

Public Redacted Version of

ANNEX 3 TO
Motion for Judicial Review of Legal Aid Decision
under Regulation 83(4) of the Regulations of the Court

Decision on the Request for Review of the Complexity Level assigned to the Defence of

Mr Abd-Al-Rahman

Date: 23 February 2024

I. Procedural Background

1. 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 should the resources assigned to the Defence under complexity level 2 at the trial stage not reflect the resources as granted prior to the entering into force of the RLAP on 1 January 2024 (“Provisional Decision”).¹
2. On 18 December 2023, the Defence requested further clarifications on the method of determination of the complexity level. In particular, Defence requested clarifications as to 1) “a detailed statement of the rationales of that ranking and how the various factors were factored in and assessed;” and 2) “information about the time limit and procedure for bringing such challenge.”²
3. 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 “Counsel can request a review of this decision to the Registrar.”³

¹ Email from Registry to the Defence on 15 December 2023 at 16.11 (“15 December 2023 Decision”).

² Email from the Defence to Registry on 18 December 2023 at 14.19.

³ Email from Registry to the Defence on 19 December 2023 at 15.39.

4. On 31 January 2024, the Defence submitted the Request for “Review of Preliminary Assessment of Complexity Level under the new Legal Aid Policy” (“Request”).⁴

II. Applicable legal framework

5. 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, hereinafter: “former LAP”) and any interim measures taken to that date.⁵
6. Under the RLAP, legal aid resources allocated to a team are “determined on the basis of the work required by a defence or victims’ team for an efficient and effective representation of the indigent person. Indicators for the determination of such work are a) the stage of the proceedings, as determined pursuant to paragraphs 29 to 42; b) the complexity of the work to be performed by a team, determined on the basis of the applicable parameters in paragraphs 50 to 51 and 53; and c) the applicable principles governing the legal aid system as per paragraph 2.”⁶
7. 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.⁷
8. 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 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

⁴ Email from Counsel to Registry dated 31 January 2024, at 18.29.

⁵ ICC-ASP/22/Res. 3, para. 89.

⁶ ICC-ASP/22/9, para. 28.

⁷ ICC-ASP/22/9, para. 46.

[REDACTED]

victims' teams, and subject to the exhaustion of the re-assessment system of complexity levels as per paragraph 46."⁸

9. 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.⁹

III. Decision on the Request

10. In assessing the request for review, the CSS is taking into account the legal framework as set out above; and the arguments brought forward by the Defence in its request for review pursuant to paragraph 46 of the RLAP. It thereby considered whether a review of the complexity level is warranted (A) under the transitional measures pursuant to paragraph 15 of the RLAP; and (B) under the parameters applicable to the Defence per paragraphs 50 to 52 of the RLAP.

A. Review of complexity level under the transitional measures

11. The Defence states that the assignment of complexity level 2 at the trial stage sets them at a disadvantage in comparison to the resources available to the Defence prior to the entering into force of the RLAP. In particular, it is pointed out in the Request that the Defence had been obliged to reduce its resources by a) 50% for the language assistant; b) 50% for the Case Manager position; c) for one position that had not been filled since the leaving of one team member in March 2023.
12. The CSS recalls that in December 2023, the Defence was composed of the following positions: Counsel ([REDACTED]); Associate Counsel ([REDACTED]); Legal Assistant

⁸ ICC-ASP/22/9, para. 76.

⁹ ICC-ASP/22/9, para. 15.

[REDACTED]

[REDACTED]; Case Manager [REDACTED]; four Evidence Reviewers [REDACTED]
[REDACTED]; and a Linguistic Assistant
[REDACTED]. The Defence was therefore composed of nine positions.

13. Based on the announced team composition under the assigned complexity level 2, the CSS further notes that there are eight full-time positions assigned to the Defence and two part-time positions, amounting to an equivalent of nine positions.
14. As to the argument that the Defence had lost another team member due to the departure of [REDACTED] in March 2023, the CSS recalls 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. As such, *in lieu* of any approved request for additional means after the departure of [REDACTED] there was no entitlement to these resources. In addition, the fact that the Defence did not request additional means after the departure of [REDACTED] the vacancy for more than 9 months does not demonstrate that the resources are required for the stability of the team composition.
15. Further to this, the CSS draws the Defence's attention to paragraph 60 of the RLAP, where it is stated that "upon a justified request in light of the specific needs of the case, Counsel can request the Registry to replace an allocated position under table 1 with a position at a lower remuneration level. A position can only be replaced with a position at a higher remuneration level on an exceptional basis, and upon prior approval by the Registrar, thereby taking into account the availability of budgetary resources."¹⁰ It is, therefore, within the responsibility of Counsel to manage the allocated resources as it is required by the needs of the case. For example, Counsel is at liberty to request to use the resources assigned for the 50% case manager position to appoint a language assistant at a full-time basis.

¹⁰ ICC-ASP/22/9, para. 60.

16. The CSS therefore considers that the threshold for the Registrar to consider transitional measures as per paragraph 15 of the RLAP in order to ensure team stability in this case is not met.

B. Review under the applicable parameters

17. Upon the request by the Defence for review of the assessment of the complexity level pursuant to paragraph 46 of the RLAP, the CSS will further assess whether a re-assessment of the complexity level is warranted and if so, conduct such reassessment on the basis of the parameters submitted by the Defence.

1) Formal requirements for a re-assessment of the complexity level

18. Pursuant to the RLAP, a “re-assessment of the complexity level may be requested by Counsel at any point [...] 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.”¹¹ In the present case, the CSS notes that if applied in a strict sense, Counsel has not submitted reasons as to why the parameters of the case have changed in a manner justifying an increase of the resources to complexity level 3. Nevertheless, the CSS is of the view that given the designation of the provisional assessment of the complexity level in December 2023 aligned with the rationale of paragraph 15 of the RLAP, a request for review may be entertained at this stage.

19. It is further required that Counsel submits a work plan as per paragraph 45 of the RLAP, on which basis the CSS can make an assessment of the parameters. This criterion is, at least for the transitional period, to be considered broadly, so that the submissions by the Defence in its Request meet the requirements.

20. The CSS is therefore satisfied that the formal requirements for the re-assessment of the complexity level are met.

¹¹ ICC-ASP/22/9, para. 46.

2) *Re-assessment of the complexity level*

21. Turning to the re-assessment of the complexity level, the Registry conducts an overall assessment of all relevant parameters as considered applicable by Counsel in line with the information provided in the work plan. At the outset, the Registry notes that all cases before the Court are complex *per se*. This does not, however, justify that all cases are considered as complexity level 3. Rather, 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. Generally, it is therefore not sufficient to establish a higher complexity level on the basis of only one parameter, unless this parameter is of such importance in the specific case that it would justify a significantly higher or lower workload for the duration of any stage of the proceedings.
22. 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.
23. Where parameters are overlapping, the Registry exercises due diligence in order to ensure that parameters are weighted proportionally, and to prevent to weigh the same information for different parameters, if not justified, by the specifics of the case.
24. Considering the submissions by the Defence on the parameters listed in paragraph 50 of the RLAP, the CSS comes to the following assessment:
- (i) **Plea-bargaining:**
- In the instance of a plea-bargaining by the defendant, the resources allocated to a defence team could – depending on the circumstances of the case – be significantly reduced. However, as a plea bargaining is a rather exceptional situation before the Court, the absence of such does not, on the other hand, justify an increase of resources. As such, the absence of a plea-bargaining in the present case does not justify an increase of resources.

(ii) **Number and nature of charges:**

- In assessing the impact of the number of charges in an objective way, a reference must be made to the range of the number of charges in both ongoing and closed cases before the Court. Only the number of charges confirmed by the Pre-Trial Chamber in the confirmation of charges decision is considered as relevant for the impact on the work load at the trial stage. In the *Abd-Al-Rahman* case, the charges confirmed in the confirmation of charges hearing amount to 31 charges. While the highest number in the *Ongwen* case (i.e. 70 charges) is not a threshold to meet in order to consider that the work load concerning this specific parameter amounts to a complexity level 3, taking into account the lowest number of charges in the *Al Mahdi* case (i.e. one charge), a balance is to be found. In that regard, the Registry reiterates a complexity level 3 assessment is rather an exception given that all cases before the Court are complex by their nature. Taking into account the number of charges in other cases, the Registry considers that indeed the charges in the *Abd-Al-Rahman* exceed the assessment of a complexity level 1 work load, but, nevertheless do not justify a complexity level 3 assessment taking into account a significantly higher number of charges in other cases such as the *Ongwen* case and the *Yekatom* and *Ngaïssona* case. Taking the number of charges alone, the Registry considers that a complexity level 2 work load is applicable to the Defence for this parameter.
- Considering the nature of charges in the present case, the Registry takes into account a) whether the charges relate to the same crimes or to different crimes; and b) whether the charges are novel legal issues or have already been brought before the Court. Absent any quantification of this parameter to date, the arguments provided by the Defence are considered in light of whether they sufficiently demonstrate an increased need for resources. The Defence argues that “[it] is the first case in which the jurisdiction of the ICC has been accepted by virtue of a

Security Council Resolution (Res. 1593 of 2005)."¹² By submitting so, the Defence, however, fails to demonstrate how this impacts the workload of the Defence in concrete. In particular, it is not apparent how the UN Security Council referral impacts the work load of the Defence at the end of the trial stage, where matters on jurisdiction and admissibility have already been decided. Absent any specifications, the CSS is not in a position to evaluate whether the referral had indeed an aggravating impact on the work of the Defence. Other submissions brought forward under this parameter relating to the security situation in and cooperation of Sudan, are addressed under parameter (x).

(iii) Number and nature of modes of liability confirmed:

- For the trial stage, a higher number of modes of liability confirmed by the Pre-Trial Chamber is generally followed by a higher demand for resources by the defence team to conduct research, investigations in the field, and other tasks required for an efficient and effective trial preparation. In assessing the impact of the number of modes of liability on the complexity level, a mere numerical approach is taken. Notwithstanding any difference between the modes of liability in the proceedings or for the determination of a sentence; for the purpose of allocating legal aid resources, no hierarchy is applied for modes of liabilities, neither between principal and accessory modes, nor between direct, joint or indirect perpetration. This is because the degree of responsibility does not necessarily correspond to the underlying work of a defence team in this regard. As such, the more modes of liability are alleged, the more work of the defence team is required. The Registry hereby notes that articles 25(3) and 28 of the Rome Statute establish a total of eleven possible modes of liability. While a number of four modes of liability in this spectrum certainly may justify a complexity level

¹² Request, p. 3.

higher than the initial one, the CSS is not satisfied that four modes of liability can be seen as a factor warranting a complexity level 3 assessment for this parameter.

- Considering the nature of the confirmed modes of liability, the Defence argues that the combination of direct and co-perpetration amounts to a particular complexity of the case. The Defence hereby does not specify how the work load is impacted by this combination in concrete. Indeed, the CSS is of the view that direct perpetration may be a factor that may in certain circumstances even decrease the complexity of a legal argument to make.

(iv) Number of accused:

- Upon a justified request in which the Defence can demonstrate sufficiently that the joinder of two or more accused in one case is an aggravating factor to the work load of the team, this parameter may be counted as an aggravating factor. Such circumstances are not applicable in this case.

(v) Number and nature of evidence disclosed:

- A relevant factor for the consideration of the number and nature of the evidence disclosed at the trial stages is the number of evidence material disclosed during the trial stage. The Defence states that the Prosecution has disclosed “18,537 pieces of evidence in the case in 377 disclosure packages. The LRV have disclosed an additional 52 pieces of evidence. The Defence have thus far disclosed 207 exhibits in 43 packages.”¹³ It further states that evidence is constituted over a wide range of material. While the CSS is not convinced as to the argument that the Defence had to counter-balance all evidence by the Prosecution as this is a general task of the Defence and not specific to the present case even if considering the main defence of mistaken identity. The CSS, however, is of the view that the number of evidence disclosed and the nature of this evidence, particularly the audio-visual and open-source evidence pending the availability of an IT

¹³ Request, p. 3.

specialist in the team, potentially aggravates this particular parameter to a complexity level exceeding the average level.

(vi) Accused's alleged position within a political or military hierarchy:

- The alleged position of the defendant within a political or military hierarchy may be relevant if it can be demonstrated that it has an impact on the workload of the team, for example through: a higher protection required for defence witnesses due to the political situation in the field; key evidence attesting of the accused's alleged position within a political or military hierarchy requiring isolated resources and/or resources in the ground to challenge the evidence; or other political factors or impact on the overall case. The CSS notes that the Defence refers to Mr Abd-Al-Rahman's alleged position, however, fails to demonstrate how this impacts the work load of the Defence in concrete, for example, through a higher level of protection of witnesses, access to key evidence or other political factors surrounding particularly Mr Abd-Al-Rahman, other than the general security situation which is considered below under parameter (x).

(vii) Number and type of witnesses called:

- The number and type of witness called is assessed separately per calling party or participant. The Defence submits that the Prosecution called in total 81 witnesses; the LRV called 4 witnesses, and the Defence intends to call up to 20 witnesses. In comparing these number with other cases, the CSS notes that the number of Prosecution witnesses alone slightly exceeds the average number of witnesses by the Prosecution, which is between 25 OTP witnesses (*Katanga and Ngudjolo Chui* case) and 116 OTP witnesses (*Ongwen* case). Witnesses called by the LRV (between 2 witnesses, for example, in the *Al Hassan* and *Bemba* cases and 7 witnesses in the *Ongwen* case) and the Defence (between 12 witnesses in the *Ntaganda* case and 63 witnesses in the *Ongwen* case) are within the scope of an

average number of witnesses. Further, the number of witnesses alone is not indicative, but also the type of witnesses and the workload associated with such type. This includes, for example, the relevance and length of the testimony of specific witnesses as indicative of the time the Defence has to spent on preparing the witness, or work on the assessment or cross examination of a Prosecution or LRV witness. The submissions by the Defence do not justify sufficiently how the type of witnesses could add an additional aggravation to this parameter. The low number of defence witnesses due to the security situation is considered below as factor for the assessment of parameter (x).

(viii) Number of victims participating in the proceedings:

- In considering the impact of the number of participating witnesses in the proceedings, the Registry makes – as for other parameters – a comparative assessment on the basis of ongoing and closed cases before the Court. Another factor to take into account is the specific point at which the proceedings are at. The CSS first notes that the number of 1,004 victims to date is a rather low number in comparison to other cases (for example: 2,196 victims in the *Al Hassan* case; 1,917 in the *Yekatom and Ngaissona* case; 4,095 in the *Ruto and Sang* case; 4,095 in the *Ongwen* case; or 2129 victims in the *Ntaganda* case). As such, the CSS considers that the number of victims is below the average number and therefore more indicative of a complexity level 1 assessment of this parameter. In addition, the CSS notes that the Defence has not sufficiently demonstrated how the number of victims is still impacting the workload of the Defence at this point of the proceedings. While a defence team may require a higher number of team members to assess submissions at a stage at which parties are called upon to make submissions on the participation of victims, particularly, where group C victims are concerned; at the present stage of the proceedings, the CSS is not convinced that the number of victims does have an impact on the workload of the Defence. Rather, where the workload of the Defence is limited to the

assessment of submissions of a LRV team as well as any responses or replies thereto, the number of the victims represented by this LRV does not seem to have a significant weight on the work of the Defence at this stage anymore.

(ix) Geographical and temporal scope of the case:

- The geographical and temporal scope of the case are only taken into consideration if the defence can sufficiently demonstrate that they have an impact on the workload and explain how the workload is impacted in concrete. For the assessment, it must be taken into account, whether the justifications provided by the defence in this regard, are taken into account for the assessment of other parameters in particular the security situation in this case.
- **Geographical scope:** Where evidence material or witnesses are placed in different countries or locations, requiring investigations or missions to those, which cannot be accessed within the scope of one investigation due to the distance between these countries or locations, this may warrant more team resources, including assigning resource persons at different locations, as well as a higher investigation budget to conduct missions to multiple sites to conduct efficient investigations. It is noted here, that despite a wide range of locations that could be assessed, it is pointed out by the Defence that the security situation does not allow for such missions, which requires the conducting of remote investigations. The indicated “unprecedented challenges”, other than the impact the general security situation has on the defence team is not apparent to the CSS. As such, the arguments by the Defence under this parameter do not justify an increase of resources. Rather, it demonstrates that on-site investigations at this stage are not possible.
- **Temporal scope:** Where more than ten years have elapsed since the crimes, this may lead to difficulties to access evidence. Where the defence team can demonstrate that this time lapse increases the workload of the

team, for example, due to the conducting of additional missions to the field in order to find suitable witnesses or other relevant evidence, or where in direct relation to this parameter, additional specialists in the field are to be recruited, this may be taken into consideration for the determination of the complexity level. The CSS notes that the time-period of the alleged crimes in the present case is rather short, namely below one year. As such, no aggravating factor is taken into consideration for this parameter.

(x) Security situation:

- Where the security situation in the country or countries where investigations are (to be) conducted leads to accessibility issues for investigations, or the finding of witnesses, and where the defence team has to conduct its witnesses examinations in another country than the one of the Situation or another location than where the crimes have allegedly been committed, this may be an indicator of an increased workload for the team, and may be taken into consideration for the determination of the complexity level. For example, where the conflict is still ongoing, additional workload could be expected due to difficulties in conducting investigation in the field, in getting a sufficient level of protection for witnesses in the field, or due to exculpatory or non-exculpatory evidence that is still being collected or revealed. It is emphasized in this regard that the security situation itself is not sufficient to demonstrate a higher workload, but it must come along with concrete obstacles for the efficient exercise of the Defence's mandate. The Registry in that regard also takes – as far as relevant – into account the necessity to conduct missions at the stage and the number of previous missions conducted or scheduled. The submissions by the Defence throughout the Request refer to the difficulties in travelling to the situation country or necessity to meet witnesses in a different country than where the evidence or witnesses are normally located and/or the alleged crimes occurred. Notwithstanding the ongoing discussions on this point before the Chamber and any submissions the Registry already made in

[REDACTED]

that regard concerning previous and future possibilities of missions to take place; for the sole purpose of the complexity level assessment, the CSS acknowledges that – despite any past opportunities to travel to the situation country with the assistance of the Registry – the security situation in the country has increased the workload of the Defence in organizing missions. Without prejudice to any decision by the Chamber on the conducting of missions, the CSS is of the view that it aggravates this specific parameter to a higher complexity level than the average.

(xi) Scope of any specific request or order by the Chamber:

- The Defence states that none has been identified.

(xii) Relevant connection to ongoing or closed cases before the Court:

- This parameter is only taken into consideration where the defence can demonstrate that an additional workload derives from an ongoing or closed case before the Court, in addition to the impact due to other (sub-)parameters, such as number and nature of evidence, number and nature of modes of liabilities, number and nature of evidence, accused joint in a proceeding, or any other relevant (sub-)parameter. The Defence states the connection with the case against Mr Harun and Mr Muhammad Hussein. However, the CSS notes that both suspects are still at large and therefore no additional work load, for example, by going through additional material is applicable here.

25. Taking into account the assessment of the different parameters, the CSS notes that only two parameters, namely the number and nature of evidence and the security situation, are 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

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and the geographical and temporal scope of the case are rather indicative of a lower complexity level, the CSS is not satisfied that a re-assessment of the complexity level to complexity level 3 is warranted.

C. Conclusion

26. In light of the above, the CSS is not satisfied that the transitional measures or the assessment of the parameters warrant resources under complexity level 3. As such, the initial assessment of the complexity level 2 at the trial stage is maintained.

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Acting Chief of the Counsel Support Section