

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 June 2023

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
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

Public redacted version of "Registry's observations on 'Urgent Request for Judicial Review of the Registry's Decisions on Funding During the Reduced Activity Phase' (ICC-01/12-01/18-2495-Conf-Exp)", 23 May 2023,
ICC-01/12-01/18-2497-Conf-Exp

Source: The Registry

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

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I. Introduction

1. Following the instruction by way of email from Trial Chamber X (“Chamber”),¹ the Registry hereby submits its observations on the “Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase” (“Request”) dated 12 May 2023 submitted by the Defence team of Mr Al Hassan (“Defence”).²

II. Procedural history

2. On 13 February 2023, the Defence submitted a request to the Registry for additional means during the phase of reduced activities, requesting that (i) The lump sum payment scheme continue to be applied until 30 days after the finalization of closing arguments; (ii) The composition and resources of the [Defence] be maintained during the reduced activity phase that follows the conclusion of the parties’ presentation of evidence; and (iii) The Defence is entitled to use any accrued savings to maintain team members during the reduced activity phase/pay experts/mission costs.³

3. On 24 March 2023, considering the Registry’s single policy document on the Court’s legal aid system (“Legal Aid Policy” or “LAP”) and upon assessment of the Defence’s request for additional means, the Registry issued a decision on the 13 February Request (“24 March Decision”) granting: (1) continuation of lump sum payment 30 days after the conclusion of closing arguments; (2) “02 FTEs (€10,755.80/month) on activity basis until a decision under article 74 of the Rome Statute is issued” commencing 30 days after the conclusion of closing arguments. As regards the Defence’s request “that 30 hours a month each be allocated for two

¹ Email from Trial Chamber X to the Registry on 15 May 2023 at 10.40.

² Al Hassan Defence, “Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase”, 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp (“Request”).

³ Al Hassan Defence, “Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase”, 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp-AnxC (“13 February Request”).

resource persons and that funds be allocated for two missions [REDACTED]" for the purpose of investigations, the Registry invited the Defence to submit a detailed and reasoned request in order to conduct an *ad hoc* assessment. Lastly, with regard to the Defence request to use accrued savings to maintain team members if necessary or pay for missions/instructions of experts related to the sentencing phase, the Registry indicated to the Defence that "upfront authorisation cannot be given"⁴ and that any such requests will be assessed by the Registry on an *ad hoc* basis.

4. On 3 April 2023, the Defence requested a reconsideration of the 24 March Decision ("Reconsideration Request"). The Defence requested: (1) "[t]he 'lump sum' scheme to continue to be applied until the start of judicial recess, being 22 July 2023, to take in to account the [REDACTED] [...]"; (2) "1 FTE be allocated for [REDACTED], who will shortly be going on maternity leave and additional resources for her replacement for the period of her leave [...]"; and (3) "[t]he specific allocation of funding for Case Manager and Language Assistant positions (altogether 1.8 FTE) [...]".⁵

5. On 26 April 2023, and considering the LAP, the Registry issued its Decision on the Defence Request for Reconsideration of funding during the phase of reduced activities, and on the Defence Request for additional means to recruit a temporary replacement during the maternity leave of a team member in the defence team of Mr Al Hassan ("Reconsideration Decision"), in which it, *inter alia*, decided that the current team composition is continued to be paid on a monthly lump-sum basis until 30 June inclusive or until 30 days after the finalization of the closing arguments should these last until the month of June, maintained the 24 March Decision granting 2 FTEs and

⁴ Al Hassan Defence, "Urgent Request for Judicial Review of the Registry's Decisions on Funding During the Reduced Activity Phase", 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp-AnxC ("24 March Decision").

⁵ Al Hassan Defence, "Urgent Request for Judicial Review of the Registry's Decisions on Funding During the Reduced Activity Phase", 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp-AnxD ("Reconsideration Request"), para. 42.

approved additional means “to recruit a replacement during the maternity leave of [REDACTED] for a period of 26 weeks, starting – at the latest – on 19 June 2023”.⁶

6. On 12 May 2023, the Defence submitted its Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the ‘Reduced Activity Phase’ (“Request”), in which it asked the Chamber to order the Registry to grant (1) “an additional 1.5 FTE as of 1 July 2023 and until at least 31 July 2023, or until completion of the redactions of Mr Al Hassan’s interviews and security assessments as well as the Rule 68 material”; and (2) “an additional 1 FTE as of 1 August 2023 and for the entirety of the reduced activity period, for the purposes of retaining or recruiting a language assistant to provide dedicated linguistic support to Mr Al Hassan”. The Defence further requested the Chamber to order that “the reduced activity phase will end 30 days before Trial Chamber X intends to issue the Article 74 judgment, so as to allow the Defence to reconstitute itself for the purposes of preparing any appeals.”⁷

III. Applicable Law

7. The following provisions are of particular relevance to the present submissions: article 67 of the Rome Statute (“Statute”), rule 21(5) of the Rules of Procedure and Evidence (“Rules”), regulations 83(4) to 85 of the RoC, regulations 130 and 132 of the Regulations of the Registry (“RoR”) and paragraphs 23, 39 to 44 and 66 to 75 of the Legal Aid Policy.⁸

IV. Submissions

8. Regulation 83(1) of the RoC stipulates that “[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence”. Pursuant to this provision the Registrar enjoys a

⁶ Al Hassan Defence, “Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase”, 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp-AnxE, para. 39 (“Reconsideration Decision”).

⁷ Request, pp. 19-20.

⁸ Registry’s single policy document on the Court’s legal aid system, [ICC-ASP/12/3](#), 4 June 2013 (“Legal Aid Policy”).

relatively wide margin of discretion in relation to the calculation and payment of fees, and is mandated to ensure that Court's limited resources are managed carefully.⁹

A. Registrar's assessment of requests pursuant to regulation 83(3) of the RoC

9. In assessing requests submitted pursuant to regulation 83(3) of the RoC, the Registrar considers a number of non-exhaustive parameters in order to allocate the resources that are considered reasonably necessary for an effective and efficient legal representation.¹⁰ The Registrar, in any case and at any stage of the proceedings, engages in an analysis of the actual needs of the case that might differ from the sole application of these parameters.

10. In application of the flexibility principle,¹¹ the Registry does not provide defence or victim teams with specific positions, but rather the funds corresponding to the standard composition in the specific phases of the proceedings and, if warranted, to the positions justified as additional resources.

11. The Registrar notes that in terms of the resources requested to meet the Defence workload needs, the Request differs from the Reconsideration Request. The Registrar understands that in the Request the Defence seeks 1.5 FTEs in addition to 2 FTEs that have been allocated in the Reconsideration Decision "to minimise any unnecessary delays and disruptions" to complete "the redactions to Mr Al Hassan's interview and security assessments and the Rule 68 materials".¹²

12. The Defence argues that these additional resources would still be required to meet "numerous and significant deadlines currently set by the Chamber for July and

⁹ Trial Chamber VII, "Decision on the Defence Application for Judicial Review of the Decision of the Registrar on the Allocation of Resources during the Trial Phase", 21 May 2015, ICC-01/05-01/13-955, para. 33; Pre-Trial Chamber I, "Decision on the Defence Request for Review of the Registrar's Decision on Legal Aid", 24 August 2015, ICC-01/11-01/11-613, para. 25; Trial Chamber VI, "Reasons for Review of Registrar's Decision on Defence Resources", 29 October 2014, ICC-01/04-02/06-389, para. 28. Appeals Chamber, "Decision on Mr Ngudjolo's request for review of the Registrar's decision regarding the level of remuneration during the appeal phase and reimbursement of fees", 11 February 2014, ICC-01/04-02/12-159, para. 22 and fn. 40.

¹⁰ See LAP, para. 69.

¹¹ See LAP, para. 44.

¹² Request, paras. 37, 38.

August 2023”,¹³ as well as facilitate the [REDACTED], “the organisation and facilitation of which would require diversion of substantial, if not all, Defence resources.”¹⁴

13. In this regard, the Registrar notes that the 13 July 2023 deadline is for the Defence to submit a “Defence Progress Report” (by this time the Single Judge expects the Defence to have substantially completed the preparation of its proposal for public redacted versions of [Defence] Rule 68 material)” and “update on its progress with respect to lesser redacted versions of [Defence] witness transcripts”, while the 16 August 2023 deadline has been set by the Chamber for the Defence to transmit to the Chamber at the latest its “proposals concerning redactions to transcripts of Mr Al Hassan’s interviews and security assessments”.¹⁵ While indeed the 13 July 2023 deadline is for “progress reports of and proposals for ongoing or future tasks”, it is clear that the Defence is not required to complete the redacted versions of all Defence Rule 68 Material and its witness transcripts by that time.

14. Furthermore, as stipulated under the LAP “[c]ounsel may exercise the flexibility principle [...] to utilize the resources provided to structure the team in a manner that both best serves the interests of the indigent client and is compatible with the judicious financial use of legal aid funds.”¹⁶ In addition, “counsel is able to distribute the accumulated FTEs as he or she deems appropriate in order to recruit additional team members in the interest of the client, within the limits of the additional resources granted.”¹⁷

15. Considering that “[t]he onus of demonstrating, to the satisfaction of the Registrar, the need for the work of each team member will fall on the counsel in charge of the case and on the team member(s) in question”,¹⁸ the Registrar reiterates that it is

¹³ Request, paras. 26, 36.

¹⁴ Request, para. 28.

¹⁵ Request, para. 36.

¹⁶ LAP, para. 44.

¹⁷ LAP, para. 71. See also Reconsideration Decision, para. 22.

¹⁸ LAP, para. 120.

the prerogative of a counsel to plan and organise the team and its work in line with the resources made available during the phase of reduced activity and, should it be necessary, consider, for example, using 2 allocated FTEs “for the part-time employment of four different positions at the part-time rate of one legal assistant.”¹⁹

16. The Registrar further notes that the Defence requests additional resources to deal with “the intense workload associated with [REDACTED]” of Mr Al Hassan.²⁰ In this regard, the Registrar submits that [REDACTED], the full Defence team composition, including at least 3 Arabic-speaking and 1 Tamasheq-speaking team members, is still in place. It is therefore the Registrar’s view that the team has sufficient resources to manage the associated workload, including providing linguistic assistance during [REDACTED] as well as meeting the deadlines that have been set by the Chamber.

17. On the request about the use of the savings “to retain personnel”,²¹ the Registrar submits that no blanket authorisation could be given, and each such request must be carefully assessed on an *ad hoc* basis in accordance with regulation 83(1) of the RoC considering the relevant circumstances and developments in the case.

18. In the present case, the Registrar has also recognised the need for additional resources allowing the Defence to retain a team member on maternity leave, in line with his commitment to ensure an improved social protection of team members, improve the stability of a team composition, while at the same time ensuring the continuance and expeditiousness of proceedings bearing in mind the rights of the accused and the interests of justice.²²

¹⁹ Reconsideration Request, para. 22.

²⁰ Request, paras. 17, 28, 30, 36 (“the need for continuing language assistance in Tamasheq or Arabic after the closing submissions, specifically in the context of the [REDACTED]”). See also Al Hassan Defence, “Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase”, 12 May 2023, ICC-01/12-01/18-2495-Conf-Exp-AnxB (“Addendum to 13 February Request”): “the Defence will need all of its resources to organize and facilitate the [REDACTED]”.

²¹ Request, para. 29.

²² Reconsideration decision, para. 35.

19. Therefore, in view of the Registrar, the Request fails to specify how the resources allocated are not sufficient to protect Mr Al Hassan's specific rights under article 67 of the Statute in this case. The Registrar submits, on the basis of the relevant provisions and the information before him, that the additional resources provided to the Defence in the Reconsideration Decision are sufficient for the Defence to meet the workload required in the current proceedings.

B. Linguistic assistance to Mr Al Hassan during the phase of reduced activities

20. With regard to the linguistic assistance to Mr Al Hassan, the Registry notes that the Request relies on previously granted resources and assistance to facilitate Mr Al Hassan's understanding of the "Prosecution's application for an arrest warrant",²³ and hearing transcripts.²⁴ Further, the Request justifies the need to continuous linguistic assistance to "interpret and translate documents for Mr Al-Hassan on an ongoing basis, to accurately receive his instructions on redactions to his statements and to the closing brief, as well as obtaining his input on evidence that [the Defence collects] for sentencing."²⁵ The Defence further submits that "an additional FTE be allocated for the specific purpose of retaining linguistic assistance on the team to facilitate communication with, and obtain instructions from, Mr Al Hassan."²⁶

21. The Registrar notes that this additional FTE is requested from 1 August 2023 for the entirety of the reduced activity period. At the same time, the Request in its most part²⁷ refers to the need for such linguistic assistance [REDACTED], with the full team composition still in place.

22. The Request fails to specify how the allocated resources (i.e. 2 FTEs) are insufficient to ensure Mr Al Hassan's rights, in particular under Article 67(1)(f) of the

²³ Request, para. 15.

²⁴ Request, para. 16.

²⁵ Request, para. 17.

²⁶ Request, para. 17.

²⁷ See Request, paras. 17, 28, 30.

Statute and generally refers to Mr Al Hassan's "statutorily-guaranteed rights to interpretation in a language he fully understands".²⁸ In this regard, the Registrar recalls that "international human rights, which establish that the right of the accused or suspect for translation or interpretation extends only to the latter's relations *vis-à-vis* the Court as to guarantee the fairness of the proceedings and not to counsel-client relationship".²⁹ The Court's jurisprudence is clear on this point. In particular, the interpretation of article 67(1)(f) of the Statute, "[...] cannot be construed as enshrining an unfettered and absolute right for the suspect to benefit from interpretation and translation services at all times and for all matters and activities. Rather, article 67(1)(f) of the Statute gives the defendant a right, subject to the Chamber's appreciation, to understand everything that happens in the *proceedings* against him or her, which does not include private and privileged communications between the defendant and his or her Defence team."³⁰ In this regard, the Registrar submits that article 67(1)(f) of the Statute does not extend to [REDACTED].

23. The fact that Mr Al Hassan does not speak the same language as his counsel and cannot communicate without assistance has been duly considered while considering the request for additional resources submitted by the Defence. This also has been reflected in the Reconsideration Decision.³¹ The Registrar reiterates that 2 FTEs granted to the Defence for the period of reduced activities could be used for the purpose of ensuring the continuous linguistic assistance to Mr Al Hassan and communication with the team in the application of the flexibility principle.

24. In addition, as has been done so far, the Registry through its language services facilitates linguistic assistance to Mr Al Hassan when requested, in full compliance with his rights under article 67(1)(f) of the Statute. Therefore, the Registry stands ready

²⁸ Request, para. 1.

²⁹ Appeals Chamber, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 10 July 2020 entitled 'Decision on Defence request under article 67(1)(f) of the Rome Statute'", 5 November 2020, ICC-02/05-01/20-199, para. 20.

³⁰ Appeals Chamber, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 10 July 2020 entitled 'Decision on Defence request under article 67(1)(f) of the Rome Statute'", 5 November 2020, ICC-02/05-01/20-199, para. 29. (Emphasis added).

³¹ Reconsideration Decision, para. 22.

to provide such assistance “if any of the proceedings of or documents presented to the Court are not in a language which [Mr Al Hassan] fully understands and speaks [i.e., Arabic].”

25. In view of the above, the Registrar submits that the additional resources allocated to the Defence (i.e., counsel + 2 FTEs) are sufficient to meet the workload during the reduced activity phase and ensure respect for Mr Al Hassan’s rights as enshrined under article 67 of the Statute.



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

Dated this 6 June 2023

At The Hague, The Netherlands