

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-01/20
Date: 27 August 2020

APPEALS CHAMBER

Before: Judge Piotr Hofmanski, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR V. ALI MUHAMMAD AL ABD-AL-RAHMAN ('ALI
KUSHAYB')**

Public

**Registrar's observations on the "Mémoire d'appel de la décision
ICC-02/05-01/20-94", (ICC-02/05-01/20-111)**

Source: The Registry

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

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I. Introduction

1. Following the Appeals Chamber's Order on 21 August 2020 ("Order"),¹ the Registrar hereby submits his observations on the matters raised in the "Mémoire d'appel de la décision ICC-02/05-01/20-94" ("Appeal Brief") submitted by defence for Mr Ali Muhammad Al Abd-Al-Rahman ("Defence").²

II. Procedural history

2. On 26 June 2020, the Defence requested Pre-Trial Chamber II of the International Criminal Court ("Chamber" and "Court", respectively) "(i) [...] ordonner au Greffier de la Cour de mettre à la disposition de l'équipe de Défense de Mr Abd-Al-Rahman les services d'interprétation et de traduction entre l'Arabe et l'une des langues de travail de la Cour nécessaires à la préparation de sa défense et à sa communication avec son équipe de défense à compter du vendredi 26 juin 2020 et jusqu'à nouvel ordre conformément à l'Article 67-1-f du Statut de Rome; and (ii) [...] d'ordonner au Greffier de mettre provisoirement à la disposition de l'équipe de défense de Mr Abd-Al-Rahman les services d'interprétation et de traduction nécessaires de la Section des Services Linguistiques du Greffe en vertu de la norme 57-1 du Règlement du Greffe et sans que le délai de préavis de la norme 58-3 du Règlement du Greffe s'applique" ("Request").³

3. On 29 June 2020, the Registrar submitted his observations on the Request ("Observations").⁴

4. On 10 July 2020, the Chamber rejected the Request ("Impugned Decision").⁵

¹ Appeals Chamber, "Order for submissions from the Registry", 21 August 2020, ICC-02/05-01/20-127 ("Order").

² Defence, "Mémoire d'appel de la décision ICC-02/05-01/20-94", 13 August 2020, ICC-02/05-01/20-111 ("Appeal Brief").

³ Defence, "Requête en vertu de l'Article 67-1-f", 26 June 2020, ICC-02/05-01/20-7 ("Request"), pp 5-6.

⁴ Registry, "Registry's Observations on the 'Requête en vertu de l'Article 67-1-f'", 29 June 2020, ICC-02/05-01/20-11 ("Registry's Observations").

5. On 16 July 2020, the Defence requested for leave to appeal the Impugned Decision.⁶

6. On 7 August 2020, the Chamber granted the requested leave⁷ and reformulated the appealable issue 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').

7. On 13 August 2020, the Defence submitted its Appeal Brief.

8. On 21 August 2020, the Appeals Chamber issued the Order, inviting the Registrar to provide observations on the matters raised in the Appeal Brief.

9. On 24 August 2020, the Prosecution submitted its response to the Appeal Brief ("Prosecution's Submissions").⁸

III. Applicable Law

10. The following provisions are of particular relevance to the present submissions: articles 50 and 67(1) of the Rome Statute ("Statute"), regulations 24*bis*, 97(1) of the Regulations of the Court ("RoC") and regulations 57 and 58 of the Regulations of the Registry ("RoR"), paragraphs 9 and 41 of the Registry's single policy document on the Court's legal aid system ("LAP").

⁵ Pre-Trial Chamber II, "Decision on the Defence request under article 67(1)(f) of the Rome Statute", 10 July 2020, ICC-02/05-01/20-94 ("Impugned Decision").

⁶ Defence, "*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)*", dated 16 July 2020 and registered on 17 July 2020, ICC-02/05-01/20-97 ("Request for Leave to Appeal").

⁷ Pre-Trial Chamber II, "Decision on the Defence Request for Leave to Appeal the 'Decision on Defence request under article 67(1)(f) of the Rome Statute'", 7 August 2020, ICC-02/05-01/20-109 ("Decision on the Request for Appeal").

⁸ Prosecution, "Prosecution response to the "*Mémoire d'appel de la décision ICC-02/05-01/20-94*", 24 August 2020, ICC-02/05-01/20-132 ("Prosecution's Submissions").

IV. Submissions

11. The Defence requests a qualified interpreter or translator paid by the Court to be assigned to the team in order to fulfil full-fledged translation and interpretation services for counsel and his team at all times. At issue is that this type of requested services is not foreseen in the Court's legal framework. Rather the provision of interpretation and translation services is only foreseen upon request, on a case-by-case basis and following a certain procedure in accordance with regulations 57 and 58 of the RoR. It is not designed and cannot be tailor-made to the communication between a defendant and counsel at all times, as requested.

A. First Ground of Appeal

i. Regulation 97(1) of the RoC is not applicable in the present case

12. The Defence's arguments in relation to regulation 97(1) of the RoC do not arise from the Impugned Decision and this provision is, in any event, not applicable to the situation at hand.

13. The Defence argues that the Registrar's interpretation of article 67(1)(f) of the Statute is erroneous and is incompatible with regulation 97(1) of the RoC.⁹

14. The Registrar recalls that, in his Observations, he provided his views on the specific points raised therein and did not go beyond what was requested.¹⁰ It should be noted that the Defence did not refer to regulation 97(1) of the RoC in the Request, nor in the Request for Leave to Appeal, and only introduced this argument for the first time in the present appeal, claiming that "*[l]a Défense, qui s'était déjà vu tancée une première fois pour avoir abordé des arguments de fond dans ses demandes d'autorisation de réplique, n'a pas été en mesure d'alerter l'Honorable Juge Unique sur l'incompatibilité des*

⁹ Appeal Brief, para. 24.

¹⁰ Request, pp 5-6.

soumissions du Greffe avec la lettre de la norme 97-1 du RdC dans sa Demande de Réplique."¹¹

15. Notwithstanding the above, the Registrar is of the view that regulation 97 of the RoC does not apply in the present circumstances. Placed in the specific chapter regulating detention matters, it does not support any general right to interpretation and translation of communications between a defendant and a counsel. Indeed, the conditional formulation of this provision ("where necessary") does not create an absolute right for interpretation or translation, even less an obligation for the Court to pay for such a full-fledged translation or interpretation services on behalf of counsel.

16. The Registrar reiterates that the communication between counsel and client does not strictly fall within article 67(1)(f) of the Statute.¹² This interpretation is consistent with the jurisprudence of the Court as well as international human rights, which establish that the right of the accused or suspect for translation or interpretation extends only to the latter's relations *vis-à-vis* the Court as to guarantee the fairness of the proceedings and not to counsel-client relationship.¹³

17. The Registrar also notes that language assistance has been provided to counsel where necessary and in accordance with regulation 97(1) of the RoC,¹⁴ and will continue to as specified in the Observations,¹⁵ as long as such assistance fits the accepted interpretation of article 67(1)(f) of the Statute. In addition, considering that the entirety of the Court's proceedings are conducted in both working languages, and, in addition, in the language the accused or suspect fully understands and speaks, this system is fully compliant with article 67(1)(f) of the Statute and ensures

¹¹ Appeal Brief, para. 25.

¹² Observations, para. 15.

¹³ See also Prosecution's Observations, para. 21.

¹⁴ Observations, para. 9.

¹⁵ Observations, para. 22.

the right of the defendant to understand the nature and cause of the charge against him as required under article 67(1)(a) of the Statute.¹⁶

18. The Registrar also recalls that, as another Chamber of the Court has stated, “the combination of having the assistance of a competent defence counsel, fluent in either of the working languages of the Court, together with the core documents [...] having been translated into [the language the defendant fully understands and speaks], satisfies [...] the fairness of the proceedings [...]”¹⁷

ii. Information on financial impact of the sought remedy

19. With full respect to the independence of the Chamber and in compliance of his obligations, in particular pertaining to the management of the legal aid policy,¹⁸ the Registrar hereby informs the Appeals Chamber about the financial costs the Court would have to bear in case the requested remedy is granted.

20. Should the requested remedy be granted, the costs for interpretation of privileged communications between the defendant and his counsel would include the hiring of a freelance interpreter, as the Languages Services Section of the Registry cannot provide this service with the current resources. The average cost for the recruitment of a freelance interpreter is about €1,000 to €1,500 a day, including daily fee, the ticket, the DSA and the terminal expenses, depending on his or her professional domicile. Further, it bears mentioning that the contracts of freelance interpreters are concluded per day and, therefore, even for a short meeting, the Registry should honour the fees for a full day.

¹⁶ See also ICTY, Trial Chamber, *Prosecutor v. Delalic et al.*, “Decision on the Defence Application for Forwarding the Documents in the Language of the Accused”, 25 September 1996, IT-96-21, para. 12.

¹⁷ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matter”, 27 February 2015, ICC-02/04-01/15-203, para. 33.

¹⁸ The Presidency, “Decision on the *“Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves”* and on the *“Urgent Request for the Appointment of a Duty Counsel”* filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007”, 29 June 2007, ICC-01/04-01/06-937, para. 16. See also The Presidency, “Decision of the Presidency upon the document entitled *“Clarification”* filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007”, 2 May 2007, ICC-01/04-01/06-874, para. 17.

21. Finally, the Registrar notes that there is a high possibility that the issue raised in the present Appeal may arise in other cases.

B. Second Ground of Appeal: the right to translation and interpretation is not conditional on the eligibility for the Court's legal aid

22. The Defence argues that the Impugned Decision erred in law in concluding that the right to interpretation is conditional on the eligibility of the accused or suspect to legal aid. In the Impugned Decision, the Single Judge only refers to legal aid in the context of counsel's obligation to "take into account the client's personal circumstances and specific needs"¹⁹ in order to maintain a Counsel-client relationship 'of candid exchange and trust' and 'act in good faith when dealing with the client'.²⁰ Contrary to what is advanced in the Appeal Brief,²¹ the Chamber does not make it a legal condition for interpretation. This ground of appeal does not arise from the Impugned Decision.

23. In any event, even if regulation 83(1) of the RoC contemplating the scope of legal assistance paid by the Court refers to potential translation or interpretation costs, it remains that this provision should be read in conjunction with, *inter alia*, regulations 57 and 58 of RoR. Accordingly, any provision of interpretation and/or translation services to a defendant (as opposed to a counsel) should follow a certain procedure.

C. Third Ground of Appeal

24. The Defence claims that "*le Greffe [...] a manqué à son obligation de fournir une information neutre et non-partisane à la considération de l'Honorable Juge Unique,*

¹⁹ Code, article 9(2).

²⁰ Impugned Decision, para. 17.

²¹ Appeal Brief, paras. 28-32.

l'induisant ainsi en erreur".²² It further asserts that "[l]a tentative d'immixtion du Greffe dans l'exercice du libre choix de son Conseil par Mr Ali Muhammad Ali Abd-Al-Rahman [...] induit un traitement discriminatoire de la part du Greffe au détriment des défendeurs qui ne maîtrisent aucune des langues de travail de la Cour" on the basis of its proposed interpretation of article 67(1)(f) of the Statute.²³

25. The Registrar, contrary to the Defence's assertions above, exercised the requisite due diligence and merely fulfilled his obligations with respect to the rights of the Defence,²⁴ when he drew the attention of Mr Abd-Al Rahman to a risk that actually has materialised. Further, assuming his neutral role, the Registrar did confirm the appointment of counsel for Mr Abd-Al-Rahman, even though he does not speak the language the suspect fully understands and speaks. Therefore, the alleged interference in the defendant's free choice of counsel or discriminatory treatment is speculative and without merit

26. With regard, to the free choice of counsel, the Registrar recalls that such right - as has been declared by the Presidency of the Court -, "is not absolute and is necessarily subject to certain limitations".²⁵ The Prosecution's Submissions refer to several such limitations and suggests the possibility that the Chamber acts upon some of them, namely the appointment of another counsel or of an associate counsel who would be able to communicate with the suspect in Arabic.²⁶ The Registrar, as a

²² Appeal Brief, para. 24. See also para. 40 of the Appeal Brief, in which Counsel accuses the Registry of having allegedly failed to inform the Pre-Trial Chamber of the application of regulation 97(1) of the RoC.

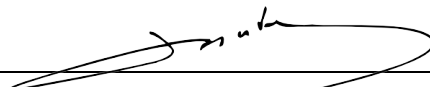
²³ Appeal Brief, para. 34.

²⁴ The Presidency, "Decision on the *"Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves"* and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007", 29 June 2007, ICC-01/04-01/06-937, para. 16. See also The Presidency, "Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007", 2 May 2007, ICC-01/04-01/06-874, para. 17.

²⁵ The Presidency, "Decision on the *"Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves"* and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007", 29 June 2007, ICC-01/04-01/06-937, para. 25. See also Prosecution's Submissions, para. 33.

²⁶ Prosecution's Submissions, para. 37.

neutral organ of the Court, is not in a position to elaborate on these submissions. At this stage, the Registrar can only remain available to assist the Chamber should it decide to take any action on that matter.



Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Peter Lewis, Registrar

Dated this 27 August 2020

At The Hague, The Netherlands