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**International
Criminal
Court**

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

Date: **07 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 “Corrigendum to Urgent Request for Judicial Review of the Registry’s Decisions on Funding During the Reduced Activity Phase”, 22 May 2023, ICC-01/12-01/18-2495-Conf-Exp-Corr

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 Mr Al Hassan

Ms Melinda Taylor
Ms Felicity Gerry KC

Legal Representatives of the Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita
Julie Goffin

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Pieter Vanaverbeke

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Mr Al Hassan respectfully seeks review, pursuant to Regulation 83(4) of the Regulations of the Court and 135(2) of the Regulations of the Registry,¹ of a discrete part of the Registry's 26 April 2023 decision on legal aid funding during the period of reduced activity in the *Al Hassan* case.² The Defence requests Trial Chamber X to: (i) order that an additional 1.5 FTE³ be allocated to the Defence from **1 July 2023 until 31 July 2023** (or until the redactions and public filings ordered by the Chamber are completed), so as to allow the Defence to meet the July and August 2023 deadlines currently imposed by the Chamber;⁴ and (ii) order the allocation to the Defence of one additional FTE (1 FTE) as of **1 August 2023** for the purpose of retaining a linguistic assistant during the reduced activity phase. This narrowly-tailored request, if granted, would enable the Defence to complete the most urgent tasks and meet the most imminent deadlines set out by this Chamber and would ensure conformity with Mr Al Hassan's statutorily-guaranteed rights to interpretation in a language he fully understands.
2. The Defence also requests that the Chamber order that the reduced activity period end 30 days before the Chamber intends to issue the Article 74 judgment to allow the Defence to properly reconstitute itself in time for any appeals under Rule 150(1).
3. This request is classified as urgent given that the end of the lump-sum scheme, and the start of the reduced activity phase, is presently scheduled for 30 June 2023. This issue

¹ Regulations of the Court are hereinafter referred to as "RoC" and Regulations of the Registry are referred to as "RoR". This submission is filed confidentially pursuant to Regulation 23*bis* (2) of the Regulations of the Court as it includes information confidential to Mr Al Hassan, references confidential communications between the Defence and the Registry, and is intended to correspond with the Registry's Decision, which was itself classified as confidential as it referred to the personal information of a defence team member.

² See **Annex E**, RefNo: DJS/2023/037/MD/jk (notified to the Defence for Mr Al Hassan on 26 April 2023, 14:35).

³ FTE refers to "Full-Time Equivalent" and is the unit used by the Registry to calculate the allocation of resources based on its evaluation of the amount of work performed by a team member working full-time. See e.g. ICC Assembly of States Parties, "Registry's single policy document on the Court's legal aid system", ICC-ASP/12/3, 4 June 2013 ("Legal Aid Policy"), para. 69.

⁴ The Defence is requesting an additional 1.5 FTE until the end of July 2023 given the Chamber's currently scheduled deadlines in July 2023. Should those deadlines be extended, the Defence requests that any allocation of additional resources be similarly extended.

directly affects the Defence's ability to plan its upcoming workload, as set by the Chamber, and to most efficiently allocate its resources.

II. PROCEDURAL HISTORY

4. On 16 April 2018, Mr Al Hassan applied for legal aid pursuant to Regulation 131(2) RoR, indicating, *inter alia*, that he had no inherited or saved wealth, no savings or investments, no other financial resources, no current job, and many dependents.⁵ Mr Al Hassan was thereafter provisionally found indigent, and his defence paid for by the Court in accordance with the legal aid scheme.
5. Mr Al Hassan's financial circumstances have not improved since 2018, and he remains unable to fund his own defence.
6. On 13 February 2023, in anticipation of the closure of evidence, the Defence wrote to the Head of the Legal Aid Unit to request, *inter alia*, that "the composition and resources of the Defence team for Mr Al Hassan be maintained during the reduced activity phase that follows the conclusion of the parties' presentation of evidence" and that it be allowed to use any accrued savings to maintain team members during the reduced activity phase.⁶
7. On 26 April 2023, the Registry informed the Defence of its decision to maintain an earlier decision, issued on 24 March 2023,⁷ granting only two FTE as of 1 July 2023.⁸

III. APPLICABLE LAW

8. Regulation 83(1) RoC requires the Registry to cover "all costs reasonably necessary as determined by the Registrar for an effective and efficient defence", including *inter alia* the remuneration of counsel and support staff while Regulation 83(4) allows the accused to seise the Chamber with a request to review any determination as to the scope of legal assistance. Regulation 135(2) RoR also envisages judicial review of Registry decisions on the calculation and payment of fees as a matter of right. Together, the

⁵ *Questionnaire sur la Situation Financière du Demandeur*, 16 April 2018.

⁶ See **Annex A**, Defence Letter to CSS, "Request for resources during the reduced activity phase", 13 February 2023, 18:19 ("Al Hassan Request to CSS for Additional Resources").

⁷ See **Annex D**, Defence Letter to CSS, "Request for Reconsideration of Reduced Activity Funding (Al-Hassan Defence)", 3 April 2023.

⁸ See **Annex E**.

relevant Regulations permit the Defence to seize the Chamber with requests to review funding decisions under the legal aid policy and to order the allocation of additional funds where reasonable and necessary to protect an accused's fair trial rights.

IV. SUBMISSIONS

A. This Chamber is Competent to Review Registry Decisions on Legal Aid Funding

9. At the outset, the Defence notes that “the right of the suspect to legal assistance paid by the Court where he lacks sufficient means to pay for it himself emanates from Article 67(1)(d) and that the decision of the Registrar as to the indigence of the suspect and his entitlement to legal assistance is merely declaratory of the fact that the requisite conditions for the right to paid legal assistance are satisfied”.⁹ The provision of legal aid goes to the heart of the fair trial guarantees promised to an accused before this Court, since it impacts his ability to exercise his rights effectively in full equality with the Prosecution and, indeed, with other defendants appearing, and who have appeared, in ICC proceedings.
10. The Defence may request judicial oversight of Registry funding decisions as a matter of right. ICC Chambers have also recognised their own “competence to review disputes as to the scope of legal assistance paid” through the application of Regulation 83(4) RoC,¹⁰ with a view to ensuring that the trial is fair and the rights of the accused respected.¹¹ This applies even **after** the closure of evidence and during the reduced activity phase,¹² and may be ordered until a material change in circumstances occurs (such as funding from elsewhere, the end of the proceedings, or adjudication of a fresh

⁹ *Mbarushimana*, Decision on the “Defence Request for the Review of the Scope of Legal Assistance”, ICC-01/04-01/10-142, 11 May 2011, para. 16.

¹⁰ *Bemba et al.*, Decision on Bemba Defence Request for Provisional Legal Assistance, ICC-01/05-01/13-1977, 30 August 2016 (“*Bemba et al. Decision on Legal Assistance*”), para. 5. *See also Bemba*, Summary of the Decision on legal assistance for the accused, ICC-01/05-01/08-568, 20 October 2009 (“*Bemba Legal Assistance Summary*”) (ordering that funding be provided to the accused after noting that, *inter alia*, his Defence team had not been paid since March 2009 for work done and needed to be done in connection with his effective representation in the proceedings); *Mbarushimana Legal Assistance Decision*, para. 16 (granting defence request for retroactive legal assistance to a time before an application for legal assistance was made).

¹¹ *Bemba et al. Decision on Legal Assistance*, para. 7. *See also Bemba Legal Assistance Summary*, para. 4 (“[t]he accused has a statutory entitlement to adequate time and facilities for the preparation of his defence and to be tried without undue delay [...], and the Trial Chamber has unhesitatingly concluded that given the resources currently available to Mr Bemba, he is seriously at risk of being denied the opportunity properly to prepare for a timely trial before the ICC.”)

¹² *Bemba et al. Decision on Legal Assistance*, paras. 3(ii), 7 (noting in paragraph 3 the closure of evidence in May 2016 and nevertheless finding that the overarching need to secure fair trial rights justified the intervention of the Chamber in August 2016).

legal aid application).¹³ Chambers have also recognised their ability to intervene in cases concerning staffing of defence teams or the quantity of financial assistance received,¹⁴ with the Trial Chamber in *Katanga and Ngudjolo* noting that

when Chambers are asked to review 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.¹⁵

11. The relevant standard for a Chamber's review of Registry decisions in the legal assistance context is as follows:

[T]he Chamber should only interfere with the exercise of the Registrar's discretion in the area of legal assistance where there are compelling reasons for doing so, taking into consideration the rights of the defence as enshrined in the Statute. In reviewing the Registrar's decisions, the Chamber must not consider whether it would have made the same decision as the Registrar. Instead, 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'.¹⁶

12. This standard applies to the judicial review of disputes concerning payment rates and fees, including the formula used by the Registry to set specific rates and caps on resources.¹⁷ Following these principles, ICC Chambers have emphasised the Registry's obligation to:

- follow the guidelines laid down in the LAP in a manner consistent with the obligation to take account of **"the actual needs of the legal aid applicant and the interest of justice in the given case"**,¹⁸

¹³ *Bemba Legal Assistance Summary*, para. 5.

¹⁴ *Bemba et al.*, Decision on Bemba Defence Request regarding the Employment Conditions of Defence Staff, ICC-01/05-01/13-2301, 17 July 2018, para. 6 (internal citations omitted).

¹⁵ *Katanga and Ngudjolo*, Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, [ICC-01/04-01/07-3277](#), 23 April 2012, para. 9.

¹⁶ *Bemba et al.*, Decision on the Defence applications for judicial review of the decision of the Registrar on the allocation of resources during the trial phase, ICC-01/05-01/13-955, 21 May 2015 ("*Bemba et al. Decision on Trial Resources*"), para. 33 (internal citations omitted).

¹⁷ *Gaddafi*, Decision on the Defence Request for Review of the Registrar's Decision on Legal Aid, ICC-01/11-01/11-613, 24 August 2015, para. 25. See also *Al Hassan*, Urgent Request for Judicial Review, ICC-01/12-01/18-2431-Red, 2 December 2022, para. 33.

¹⁸ *Bemba et al. Decision on Trial Resources*, para. 37 (emphasis added).

- allocate resources that will “secure the proceedings against interruptions” and “minimis[e] the incidence of avoidable delays”;¹⁹
- interpret the LAP in a manner that avoids gaps and that ensures, to the extent possible, continuity within the Defence;²⁰ and
- **avoid unduly formulistic interpretations that do not reflect the reality of the context in which Defence is operating.**²¹

13. The *Bemba et al.* Chamber has emphasised the importance of the Registrar not applying the legal aid policy in an overly-rigid manner that ignores the individual circumstances of the case before him and has highlighted the “actual needs of the legal aid applicant and the interest of justice” as considerations that “must be fully taken into account”.²²

B. The Legal Aid Decision Failed to Address or Give Reasons for No Longer Providing Arabic-Language Assistance to Mr Al Hassan, Giving Rise to Errors of Fact and Law

14. The right to linguistic assistance in a language fully understood by an accused is a fair trial right consistent with international human rights jurisprudence.²³ This right, which is corollary to the right of effective participation,²⁴ applies to all stages of a criminal proceeding, including the sentencing and appellate phases.²⁵ ICC Chambers have upheld the right to translations or language assistance for the benefit of the accused,²⁶ with the *ad hoc* tribunals finding this “so fundamental [a right] as to outweigh considerations of judicial economy” **even where** the accused has an adequate understanding of another language used in court.²⁷

¹⁹ *Bemba et al.* Decision on Trial Resources, para. 38.

²⁰ *Bemba et al.*, Decision on Defence Request to Review and Vary the Registry’s Scope of Legal Assistance Decision, ICC-01/05-01/13-2063, 25 November 2016 (“*Bemba et al.* Decision on Scope of Legal Assistance”), paras. 10-13.

²¹ *Bemba et al.* Decision on Scope of Legal Assistance, para. 13 (emphasis added).

²² *Bemba et al.* Decision on Trial Resources, para. 37.

²³ ECHR, *Kamasinski v. Austria*, App. no. 9783/82, Judgment, 19 December 1989, para. 74.

²⁴ Article 6 of the European Convention on Human Rights guarantees the right of an accused to participate effectively in a criminal trial. See e.g. *Murtazaliyeva v. Russia*, App No. 36658/05, Judgment, 18 December 2018, para. 91.

²⁵ ECHR, *Phillips v. the United Kingdom*, App. no. 41087/98, Judgment, 12 December 2001, para. 39. See also *Aleksandr Dementyev v. Russia*, App. no. 43095/05, Judgment, 28 November 2013, paras. 23-26 (finding that the right to a fair trial – of which the right to understand the criminal charges in a language one fully understands is a part – is applicable throughout the entirety of proceedings for the determination of any criminal charge).

²⁶ *Mahamat Said Abdel Kani*, Decision on Defence Request for Suspension of Deadline for Response to the Trial Brief and Postponement of Commencement of Trial pending Translation of Trial Brief, ICC-01/14-01/21-408, 14 July 2022, para. 15; *Bemba*, Decision on the Defence’s Request Related to Language Issues in the Proceedings, ICC-01/05-01/08-307, 4 December 2008, para. 12, 14 and 16 (“entitled to receive the French translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him”).

²⁷ *Milosevic*, IT-02-54, Decision on Prosecution motion for permission to disclose witness statements in English, 19 September 2001 (finding that an accused’s minimum rights to be informed promptly and in detail in a language

15. Mr Al Hassan has, from the outset, been unambiguous in his need for Arabic language assistance. At his initial appearance before Pre-Trial Chamber I, Mr Al Hassan emphasised his preference to “use [the] Arabic language” during his Court proceedings.²⁸ This was underscored in subsequent applications to the Pre-Trial Chamber,²⁹ in which Mr Al Hassan, noting that he could not speak any English,³⁰ requested Arabic translations for certain critical documents.³¹ Mr Al Hassan also clarified that he “ha[d] not studied French at an academic level at any point in his life and ha[d] a rudimentary knowledge of French”.³² In recognition of Mr Al Hassan’s inability to understand the basis of his detention or prepare his defence in French or English,³³ the Pre-Trial Chamber ordered an Arabic version of the Prosecution’s application for an arrest warrant.³⁴ Attempts to authorise Arabic as a working language in his proceedings, though unsuccessful,³⁵ highlighted Mr Al Hassan’s ongoing need for Arabic translations and/or language assistance.
16. In the status conferences leading up to trial, this was once again at issue, with Mr Al Hassan making “a request to receive Arabic translation of the hearing transcripts”.³⁶ The Registry recognised the need for language assistance and indicated that, while it would be unable to provide the daily trial transcripts in Arabic,³⁷ it would provide additional resources in the form of a language assistant.³⁸ CSS confirmed in an email

which he understands outweigh considerations of judicial economy and that translations must be provided even where the accused speaks, reads, writes, and understands English adequately).

²⁸ T-001, p. 7, line 3.

²⁹ Defence request to authorise the use of Arabic as a working language, [ICC-01/12-01/18-268](#), 8 March 2019 (“Authorisation Request”); Request for Translation, [ICC-01/12-01/18-39-Red](#), 31 May 2018 (“Translation Request”).

³⁰ [Authorisation Request](#), para. 4 (“Mr Al Hassan does not speak or understand English”); 8 (indicating that Arabic was the only common language between Mr Al Hassan and his then-Counsel, the latter of whom also spoke English).

³¹ Status Conference of 12 December 2019, T-008 (“T-008”), p. 51, lines 10-11 (“[t]he Chamber wishes to stress that Mr Al Hassan has made a request to receive Arabic translation of the hearing transcripts”); 17-19 (“a transcript in Arabic should be provided so that Mr Al Hassan can follow the proceedings in a language that he fully understands”).

³² [Translation Request](#), para. 12; T-008, p. 53, lines 15-17 (“Mr Al Hassan studied at a university in Tripoli in Arabic, not in French. So yes, he can speak French, he can understand French, he cannot read or write in French to the level required under the Statute”).

³³ Decision on the Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest, ICC-01/12-01/18-42-tENG, 1 June 2018 (ordering an Arabic translation of the Prosecution Application for the Issuance of a Warrant of Arrest, which had been provided to Mr Al Hassan in French).

³⁴ *Id.* para. 13.

³⁵ [Authorisation Request](#), para. 7.

³⁶ T-008, p. 51, line 10 – p. 52, line 3.

³⁷ T-008, p. 52, lines 10-11.

³⁸ T-008, p. 52, lines 15-17 (“[a]s for the request from the -- by the Defence to CSS for additional resources for a language assistant, and on this particular point I can already say that additional, an additional resource, a language assistant shall be provided.”)

dated 19 December 2019 that 1 FTE would be provided “for the sole purpose of linguistic assistance” until the end of closing arguments.³⁹ Mr Al Hassan’s need for specific and dedicated language assistance was therefore clear and undisputed.

17. In a 6 March 2023 communication to the Head of the Legal Aid Unit, the Defence addressed the need for continuing language assistance in Tamasheq or Arabic after the closing submissions, specifically in the context of the upcoming June 2023 family visit.⁴⁰ The Registry’s response of 24 March 2023 did not address this request. In its subsequent request for reconsideration, the Defence reiterated the need for additional resources for a language assistant, given the critical issue of language in respect of Mr Al Hassan and the need to safeguard his rights.⁴¹ The Defence emphasised the need for a dedicated language assistant during the upcoming reduced activity phase in order 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 we collect for sentencing. This is further to supporting Mr Al Hassan whilst in detention and to assist with undertaking investigations sought to be carried out during the reduced activity period [as well as] detention issues and complaints [that] have arisen throughout the proceedings [...] Without a language assistant, he will not be able to exercise his right to communicate freely in a language that he fully understands.⁴²

This work is distinct from the (other) work that needs to be carried out by a case manager or legal assistant. As such, the Defence requested 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.

18. In its 26 April decision on the reconsideration request, the Registry did not address the Defence’s request or arguments in respect of the need for ongoing language assistance, indicating only that Counsel should utilise the flexibility principle to allocate resources:

the allocation of 02 FTE may be used, for example, for the part-time employment of four different positions at the part-time rate of one legal assistant. Taking this into consideration, the Registry is of the view that Counsel can allocate the available resources to the specific services needed as indicated in the Defence Request, **including case manager, linguistic assistant, and a legal assistant.**

³⁹ Email from CSS to Defence, “Re: Request for additional resources – Al Hassan”, 19 December 2019, 11:25.

⁴⁰ See **Annex B**, Defence Addendum to Letter, “Request for resources during the reduced activity phase”, 6 March 2023, 11:22.

⁴¹ See **Annex D**, paras. 3(c), 22.

⁴² See **Annex D**, para. 22.

The Registry seemingly failed to address the appreciable impact on Mr Al Hassan that would arise from being able to communicate with his team only on a “part-time” basis. Nor did the Registry address the fact that a case manager, linguistic assistant, and legal assistant have vastly different skill sets and are charged with distinct tasks, making a part-time rotation amongst them not only inefficient but unfeasible. Accordingly, the Decision does not reflect the reality of how the Defence has needed, and must continue, to operate, giving rise to an error of fact.

19. The right to a fair trial applies throughout the entirety of criminal proceedings.⁴³ This includes the right to – where applicable, free – legal assistance at every stage.⁴⁴ For the right to legal assistance to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions. Indeed, it is the Court’s responsibility to ensure a trial is fair and, accordingly, that a counsel charged with defending the accused is given a meaningful opportunity to do so.⁴⁵ The right to be effectively defended by a lawyer – and to effectively participate in one’s own defence – is a basic feature of a fair trial.⁴⁶
20. Mr Al Hassan’s statutory right to participate in the proceedings against him is not rendered moot or suspended simply because the case has entered the deliberations phase. On the contrary, he has a right to **effectively participate** in each aspect of his case for as long as the case against him persists, including periods during which his team is gathering evidence or preparing for subsequent phases, such as sentencing. Effective participation is ensured by the accused’s ability to fully hear, follow, and participate in the proceedings against him,⁴⁷ including, *inter alia*, by being able to compile notes for sharing with, and facilitating the conduct of, the defence.⁴⁸ Where conditions are imposed that make it difficult to follow the proceedings or instruct one’s legal team, there may exist a breach of this right.⁴⁹ Provision of legal aid to Mr Al

⁴³ ECHR, [Phillips v. the United Kingdom](#), para. 39; [Aleksandr Dementyev v. Russia](#), paras. 23-26.

⁴⁴ ECHR, [Imbrioscia v. Switzerland](#), App. no. 13972/88, Judgment, 24 November 1993, para. 37.

⁴⁵ ECHR, [Van Geyseghem v. Belgium](#), App. no. 26103/95, Judgment, 21 January 1999, paras. 33-34 (discussing a defendant’s right to be adequately defended as prevailing over other interests, even where the defendant fails to appear when summoned).

⁴⁶ ECHR, [Van Geyseghem v. Belgium](#), para. 34.

⁴⁷ ECHR, [Murtazaliyeva v. Russia](#), App. no. 36658/05, Judgment, 18 December 2018, para. 91.

⁴⁸ ECHR, [Moiseyev v. Russia](#), App. no. 62936/00, Judgment, 9 October 2008, para. 214.

⁴⁹ ECHR, [Stanford v. the United Kingdom](#), App. no. 16757/90, Judgment, 23 February 1994, paras. 26, 29 (finding that poor acoustics in the courtroom and hearing difficulties could give rise to a fair trial issue under Article 6).

Hassan without simultaneous linguistic assistance is one such limiting condition, since he is, in practical effect, precluded from fully engaging in his own defence.⁵⁰

21. As with the assistance of a lawyer, the right to interpretation is one of the guarantees of a fair trial⁵¹ and applies throughout the proceedings, unless compelling reasons are demonstrated to restrict this right.⁵² The purpose of this is to ensure that an accused fully understands the proceedings and can inform his lawyer of any point that should be made in his defence.⁵³ This right does not cease to operate during the deliberations stage. Defects in interpretation can have ramifications for other rights and may undermine the overall fairness of the proceedings.⁵⁴ The Trial Chamber in *Bemba et al.* also explicitly recognised the need to ensure linguistic competence within a team in order to minimise avoidable difficulties arising from the language demands of a case.⁵⁵ That Mr Al Hassan has a basic command of French, a language spoken by members of his defence team, does not by any means negate his right to interpretation in a language he understands sufficiently well to **fully** exercise his right to effectively participate in his own defence.⁵⁶ This can only be achieved by provision of a linguistic assistant proficient in Arabic or Tamasheq. The Registry's failure to take this into account is a manifest breach of the settled "interest of justice" standard.⁵⁷
22. Human rights jurisprudence has found that provision of oral linguistic assistance, such as is being requested in the present case, may well satisfy this particular right.⁵⁸ While judicial economy cannot outweigh Mr Al Hassan's fair trial rights, it should be noted

See also *Razvozhayev v. Russia and Ukraine and Udaltsov v. Russia*, 2019, paras. 253-254 (finding that the cumulative effect of exhaustion caused by lengthy prison transfers – in poor conditions and with less than eight hours of rest, repeated for four days a week over a period of more than four months – seriously undermined the applicant's ability to follow the proceedings, make submissions, take notes and instruct his lawyers, which was, in turn, a denial of adequate facilities for the preparation of his defence and a breach of his right to a fair trial).

⁵⁰ ECHR, *Zana v. Turkey*, App. no. 69/1996/688/880, Judgment, 25 November 1997, para. 72 (finding that the presence of an accused's lawyer cannot compensate for the accused's absence in the context of an "effective defence").

⁵¹ N. Vogiatzis, "[Interpreting the Right to Interpretation under Article 6\(3\)\(e\) ECHR](#)" (2022) 22(1) Human Rights L. Rev., Section 2.

⁵² ECHR, *Baytar v. Turkey*, App. no. 45440/04, Judgment, 14 October 2014, para. 50.

⁵³ ECHR, *Kamasinski v. Austria*, App. no. 9783/82, Judgment, 19 December 1989, para. 74.

⁵⁴ ECHR, *Baytar v. Turkey*, App. no. 45440/04, Judgment, 14 October 2014, paras. 50, 55.

⁵⁵ *Bemba et al. Decision on Trial Resources*, para. 41(a). See also *Gaddafi*, ICC-01/11-01/11-613, para. 2 (recognising the need for additional resources for an Arabic language assistant to facilitate communication between counsel and client); para. 34, fn. 62 (acknowledging the necessity of Arabic-language assistance in the case).

⁵⁶ See e.g. ECHR, *Vizgirda v. Slovenia*, App. no. 59868/08, Judgment, 28 August 2018, paras. 53, 79, 83.

⁵⁷ See *supra* paras. 13, 19.

⁵⁸ ECHR, *Vizgirda v. Slovenia*, para. 78.

that the relief requested by the Defence – *i.e.* the provision of 1 additional FTE as of 1 August 2023 for the services of a linguistic assistant during the deliberations phase – is significantly more cost-effective and less administratively cumbersome than overburdening the Language Services Section with constant requests for written translations of evidence and trial-related communications. Nor would the LSS be able to assist in terms of day-to-day communications with Mr Al Hassan.⁵⁹ It is, on balance, the most appropriate remedy for all parties.

23. Provision of language assistance is also critical to ensure continuity within the Defence, as elaborated in *Bemba et al.*,⁶⁰ as it will enable the retention of longstanding team members who have assisted Mr Al Hassan with extensive linguistic interpretation and with whom Mr Al Hassan has developed a trusting and professional working relationship. Incidentally, the *Lubanga* Chamber once cautioned the Registry about the limited value of savings accrued by dissolving a defence team during the reduced activity phase when weighed against the possibility of future disruption,⁶¹ a point later echoed by the Trial Chamber in *Bemba et al.*⁶²
24. The Defence requests allocation of an additional one FTE from 1 August 2023 until the end of the reduced activity phase for the express purpose of retaining a linguistic assistant to ensure compliance with Mr Al Hassan's right under Article 67 of the Rome Statute to be able to fully comprehend the nature and content of the evidence against him. Mr Al Hassan's need to be able to communicate effectively with his team is not diminished in the upcoming months; on the contrary, he will need to be able to advise his team on various issues, including *inter alia* the evidence on which he wishes to rely for sentencing and appeals; the redactions of the Defence's filings and submissions; and the translation of a significant volume of Tamasheq-language evidence into English or French, and to review, as necessary, any evidence in Tamasheq with witnesses. Mr

⁵⁹ See *e.g.* *Gaddafi*, Decision on "Request for Review of Registrar's Decision" by the Defence of Saif Al-Islam Gaddafi, ICC-01/11-01/11-390-Red, 30 July 2013, para. 41 (with the Chamber accepting that the Defence could not rely, as a solution to its need for Arabic-language assistance on the defence team, on the Court Translation and Interpretation Section, which would, in any case, be unavailable to offer its assistance on a continuous basis as necessary to the Defence).

⁶⁰ *Bemba et al.* Decision on Scope of Legal Assistance, paras. 10-13.

⁶¹ *Lubanga*, Decision Reviewing the Registry's Decision on Legal Assistance for Mr. Lubanga pursuant to Regulation 135 of the Regulations of the Registry, [ICC-01/04-01/06-2800](#), 30 August 2011 ("*Lubanga* Decision on Legal Assistance"), para. 56.

⁶² *Bemba et al.* Decision on Legal Assistance, para. 14, internally citing to [Lubanga Decision on Legal Assistance](#), paras. 57-58.

Al Hassan has also faced various issues in respect of his detention, about which he is most comfortable speaking in Arabic or Tamasheq.

25. Conversely, Mr Al Hassan will require assistance in either Tamasheq or Arabic to understand the Prosecution's and LRV's closing briefs and responses; the evidence on which they rely; and the Article 74 judgement that will eventually be issued. All these issues require daily and lengthy contact and communications with Mr Al Hassan; it would be impossible to complete these tasks – in addition to the Defence's other outstanding deadlines and workload, as discussed below – within the two FTE currently envisaged to maintain the Al Hassan Defence team during the entirety of the reduced activity period.

C. The Legal Aid Decision Failed To Consider Relevant Factors

26. The Registry's 26 April 2023 decision failed to consider relevant factors that would justify the allocation of additional resources during the reduced activity period, including the numerous and significant deadlines currently set by the Chamber for July and August 2023. The Registry's failure to consider these factors in its assessment of the "actual needs of the legal aid applicant" has resulted in an improper exercise of power.⁶³
27. In its 13 February 2023 letter to the Registry, the Defence explained that, given the intensity of the final briefing period, certain tasks and deadlines would need to be deferred until after closing statements. It informed the Registry of the deadlines imposed by the Chamber during the reduced activity period and the fact that team members would need to continue to work intensively during this phase to deal with these outstanding tasks as well as to prepare for future phases. In line with the Registry's previous arguments that requests for additional resources not be based on speculative issues,⁶⁴ the Defence then provided a detailed list – spanning two pages – of tasks needing completion (and by whom) during the reduced activity phase. This included, *inter alia*, extensive redactions to confidential Court documents for public classification, a time-consuming task that is particularly sensitive in light of the ongoing security risks faced by witnesses in Mali. As noted by the Defence in its letter, the

⁶³ *Bemba et al. Decision on Trial Resources*, para. 37.

⁶⁴ *Bemba et al. Decision on Trial Resources*, para. 27.

Prosecution team is not similarly affected by a reduction in resources and can continue to work uninterrupted and with the necessary support to meet the Chamber's deadlines until the trial judgement is issued.⁶⁵

28. In its 6 March 2023 addendum, the Defence informed the Head of the Legal Aid Unit of a Registry-approved two-week visit in June 2023 by five members of Mr Al Hassan's family, the organisation and facilitation of which would require diversion of substantial, if not all, Defence resources. The Defence explained that, in addition to the usual logistical arrangements, the family also requires specialised language skills (in Tamasheq and Arabic) [REDACTED].⁶⁶ The accommodation arranged by the Registry is also not within walking distance of the detention unit [REDACTED], which means that a defence team member will have to shuttle them to and from the detention unit, sometime several times a day. This will necessarily impair the Defence's ability to exclusively focus on and meet the deadlines set out by the Chamber.
29. On 24 March 2023, the Head of the Legal Aid Unit responded that the current lump sum payment structure will cease 30 days after the closing submissions and only two FTE would be provided to retain the team.⁶⁷ This is sufficient to retain only two legal assistants full-time, in addition to Counsel. Despite indicating that the flexibility principle allows Counsel to distribute resources as she sees fit, including by splitting the two FTE amongst multiple support staff,⁶⁸ the Registry simultaneously declined to issue any "upfront authorisation" for Counsel to use the team savings to retain personnel, indicating that any such assessment would need to be made on an *ad hoc* basis upon renewed requests.
30. The Defence requested a reconsideration of the Registry's decision, emphasising the need to ensure Mr Al Hassan's proper representation during the reduced activity

⁶⁵ **Annex A**, p. 3.

⁶⁶ [REDACTED].

⁶⁷ See **Annex C**, CSS Response to Defence Letter, "Request for resources during the reduced activity phase", 24 March 2023, 14:55.

⁶⁸ Incidentally, the Rogers Report addressed this "flexibility principle" indicating that while "[f]lexibility has its benefits, [it] should not provide a license to exploit junior team members [...] [by allowing a lead lawyer to] hire several junior lawyers for the price of one, thereby reducing fees to below a livable wage"). See R. Rogers, "Assessment of the ICC's Legal Aid System" (5 January 2017) ("[Rogers Report](#)"), paras. 157-160. See also **Annex D**, para. 24 ("the Registry have previously asked counsel to refrain from splitting FTEs. We agree with this course and are attempting to comply with this direction. In practice, this means that Counsel cannot expect support staff to perform these tasks pro bono or to do so on a full-time basis while being paid on a part-time salary. The Decision risks overworking those we can reasonably retain rather than properly remunerating those we need to keep on the team.")

phase.⁶⁹ It also explained, in detail, the nature of the work that had been deferred throughout the course of the trial proceedings due to various factors (such as COVID restrictions) and which now require attention,⁷⁰ the fact that Mr Al Hassan's family visit would require substantial resources during the month of June (and would necessarily delay completion of other projects and deadlines), and the need to retain a case manager and language assistant given the client's – and his family's – specific linguistic needs.⁷¹

31. The Defence also detailed the nature and breadth of the work it would need to complete in July 2023, as well as the precise number of hours or days it anticipates for each task,⁷² explaining that the two FTE allocated by the Registry to run as of 1 July 2023 would be untenable in terms of the Defence's workload and deadlines.⁷³ The Registry responded to the Defence's reconsideration request on 26 April, rejecting the request for additional resources and maintaining the Registry's "decision to grant 02 FTE during the reduced activity phase of the Al Hassan proceedings".⁷⁴
32. Chambers have long recognised that though workloads are reduced during the deliberations phase, they by no means stop altogether.⁷⁵ Trial Chamber I in *Lubanga*, for example, found, without holding firm to any estimates, that the defence would likely need as much time to complete outstanding tasks during the deliberations phase as would the Trial Chamber to issue its decision:

[t]here are a variety of tasks that the defence will need to undertake between closing arguments and the Article 74 Decision. Particularly the review of the case record that needs to occur in order to issue public versions of the filings and the transcripts, is likely to be a time-consuming exercise. In addition, and without prejudice to the outcome of the Article 74 Decision, the Chamber is of the view that any conscientious defence team in the circumstances will give careful attention – to the extent possible – to the next stages of the trial proceedings. Although it is difficult to predict with precision, as an estimate the Chamber is of the view that in

⁶⁹ See Annex D.

⁷⁰ Annex D, paras. 2, 21, 25-28.

⁷¹ Annex D, paras. 21 ("[i]n the reduced activity period, the case manager is responsible for, amongst other things, reviewing and archiving the entirety of the case file which far exceeds 30,000 pages given the number of charges and victims in this case, and which the Legal Aid Policy deems equivalent to 1 FTE"); 22 ("the Decision makes no provision for an Arabic/Tamasheq language assistant, even though [the] Registry has previously agreed that the defence requires one to safeguard Mr Al Hassan's rights under article 67(1) of the Rome Statute and allocated 1 FTE for this purpose. The language assistant will be required 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 we collect for sentencing.")

⁷² Annex D, paras. 29-35.

⁷³ Annex D, paras. 4-8, 17.

⁷⁴ Annex E, para. 39(ii).

⁷⁵ *Bemba et al. Decision on Legal Assistance*, para. 9.

order for the defence properly to fulfil these tasks, it will require approximately the same length of time as it will take the Chamber to issue the Article 74 Decision.⁷⁶

33. The *Bemba et al.* Chamber affirmed this reasoning, conceding that in addition to the work and deadlines it had issued to the five accused in respect of filing public redacted versions of submissions, the parties would also likely use the deliberations phase to prepare for “potential sentencing submissions or appeals following the upcoming judgment”.⁷⁷ As such, Chambers have acknowledged the inherent inequality of reducing the defence’s legal assistance during the deliberations phase to a point where the defence team would need to be dissolved:

It would in all likelihood be wholly unfair to the accused to dissolve his defence team following the closing submissions, leaving one lead counsel, a legal assistant and a case manager, who would - depending on the outcome of the Article 74 Decision - have to recruit a new team and file the accused’s appeal in 30 days. **It is of note that the prosecution will inevitably be in a far more advantageous position in this regard, since the Prosecutor is not under any obligation to lay off staff following the concluding submissions.**⁷⁸

Indeed, the *Lubanga* Chamber even held that the trial phase should be considered as ongoing until issuance of the Article 74, 75 and 76 decisions, *i.e.* until the resolution of sentencing and potential reparations issues, and that the accused’s rights under Article 67 should continue to operate without interruption:

In the judgment of the Chamber, as reflected in the Rome Statute framework, the “Trial”, the “Trial Procedure” or the “Trial Proceedings” only comes to an end when the Article 74, 75 and 76 Decisions have been delivered, as appropriate. It is only then that the Trial Chamber will have ceased its substantive work.

Without prejudice to the rights of the accused during any appellate stage, at least until the end of the trial, he is protected by Article 67 of the Statute, and his rights thereunder should not be undermined simply because a particular stage of the trial proceedings (such as the presentation of evidence or the closing statements) has concluded.⁷⁹

Though this holding was negated in the subsequent 2013 Legal Aid Policy,⁸⁰ the *Lubanga* considerations – that a defence team continues to have substantial work during

⁷⁶ [Lubanga Decision on Legal Assistance](#), para. 59.

⁷⁷ *Bemba et al.* Decision on Legal Assistance, para. 9.

⁷⁸ [Lubanga Decision on Legal Assistance](#), para. 57 (emphasis added).

⁷⁹ [Lubanga Decision on Legal Assistance](#), paras. 47, 48 (internal citations omitted).

⁸⁰ Legal Aid Policy, [ICC-ASP/12/3](#), paras. 116, 117.

the deliberations phase and that an accused's rights must continue to be respected – stands.

34. The *Bemba et al.* Chamber also reasoned that the Registry “should consult with the Chamber prior to taking measures which may result in dissolving a defence team during the deliberations phase [...] as it may cause less overall disruption to maintain a relatively higher level of legal assistance and avoid having to reconstitute the defence team during an appeals phase”.⁸¹ This aligns with the *Lubanga* Chamber's reasoning advising the Registry to balance any savings amassed from dissolving a defence team against the likelihood of future disruption to the proceedings,⁸² a point echoed in the Rogers Report, in which the independent expert found that “legal aid is not an area where significant overall savings can be made”.⁸³
35. The same reasoning applies to the present case. The practical implication of eliminating funding for the majority of the Al Hassan Defence team within 30 days of closing statements is manifestly unreasonable and will cause a torrent of avoidable delays, litigation to this Chamber in the form of requests for extensions of time, further requests to the Registry for additional resources, and a very real likelihood of overworking – and potentially losing – the few team members who will be retained with the two FTE.
36. Furthermore, the Chamber has set out several deadlines for July 2023 that the Defence already anticipates it will be unable to meet with such a significantly diminished capacity. In her email of 3 April 2023,⁸⁴ the Single Judge ordered the Defence to:
 - file a Defence Progress Report by 13 July 2023, by which time she also “expects the Defence to have substantially completed the preparation of its proposal for public redacted versions of [its] Rule 68 material”;
 - provide on 13 July 2023 an update on its progress with respect to lesser redacted versions of its witness transcripts; and
 - transmit to the Chamber by 16 August 2023 at the latest its “proposals concerning redactions to transcripts of Mr Al Hassan's interviews and security assessments”.

⁸¹ *Bemba et al. Decision on Legal Assistance*, para. 14, internally citing to [Lubanga Decision on Legal Assistance](#), paras. 57-58.

⁸² [Lubanga Decision on Legal Assistance](#), para. 56.

⁸³ [Rogers Report](#), para. 12.

⁸⁴ Email from Trial Chamber X Communications, “TC X - Further directions on the preparation of public redacted versions of transcripts and other evidentiary material”, 3 April 2023, 14:56.

Given that the current deadlines of 13 July 2023 and 16 August 2023 are in respect of progress reports of and proposals for ongoing or future tasks, the deadlines are evidently non-exhaustive. The Defence thus expects to receive more instructions and further deadlines from the Chamber in the coming weeks. With only sufficient resources to maintain two support staff full-time, however, it is already evident that the Defence will struggle to meet these deadlines, while fielding the intense workload associated with the family visit, and that additional resources and/or extensions of time will prove necessary.

37. It stands to reason that it would cause less overall disruption to maintain a relatively higher level of legal assistance for a limited time than to require, as the Registry seems to suggest in its Decision,⁸⁵ protracted litigation in the form of new, ongoing requests for additional means, which, incidentally, would further divert the Defence's limited resources from its ongoing deadlines. While provision of additional resources (*i.e.* 1.5 FTE) for approximately one month would not be of great cost to the Court, it would, on the other hand, allow the Defence to meet at least the most urgent of deadlines imposed by this Chamber. Provision to the Defence of an additional 1.5 FTE until 31 July 2023 – or such time as the redactions to Mr Al Hassan's interview and security assessments and the Rule 68 materials are completed – would minimise any unnecessary delays and disruptions.
38. The Court's legal aid framework must ensure effective legal representation in a manner consistent with Article 21(3) of the Rome Statute,⁸⁶ which includes, *inter alia*, the right to equality of arms as enshrined in Article 67(1). The principle of equality of arms, while not requiring total quantitative equality, does require, at a minimum, that legal aid systems ensure equivalent quality of means between parties.⁸⁷ While an additional 1.5 FTE for a period of approximately one extra month would not place the Defence on equal terms as the Prosecution for the duration of the deliberations period, it would, at the very least, mitigate the substantial disadvantage caused by requiring the Defence to undertake such an immense workload at such a reduced capacity. It would also position

⁸⁵ **Annex E**, para. 39(iii) ("the Registry [...] [r]eminds the Defence that this decision is without prejudice to the possibility to submit a new request for additional means based on the parameters applicable in the LAP, should the circumstances of the case so require").

⁸⁶ *Bemba et al. Decision on Trial Resources*, para. 36.

⁸⁷ ECHR, *Steel and Morris v. UK*, App. no. 68416/01, Judgment, 15 February 2005, paras. 62, 72 (finding that denial of legal aid deprived the applicants of the opportunity to effectively present their case and contributed to an unacceptable inequality of arms).

the Al Hassan Defence team on more equal footing with other defence teams for whom the Defence understands that the Registry has, in the past, extended the lump sum payment scheme beyond the typical 30 days after closing statements. Indeed, trial fairness and equality of arms entails non-differential treatment not only between the accused and the Prosecution, but also between the various accused before the Court. As such, the considerations granted to other accused should be similarly afforded in the present case.

39. Finally, the Defence notes that it takes significant time to properly reconstitute a team after it has been dissolved, whether in terms of recruitment of new team members or of relocation to The Hague of former team members who have had to leave The Netherlands. This can often take longer than 30 days, which is the time limit afforded under Rule 150(1) when lodging an appeal against a conviction and/or sentence. As such, the Defence requests that Trial Chamber X order that the reduced activity phase shall be considered as ending one month before the Article 74 judgment is issued to allow the Defence to reconstitute itself in time to be able to abide by the time limit set out in Rule 150(1).

V. RELIEF SOUGHT

40. Trial Chamber X is respectfully requested to:

ORDER the Registry to grant to the Defence for Mr Al Hassan 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;

ORDER the Registry to grant to the Defence for Mr Al Hassan 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; and

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.



Melinda Taylor
Lead Counsel for Mr Al Hassan

Respectfully submitted this 7th June 2023,
At The Hague, The Netherlands