or she must pay income tax of, say, 30%, which results in €6,544 per month. Meanwhile, for a P5 prosecuting counsel with a starting point of €8,220 per month (net fee) and an increase of around 50% (for benefits and entitlements), the real value of his or her salary package is around €12,330 per month, tax-free. This is almost double the fee (with expenses) of a lead counsel engaged at the ICC, once costs and tax have been deducted.”

²⁸ Letter from Counsel for Al Hassan, Yekatom, Ngaissona, Ongwen, Ntaganda & Abdelrahman To the Registry on 7 July 2022 at 10:53Annex A

into account wage increases and the post adjustment multiplier that is used to calculate ICC salaries in The Hague.²⁹

24. On 21 November 2022, the Defence communicated the urgency of finding an immediate solution given the direct impact on Defence preparation and morale.³⁰
25. On 24 November, the Registrar responded and rejected the requests.³¹ The Registrar [REDACTED].³² [REDACTED].
26. This response had a catastrophic impact on Defence morale and productivity. The Defence has just completed a long and intense trial punctuated by harrowing COVID scares and lockdowns. It is now entering another period of high intensity (brief drafting), which looks likely to coincide with the judicial recess. Support staff members were rightfully upset by any suggestion that they should take on additional work/additional cases, simply to be paid the proper rate corresponding to their position. They were also rightfully upset that although the Registry clearly recognised that the rates and conditions need to be modified (as reflected in the Registry proposal that has been submitted to the ASP) these changes will not be applied to them. They have worked throughout the most difficult time in the Court's history and have received the lowest salary in terms of purchasing power.
27. With a view to finding constructive solutions, Counsel wrote to the Registry requesting an urgent in person meeting with support staff.³³
28. On 30 November, a Registry representative met with Defence teams. During this meeting, the Registry indicated that it was not in position to propose or agree to solutions that would address the immediate situation. The Registry also informed Counsel that although the [REDACTED].
29. The Registry representative expressed his view that any solutions rested in the hands of the State parties. The Registry representative further [REDACTED].

B. The standard of judicial review for legal aid decisions

30. Regulation 83(1) of the Regulations of the Court requires the Registry to cover "all costs reasonably necessary as determined by the Registrar for an effective and

²⁹ Email from Melinda Taylor to Counsel Support Section sent on 10 November 2022 at 17:19, Annex B.

³⁰ Email From Melinda Taylor to Counsel Support Section sent on 21 November 2022 at 16:00, Annex C

³¹ Annex D.

³² Annex D.

³³ Annex E.

efficient defence”. This includes the remuneration of counsel and support staff. Regulation 83(4) allows the defendant to seize the Chamber with a request to review any determination as to the scope of assistance. Regulation 135(2) also provides for right to seek the Chamber’s review of determinations of the calculation and payment of fees. In combination, these regulations allow the Defence to seize the Chamber with a request to review the manner in which the Registry has calculated fees, and to allocate sufficient funds to ensure that adjusted fee rates are paid.

31. The Defence is aware that the Chamber has exercised a deferential approach to the decisions of the Registry. In circumstances where the Regulations have established an explicit mechanism for judicial review before the Trial Chamber, this level of deference should not exceed the usual standards of judicial review. Otherwise, the Defence would be deprived of the right to an effective remedy.
32. In accordance with accepted principles of conducting judicial review of legal aid decisions:³⁴

The Chamber must assess, inter alia: whether the decision of the Registrar was materially affected by an error of law or fact; whether the Registrar abused his discretion; the propriety of the procedure by which the Registrar reached a particular decision; or whether the Registrar could not rationally have reached a given conclusion. Furthermore, 'when.. .review[ing] crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation'.

33. This standard applies to judicial review concerning disputes concerning payment rates and fees, including the formula used by the Registry to set specific rates.³⁵ Following these principles, ICC Chambers have emphasised the Registry’s obligation to:
- “Follow the guidelines laid down in the LAP” in a manner that is consistent with obligation to take account of “the actual needs of the legal aid applicant and the interest of justice in the given case”;³⁶
 - Allocate resources that will “secure the proceedings against interruptions” and “minimis[e] the incidence of avoidable delays”;³⁷

³⁴ [ICC-01/05-01/13-955](#), para. 33.

³⁵ [ICC-01/11-01/11-613](#), para. 25.

³⁶ [ICC-01/05-01/13-955](#), para. 37.

³⁷ [ICC-01/05-01/13-955](#), para. 38.

- Interpret the LAP in a manner that avoids gaps and ensures, to the extent possible, continuity within the Defence; and ³⁸
- Avoid unduly formulaistic interpretations that do not reflect the reality of the context in which Defence are operating. ³⁹

34. The right to judicial review must also be construed in a manner that is consistent with the right to an effective remedy. The applicable ICC regulations provide no arbitration or dispute mechanism in case of disputes concerning fees: the Chamber is entrusted with this role. Moreover, although Regulation 136 refers to the appointment of legal aid commissioners, tasked with providing advice as concerns the necessity or sufficiency of the funds allocated to teams, there is no indication that any persons have been appointed to this role in recent years.

C. Bases for Reversal

- (i) *the Registrar erred in law by misapplying the principles and terms of the legal aid policy approved by the ASP*

35. In accordance with consistent ASP resolutions, the Registry is obliged to interpret and apply the LAP in a manner that is consistent with the principles set out in paragraph 16 ICC-ASP/3/16 (the 2004 policy). These principles require the Registry to ‘peg’ Defence rates to that of their Prosecution counterpart. The current application of the LAP fails to achieve this agreed principle of equivalence, due to the Registry’s failure to adjust the base rates by reference to current salary rates. The Registry therefore erred by failing to apply the terms of the LAP in a manner that is consistent with the chapeau principles.

36. The Registrar’s claim that the ASP did not endorse a ‘mirroring of resources’ is misconceived. The Defence is not requesting the same amount of resources as the Prosecution. The Defence accepts that equality of arms does not mean the same financial resources. Procedural equality does, however, require equivalent resources in terms of qualifications and quality. As set out above, the ASP has consistently endorsed the principle of fair trial and equality of arms by reference to this equivalence principle. By writing that team members are set at a ‘step V’ rate – the Registrar’s letter has conceded the same. The term ‘step V’ can only be understood by

³⁸ [ICC-01/05-01/13-2063](#), para. 10-13.

³⁹ [ICC-01/05-01/13-2063](#), para. 13.

reference to UN salary scales. Defence salary rates do not exist in a vacuum- they exist by virtue of the promulgation of specific salary rates which are meant to reflect a certain degree of skill and qualifications. By adhering to a figure that no longer reflects the current salary scales, the underlying teleological purpose of the LAP and related ASP resolutions has been frustrated. To borrow from past legal aid decisions, the Registrar's unduly formalistic interpretation has produced a result that does not reflect the reality that **we are now in 2022/2023 not 2012/2013**, and the rates that were necessary and reasonable in 2012/2013 are now manifestly insufficient and unreasonable.

37. This error can and should be corrected through proper interpretation and not amendment: that is, the Registrar should calculate fees by referenced to the approved formula (2022 base salaries plus post adjustment = current net salaries) rather than the illustrative figures. This result is necessary to ensure that the outcome is consistent with the underlying rationale of the formula and the principles of equivalence set out in paragraph 16 of the 2004 policy.

(ii) *the Registrar erred by failing to take into account relevant principles – namely, the prohibition of discrimination, and the right to equality of arms (taking into account the particular requirements of the case), and taking into account irrelevant factors. These errors have produced a manifestly unreasonable result*

38. “Whilst the Registrar retains a relatively wide margin of discretion in the management and application of the legal aid scheme, as noted above, this must be exercised in accordance with the Statute”.⁴⁰ The Court's legal aid framework must therefore ensure effective legal representation in a manner that is consistent with Article 21(3), which includes the protection against discrimination and the right to equality of arms, enshrined by Article 67(1). Both principles, in the context of working conditions within a protracted criminal trial, this can be distilled to the fundamental principle of equal pay for equal work. This principle is recognised in both international

⁴⁰ [ICC-01/05-01/13-955](#), para 36.

administration law⁴¹ and international human rights law.⁴² It also forms part of the principle of equality of arms, according to which legal aid systems must ensure equivalent quality of means between parties.⁴³

39. This principle has been interpreted by every international court and tribunal as requiring the Registry to peg the rates of the Defence (Counsel) to the salary of their counterpart in the Prosecution. As explained in the Rogers Report,⁴⁴

*The basic principle applied to find the right level for lawyers' fees at the UN assisted tribunals is that independent lawyers (and legal assistants) should be paid at a rate that is (to the extent possible) equivalent to their counterparts in the prosecution. So a lead counsel fee would match the salary of a P5 prosecutor, an associate / co-counsel would match a P4, a legal assistant with a P3, and a case manager with a P1/2. **This is not only 'fair', but also reflects the need to ensure an effective defence by attracting quality lawyers.***

40. The proceedings before the ICC are arguably the most complex of all international courts – due to the specificities of the Rome Statute, the complexities of State cooperation and the security risks associated with conducting investigations in active zones of insecurity/or conflict. And yet, as a result of the Registry's failure to apply the equivalence principle, the rates of Defence are now the lowest of all the Courts.⁴⁵ The Defence have been asked to do more, to have more qualifications, to accept more risk, while being paid less than their Defence counterparts at other courts and less than their Prosecution counterparts in this Court.

41. In the context of this case, the implications are not abstract or speculative. Whereas Prosecution staff can look forward to paid annual leave after closing submissions, Defence team members are facing the spectre of unemployment. There is no light at

⁴¹ILOAT [Judgment 2706](#), consideration 12, that: "it is the duty of international organisations to abide by the principle of equality and in particular to comply with its requirement that there be equal pay for work of equal value. [...] if their rules and procedures do not ensure adherence to those requirements in respect of their staff, it is their duty to take remedial steps, whether by way of some general rule or by some specific procedure for the particular case."

⁴² Article 23(2), UDHR. See also Article 7(a) (i) of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3 (hereinafter 'ICESCR'), concerning the obligation to "Pair wages and equal remuneration for work of equal value without distinction of any kind". See also, Article 4 (3) of the European Social Charter.

⁴³ [Steel and Morris v. UK](#), ECtHR, 15 February 2005, paras. 62, 72.

⁴⁴ Rogers Report, para. 133.

⁴⁵ [IBA Comments on 'Concept Paper: Review of the International Criminal Court Legal Aid System'](#) (9 June 2017) p. 6. See also the Rogers Report, p. 19.

the end of the tunnel for them and no solutions on the table. The Defence has lost key support staff, who were offered better professional opportunities, and it will continue to do so. The fact that support staff have no contractual status affects both their welfare and well-being and the continuity of their presence in their case. The fact that the briefing schedule is occurring over winter is also impacting matters. Electricity and heating costs are rising exponentially, in a manner that is eroding the purchasing power of Defence salaries in very severe terms.

42. The suggestion that salary disparity can or should be remedied by taking on other cases is unhelpful and misplaced in the context of the stage of this case. Final brief drafting requires team members to focus their available time on this case and to prioritise the interests of Mr Al Hassan: this is not a part-time exercise.
43. As result of the absence of any solutions, Defence team members are demotivated and disincentivised. Their time has also been diverted to the necessary task of litigating and advocating for their basic rights. Support staff will be attending the Assembly of State Parties sessions, with a view to explaining and advocating for their rights. These sessions, running from 5-9 December 2022, coincide with a particularly critical week for Defence activities in the field.
44. These developments are creating a concrete disparity between the capacity of the Defence as compared to the Prosecution.
45. Over the last month, the Defence has been working around the clock to finalise Rule 68 certifications and filings and to resolve any outstanding procedural issues before the completion of the Defence case. Conversely, since the Prosecution is not engaged in this activity, the Prosecution has been able to use this time to finalise its Trial brief. After the close of the Defence case, the Prosecution will then have an additional four weeks to file, triggering the Defence deadline of four weeks to submit the Defence brief. The Prosecution thus already has a tangible head start as concerns the preparation of its brief.
46. This 'gap' is widening further due to the drastically different conditions under which the two parties are preparing their closing briefs and arguments. The Defence lacks the ability to retain and motivate qualified staff at the most critical juncture of its case as a result of specific aspects concerning the current interpretation and modalities of application of the Legal Aid Policy, specifically:

- Team members are being paid at least 30% less than their prosecution counterparts, even though they perform the same tasks, often with less institutional support and resources, and in some cases, tighter deadlines. This gap is widening on a daily basis, due to rapidly escalating costs of living hikes in The Hague, which are not addressed or adjusted for, in Defence fees; and
- The Registry has conveyed the message to team members that in order to obtain a fair and full salary, they should work on other cases at the same time: if they don't like their conditions, they can leave (taking their institutional knowledge and expertise with them).

47. If the gap is not addressed and rectified on an urgent basis, Mr Al Hassan's right to effective representation will have been compromised. The Defence will have been compelled to prepare a crucial step of the case under conditions that were substantially more disadvantageous than those of the Prosecution, in violation of the principle of equality of arms.

48. The current situation falls squarely within the terms of the 2011 decision of Trial Chamber I in *Lubanga*. In that decision, the Chamber underscored that:⁴⁶

it is necessary to observe that the guarantee of a fair trial is, in essence, an indispensable element of international justice. This fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties (the Adjustments). If the accused's right to an effective defence is infringed, a fair trial for the accused is no longer possible.

49. The Trial Chamber further concluded that these principles required the Registry to apply the legal aid policy in a manner that would ensure continuity and adequacy of resources and that the Defence would not be prejudiced in connection with its ability to respond to critical submissions within short deadlines.⁴⁷

50. These conditions are not met in the current case due to the fact that the LAP undermines rather than supports the goal of ensuring the continuous availability of qualified staff, during the drafting of final briefs and closing statements. The

⁴⁶ [ICC-01/04-01/06-2800](#), para. 54.

⁴⁷ [ICC-01/04-01/06-2800](#), para.58.

Registrar's failure to consider the need for equivalence in quality and to avoid discrimination between fundamental aspects of working terms has produced an outcome that disadvantages the Defence at the most critical stage of the process. If the playing field is not levelled, the outcome will be an unfair trial.

III. Relief sought

51. For the reasons set out above, the Defence respectfully requests the Honourable Trial Chamber to:

- Review and Reverse the Decision of the Registrar; and
- Request the Registrar to calculate the rates of Defence team members by reference to the current net salary of the pegged Prosecution positions.



Melinda Taylor
Counsel for Mr. Al Hassan

Dated this 2nd Day of December 2022
At The Hague, The Netherlands