



**Original: English**

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

**Date: 10 July 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 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*

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## **REGISTRY**

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**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,<sup>1</sup> issues this Decision on the Defence request under article 67(1)(f) of the Rome Statute (the ‘Request’).<sup>2</sup>

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Rome Statute (the ‘Statute’)<sup>3</sup> and decided<sup>4</sup> to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)<sup>5</sup> for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (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 Statute<sup>6</sup> by issuing a second warrant of arrest against Mr Abd-Al-Rahman<sup>7</sup> for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (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 12 June 2020, the Chamber decided to sever the case against Mr Abd-Al-Rahman from the case of *The Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).<sup>8</sup>

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

<sup>2</sup> 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).

<sup>3</sup> 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).

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

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

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

5. On 15 June 2020, Mr Abd-Al-Rahman made his first appearance before the Single Judge and, on that occasion, he indicated that Arabic is the language he fully understands and speaks.<sup>9</sup>

6. On 25 June 2020, the Defence submitted the Request asking the Single Judge to (i) urgently order the Registry to provide the Defence team with the interpretation and translation services that are necessary for the preparation of the suspect's defence and for his communication with the Defence team, as of Friday 26 June 2020, pursuant to article 67(1)(f) of the Statute; and, in the meantime, (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.<sup>10</sup>

7. On 29 June 2020, following the Single Judge's order,<sup>11</sup> the Registry submitted its observations on the Request, arguing, *inter alia*, that the request 'has no legal basis', 'is not reasonable and not adequately justified', and 'should be dismissed accordingly' (the 'Registry's Observations').<sup>12</sup>

8. On 1 July 2020, the Defence submitted a request asking the Single Judge to (i) order the reclassification as confidential of the Registry's Observations (the 'Request for Reclassification'); and (ii) grant the Defence a leave to reply (the 'Request for Leave to Reply').<sup>13</sup>

## **I. THE REQUEST FOR RECLASSIFICATION**

9. The Defence submits that the Registry's Observations contain and refer to information on the management of legal assistance paid by the Court, which shall be treated confidentially according to regulation 130 of the Regulations of the Registry. Accordingly, the Defence asks for the Registry's Observations to be reclassified as confidential and that a public redacted version be filed. In addition, the Defence

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<sup>9</sup> Transcript of hearing, ICC-02/05-01/20-T-001-ENG, p. 20, lines 16-18.

<sup>10</sup> Request, pp. 5-6.

<sup>11</sup> Email sent on behalf of the Single Judge dated 25 June 2020, 17:11.

<sup>12</sup> 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.

<sup>13</sup> 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, ICC-02/05-01/20-13-Conf.

requests that the Registry be ordered to submit a report on its alleged violation of regulation 130 of the Regulations of the Registry.

10. The Single Judge notes that, pursuant to regulation 130 of the Regulations of the Registry, the Registry ‘shall manage the legal assistance paid by the Court with due respect to confidentiality’ and it ‘shall treat all information known with the utmost confidentiality’. Having regard to the Registry’s Observations, however, the Single Judge finds that they do not reveal any information that would fall under this provision. The Single Judge notes that, while the Registry’s Observations contain information on the procedure and the modalities of Defence Counsel’s appointment, this cannot be considered as falling within the scope of regulation 130 of the Regulations of the Registry. Accordingly, the Single Judge sees no justification to reclassify the Registry’s Observations. Consequently, there is also no need for the Registry to prepare a report into the alleged violation of regulation 130 of the Regulations of the Registry.

## **II. THE REQUEST FOR LEAVE TO REPLY**

11. The Defence requests leave to reply to the Registry’s Observations noting that they raise new issues which could not have been reasonably anticipated in the Request, in particular as regards (i) the Registry’s interpretation of the suspect’s right to interpretation and translation under article 67(1)(f) of the Statute; (ii) the Registry’s interpretation of the suspect’s right to freely choose his Counsel under article 67(1)(b) of the Statute; (iii) the Registry’s submissions on Counsel’s choices regarding the composition of the Defence team; and (iv) the Registry’s submissions on the excessive financial impact that the granting of the Request would have on the Court.

12. Noting regulation 24(5) of the Regulations of the Court (the ‘Regulations’), according to which a reply may only be submitted with leave of the Chamber, unless otherwise provided, the Single Judge considers that he has sufficient information to make an informed decision on the Request. Furthermore, the Single Judge notes that, by making substantive submissions in its Request for Leave to Reply, the Defence has not complied with regulation 24(5) of the Regulations. Accordingly, the Single Judge rejects the Request for Leave to Reply.

### III. THE REQUEST UNDER ARTICLE 67(1)(f) OF THE ROME STATUTE

13. The Defence submits that (i) provisions regarding eligibility for and the scope of the Court's legal aid enshrined in article 67(1)(d) of the Statute and regulation 83 of the Regulations do not constitute conditions applicable to the suspect's 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' under article 67(1)(f) of the Statute; (ii) pursuant to regulation 83(1) of the Regulations and paragraph 15(1) of the Registry's single policy document on the Court's legal aid system,<sup>14</sup> costs related to translations and interpretation qualify as 'reasonably necessary [...] for an effective and efficient Defence'; and (iii) the time limit for submitting a request for interpretation services provided for in regulation 58(3) of the Regulations of the Registry may not infringe upon the suspect's fundamental rights under article 67(1)(f) of the Statute. Accordingly, in the view of the Defence, Mr Abd-Al-Rahman enjoys an unqualified right to benefit from interpretation and translation services within the meaning of article 67(1)(f) of the Statute and for the purposes of privileged communications with his Defence Counsel and his team.

14. The Registry submits that 'the right to translation or interpretation is not an absolute right under the Court's legal framework and 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'. In support, the Registry affirms that (i) 'no legal text stipulates such right as to receive support from the Court for the purpose of privileged communication(s) between client and counsel'; and (ii) it has been ruled that 'article 67(1)(f) of the Statute does not grant [...] the right to have all procedural documents and all evidentiary materials [...] translated into a language that [the suspect] fully understands and speaks'. In the Registry's view, while the suspect has a 'wide freedom to choose counsel, that freedom of choice cannot lead to what may be seen as excessive financial impact on the Court'. Accordingly, the Registry submits that 'it is [Defence] Counsel's responsibility to organise the team in order to meet the specific language needs and

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<sup>14</sup> Assembly of States Parties, Registry's single policy document on the Court's legal aid system, 4 June 2013, ICC-ASP/12/3, para. 15(1).

ensure communication with his client’, as it has already been done in the present case since ‘one of the team members appointed by Counsel is fully proficient in Arabic’.

15. The Single Judge notes that article 67(1)(f) of the Statute provides that the suspect shall be entitled 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 of or documents presented to the Court* are not in a language which the accused fully understands and speaks’ (emphasis added). A textual interpretation of the provision 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 everything that happens in the *proceedings* against him or her, which does not include private and privileged communications between the defendant and his or her Defence team.

16. This conclusion is supported by the well-established jurisprudence of the Court on the matter,<sup>15</sup> which is in accordance with internationally recognised human rights and, in particular, with the jurisprudence of the European Court of Human Rights (the ‘ECHR’). Similarly to article 67(1)(f) of the Statute, article 6(3)(e) of the European Convention on Human Rights provides that ‘[e]veryone charged with a criminal offence has the following minimum rights: [...] (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court’. The ECHR has constantly held that, ‘[c]onstrued in the context of the right to a fair trial’, article 6(3)(e) ‘signifies that a person “charged with a criminal offence” who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements *in the proceedings instituted against him which it is necessary for him to understand*

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<sup>15</sup> Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Requests of the Defence of 3 and 4 July 2006, 5 August 2006, ICC-01/04-01/06-268, p. 7; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, Decision on the Defence Request Concerning Languages, 21 December 2007, ICC-01/04-01/07-127, para. 43; Pre-Trial Chamber I, *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the Defence Request concerning time limits, 27 February 2008, ICC-01/04-01/07-304, p. 4; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence’s Request Related to Language Issues in the Proceedings, 4 December 2008, ICC-01/05-01/08-307, para. 18.

or to have rendered into the court's language in order to have the benefit of a fair trial' (emphasis added).<sup>16</sup> The ECHR has further specified that such right shall be limited to activities in connection to judicial proceedings by underlining that the 'interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.<sup>17</sup>

17. In this respect, the Single Judge recalls that Pre-Trial Chamber I held that, as regards issues relating to the languages used in judicial proceedings, 'it is the responsibility of permanent Counsel to compose the Defence team in a manner which will allow him [or her] to (i) properly be assisted in the presentation of the case before the Chamber; and (ii) effectively protect the rights of [the suspect]'.<sup>18</sup> In the same vein, the Single Judge notes that, pursuant to the Code of Professional Conduct for Counsel (the 'Code'), Defence Counsel is expected to 'take into account the client's personal circumstances and specific needs'<sup>19</sup> in order to maintain a Counsel-client relationship 'of candid exchange and trust' and 'act in good faith when dealing with the client',<sup>20</sup> to 'consult the client on the means by which the objectives of his or her representation are to be pursued'<sup>21</sup> and to 'provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation'.<sup>22</sup> Accordingly, the Single Judge considers that it is the responsibility of a Defence Counsel who has accepted to defend a suspect with whom he or she cannot

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<sup>16</sup> Court (Chamber), *Luedicke, Belkacem and Koç v. Germany*, Application no. 6210/73; 6877/75; 7132/75, Judgment, 28 November 1978, para. 48; Court (Chamber), *Kamasinski v. Austria*, Application no. 9783/82, Judgment, 19 December 1989, para. 74. See also Court (Grand Chamber), *Hermi v. Italy*, Application no. 18114/02, Judgment, 18 October 2006, paras 69-70; Court (Fourth Section), *Protopapa v. Turkey*, Application no. 16084/90, Judgment, 6 July 2009, paras 79-80; Court (Fourth Section), *Vizgirda v. Slovenia*, Application no. 59868/08, Judgment, 28 November 2018, paras 75-79; Court (First Section), *Knox v. Italy*, Application no. 76577/13), Judgment, 24 June 2019, para. 182.

<sup>17</sup> Court (Chamber), *Kamasinski v. Austria*, Application no. 9783/82, Judgment, 19 December 1989, para. 74.

<sup>18</sup> *The Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the Defence Request concerning time limits, 27 February 2008, ICC-01/04-01/07-304, p. 5; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents, 15 May 2008, ICC-01/04-01/07-477, p. 4; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence for Mathieu Ngudjolo Chui's request for leave to appeal the Decision concerning translation of documents, 2 June 2008, ICC-01/04-01/07-538, pp. 6-7.

<sup>19</sup> Code, article 9(2).

<sup>20</sup> Code, article 14(1).

<sup>21</sup> Code, article 14(2)(b).

<sup>22</sup> Code, article 15(1).



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.

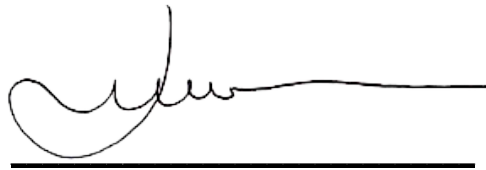
**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Defence Request for Reclassification;

**REJECTS** the Defence Request for Leave to Reply; and

**REJECTS** the Defence Request under article 67(1)(f) of the Statute.

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

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of loops and a long horizontal stroke extending to the right.

**Judge Rosario Salvatore Aitala**  
**Single Judge**

Dated this Friday, 10 July 2020

At The Hague, The Netherlands