



Original: English

No. ICC-02/05-01/20

Date: 7 August 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on the Defence Request for Leave to Appeal the 'Decision on Defence request under article 67(1)(f) of the Rome Statute'

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,¹ having regard to Articles 67(1)(d), 67(1)(f), and 82(1)(d) of the Rome Statute (the ‘Statute’), issues this Decision on the Defence Request for Leave to Appeal the ‘Decision on Defence Request under article 67(1)(f) of the Rome Statute’.²

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute³ and decided⁴ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)⁵ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in Darfur, Sudan, between August 2003 and March 2004.
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁶ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁷ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas, in Darfur, Sudan, between on or about 5 to 7 March 2004.
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.
4. On 25 June 2020, the Defence submitted a request pursuant to article 67(1)(f) of the Statute asking the Single Judge to (i) urgently order the Registry to provide the

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

² Requête en vertu de l’Article 67-1-f, 25 June 2020, ICC-02/05-01/20-7 (with confidential Annex ICC-02/05-01/20-7-Conf-Anx).

³ Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, ICC-02/05-56).

⁴ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁵ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁶ Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

⁷ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

Defence team with interpretation and translation services that are necessary for the preparation of the suspect's defence and for his communication with the Defence team; and, in the meantime, and (ii) order the Registry to provide the Defence team with provisional interpretation and translation services pursuant to regulation 57(1) of the Regulations of the Registry and without applying the criteria set out in regulation 58(3) of the Regulations of the Registry.⁸ On 29 June 2020, the Registry submitted its observations thereon arguing, *inter alia*, that the request 'has no legal basis', 'is not reasonable and not adequately justified', and 'should be dismissed accordingly'.⁹

5. On 10 July 2020, the Single Judge issued the 'Decision on Defence request under article 67(1)(f) of the Rome Statute' (the 'Decision'), rejecting the request in its entirety.¹⁰ The Single Judge found, *inter alia*, that article 67(1)(f) 'cannot be construed as enshrining an unfettered and absolute right for the suspect to benefit from interpretation and translation services at all times and for all matters and activities', and that the provision does not 'include private and privileged communications between the defendant and his or her Defence team'.¹¹

6. On 16 July 2020, the Defence submitted a request for leave to appeal the Decision (the 'Request').¹²

II. SUBMISSIONS

7. The Defence submits that the interpretation of article 67(1)(f) as set out in the Decision is too restrictive, as it makes the exercise of the right to interpretation conditional upon a suspect qualifying for legal aid under article 67(1)(d) of the Statute. Thus, the Defence submits that from the Decision arises the fundamental question as to whether the suspect has a right to interpretation services from Arabic - the only language he speaks and understands perfectly - to at least one of the two working languages of the Court, pursuant to article 67(1)(f) of the Statute, and

⁸ Requête en vertu de l'Article 67-1-f, ICC-02/05-01-20-7.

⁹ Registry's observations on the «Requête en vertu de l'Article 67-1-f» (ICC-02/05-01/20-7), ICC-02/05-01/20-11.

¹⁰ ICC-02/05-01/20-94.

¹¹ ICC-02/05-01/20-94, para. 15.

¹² Demande d'autorisation d'interjeter appel de la 'Decision on the Defence request under article 67(1)(f) of the Rome Statute' (ICC-02/05-01/20-94), ICC-02/05-01/20-97.

whether such a right should be conditional upon qualifying for the legal aid services of the Court, pursuant to article 67(1)(d) of the Statute.

8. In the view of the Defence, the proposed issue affects the fairness and expeditiousness of proceedings, insofar as the Defence's ability to prepare its case will be impacted by not having an interpreter as provided for by article 67(1)(f) of the Statute. Further, the Defence submits that the immediate resolution of the issue by the Appeals Chamber would allow the proceedings to continue in an efficient manner while respecting the rights of the accused, and avoiding the risk of an eventual mistrial if it were to be found that Mr Abd-Al-Rahman's rights under article 67(1)(f) of the Statute had been violated.

III. ANALYSIS

9. The Single Judge recalls that pursuant to article 82(1)(d) of the Statute, the following requirements must be met for a request for leave to appeal to be granted:

- i) The matter is an 'appealable issue';¹³
- ii) The issue at hand would significantly affect:
 - a. The fair and expeditious conduct of the proceedings, or
 - b. The outcome of the trial; and
- iii) In the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

10. The Single Judge recalls his finding in the Decision that article 67(1)(f) of the Statute 'cannot be construed as enshrining an unfettered and absolute right for the suspect to benefit from interpretation and translation services at all times and for all matters and activities', and that the aforementioned provision does not include a right to interpretation for 'private and privileged communications between the defendant and his or her Defence team'.¹⁴ Noting that Counsel chose to defend a suspect with whom he could not communicate, and noting that the suspect is eligible for legal aid,

¹³ Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeals, 13 July 2006, ICC-01/04-168, para. 9.

¹⁴ ICC-02/05-01/20-94, para. 15.

the Single Judge directed Counsel to ‘use the legal aid funds [...] to ensure that his or her client’s needs in terms of communication with Defence Counsel are adequately satisfied’.

11. Accordingly, the Single Judge finds that the issue of whether article 67(1)(f) covers a right to interpretation services for the private and privileged communications between Defence counsel and client, to be paid for by the Court, arises from the Decision. While the Defence seeks both legal aid and funds for interpretation – and has posited that the Decision links the eligibility of one to the other – the Single Judge notes that the Decision clearly indicates otherwise. While the Single Judge directed that in the present circumstances, Counsel should use legal aid funds to ensure that the suspect’s communication needs are adequately met, the Decision also indicates that in no circumstances does article 67(1)(f) provide for a right to interpretation services for private and privileged communications between Counsel and client, paid for by the Court.

12. In order to reflect the Single Judge’s understanding of the issue and in accordance with the Chamber’s discretionary power to reformulate appealable issues,¹⁵ the Single Judge considers it appropriate to rephrase the issue put forth by the Defence as follows:

Whether article 67(1)(f) of the Statute gives rise to a right to an interpreter to be provided by the Court free of charge for some or all communications between a defendant and his or her Counsel/Defence team, when the defendant has freely chosen Counsel with whom he cannot communicate, and while numerous other qualified Counsel were available who did speak a language the defendant fully understands and speaks (the ‘Issue’).

13. The Single Judge considers that the Issue may impact the fairness and expeditiousness of the proceedings, as the provision, or lack thereof, of interpretation

¹⁵ See Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 April 2006, ICC-01/04-168, para. 20. See also Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the Prosecutor’s request for leave to appeal the “Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’”, 18 January 2019, ICC-01/13-73, para. 39.

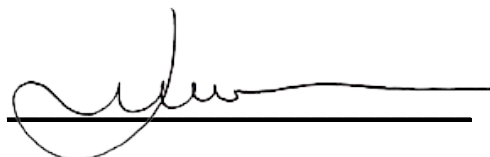
services, paid for by the Court, for Counsel-client communications could significantly influence the manner in which the Defence interacts with his client throughout the preparation of the case. Furthermore, noting that ‘proceedings’ within the meaning of article 82(1)(d) of the Statute is not limited to the proceedings at hand, but extends to subsequent proceedings,¹⁶ the Single Judge considers that the reformulated issue is likely to arise in other cases, and as such, that the Issue would affect the fairness of future proceedings as well.

14. For the reasons outlined above, the Single Judge is also satisfied that the immediate resolution of the Issue by the Appeals Chamber would materially advance the proceedings.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request for Leave to Appeal, for the issue as reformulated at paragraph 12 of the present decision.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid black horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 7 August 2020

At The Hague, The Netherlands

¹⁶ ICC-01/04-168, para. 12.