

Public Redacted Version of

ANNEX 5 TO
Motion for Judicial Review of Legal Aid Decision
under Regulation 83(4) of the Regulations of the Court

**Decision on “Request for Reconsideration of
Decision denying Review of Preliminary Assessment of Complexity Level under the new Legal
Aid Policy” of Mr Ali Muhammad Ali Abd-Al-Rahman**

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 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 2024.¹
2. 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 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 that *“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
5. On 23 February 2024, the Acting Chief of the CSS, [REDACTED] 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.
6. On 7 March 2024, Counsel for Mr Abd-Al-Rahman, [REDACTED] 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 is limited *“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”*.⁵
7. Counsel submits that the Review Decision denied Counsel’s Request *“for a variation of the Preliminary Assessment of complexity level on the grounds that (i) the preliminary assessment has kept the resources of the Defence team to nine positions (paras. 12-13 of the Review Decision) and (ii) that the position of one former Assistant Evidence Reviewer, [REDACTED]”*.

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

⁵ Request for Reconsideration, p. 1.

[REDACTED] under the former Legal Aid Policy had not been replaced for nine months and that this position no longer existed within the Defence team at the time of the transition to the LAP (para. 14 of the Review Decision)". Counsel submits that these two justifications "are fundamentally flawed in fact".⁶

8. In sum, Counsel requests 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.

II. Applicable legal framework

9. 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.⁷
10. 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

⁶ Request for Reconsideration, p.2.

⁷ ICC-ASP/22/Res. 3, para. 89.

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.”⁸

11. 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. Analysis

12. In addressing the Request for Reconsideration, the Registrar is assessing whether any new elements have been submitted. These elements may be factual or legal.

a) Complexity level assessment

13. In the Review Decision, the CSS recalled that in December 2023, the Defence was composed of the following nine (9) positions: Counsel ([REDACTED]); Associate Counsel ([REDACTED]); Legal Assistant ([REDACTED]); Case Manager ([REDACTED]); four Evidence Reviewers ([REDACTED]); and a Linguistic Assistant ([REDACTED]).

14. The CSS further noted that “[b]ased on the announced team composition under the assigned complexity level 2, [...] there are eight full-time positions assigned to the Defence and two part-time positions, amounting to an equivalent of nine positions”.¹⁰

⁸ ICC-ASP/22/9, para. 76.

⁹ ICC-ASP/22/9, para. 15.

¹⁰ Review Decision, para. 13.

15. Counsel submits that *“had CSS based its Preliminary Assessment on the composition of the Defence team in December 2023, i.e. 10 positions, the outcome would have been a classification of the Case at Complexity Level 3, instead of 2, which is the only outcome consistent with its actual complexity level. Preliminary Assessment at Complexity Level 3 would have given the possibility of carrying on employing the Defence team’s Language Assistant at 100%, by relying on a third Case Manager position provided at 50% at this level, and employing [REDACTED] as a fourth Legal Assistant at 100%, instead of her current 50% Case Manager”*.¹¹

16. The Registry disagrees with the above submission, in light of the fact that the *Abd-Al-Rahman* case does not qualify for Complexity Level 3. The composition of the team in December 2023 comprised of 10 positions, which amounts to one extra position than what is envisaged under Complexity Level 2. However, the number of positions in the *Abd-Al-Rahman* case does not reach Complexity Level 3, which is set at 11 or more positions under the RLAP.

b) *On the Legal Assistant position*

17. The CSS recalled 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”.¹²

¹¹ Defence Request for Reconsideration, p. 4.

¹² Review Decision, para. 14.

18. In the Request for Reconsideration, Counsel explains that upon [REDACTED] departure from the team, the position that she occupied was immediately used to hire [REDACTED] as Legal Adviser in charge of investigations.
19. Counsel further points out that *"when the decision was taken to separate [REDACTED] from the Defence team by the end of July 2023, the informal information that the Defence team had about the progress of the Mokom case suggested that there was a real likelihood that the charges would not be confirmed"* which constituted relevant information in light of [REDACTED] having joined the Mokom team. Counsel further notes that *"in that event, [REDACTED] would become available again to resume her appointment within the Defence team"*, which clarifies why her position had been kept vacant.
20. In that regard, it is hereby noted that Counsel submits additional information as part of the Request for Reconsideration, which does 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.¹³
21. Precisely, Counsel refers to the email received from the Acting Chief of the CSS on 3 July 2023, that is annexed to the Request for Reconsideration, whereby the CSS states that *"the requested extensions are confirmed 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, that were initially granted until 30 June and 31 August 2023, respectively.¹⁴
22. It stems from the email of 3 July 2023 from CSS to Counsel, that the allocation of the requested extensions was not conditional to the full-time occupation of the position of [REDACTED] which, if it had not been the case, would have resulted in the loss of the position within the Defence team.
23. It must be considered that, when the CSS grants a position to a team, such position is not conditional to the appointment of a specific team member, but rather to the function that the team member fulfils. In this case, the position of [REDACTED] had been granted under the additional means system on the basis of the assessment of the workload of the team.
24. As a consequence, it is the Registrar's assessment that the position of Legal Assistant - which has been used to fill in the requested extension granted by the CSS on 3 July

¹³ Annex to Request for Reconsideration.

¹⁴ Annex to Request for Reconsideration.

2023 - should be maintained at 100% until the end of the presentation of the Defence evidence.

c) *On the Language Assistant position*

25. In the Review Decision, the CSS recalled paragraph 60 of the RLAP which states 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."*¹⁵
26. On this basis, the CSS indicated that it was within the responsibility of Counsel to manage the allocated resources as it is required by the needs of the case and that Counsel had the discretion to request to use the resources assigned for the 50% case manager position in order to appoint a language assistant at a full-time basis (100%).
27. Notwithstanding the conclusion regarding the Preliminary Assessment (section III, A) it is recalled that, as set under the Applicable Law Section, under the RLAP 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.¹⁶ 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.¹⁷ 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 has demonstrated to the satisfaction of the Registrar that the position of Language

¹⁵ ICC-ASP/22/9, para. 60.

¹⁶ ICC-ASP/22/9, para. 15.

¹⁷ Request for Reconsideration, p. 5.

Assistant is required for team stability.

28. As a consequence, the Registrar concludes that the requirements for granting the Language Assistant position at 100%, as transitional measures envisaged under the RLAP, are met. These transitional measures shall be allocated until the end of the Defence case. Afterwards, the Language Assistant position shall be allocated on a 50% basis unless otherwise granted within the available resources corresponding to the complexity level reached.

IV. Conclusion

29. In light of the above, the Registrar:

REJECTS the review of the Preliminary Assessment from level 2 to level 3;

GRANTS the additional 50% Language Assistant position until the end of the Defence case;

REJECTS the compensation of the [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%;

CONFIRMS the Legal Assistant position at 100% until the end of the Defence presentation of evidence.



Osvaldo Zavala Giler, Registrar

6 May 2024,
The Hague, The Netherlands