

ANNEX

**PARTIALLY DISSENTING OPINION OF JUDGE LUZ DEL
CARMEN**

IBÁÑEZ CARRANZA

I. Introduction

1. Although I agree with some of the reasoning of the judgment, I disagree with the scarce protection of the right to defence of Mr Abd-Al-Rahman provided therein. In my view, the rights and guarantees set out in article 67(1) of the Statute must be read in a holistic manner that is favourable to the suspect or accused person and conducive to a non-restrictive interpretation of these provisions, especially (and contrary to the conclusion reached by the Pre-Trial Chamber), article 67(1)(f) must be read together with the other sections of this article, not in an isolated manner. For the reasons explained below, this interpretative framework leads to the conclusion that the right to freely communicate with counsel of one's choice in order to prepare a defence entails that an interpreter must be provided, if necessary, for this purpose.

II. The Right to Defence, its nature and scope

2. The right to defence is an essential aspect of every criminal proceeding as it is the only means of any accused to face the punitive and coercive power of the State or the international community, as in the case of the International Criminal Court (hereinafter 'the Court' or 'ICC'), especially if the accused is in detention and has limited availability and resources.

3. Notably, the right to defence enjoys a double nature, it is (i) a guarantee of the proper administration of justice and due process, and (ii) a human right internationally recognized in the universal and regional human rights treaties,¹ national legislations and the Rome Statute legal framework. Since the right of defence is an essential part of due process and fair trial guarantees, it is of the highest importance for every judicial proceeding.

4. In accordance, the scope of the right to defence encompasses several elements, namely: the right of the accused to be informed of the charges in a language that he or she fully understands and speaks; have counsel of his or her own choosing, and freely communicate with her or him; have the adequate time and facilities for the preparation of the defence; and, have access to an interpreter in case the accused and her or his counsel do not speak the same language. Human rights jurisprudence, especially that of the Inter-American Court of Human Rights (hereinafter 'IACtHR'), has stressed the need of interpretation in cases where the

¹ See article 14 of the International Covenant on Civil and Political Rights, article 6 of the European Convention on Human Rights, article 8 of the American Convention on Human Rights, and article 7(1) of the African Charter on Human and People's Rights.

accused does not speak the language in which the process is being carried out, namely indigenous peoples and foreigners.²

5. Therefore, whenever the accused cannot communicate with her or his counsel due to language barriers, the right to an interpreter becomes imperative in order to fulfil the right to defence and respect the guarantee of due process. In words of the IACtHR, ‘the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination’, hence ‘[t]he presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests’,³ such as providing an interpreter. When proceedings are carried out in contravention to this requirement, they may constitute a breach of the principle of no discrimination on the basis of language (forbidden both by the ICCPR and the Rome Statute)⁴ and the guarantees of due process, eventually making them null and void.

6. Acknowledging this double nature of guarantee and human right, the reading of these norms must be systemic, systematic and comprehensive through the lens of the international human rights norms that recognize it as such. Consequently, any interpretation must take into account the ‘universal, indivisible and interdependent and interrelated’ nature of human rights⁵ and be done in accordance with the *pro homine* or *pro persona* principle, meaning in the ‘way that most fully and adequately protects human beings’.⁶

² See IACtHR, *Rosendo Cantú v. México*, [Judgment](#), 31 August 2010, paras. 184 and 185; IACtHR, *Fernández Ortega et al. v. México*, [Judgment](#), 30 August 2010, paras. 200 and 201; IACtHR, *Case of Vélez Looor V. Panama*, Judgment, 23 November 2010, para. 152; IACtHR, *Pacheco Tineo Family v. Bolivia*, [Preliminary Objections, Merits, Reparations, and Costs, Judgment](#), 25 November 2013, para. 133; IACtHR, *Tiu-Tojín v. Guatemala*, [Merits, Reparations, and Costs, Judgment](#), 26 November 2008, para. 100

³ IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process Of Law*, [Advisory Opinion](#), 1 October 1999, paras 119 and 120.

⁴ See ICCPR article 2 and Rome Statute article 21(3).

⁵ World Conference on Human Rights, article 5 of the Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

⁶ [Separate Opinion of Judge Luz del Carmen Ibáñez Carranza to the ‘Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’](#), 16 September 2019, ICC-01/04-01/06-3466-AnxII, paras 64-68, referring to H. Victor Condä, *A Handbook of International Human Rights Terminology* (1999), p. 207.

III. The Right of Defence in the Rome Statute Legal Framework

7. The dual nature of the right to defence is recognized and guaranteed by the Rome Statute legal framework; starting with article 67, mainly subsections 1(a), (b), (d) and (f), by establishing:

(i) article 67(1)(a): ‘[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(ii) article 67(1)(b): ‘[t]o have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence’;

(iii) article 67(1)(d) ‘[...] to conduct the defence in person or through legal assistance of the accused's choosing to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it’; and

(iv) article 67(1)(f) ‘[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks’.

8. Following the reasoning provided above, these norms must be read in a systemic and systematic manner and jointly with the norms that make the exercise of the right to defence possible. Highlighting that contrary to the findings of the Pre-Trial Chamber, article 67(1)(f) cannot be read in isolation as it is an integral part of these guarantees and rights.

9. This legal reasoning is only reinforced by article 21(3) of the Rome Statute, hence this interpretation derives firstly from the dual nature of the right to defence as guarantee and human right and secondly from the need to apply and interpret the law consistently with internationally recognized human rights.

10. Additionally, this Court is the first international tribunal of a permanent nature and its Statute is open for universal ratification. As a result, it may be assumed that persons who stand accused before it will have diverse cultural backgrounds and linguistic requirements. In consequence, the Court must conform to the highest legal standards in addressing the particular needs of each person on a case by case basis and in vigorously protecting and promoting their rights.

IV. Analysis of the Provisions relevant to Interpretation for the purpose of communication with counsel

11. As set out above, article 67(1)(a), (b), (d) and (f) of the Statute must be read in light of the fundamental human rights enshrined in article 14(3) of the International Covenant on Civil and Political Rights (hereinafter ‘ICCPR’), specifically 14(3)(a), (b), (d) and (f),⁷ and in a manner that does not restrict the essential scope or content of these rights. Considering the entire dimension of the relevant defence rights, depending on the circumstances of the case, interpretation may be an essential condition in order to allow for the preparation of the defence and free communication with counsel of the accused’s choosing.

12. A similar interpretation was endorsed by the Human Rights Committee in its General Comment 32 on the right to equality before courts and tribunals and to fair trial:

Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pre-trial and trial phase.⁸

13. In that context, the Human Rights Committee referred only to the pre-trial and trial phase of proceedings, however, in the Rome Statute framework it must be considered to include the investigation phase (as guaranteed under article 55(2) of the Statute). As a result, interpretation may be necessary to facilitate communication with counsel during the investigation phase, as well as during any appeal that follows the trial. Indeed, the IACtHR and the European Court of Human Rights have emphasised that interpretation, if needed, should be provided from the investigation phase and extend throughout proceedings.⁹

⁷ In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; [...] and (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

⁸ Human Rights Committee, *General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, para. 32.

⁹ IACtHR, *Rosendo Cantú v. México*, [Judgment](#), 31 August 2010, para. 185: ‘The Court considers it proven that Mrs. Rosendo Cantú was not provided with a translator by the State when she required medical care, or when she filed her initial complaint; nor did she receive information, in her own language, about the subsequent steps taken regarding her complaint. In order to inform the authorities about what had happened to her and to obtain information, she had to turn to her husband who spoke Spanish. Nevertheless, on subsequent occasions when

14. Moreover, the obligation to provide interpretation services, if necessary, to facilitate client/counsel communication is also reflected in the broader legal framework of the Court. Regulation 97(1) of the Regulations of the Court (the ‘Regulations’) addresses the right of a detained person to communicate with his or her counsel in the following terms: ‘A detained person shall be informed of his or her *right to communicate fully, where necessary with the assistance of an interpreter*, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68’ (emphasis added). Read in light of the protection afforded under article 67(1) of the Statute, this regulation addresses the special circumstances and status of detained persons and the need to give effect to their rights to communicate with counsel, through an interpreter if necessary.

15. Additionally, regulation 40(2) of the Regulations is also relevant in this context as it provides that ‘[t]he Registrar shall ensure that interpretation services are provided in all proceedings [...] [f]or the language of the person to whom article 58 applies, the accused, convicted or acquitted person if he or she does not fully understand or speak any of the working languages’.

V. Application of legal framework to the present case

16. In the case at hand, Mr Abd-Al-Rahman, exercising his right to defence and benefiting from legal assistance paid by the Court, freely chose a counsel who is fluent in one of the two

the State called upon the victim, it offered an interpreter and also stated that it was implementing a program to provide indigenous interpreters in Guerrero. The Court takes a positive view of both these steps. However, the inability to file a complaint and receive information in her language at the initial stages of this case implied treatment that did not consider Mrs. Rosendo Cantú’s situation of vulnerability based on her language and ethnicity, thereby constituting an unjustified impairment of her right to obtain justice. Accordingly, the Court considers that the State did not fulfil its obligation to guarantee, without discrimination, the right to have access to justice, according to Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof.’; *see also* IACtHR, *Fernández Ortega et al. v. México*, [Judgment](#), 30 August 2010, para. 201; IACtHR, *Barreiro Leiva v. Venezuela*, Merits, Reparations, and Costs, Judgment, 17 November 2009, para. 62; and, European Court of Human Rights, *Baytar v. Turkey*, [Judgment](#), 14 October 2014, paras 50, 54-55: ‘Furthermore, like the assistance of a lawyer, that of an interpreter should be provided from the investigation stage, unless it is demonstrated that there are compelling reasons to restrict this right [...]. 54. The Court takes the view that, as the applicant was not able to have the questions put to her translated and was not made aware as precisely as possible of the charges against her, she was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. Accordingly, it is questionable whether the choices made by the applicant without the assistance of an interpreter were totally informed. 55. The Court finds that this initial defect thus had repercussions for other rights which, while distinct from the right alleged to have been breached, were closely related thereto and undermined the fairness of the proceedings as a whole’.

working languages of this Court; but does not speak the same language as him.¹⁰ He is entitled to make this choice and it must be respected, as the right to freely choose counsel enshrined under article 67(1)(d) of the Statute is not subject to restriction or limitation on the basis of linguistic ability.¹¹

17. Accordingly, I agree with the judgment insofar as it finds that ‘the fact that a suspect and his counsel do not speak the same language and cannot communicate without assistance clearly has the potential to impact on the rights enshrined in article 67(1)(b) and (d) of the Statute.’¹² This state of affairs affects article 67 of the Rome Statute, translating in a possible impact on the fairness of the present case, which may have gross consequences in later stages of the proceedings.

18. Therefore, while I also agree with the Majority that ‘a solution must be found that allows communication to take place’,¹³ I find that the only appropriate solution for this issue is the provision of interpretation.¹⁴ I consider that, in the circumstances of the present case, Mr Abd-Al-Rahman should have access to the services of an interpreter to allow accused/counsel communication for defence preparations purposes in order to fulfil the rights guaranteed under article 67(1)(b) of the Rome Statute, implying an obligation on behalf of the Court. Such facility should be provided following a request by the defendant and an approval by the Registrar, complying with the requirements and restrictions contained in the Court’s statutory framework, namely regulation 83 of the Regulations.

19. This conclusion is reached by the recognition of the right to defence as both a guarantee of due process and a human right, not as a mere ‘minimum guarantee’ and through a systemic and systematic interpretation done in accordance with internationally recognized human rights, as required by article 21(3) of the Rome Statute, applying a *pro-persona* approach

¹⁰ [Appeal Brief](#), para. 26; [Impugned Decision](#), paras 5, 17; Prosecutor’s Response, para. 34, referring to Registrar’s Observations before the Pre-Trial Chamber, paras 4-5.

¹¹ Rule 21(2) of the Rules provides that ‘[t]he Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list’. Regulation 75(1) of the Regulations provides that: ‘If the person entitled to legal assistance chooses counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person’. While regulation 73(2) of the Regulations allows the Registrar to take into account, *inter alia*, the languages spoken by counsel in appointing duty counsel, there is no equivalent provision for the appointment of counsel of the accused’s choice.

¹² Judgment, para. 32.

¹³ Judgment, para. 32.

¹⁴ Judgment, para. 33.

recognizing that the right of defence is the only mean the accused has to face to punitive power of the international community exercised through this Court. I note that the Pre-Trial Chamber considered Mr Abd-Al-Rahman's request for interpretation services under article 67(1)(f) of the Statute in isolation, and, in rejecting it on this basis alone, without considering other relevant provisions of article 67(1) of the Statute, I find that it failed in its duty to ensure adequate protection for Mr Abd-Al-Rahman's rights.

VI. Conclusion

20. Acknowledging the dual nature of the right of defence, I am of the view that the legal framework contemplates the accused's right to choose his or her own counsel and to freely communicate with him or her, through an interpreter (if necessary) for the purposes of preparation of his or her defence. Assessing the circumstances of the present case against the relevant legal framework, I find that Mr Abd-Al-Rahman requires the assistance of an interpreter so that he is in a position to communicate with his counsel during the entire proceedings, for the purposes of preparing his defence. Finally, such interpretation services must be provided in the manner regulated by the Rome Statute and modulated according to his current circumstances, as agreed by the majority, taking note of his condition as a detained person.

21. In consequence, I find that the Pre-Trial Chamber erred in law by not ensuring the protection of the right of defence in the way elaborated above.

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



Judge Luz del Carmen Ibáñez Carranza

Dated this 5th day of November 2020
At The Hague, The Netherlands