

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 July 2026

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public Redacted Version of “Registry’s Observations on the “Motion for Judicial Review of Legal Aid Decision under Regulation 83(4) of the Regulations of the Court” (ICC-02/05-01/20-1135-Conf-Exp)”, 31 May 2024, ICC-02/05-01/20-1141-Conf-Exp

Source: Registry

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

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D31

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REGISTRY

Registrar

Mr. Osvaldo Zavala Giler

☒ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

I. INTRODUCTION

1. Pursuant to Trial Chamber I's ("Chamber") order communicated on 21 May 2024 by way of email,¹ the Registry hereby submits its observations in relation to the "Motion for Judicial Review of Legal Aid Decision under Regulation 83(4) of the Regulations of the Court" (ICC-02/05-01/20-1135-Conf-Exp) ("Defence Request").

II. LEVEL OF CLASSIFICATION

2. In accordance with regulation 23bis (2) of the Regulations of the Court, the present observations are classified as confidential, *ex parte*, as they refer to a submission which has the same classification.

III. PROCEDURAL BACKGROUND

3. On 15 December 2023, the Counsel Support Section ("CSS") announced to the Defence team of Mr Abd-Al-Rahman ("Defence") the assignment of the provisional complexity level 2 at the trial stage, and invited the Defence to provide an overview of the team composition in line with the resources provided under complexity level 2 as outlined in the reformed Draft Legal Aid Policy of the International Criminal Court (ICC-ASP/22/9, hereinafter: "RLAP"). The CSS further invited the Defence to consult with the CSS in the event the resources assigned to the Defence under complexity level 2, at the trial stage, did not reflect the resources granted prior to the entering into force of the RLAP on 1 January 2024.²
4. On 18 December 2023, the Defence requested further clarifications on the methodology for determination of the complexity level. In particular, the Defence requested 1) "*a detailed statement of the rationales of that ranking and how*

¹ Email from Trial Chamber I Communications, dated 21 May 2024 at 16:54.

² Email from Registry to the Defence on 15 December 2023 at 16.11 ("15 December 2023 Decision").

the various factors were factored in and assessed;" and 2) "information about the time limit and procedure for bringing such challenge".³

5. On 19 December 2023, the CSS provided the Defence with further clarifications, *inter alia*, informing the Defence that *"the Registry assessed the complexity level taking into account the resources allocated per team under ICC-ASP/12/3"* and that *"Counsel can request a review of this decision to the Registrar"*.⁴
6. On 31 January 2024, the Defence submitted a Request for "Review of Preliminary Assessment of Complexity Level under the new Legal Aid Policy" ("Request").⁵
7. On 23 February 2024, the Acting Chief of the CSS issued the "Decision on the Request for Review of the Complexity Level assigned to the Defence of Mr Abd-Al-Rahman" ("Review Decision"). The CSS considered whether a review of the complexity level is warranted (i) under the transitional measures pursuant to paragraph 15 of the RLAP; and (ii) under the parameters applicable to the Defence pursuant to paragraphs 50-52 of the RLAP. On the basis of this assessment, the CSS concluded that it was not satisfied that the transitional measures or the assessment of the parameters warranted resources under complexity level 3. As such, the initial assessment ("Preliminary Assessment") of the complexity level 2 at the trial stage was maintained.
8. On 7 March 2024, Counsel for Mr Abd-Al-Rahman, Mr Cyril Laucci, filed the "Request for Reconsideration of Decision denying Review of Preliminary Assessment of Complexity Level under the new Legal Aid Policy" ("Request for Reconsideration"), which is a request for reconsideration of the Review Decision. Counsel specified that the Request for Reconsideration was limited

³ Email from the Defence to Registry on 18 December 2023 at 14.19.

⁴ Email from Registry to the Defence on 19 December 2023 at 15.39.

⁵ Email from Counsel to Registry dated 31 January 2024, at 18.29.

“to seeking the Registry’s reconsideration of the Preliminary Assessment under the transitional measures and keep the other aspect of final determination of the complexity level of the case under the LAP for later determination, at the end of the trial”.⁶

9. Counsel submitted in its Request for Reconsideration that the Review Decision denied Counsel’s Request for a variation of the Preliminary Assessment of complexity level on the grounds that the preliminary assessment has kept the resources of the Defence team to nine positions (paras. 12-13 of the Review Decision) where it should have counted ten positions even though [REDACTED] position under the former Legal Aid Policy had not been replaced for nine months.⁷

10. Therefore, Counsel requested that:

- i. Preliminary assessment shall be reviewed from level 2 to level 3 and the corresponding resources provided under paragraph 60, Table 1 of the RLAP should be added to the composition of the Defence team with retroactive effect as of 1st January 2024;
- ii. Defence language assistance shall be employed at 100% and that [REDACTED] shall be compensated for the loss of 50% of his salary for the months of January, February and, where applicable, March 2024.
- iii. [REDACTED] shall shift from Case Manager to Legal Assistant and shall be compensated for the calculation of her salary as 50% Case Manager, instead of 50% Legal Assistant, for the same period.

11. On 6 May 2024, the Registrar issued its Decision rejecting the review of the preliminary assessment from level 2 to level 3 (i), granting the additional 50% Language Assistant position until the end of the Defence case (ii), rejecting the

⁶ Request for Reconsideration, p. 1.

⁷ Request for Reconsideration, p.2.

compensation of [REDACTED] up to a full-time commitment for the months of January, February and March 2024, as the Language Assistant position was up to 50% (iii) and confirmed the Legal Assistant position at 100% until the end of the Defence presentation of evidence (iv) (“Registry Decision”).

12. On 20 May 2024, the Defence filed a “Motion for Judicial Review of Legal Aid Decision under Regulation 83(4) of the Regulations of the Court” by which it requests the Chamber to reverse and revise the Registry Decision.

IV. APPLICABLE LAW

13. According to resolution ICC-ASP/22/Res.3 issued by the Assembly of States Parties (“ASP”), the RLAP entered into force on 1 January 2024, thereby superseding the Registry’s single policy document on the Court’s legal aid system (ICC-ASP/12/3) and any interim measures taken to that date.⁸

14. Pursuant to regulation 83(3) of the Regulations of the Court (“RoC”), a person receiving legal assistance paid by the Court may personally, or through his or her Counsel, apply to the Registrar for additional means which may be granted depending on the circumstances of the case. As per the RLAP, “additional means are only granted on an exceptional basis and for a very limited time, and only in the case of unforeseen circumstances outside the control of defence or victims’ teams, and subject to the exhaustion of the re-assessment system of complexity levels as per paragraph 46.”⁹

15. For teams already operating in a case before the Court, transitional measures may be taken at the discretion of the Registrar to ensure stability of operating teams and to prevent any negative impact of the transition to the new legal aid

⁸ ICC-ASP/22/Res. 3, para. 89.

⁹ ICC-ASP/22/9, para. 76.

system on ongoing judicial proceedings.¹⁰

16. Pursuant to Regulation 83(4) of the RoC, “Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving assistance.”

17. Pursuant to paragraph 103 of the RLAP, “the standard of judicial review of the Registrar’s decisions concerns the propriety of the outcome of the decision and of the procedure by which it was reached. Without prejudice to the decision making of the Chamber, the judicial review procedure shall take into account the scope of the resources allocated under the Court’s Legal Aid Policy. The review involves an assessment of (a) whether the Registrar has acted without jurisdiction; (b) whether the Registrar’s decision is affected by a material error of law or fact; (c) whether the Registrar abused his or her discretion, for example, by failing to act with procedural fairness, acting in a disproportionate manner, making a decision based on irrelevant factors or failing to take into account relevant factors; or (d) whether the Registrar’s decision is manifestly unreasonable by reaching a conclusion which no reasonable person who has properly applied the legal basis and circumstances of the case to the issue could have reached”.

V. OBSERVATIONS

A. On the “first aspect”: The Registry correctly complied with the figures provided under table 1 of the RLAP

18. In its Request, the Defence argues that: 1) “the Impugned Decision errs [sic] in law by concluding, at paragraph 16, that the tenth position additional to what

¹⁰ ICC-ASP/22/9, para. 15.

is envisaged under Complexity level 2 does not reach the level of eleven or more position under Complexity level 3 under Table 1 of the New Legal Aid Policy”; and that 2) “the Impugned Decision thus erred in law when it concluded, based on the number of ten positions within the Defence team at the time of transition to the New Legal Aid Policy, the provisional measures shall be implemented at Complexity level 2, instead of level 3”.

1. The complexity level assessment is made on the basis of the parameters (paragraphs 50 and 51 of the RLAP)

19. Legal aid resources for proceedings under article 5 of the Statute are allocated on the basis of the complexity of the work and the stage of the proceedings.¹¹ As the LAP entered into force on 1 January 2024, thereby superseding ICC-ASP/12/3,¹² “the complexity level of the work to be performed by a defence or victims’ team is assessed prior to the beginning of each stage of the proceedings”¹³ on the basis of a work plan submitted by Counsel to the Registry, including information on the applicable parameters listed in paragraphs 50 to 52 of the LAP.¹⁴

20. Counsel may request a re-assessment of the complexity level at any point during a stage or may be initiated by the Registrar proprio motu, if the parameters of the case for the assessment of allocated legal aid resources change in a manner justifying an increase or decrease of legal aid resources.¹⁵

21. Pursuant to regulation 83(3) of the RoC, a person receiving legal assistance paid by the Court may personally or through his or her Counsel apply to the Registrar for additional means which may be granted depending on the

¹¹ ICC-ASP/22/9, para. 28.

¹² ICC-ASP/Res.3, para. 89, and ICC-ASP/22/9, para. 3.

¹³ LAP, para. 43.

¹⁴ ICC-ASP/22/9, para. 45.

¹⁵ ICC-ASP/22/9, para. 46.

circumstances of the case. As per the RLAP, “additional means are only granted on an exceptional basis and for a very limited time, and only in the case of unforeseen circumstances outside the control of defence or victims’ teams, and subject to the exhaustion of the re-assessment system of complexity levels as per paragraph 46.”¹⁶

22. For teams already operating in a case before the Court, transitional measures may be taken at the discretion of the Registrar to ensure stability of operating teams and to prevent any negative impact of the transition to the new legal aid system on ongoing judicial proceedings.¹⁷

23. Therefore, in assigning the complexity level to teams operating in ongoing cases before the Court, the Registry took into account that: a) submissions on the complexity level can only be received upon adoption of the reformed legal aid policy (i.e. after adoption on 13 December 2023) as otherwise lacking a legal basis; b) the assessment of the complexity level is made on the basis of a work plan submitted by Counsel for which he or she would only have had a limited time period considering the short time period between adoption of the LAP and entering into force; c) the work plan is to be submitted prior to the beginning of a stage of the proceedings and whether proceedings are at an ongoing stage of the proceedings as of 1 January 2024; and d) resources allocated to a team in ongoing cases have been based on a legal basis applicable at that point of time.

24. In the present case, the Registry assessed the complexity level taking into account the objective parameters with reference to resources allocated to the Defence under ICC-ASP/12/3. It took thereby into account: (a) the de facto team composition, i.e. the resources allocated as part of the core-team composition per stage of the proceedings (per diagrams 1 or 2 of ICC-ASP-12-3) and the Full-Time Equivalent (“FTE”) allocated to a team per the additional means system;

¹⁶ ICC-ASP/22/9, para. 76.

¹⁷ ICC-ASP/22/9, para. 15.

c) the time-period for which FTE have been approved by the Registry based on a justified request, particularly whether FTE had been allocated for a specific purpose and whether this purpose would still be applicable after 31 December 2023; and d) the working arrangements of team members (i.e. whether team members work up to a full-time or part-time position).

25. Taking this into account, the Registry came to the conclusion, on 15 December 2023, that the complexity level applicable to the present case was complexity level 2 at the trial stage. A complexity level 3 assessment is made where a team can justify that the work load on the basis of several parameters is exceptionally high.

26. The burden to prove that a parameter warrants a higher level of resources, or several parameters together warrant the assessment or re-assessment to a higher complexity level, lies with the team requesting the assessment. In particular, it is upon Counsel to justify in the warranted detail how a parameter impacts the work of the Defence in concrete.

27. Considering the submissions by the Defence on the parameters listed in paragraph 50 of the RLAP, the CSS came to the assessment that only two parameters, namely the number and nature of evidence and the security situation, were indicative of a higher complexity level than the one allocated. Considering that other parameters fall rather in an average level of complexity compared to ongoing and closed cases before the Court and other parameters such as the number of participating victims and the geographical and temporal scope of the case are rather indicative of a lower complexity level, the CSS was not satisfied that the complexity level 3 was warranted¹⁸.

2. Transitional measures are granted for ensuring “team stability”

¹⁸ Annex III of the Request for Judicial Review, para. 25.

28. On this basis, there is a clear distinction between the complexity level assessment on one part, and the transitional measures that can discretionary be granted on the other part. As such, the provisional assessment is strictly limited to ensuring team stability pursuant to paragraph 15 of the RLAP.
29. Therefore, there has been, for operating teams, a practical approach applied to fit their needs into the framework of the RLAP. While the Registry has applied an approach to ensure that all team members that have been appointed until the end of a phase or until a certain time can continue to work on the team until this determined point, it would amount to be outside the scope of the transitional measures to infer from the number of team members an entitlement to more resources considering that the purpose of the transitional measures is to “ensure the stability” of the operating teams.
30. In the present case, the Registry has made a determination on the parameters¹⁹, which clearly determines complexity level 2 and supersedes the provisional assessment.
31. The resources granted under the transitional measures as per paragraph 15 of the RLAP are resources which are only designed for the additional team member(s) that exceed the resources as allocated under complexity level 2 pursuant to table 1 of the RLAP in order to ensure team stability.
32. In its Request, the Defence notes that “the issue submitted for judicial review is limited to the implementation of the transitional measures under paragraph 15 of the New Legal Aid Policy in the Impugned Decision” and “not about any new assessment of the complexity level of the Abd-Al-Rahman Case under paragraph 47 of the New Legal Aid Policy”. This assessment will take place prior to the beginning of the next stage of the proceedings, before the appeals stage if any.

¹⁹ Annex III of the Request for Judicial Review.

33. However, the Defence submits that “[REDACTED] position had been forgotten by the Registry and left aside in the assessment of the Registry”.²⁰ Should that not have been the case, “the only reasonable conclusion could have been that the implementation of provisional measures under paragraph 15 of the New Legal Aid Policy called for a provisional assessment at Complexity level 3, allowing a maximum of eleven and a half positions, instead of nine”.

34. The Registry noted that the Defence submitted additional information as part of its Request for Reconsideration, which did not appear to have been specifically addressed in the context of the Review Decision: namely, that the position of [REDACTED] had been granted by the Registry until the end of the Defence case and that the vacancy of her position within the team had only been temporary²¹.

35. The Registry did not forget [REDACTED] position as it specifically noted that there were : eight full-time positions assigned to the Defence and two part-time positions, amounting to an equivalent of nine positions ; and that resources provided for [REDACTED] were assigned upon a request for additional means under the former LAP. Resources granted from the additional means budget, which are different to the core-team composition, were only allocated temporarily following an assessment by the Registry of a reasoned request to this effect.

36. Further to Counsel’s Request for Reconsideration on the necessity of [REDACTED] position to ensure the team stability, and despite the fact that her seat had been vacant for more than nine months, the Registry confirmed her position at 100%.

²⁰ Annex V, para. 20.

²¹ Annex V, para. 20.

37. In other words, the Registry fully complied with the RLAP by applying all the transitional measures necessary to fully meet the size of the team before the reform.

38. Therefore, the Registry is of the view that it has fully complied with the RLAP.

B. On the “second aspect”: The Registry did not fail to implement the RLAP retroactively from the 1st January 2024

39. The Defence submits that “the Defence had specifically requested the granting of an additional Legal Assistant position and additional 50% Language Assistant position from the 1st January 2024. This necessary implied retroactive effect of the Registrar’s decision to 1st January 2024 on its Second and Third Aspects”.

40. However, a decision which grants a request cannot take effect on a date prior to that on which it becomes enforceable.

1. On the Legal Assistant position

41. The Registry recalls that on 3 July 2023, the CSS confirmed to the Defence the requested extensions until the end of the Defence presentation of evidence with reference to Counsel’s request for extension of 02 FTEs additional resources for “evidence analysis”²².

42. The position had been granted under the additional means system on the basis of the assessment of the workload of the team. As such, the position occupied by [REDACTED] was, first, the one of “Assistant Evidence Reviewer”²³ from 16 August 2021 to 24 March 2023 and then the one of Case Manager, appointed on

²² Annex V, para. 21.

²³ Defence Request for Reconsideration, p. 2.

a part-time basis at 50% at the time of the Defence Request for Review of the Preliminary Assessment of Complexity Level made by the Registry, sent on 31st January 2024.

43. Therefore, the recruitment of [REDACTED] as “Legal Assistant” was only granted by the Registry on 6 May 2024.

44. Under the former LAP, this position required five years of practical experience. It is only since the adoption of the RLAP that a minimum of two years of relevant working experience is required.²⁴

45. As a consequence, the Defence requested the Registry to grant the “Legal Assistant” position in its 7th of March Request. The position which was occupied by [REDACTED] before the adoption of the RLAP was the one of Case Manager. It is only starting from the confirmation decision of the Registry filed on 6 May 2024 that [REDACTED] was granted to occupy her functions as a Legal Assistant at 100% in the context of the additional resources (under the former LAP) or stability of the team (under the RLAP).

46. Paragraph 14 of the RLAP which states that the policy shall enter into force on 1 January 2024 and supersede the Registry’s single policy document does not amount to considering that all decisions that will be rendered under the RLAP will be applicable retroactively as of 1 January 2024.

47. For all the reasons set out above, the Registry considers that it did not err by not implementing the RLAP retroactively for the position of “Legal Assistant” which has only been granted on 6 May 2024.

2. On the Language Assistant position

²⁴ RLAP, p. 42.

48. The Defence submits that “the incumbent Language Assistant had to perform his functions at 100% from 1st January until 31st March 2024 without full remuneration as a result of the unreasonable and unjustified decision not to correct the error with retroactive effect”.

49. In the present case, Counsel has explained that the position of Language Assistant is needed to communicate with the accused, the resource person and the Defence witnesses, the majority of whom are arabophone.²⁵ In the context of the presentation of the Defence case, and the necessity for the Defence to meet witnesses on the ground, to collect their written statements and to organize their appearance at trial, Counsel demonstrated to the satisfaction of the Registrar that the position of Language Assistant was required for team stability.

50. As a consequence, the Registrar concluded that the requirements for granting the Language Assistant position at 100%, as transitional measures envisaged under the RLAP, were met.

51. Since the position had originally been granted at 50%, the Registry did not err by not applying retroactively a decision that it has only taken in the context of its Reconsideration Decision of the 6th of May. The Registry was not in a position to retroactively compensate [REDACTED] up to a full-time commitment for the months of January, February and March 2024 when the Language Assistant position was only granted up to 50% at the time.

C. On the “third aspect”: the Registry did not err by not implementing the provisional measures until the end of the current stage of the proceedings

²⁵ Request for Reconsideration, p. 5.

52. First, the Defence submits that “the addition of a 100% Legal Assistant position is unreasonably and unjustifiably granted until the end of the presentation of Defence evidence only”.²⁶
53. As recalled, the Registry based its determination on the appointment of the Legal Assistant position under the former LAP. As such, on 3 July 2023, the CSS confirmed to the Defence the requested extensions until the end of the Defence presentation of evidence with reference to Counsel’s request for extension of 02 FTEs additional resources for “evidence analysis”.²⁷
54. Considering the fact that this position is not part of the core-team composition, the Registry did not err in law by following the decision which had been granted under the former LAP.
55. Second, the Defence submits that “the extension of the Language Assistant position to 100% is similarly unreasonably and unjustifiably granted until the end of the Defence case only”.²⁸ In its Review Decision, the Registry concluded that the requirements for granting the Language Assistant position at 100%, as transitional measures envisaged under the RLAP, were met, therefore granting these transitional measures until the end of the Defence case. Afterwards, the Registry stated that “the Language Assistant position shall be allocated on a 50% basis unless otherwise granted within the available resources corresponding to the complexity level reached”.²⁹
56. As a consequence, within the resources available to the Defence under the assigned complexity level, pursuant to the RLAP, the resources are available until the end of the trial stage, i.e. closing arguments. This is therefore irrespective of the appointment letter of one team member, which can be

²⁶ Request for Judicial Review, para. 31.

²⁷ Annex V, para. 21.

²⁸ Request for Judicial Review, para. 31.

²⁹ Reconsideration Decision, para. 28.

modified should the resources dedicated to the team still remain applicable after the end of the defence case.

D. Conclusion

57. For the reasons set out above, the Registry is of the view that the Request should be rejected in its entirety.

p.p. 

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

Dated this 21 July 2026

At The Hague, the Netherlands