

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: ICC-02/05-01/20

Date: **13 August 2020**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN

Public Document

Appeal Brief against Decision ICC-02/05-01/20-94

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

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1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) submits this document (“Brief”) in support of its appeal against decision ICC-02/05-01/20-94 issued by the Single Judge of the Honourable Pre-Trial Chamber II (“Honourable Single Judge”) on 10 July 2020 (“Decision under Appeal”),¹ pursuant to leave to appeal granted on 7 August 2020 (“Decision Granting Leave to Appeal”).²

SUMMARY OF PROCEEDINGS LEADING TO THE PRESENT APPEAL

2. By an urgent request of 25 June 2020 (“Request under Article 67(1)(f)”), the Defence moved the Honourable Single Judge to direct the Registry of the Court to make available to it such translation and interpretation services between Arabic and one of the working languages of the Court as are necessary for the preparation of Mr Ali Muhammad Ali Abd-Al-Rahman’s defence and for him to communicate with his defence team, from Friday, 26 June 2020 until further notice, in accordance with article 67(1)(f) of the Rome Statute (“Statute”).³

3. On 29 June 2020, the Registry filed observations in response to the Request under Article 67(1)(f) (“Registry’s Observations”).⁴

4. On 1 July 2020, the Defence sought leave to reply to the Registry’s Observations (“Request for Leave to Reply”).⁵ For the reasons stated in the Request for Leave to Reply, it was classified as confidential. Its existence was, however, made public by the Decision under Appeal.

5. On 9 July 2020, the Defence lodged a further request (“Request under Rule 20(1)(b)”),⁶ whereby it prayed the Honourable Single Judge to remind the Registry of the nature and extent of its obligations under rule 20(1)(b) of the Rules of

¹ [ICC-02/05-01/20-94](#): “Decision on the Defence request under article 67(1)(f) of the Rome Statute” (French version not available), 10 July 2020.

² [ICC-02/05-01/20-109](#): “Decision on the Defence Request for Leave to Appeal the ‘Decision on Defence request under article 67(1)(f) of the Rome Statute’” (French version not available), 7 August 2020.

³ [ICC-02/05-01/20-7](#): “*Requête en vertu de l’Article 67-1-f*”, 25 June 2020.

⁴ ICC-02/05-01/20-11: “Registry’s Observations on the ‘*Requête en vertu de l’Article 67-1-f*’ (ICC-02/05-01/20-7)” (French version not available), 29 June 2020.

⁵ ICC-02/05-01/20-13-Conf: “*Requête aux fins de: 1/ reclassification des écritures ICC-02/05-01/20-11 en vertu de la norme 23bis-2 et 2/ autorisation d’y répliquer en vertu de la norme 24-5*”, 1 July 2020.

⁶ [ICC-02/05-01/20-93](#): “*Requête en vertu de la règle 20-1-b*”, 9 July 2020.

Procedure and Evidence (RPE) regarding the provision of support, assistance and information necessary for the fulfilment of the defence remit, and to make available to the Defence, immediately and without further advance request, such interpretation services as it will require on the basis of regulation 58 of the Regulations of the Registry (RoR) pending a final ruling on the Request under Article 67(1)(f).

6. On 10 July 2020, the Honourable Single Judge handed down the Decision under Appeal, which rejected in every respect the Request under Article 67(1)(f) and the Request for Leave to Reply.⁷

7. On 16 July 2020, the Defence applied for leave to appeal against the Decision under Appeal (“Request for Leave to Appeal”).⁸

8. The Honourable Single Judge granted leave to appeal on 7 August 2020.⁹

9. This Brief is filed within the time set by regulation 65(4) of the Regulations of the Court (RoC) following notification of the Decision Granting Leave to Appeal.

ISSUES PUT TO THE APPEALS CHAMBER FOR CONSIDERATION

10. At paragraph 7 of the Request for Leave to Appeal, the Defence sought leave to appeal under article 82(1)(d) of the Statute on the ground that the Decision under Appeal involved the issue as to

[TRANSLATION] whether Mr Ali Muhammad Ali Abd-Al-Rahman’s right under article 67(1)(f) of the Statute to interpretation services between the only language which he fully understands and speaks – Arabic – and at least one of the Court’s two working languages – English and French – is conditional upon his entitlement to legal assistance paid by the Court pursuant to article 67(1)(d) of the Statute and/or upon the scope and content of that legal assistance.¹⁰

11. At paragraph 12 of the Decision Granting Leave to Appeal, the Honourable Single Judge, relying on the Chamber’s discretion to reformulate issues for consideration by the Appeals Chamber, rephrased the issue as follows:

⁷ [ICC-02/05-01/20-94](#), *op. cit.*

⁸ [ICC-02/05-01/20-97](#): “*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)*”, 16 July 2020.

⁹ [ICC-02/05-01/20-109](#), *op. cit.*

¹⁰ [ICC-02/05-01/20-97](#), *op. cit.*, para. 7.

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').¹¹

12. The issue to be put before the Honourable Appeals Chamber for consideration as reformulated in the Decision Granting Leave to Appeal is significantly narrower in scope and ambit than the issue on which the Defence sought leave to appeal. Its resolution, which, as shown below, requires no more than that effect be given to the letter of regulation 97(1) of the RoC, would do little to advance the proceedings. Unless the wider issue of the relationship between article 67(1)(f) and article 67(1)(d) of the Statute is referred to it, the Honourable Appeals Chamber will not be in a position to cure the proceedings against Mr Ali Muhammad Ali Abd-Al-Rahman of all present and future violations of his article 67(1)(f) right. For that right is not limited to the needs of his communication with his defence team, as circumscribed by the reformulation of the issue effected in the Decision Granting Leave to Appeal and as laid down by regulation 97(1) of the RoC. It is substantially broader and extends to all language services between Arabic and one of the two working languages of the Court which an interpreter placed at the disposal of the Defence team may provide, such as in its interaction with possible witnesses, intermediaries and resource persons or the analysis of documents, including audio and video files transmitted by the Office of the Prosecutor. This list of other services is not intended to be exhaustive. Resolution by the Appeals Chamber of only the issue reformulated in the Decision Granting Leave to Appeal would leave all of these other issues unanswered and would either necessitate further applications and appeals by the Defence on those related aspects, thus needlessly delaying the proceedings, or would constitute an unresolved violation of Mr Ali Muhammad Ali Abd-Al-Rahman's article 67(1)(f) right capable of invalidating the entire proceedings against him at the conclusion of the penal phase. The fair and expeditious conduct of the proceedings therefore calls for the resolution of the entirety of the issue stated by the Defence in

¹¹ [ICC-02/05-01/20-109](#), *op. cit.*, para. 12.

its Request for Leave to Appeal rather than reducing it to the ambit of the issue reformulated in the Decision Granting Leave to Appeal.

13. The Defence does not dispute the power of the Pre-Trial and Trial Chambers to set out their views on what issues ought to come for consideration before the Honourable Appeals Chamber. Although it is not the purpose or *raison d'être* of decisions granting leave to appeal to reformulate, specify, clarify, amend or bolster the reasons for decisions under appeal,¹² the Defence sees in the reformulation of issues a legitimate discharge of the duty to give reasons for decisions granting leave to appeal – as opposed to decisions under appeal – pursuant to article 74(5) of the Statute as it applies to interlocutory rulings.¹³

14. However, the Defence respectfully submits that the exercise of this discretion by a Chamber granting leave to appeal cannot bind the Honourable Appeals Chamber or limit the exercise of its jurisdiction over all issues involved in the decision under appeal. Under article 82(1)(d) of the Statute, appeal lies from a “decision”, not from an “issue”. The “issue” is merely the criterion in respect of which leave to appeal may be granted under article 82(1)(d) and it must be “involved”, that is to say contained, in the “decision” under appeal. But once the “issue” criterion is satisfied, it is the entire “decision” on which appellate jurisdiction is brought to bear. Both of the precedents adverted to in paragraph 12 of the Decision Granting Leave to Appeal support the Defence’s analysis on this point.

15. In its Judgment in the *Situation in the Democratic Republic of the Congo* (ICC-01/04),¹⁴ cited in the Decision Granting Leave to Appeal, the Honourable Appeals Chamber confirmed that “the Pre-Trial or Trial Chamber is vested with power to state, **or more accurately still, to certify** the existence of an appealable issue.”

¹² [ICC-01/04-01/06-2205 OA16](#): “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, 8 December 2009, para. 92.

¹³ [ICC-01/04-01/06-774 OA6](#): “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, paras. 33-34.

¹⁴ [ICC-01/04-168 OA3](#): “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, para. 20.

[Emphasis added]. It does so “on its own accord” or, “[i]f it fails to address the appealability of an issue it may do so on the application of any party to the proceedings”. Where a Chamber certifies an appeal of its own accord, it necessarily determines which issue or issues are put to the Honourable Appeals Chamber, inasmuch as the exercise of the power to certify entails formulating an issue. But where, as in these proceedings, a party seeks a Chamber’s leave to appeal, the role of the Chamber is not to “state” but to “certify” the appealability of the issue on which its leave is sought. Once the existence of an appealable issue is certified, nothing in the Judgment cited casts doubt on the authority of the Honourable Appeals Chamber to exercise jurisdiction over all aspects of the decision under appeal.

16. In its decision in the situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (ICC-01/13),¹⁵ the Honourable Pre-Trial Chamber I exercised the authority which vests in it so as to reason its decision granting leave to appeal by reformulating one of the issues raised by the appellant. However, the appellant, in its appeal brief, did not call into question the reformulation effected in the decision granting leave to appeal and, unlike in the case at bar, did not invite the Honourable Appeals Chamber to bring its jurisdiction to bear on the aspects or issues left out of account in the decision granting leave to appeal.¹⁶ This did not prevent the Honourable Appeals Chamber from looking at the choice and order of issues certified for appeal, thereby exercising its jurisdiction over all aspects of the matter before it.¹⁷

17. The Honourable Appeals Chamber also had occasion, in a different case, to exercise its competence to determine whether and to what extent “the issues raised

¹⁵ [ICC-01/13-73](#): “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”” (French version not available), 18 January 2019, para. 39.

¹⁶ [ICC-01/13-85 OA2](#): “Prosecution Appeal Brief” (French version not available), 11 February 2019, paras. 7-14.

¹⁷ [ICC-01/13-98 OA2](#): “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”” (French version not available), 2 September 2019, paras. 34, 56.

for consideration derive from the Impugned Decision”,¹⁸ noting “that these issues, if not addressed and placed in their proper context, could have an impact on the conduct of the proceedings” and confirming “that the [...] issues raised for consideration [were] appropriately before the Appeals Chamber.”¹⁹ In that instance the Honourable Appeals Chamber agreed with the issues raised, but the fact that it saw fit to say so necessarily means that it had first exercised its competence to ascertain the validity and relevance of the issues raised, as the Defence invites it to do at present, and that it could have decided otherwise.

18. Lastly, the Honourable Appeals Chamber’s exercise of its competence to assess the validity, relevance and scope of “issues” involved in “decisions” under appeal which come before it for determination is consonant with the exercise by a court of jurisdiction to determine its own jurisdiction [*compétence de la compétence* or *Kompetenz-Kompetenz*] as established in previous decisions of this Court²⁰ by reference to article 36(6) of the Statute of the International Court of Justice (ICJ) and the decisions of that court, pursuant to which,

[s]ince the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.²¹

The Honourable Appeals Chamber has itself exercised its *compétence de la compétence* on a number of occasions, holding for example that it lacked jurisdiction to issue clarifications²² and asserting its jurisdiction to address and comment upon

¹⁸ [ICC-01/04-01/06-1433 OA11](#): “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, 11 July 2008, para. 14.

¹⁹ *Ibid.*, para. 19.

²⁰ [ICC-02/04-01/05-147](#): “Public Redacted Version of the Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005” (French version not available), 9 March 2006, paras. 22-24.

²¹ International Court of Justice, [Judgment of November 18th, 1953, Nottebohm case \(Liechtenstein v. Guatemala\)](#), ICJ Reports 1953, p. 119. See also the references to other ICJ judgments in footnotes 31 and 32 of decision [ICC-02/04-01/05-147](#), cited above.

²² [ICC-02/05-138 OA-OA2-OA3](#): “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 6 December 2007” (French version not available), 18 June 2008, paras. 18-19.

hypothetical questions.²³ In asking it to determine for itself the nature and exact scope of the issue over which the exercise of its jurisdiction is sought in the present appeal, the Defence merely invites the Honourable Appeals Chamber to exercise, again, its *compétence de la compétence*.

19. The Defence therefore prays the Honourable Appeals Chamber to exercise its jurisdiction over all aspects of the Decision under Appeal by extending its inquiry to the entirety of the issue posed at paragraph 7 of the Request for Leave to Appeal rather than confining itself to the limited ambit of the issue reformulated at paragraph 12 of the Decision Granting Leave to Appeal. The reformulated issue should be regarded solely as part of the reasons for the Decision Granting Leave to Appeal, casting light on the Honourable Single Judge's viewpoint in the Decision under Appeal. The Defence's grounds of appeal are stated on the basis of the issue stated in its Request for Leave to Appeal. In the unlikely event that the Honourable Appeals Chamber should confine its inquiry to the issue reformulated in the Decision Granting Leave to Appeal, it will be for the Appeals Chamber to entertain these submissions in the light of the limited ambit of that issue alone.

GROUND OF APPEAL AND SUPPORTING ARGUMENTS

20. It is not disputed that the only language which Mr Ali Muhammad Ali Abd-Al-Rahman fully understands and speaks is Arabic.²⁴ Article 50(2) of the Statute provides that English and French are the working languages of the Court.

21. In the Decision under Appeal, the Honourable Single Judge held that the right to translation and interpretation as set out in article 67(1)(f) of the Statute was not an absolute right:

A textual interpretation of [article 67(1)(f)] thus indicates that it 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. Rather, article 67(1)(f) of the Statute gives the defendant a right, subject to the Chamber's appreciation, to understand that everything that happens in the proceedings against him or her, which

²³ [ICC-01/04-01/06-1433 OA11](#), *op. cit.*, paras. 39, 52-54.

²⁴ <https://www.legal-tools.org/doc/ut4g7z/pdf>, p. 20, line 1.

does not include private and privileged communications between the defendant and his or her Defence team.²⁵

The Honourable Single Judge also held that the needs of the person charged, as regards communication with his or her Defence team, were to be met solely from the funds accorded by way of legal assistance paid by the Court, and that Lead Counsel who agreed to defend a person charged whose language he or she did not speak bears responsibility for meeting the costs of their communication solely from the legal assistance:

[I]t is the responsibility of a Defence Counsel who has accepted to defend a suspect with whom he or she cannot communicate in any language to use the legal aid funds to which the suspect is entitled to ensure that his or her client's needs in terms of communication with the Defence Counsel are adequately satisfied.²⁶

The Defence submits that these three conclusions of the Honourable Single Judge were affected by an error of law, prompted largely by the Registry's Observations, which consisted of relying on an overly reductive definition of the word "proceedings" within the meaning of article 67(1)(f) of the Statute and disregarding the letter of regulation 97(1) of the RoC. The Defence will discuss these three alternative grounds of appeal in turn. The Decision under Appeal may be reversed on any one, or more, of these three grounds of appeal.

First ground of appeal – error of law: definition of "proceedings" within the meaning of article 67(1)(f) of the Statute

22. The rejection of the Request under Article 67(1)(f) is predicated, first, on a reductive definition of the word "proceedings", within the meaning of article 67(1)(f) of the Statute, as excluding communication between the person charged and his or her counsel. That reductive view was directly influenced by the Observations of the Registry, which attempted to circumscribe the right to translation and interpretation vested by article 67(1)(f).

23. First, the Registry argued at paragraphs 12-15 of its Observations for a reductive reading of article 67(1)(f), according to which the right to translation and

²⁵ [ICC-02/05-01/20-94](#), *op. cit.*, para. 15.

²⁶ [ICC-02/05-01/20-94](#), *op. cit.*, para. 17.

interpretation is not an absolute right like the other rights of the Defence enumerated in article 67 and does not apply to communication between Mr Ali Muhammad Ali Abd-Al-Rahman and his defence team. That reductive reading is relied on at paragraph 15 of the Decision under Appeal and rested on irrelevant references to authority about the right to translation of documents disclosed by the Office of the Prosecutor. The fact that a person charged is not entitled to receive all court documents and evidence in a language that he or she fully understands and speaks²⁷ does not mean that he or she is not entitled to the translation and interpretation services for which article 67(1)(f) provides. Quite the opposite: such services are made even more essential by the fact that not all documents are translated. For instance, the Registry omits to state that the decision on which it relies at paragraph 13 of its Observations is the very one which afforded the person charged the permanent services of an interpreter working between the Court's two working languages for the purposes of the preparation of his Defence.²⁸ The Registry also omits to state that the permanent aid of translation and interpretation services has been afforded to persons charged²⁹ even where they were not eligible for legal assistance paid by the Court,³⁰ and that the Honourable Appeals Chamber has itself held that the right to interpretation – construed inclusively and irrespectively of the language skills of the Defence team³¹ – is “a *sine qua non* for the holding of a fair trial.”³²

24. The Registry's assertion that “the communication between counsel and client is not in itself part of the proceedings, so it cannot be said that it falls *stricto sensu* into the invoked sub-paragraph of article 67 of the Statute” did not rest on any definition,

²⁷ ICC-02/05-01/20-11, *op. cit.*, para. 12.

²⁸ [ICC-01/04-01/06-268](#): “Decision on the Requests of the Defence of 3 and 4 July 2006”, 4 August 2006, pp. 7-8.

²⁹ [ICC-01-05-01/08-307](#): “Decision on the Defence's Request Related to Language Issues in the Proceedings”, 4 December 2008 (French version not available), para. 18.

³⁰ [ICC-01/05-01/08-76-tENG](#): “Registrar's Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo”, 25 August 2008, p. 8.

³¹ [ICC-01/04-01/07-522 OA3](#): “Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’”, 27 May 2008, paras. 49, 59.

³² [ICC-01/04-01/07-522 OA3](#), *op. cit.*, para. 41.

reference or previous decision of the Court. It makes no sense in so far as Counsel is the main point of contact through whom the person charged is able to understand and follow the proceedings and decide whether it is expedient to exercise his or her procedural rights and how to do so. That reading is also utterly incompatible with the right of every detained person “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]” vested by regulation 97(1) of the RoC, a provision of which the Registry, which oversees detention, could not have been unaware, and in respect of which it failed in its duty to provide neutral and impartial information for the consideration of the Honourable Single Judge, and thereby misled him. The granting of interpretation services for the purposes of communication between the person charged and his or her defence team is contemplated specifically by regulation 97(1) of the RoC. The Registry’s assertion to the contrary is therefore without merit, and the Decision under Appeal was wrong in law to rely on it.

25. To the extent that it relied on the Registry’s narrow concept of “proceedings” as excluding communication between the person charged and his or her client,³³ without granting the Defence leave to reply,³⁴ the Decision under Appeal repeated the errors of law committed in the Registry’s Observations. The Defence, having been rebuked once before for entering into substantive argument in its applications for leave to reply,³⁵ was not in a position to alert the Honourable Single Judge to the incompatibility of the Registry’s submissions with the letter of regulation 97(1) of the RoC in its Request for Leave to Reply. If, rather than considering that he had enough information before him, the Honourable Single Judge had granted the Request for Leave to Reply, the Defence would have been able to direct his attention to the letter of regulation 97(1) of the RoC and to correct the error of law prompted by the Registry’s Observations before the Decision under Appeal was handed down.

³³ [ICC-02/05-01/20-94](#): *op. cit.*, paras. 11-12.

³⁴ [ICC-02/05-01/20-94](#): *op. cit.*, para. 15.

³⁵ [ICC-02/05-01/20-8](#): “Decision on the Defence request to amend the name of the case” (French version not available), 26 June 2020, para. 12.

Denial of the Request for Leave to Reply precluded the Honourable Single Judge from being apprised in time of the letter of regulation 97(1) of the RoC and led him to make the same error of law as the Registry in the Decision under Appeal.

26. The references in the Decision under Appeal to a series of decisions of the ECtHR – which are irrelevant and do not cast any doubt on the Defence’s view – and to the Code of Professional Conduct for counsel are without bearing on the fundamental error, prompted by the Registry’s Observations, as to the restrictive definition of the word “proceedings” and the disregard for the letter of regulation 97(1) of the RoC. Those references instead confirm that Lead Counsel has done and continues to do his utmost, by judicious use of the funds afforded to him under the head of legal assistance, to mitigate temporarily and in part the effects of the Registry’s unjustified refusal to make available to him the translation and interpretation services required by article 67(1)(f) of the Statute and regulation 97(1) of the RoC.

27. The error of law, at paragraph 15 of the Decision under Appeal, of relying on an overly restrictive definition of the word “proceedings” within the meaning of article 67(1)(f) of the Statute that is incompatible with regulation 97(1) of the RoC, and of disregarding the letter of that regulation, had a substantial impact on the legality of the Decision and on Mr Ali Muhammad Ali Abd-Al-Rahman’s right to the translation and interpretation services required by the Court’s instruments for the preparation of his defence. This error has unduly protracted the period during which the Defence team has been deprived of the services of an interpreter to enable it to communicate with Mr Ali Muhammad Ali Abd-Al-Rahman and others, thus significantly affecting the preparation of his defence.

Second ground of appeal – error of law: the limitation of the right to interpretation on the basis of eligibility for legal assistance and/or the content of the legal assistance budget

28. By making the granting of interpretation services for the purposes of communication between the charged person and his Counsel contingent on

eligibility for legal assistance paid by the Court and on its budget,³⁶ the Decision under Appeal also erred in law by restating the Registry's baseless Observations among its reasons.

29. As it has already contended in its Request under Article 67(1)(f), the Defence submits that the right to

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 or documents presented to the Court are not in a language which the accused fully understands and speaks

is not subject to any precondition connected to eligibility for the legal assistance paid by the Court governed by article 67(1)(d) of the Statute or connected to the scope of the legal assistance paid by the Court governed by regulation 83 of the RoC and the "Registry's single policy document on the Court's legal aid system" ("Legal Aid Policy").³⁷

30. Neither the Rome Statute nor its subordinate instruments make the article 67(1)(f) right conditional upon the granting under article 67(1)(d) of the legal assistance paid by the Court. Quite the opposite: regulation 97(1) of the RoC provides for the assistance of an interpreter "*where necessary*" for the specific needs of a detained person's communication with his or her counsel and/or assistants to counsel, with no condition of eligibility for legal assistance paid by the Court. Likewise, regulations 57(1) and 58 of the RoR provide for interpretation and translation services to be made available by the Registry with no prerequisite of eligibility for legal assistance paid by the Court.

31. The inclusion in regulation 83(1) of the RoC of "translation and interpretation costs" under the head of reasonably necessary costs covered by legal assistance paid by the Court cannot, alone, call into question the letter of article 67(1)(f) of the Statute – which is hierarchically superior to it – or the letter of regulation 97(1) of the RoC – which is on a par with it. This holds particularly true given that, despite its general

³⁶ [ICC-02/05-01/20-94](#), *op. cit.*, para. 17.

³⁷ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf.

reference to regulation 83(1) in section 15(1),³⁸ the Legal Aid Policy does not include a chapter on expenses relating to interpretation services granted by way of legal assistance. The fact that the documents governing the content and scope of legal assistance do not contain specific provisions as to the implementation of the right to interpretation and translation services under article 67(1)(f) of the Statute and regulation 97(1) of the RoC can be understood one of two ways: either as meaning that the granting of interpretation and translation services under article 67(1)(f) is not conditional on eligibility for legal assistance paid by the Court – which is the Defence’s understanding – or as an omission. In the latter case, the omission of interpretation and translation services from the documents governing legal assistance cannot call into question the right enshrined in article 67(1)(f) of the Statute, which takes precedence over the documents, and in regulation 97(1) of the RoC, which is on a par with or takes precedence over them; it is in the light of those provisions that the instruments governing legal assistance paid by the Court must be interpreted.

32. As none of the instruments governing legal assistance paid by the Court explicitly makes the right to interpretation and translation services conditional on a person’s eligibility for legal assistance, in order to place reliance on such a condition and restriction it is necessary to engage in an exercise of interpretation of those instruments. It is the consensus of the Honourable Pre-Trial Chamber,³⁹ the Honourable Trial Chamber⁴⁰ and the Honourable Appeals Chamber⁴¹ of the Court, as well of its Presidency,⁴² that the provisions of the Rome Statute must be

³⁸ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf, section 15(1).

³⁹ For example, [ICC-01/04-01/06-1](#): “Decision on the Prosecutor’s Application for a warrant of arrest, Article 58”, 10 February 2006, para. 42.

⁴⁰ For example, [ICC-01/04-01/07-1213-tENG](#): “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, 16 June 2009, para. 31.

⁴¹ For example, [ICC-01/04-168 OA3](#): “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, para. 33.

⁴² For example, [ICC-01/04-01/06-2138-AnxIII](#): “Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence” (French version not available), 23 September 2009, p. 5.

interpreted in accordance with the principles of interpretation set out at articles 31 and 32 of the Vienna Convention of 23 May 1969 on the Law of Treaties.⁴³ Among them, article 31(1) provides that treaties are to be interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*” (emphasis added); article 31(2)(b) makes reference, for interpretation purposes, to “*any instrument [...] accepted by the other parties as an instrument related to the treaty*”, which, in the case of the Statute, denotes the other instruments subordinate to it in the hierarchy of the Court’s instruments, such as the RPE, the RoC and the RoR; and article 31(3)(c) sets forth that “[t]here shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties” – another reference to the relevant provisions of the Court’s other instruments, which include the RPE, the RoC and the RoR. On the basis of these principles of interpretation, the general provisions governing legal assistance paid by the Court on which the Registry relies must be interpreted in the light of their context, which includes, if relevant, the provisions of the Court’s other instruments, including article 67(1)(f) of the Statute, regulation 97(1) of the RoC and regulations 57 and 58 of the RoR. These instruments preclude an interpretation of a general provision on legal assistance that would run counter to their relevant express provisions on the right to receive interpretation and translation services. Since article 67(1)(d) of the Statute does not make interpretation and translation services contingent on eligibility for legal assistance, and since to interpret it thus would be incompatible with the letter of article 67(1)(f) of the Statute, the letter of regulation 97(1) of the RoC and the letter of regulations 57 and 58 of the RoR, an interpretation in that sense must be ruled out.

Third ground of appeal - error of law: the consideration afforded to the language skills of Counsel and/or the Defence team

33. Lastly, the Decision under Appeal committed a third error of law by considering the language skills of Lead Counsel and/or the Defence team as a

⁴³ United Nations, “[Vienna Convention of the Law of Treaties](#)”, 23 May 1969, articles 31-32.

criterion relevant to the right of the person charged to receive interpretation and translation services under article 67(1)(f) of the Statute.

34. This third error of law was also prompted by the Registry's Observations. At paragraphs 16 to 21 of its Observations, the Registry put forward an unprecedented interpretation of a charged person's free choice of Counsel and team, seeking to circumscribe that choice on the basis of their language skills. It is that submission on which the Decision under Appeal draws at paragraph 17. That submission is in conflict with the position taken in the Honourable Appeals Chamber's decisions which has made clear that the language skills of the Defence team were without prejudice to a defendant's right to receive the services of an interpreter under article 67(1)(f).⁴⁴ The Registry's attempt to interfere in Mr Ali Muhammad Ali Abd-Al-Rahman's exercise of his free choice of Counsel on a ground that is fallacious and contrary to the Appeals Chamber's position entails discrimination on the part of the Registry against defendants who do not have a command of either of the Court's working languages and whose choice of Counsel would be dictated by the need to select a Counsel with a thorough command of their language as well as the Court's two working languages, even though regulation 97(1) of the RoC expressly provides for interpretation services to be made available for the purposes of communication between Counsel, his or her Defence team and his or her client. The Registry's stance undermines the Court's mission of universality by limiting its capacity to try persons who do not have a command of its working languages. If the Registry was thereby seeking to prompt Mr Ali Muhammad Ali Abd-Al-Rahman to choose a different Counsel, that stance also calls for a reminder from the Honourable Appeals Chamber about the Registry's duties of neutrality and respect for Counsel.

35. The reasons which informed Mr Ali Muhammad Ali Abd-Al-Rahman's choice of Counsel are personal and his affair alone. Insofar as he chose to keep on as his Lead Counsel the Duty Counsel who had been assigned to him for his first appearance hearing, despite Counsel's lack of proficiency in Arabic, his choice may

⁴⁴ [ICC-01/04-01/07-522 OA3](#): *op. cit.*, para. 59.

have been informed by privileged discussions that he might have had with Lead Counsel while preparing for his first appearance, including those related to devising and developing his defence strategy. Certain striking, novel and specific elements of this strategy relating to, for instance, the funding of the Court's activities by the United Nations⁴⁵ or the precedence given to reparations for victims of the Situation without the prerequisite of a conviction,⁴⁶ have already been brought up-to-date through action taken by the Defence. While the Registry may show that Arabic-speaking Counsel are available in the list of Counsel, it cannot however prove that there are any other Counsel who would have taken such action on behalf of Mr Ali Muhammad Ali Abd-Al-Rahman, since that action was unprecedented. The Registry's suggestion that a command of Arabic should have been the overriding criterion in Mr Ali Muhammad Ali Abd-Al-Rahman's choice of defence team⁴⁷ is thus tantamount to refusing him the choice of a Counsel willing to follow the novel and distinct defence strategy elaborated with his Counsel. That suggestion cannot be accepted by the Honourable Appeals Chamber.

36. Turning to the composition of the Defence team, the fact that it includes an Arabic-speaking Case Manager cannot, alone, fulfil the right to receive interpretation and translation services pursuant to article 67(1)(f) of the Statute. That submission is antithetical to the above-mentioned position of the Appeals Chamber.⁴⁸ It is without merit, since command of a language does not qualify a person as an interpreter or a translator, which are professional occupations, each requiring specific training and specific expertise, and the Case Manager role already involves a full-time workload for the purpose of performing tasks that are important to the preparation of the defence but incompatible with the addition specifically of interpretation and translation services on a long-term basis. Hence, it is beside the point that Mr Ali Muhammad Ali Abd-Al-Rahman's Defence team has made arrangements to compensate for the Registry's temporary refusal to grant it interpretation and

⁴⁵ [ICC-02/05-01/20-10](#): "Requête en vertu de l'Article 115-b", 26 June 2020.

⁴⁶ [ICC-02/05-01/20-98](#): "Requête et observations sur les réparations en vertu de l'Article 75-1", 17 July 2020.

⁴⁷ ICC-02/05-01/20-11, *op. cit.*, para. 19.

⁴⁸ [ICC-01/04-01/07-522 OA3](#) : *op. cit.*, paras. 41, 49, 59.

translation services on a permanent basis. Those arrangements are to the credit of Lead Counsel's judicious management of the funds accorded by way of legal assistance paid by the Court and cannot be used as a ground for further depriving Mr Ali Muhammad Ali Abd-Al-Rahman of his right to interpretation and translation services under article 67(1)(f) of the Statute and regulation 97(1) of the RoC.

37. The consideration given to the language skills of Counsel and the Defence team in the Decision under Appeal also appears to be prompted by the concerns expressed in the Registry's Observations regarding the financial impact of the request for the interpretation and translation services required by the instruments.⁴⁹ Yet, those concerns were of no substance given that the Registry did not take the trouble to prove the potential cost of the expense or to compare it with the foreseeable costs of all the translation and interpretation services that Lead Counsel will have to request repeatedly – interpretation of meetings, translation of documents, etc. – so as to be in a position to prepare Mr Ali Muhammad Ali Abd-Al-Rahman's defence. Those costs will inevitably be augmented by the administrative costs inherent in processing those repeated requests for language services and the cost of repeated delays to the proceedings, as language services cannot be obtained unless requested with the 10 days' notice stated at regulation 58(3) of the RoC. The financial impact argument remains, moreover, of limited relevance since the Court's decisions do not in any way countenance the violation of a fair trial safeguard, such as the one in article 67(1)(f) of the Statute, on the ground of costs arising from respecting that safeguard.⁵⁰ The Court has also ruled that the responsibility of Chambers to safeguard the fairness of the proceedings cannot be limited by the Registry's financial responsibility for the management of the Court's budget.⁵¹ Therefore, the financial argument, which has not been substantiated, cannot prevail over the legal considerations and the safeguarding of the right of Mr Ali Muhammad

⁴⁹ ICC-02/05-01/20-11, *op. cit.*, paras. 16, 20.

⁵⁰ [ICC-01/04-01/06-1974](#): "Decision on discrepancies between the English and the French Transcripts and related issues" (French version not available), 18 June 2009, paras. 36-37.

⁵¹ [ICC-01/05-01/08-567-Red](#): "Public Redacted Version of 'Decision on legal assistance for the accused'" (French version not available), 26 November 2009, paras. 71-74, 77-82, 106, 110.

Ali Abd-Al-Rahman to interpretation and translation services under article 67(1)(f) of the Statute. The Decision under Appeal thus erred in repeating this argument by taking into account the Defence team's language skills.

38. The Defence therefore moves the Honourable Appeals Chamber to confirm that article 67(1)(f) of the Rome Statute establishes the right of Mr Ali Muhammad Ali Abd-Al-Rahman to receive, on a permanent basis, the necessary interpretation and translation services between Arabic and one of the Court's working languages – including, but not exclusively – for the purposes of his communication with his Defence team under regulation 97(1) of RoC, with no condition of eligibility for legal assistance paid by the Court under article 67(1)(d) of the Statute and irrespective of the language skills of his Counsel or his defence team. On that basis, the Decision under Appeal must be reversed for error of law and the Registry must be ordered to promptly provide the Defence team for Mr Ali Muhammad Ali Abd-Al-Rahman with an interpreter and translation services between Arabic and one of the Court's two working languages such as are necessary to meeting the requirements of fairness for the duration of the proceedings in the instant case, and including but not exclusively, for the purposes of communication with his Counsel.

REQUEST UNDER ARTICLE 82(3) OF THE STATUTE AND RULE 156(5) OF THE RPE

39. Even before it filed its Request under Article 67(1)(f), the Defence had brought to the Registry's attention the urgency of its request for interpretation services.⁵² The Request was filed as "Urgent". That same day, at 17.11, Pre-Trial Chamber II informed the Defence by email that the Honourable Single Judge saw no need to dispose of the Request as a matter of urgency and invited submissions from the Registry. Since then, the Defence has made every effort to underscore the urgency of the provision of interpretation services for its meetings with Mr Ali Muhammad Ali Abd-Al-Rahman. The Defence has been able to continue communicating with him for the time being thanks to the language skills of its Case Manager, but with the

⁵² [ICC-02/05-01/20-7](#): *op. cit.*, paras. 3-5.

trade-off that the Case Manager has had to devote to that activity a significant amount of the time usually spent organizing and managing the Defence case. By its Request under Rule 20(1)(b),⁵³ the Defence moved the Honourable Single Judge to order that, immediately and without further advance request, such interpretation services be made available to the Defence as it will require on the basis of regulation 58 of the RoR pending a final ruling on the Request under Article 67(1)(f). That Request remains unadjudicated. Correspondence between the Defence and the Registry shows that the latter intends to capitalize on the fact that the request was pending determination elsewhere to delay the nevertheless inevitable provision of interpretation services.⁵⁴

40. The Registry cannot benefit from its failure to discharge its duty to provide information to the Honourable Single Judge by not drawing his attention to regulation 97(1) of the RoC in its Observations and by encouraging him to issue the Decision under Appeal which is affected by this flagrant error of law and thus delay further the provision to the Defence of the interpretation and translation services required by the instruments, pending the Decision of the Honourable Appeals Chamber. The mere fact that this issue remains pending does not relieve the Registry of its obligations under rule 20(1)(b) of the RPE, regulation 97(1) of the RoC and regulations 57 and 58 of the RoR.

41. The Defence therefore requests, at a minimum, that the Honourable Appeals Chamber order – as an interim measure under article 82(3) of the Statute and rule 156(5) of the RPE – the Registry to comply with regulation 97(1) of the RoC pending resolution of the broader issue put before the Honourable Appeals Chamber by way of the present appeal. The criteria in article 82(3) and rule 156(5) of the RPE⁵⁵ are fully met by this appeal. The terms of regulation 97(1) of the RoC are clear and unequivocal as regards Mr Ali Muhammad Ali Abd-Al-Rahman's right to receive "*where necessary*" the assistance of an interpreter to communicate with his Counsel,

⁵³ [ICC-02/05-01/20-93](#): *op. cit.*

⁵⁴ [ICC-02/05-01/20-93](#): *op. cit.*, para. 4.

⁵⁵ [ICC-01/04-01/06-1290](#): "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, para. 8.

without prejudice to the determination that the Honourable Appeals Chamber will make on the broader issue of the relationship between article 67(1)(d) and article 67(1)(f) of the Statute. Continued refusal to grant the interpretation services required by regulation 97(1) of the RoC would likely create an irreversible situation in which the Defence would continue to be deprived, for an extended period, of the requisite interpretation services for its preparation and of a significant amount of its Case Manager's time; meanwhile, the Office of the Prosecutor has begun disclosing hundreds of documents it intends to tender as evidence. Continued denial of such resources to the Defence at so critical a juncture in the proceedings would irreversibly harm its preparation, which only a subsequent determination of the present appeal in favour of the Defence could set right.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER to

GRANT the present appeal and **REVERSE** the Decision under Appeal;

ORDER that the services of an interpreter and translation services between Arabic and one of the Court's two working languages be made available to Mr Ali Muhammad Ali Abd-Al-Rahman's Defence team for the duration of the proceedings in the instant case; and

ORDER that the present appeal have suspensive effect and, as an interim measure, **DIRECT** the Registry to make interpretation services available to meet the urgent needs of the Defence pending the Honourable Appeals Chamber's decision on the present appeal.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 13 August 2020

At The Hague, Netherlands