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

Date: 5 November 2020

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, 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 ALI ABD-AL-
RAHMAN ('ALI KUSHAYB')**

Public document

Judgment

**on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of
Pre-Trial Chamber II of 10 July 2020 entitled 'Decision on Defence request
under article 67(1)(f) of the Rome Statute'**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Cyril Laucci

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled ‘Decision on Defence request under article 67(1)(f) of the Rome Statute’ of 10 July 2020 (ICC-02/05-01/20-94),

After deliberation,

By majority, Judge Ibáñez Carranza partially dissenting,

Delivers the following

JUDGMENT

The ‘Decision on Defence request under article 67(1)(f) of the Rome Statute’ is confirmed.

REASONS

I. KEY FINDINGS

1. Article 67(1)(f) of the Statute relates to the proceedings and documents presented to the Court and not to communication with defence Counsel.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

2. On 10 July 2020, the Single Judge on behalf of Pre-Trial Chamber II (the ‘Pre-Trial Chamber’) rejected Mr Abd-Al-Rahman’s request for an order to 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 [...] pursuant to article 67(1)(f) of the Statute’ (the ‘Impugned Decision’).¹

¹ [Decision on the Defence request under article 67\(1\)\(f\) of the Rome Statute](#), ICC-02/05-01/20-94, para. 6, p. 9, referring to [Requête en vertu de l’Article 67-1-f](#), 25 June 2020, ICC-02/05-01/20-7 (the ‘Request’).

3. On 7 August 2020, the Pre-Trial Chamber granted Mr Abd-Al-Rahman leave to appeal the Impugned Decision under article 82(1)(d) of the Statute in respect of the following issue:

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.²

B. Proceedings before the Appeals Chamber

4. On 13 August 2020, Mr Abd-Al-Rahman filed his appeal against the Impugned Decision (the ‘Appeal Brief’).³

5. On 24 August 2020, the Prosecutor filed her response to the Appeal Brief (the ‘Response’).⁴

6. On 25 August 2020, the Appeals Chamber rejected the request to suspend the effect of the Impugned Decision pending resolution of the merits of the appeal.⁵

7. On 27 August 2020, the Registrar filed observations on the Appeal Brief (the ‘Registrar’s Observations’).⁶

III. MERITS

A. Relevant background and Impugned Decision

8. The present matter was triggered by Mr Abd-Al-Rahman’s request for the Pre-Trial Chamber ‘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,

² [Decision on the Defence Request for Leave to Appeal the ‘Decision on Defence Request under article 67\(1\)\(f\) of the Rome Statute’](#), ICC-02/05-01/20-109.

³ [Appeal Brief against Decision ICC-02/05-01/20-94](#), ICC-02/05-01/20-111-tENG, para. 41.

⁴ [Prosecution response to the ‘Mémoire d’appel de la décision ICC-02/05-01/20-94’](#), ICC-02/05-01/20-132.

⁵ [Decision on request for suspensive effect](#), ICC-02/05-01/20-134.

⁶ [Registrar’s observations on the ‘Mémoire d’appel de la décision ICC-02/05-01/20-94’](#), (ICC-02/05-01/20-111), ICC-02/05-01/20-136.

(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'.⁷

9. The Pre-Trial Chamber rejected the request on the basis that the right to interpretation and translation set out in article 67(1)(f) of the Statute is limited to the purpose of understanding proceedings and does not cover client/counsel communication.⁸ The Pre-Trial Chamber considered 'that it 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'.⁹

B. Summary of submissions

1. Mr Abd-Al-Rahman's submissions

10. Mr Abd-Al-Rahman alleges that the Pre-Trial Chamber committed three legal errors in the Impugned Decision.¹⁰ He requests the Appeals Chamber to confirm that article 67(1)(f) of the Rome Statute prescribes his right 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 Regulations of the Court, with no condition of eligibility attached to 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.¹¹

11. First, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber adopted an excessively limited definition of 'proceedings' within the meaning of article 67(1)(f) of the Statute in excluding communication between the suspect and his or her counsel

⁷ [Impugned Decision](#), para. 6.

⁸ [Impugned Decision](#), para. 15.

⁹ [Impugned Decision](#), para. 17.

¹⁰ [Appeal Brief](#), paras 21-38.

¹¹ [Appeal Brief](#), para. 38.

from its ambit.¹² He argues that this interpretation ‘rested on irrelevant references to authority about the right to translation of documents disclosed by the Office of the Prosecutor’, the case law of the European Court of Human Rights and the Code of Professional Conduct for Counsel.¹³ He underlines that ‘the permanent aid of translation and interpretation services has been afforded to persons charged even where they were not eligible for legal assistance paid by the Court, 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 team – is “a *sine qua non* for the holding of a fair trial”’.¹⁴

12. Mr Abd-Al-Rahman contends that ‘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’.¹⁵ In his view, the limited definition of ‘proceedings’ adopted by the Pre-Trial Chamber is ‘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” vested by regulation 97(1) of the [Regulations of the Court]’.¹⁶

13. Mr Abd-Al-Rahman submits that the error ‘had a substantial impact on the legality of the [Impugned] Decision’ and on his ‘right to the translation and

¹² [Appeal Brief](#), para. 22.

¹³ [Appeal Brief](#), paras 23, 26.

¹⁴ [Appeal Brief](#), para. 23, referring to *The Prosecutor v. Germain Katanga*, Appeals Chamber, [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, ICC-01/04-01/07-522, para. 41 (‘Looking at article 67 as a whole emphasises that the right to interpretation, one of the basic rights of the accused, is an essential component of a fair trial. Article 67, entitled “[r]ights of the accused”, is situated in Part 6 of the Statute, “The Trial”, and is made applicable to proceedings at the pre-trial phase by virtue of rule 121 of the Rules which states that “[s]ubject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67”. The *chapeau* of article 67 (1) states that the accused shall have the right “to a fair hearing conducted impartially” and that the accused shall be entitled to a list of rights stipulated to be “minimum guarantees, in full equality”. The inclusion of the right to interpretation in the terms provided in article 67 as a whole indicates that this right is a *sine qua non* for the holding of a fair trial’).

¹⁵ [Appeal Brief](#), para. 24.

¹⁶ [Appeal Brief](#), para. 24.

interpretation services required by the Court's instruments for the preparation of his defence' and has significantly affected the preparation of his defence.¹⁷

14. Second, Mr Abd-Al-Rahman argues that the Pre-Trial Chamber erred in law by making the provision of interpretation services for the purposes of communication between the person being prosecuted and his Counsel contingent on eligibility for legal assistance and on its budget.¹⁸ Mr Abd-Al-Rahman submits that the right guaranteed by article 67(1)(f) of the Statute is not 'conditional upon the granting under article 67(1)(d) of the legal assistance paid by the Court' and that regulations 97(1) of the Regulations of the Court and regulations 57(1) and 58 of the Regulations of the Registry provide for services 'with no prerequisite of eligibility for legal assistance paid by the Court'.¹⁹ In his view, '[t]he inclusion in regulation 83(1) of the [Regulations of the Court] 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 [Regulations of the Court] – which is on a par with it'.²⁰ He further notes that 'despite its general reference to regulation 83(1) in section 15(1), the Legal Aid Policy does not include a chapter on expenses relating to interpretation services granted by way of legal assistance'.²¹

15. Third, Mr Abd-Al-Rahman submits that the Pre-Trial Chamber erred in 'law by considering the language skills of Lead Counsel and/or the Defence team as a criterion for the right of the person charged to receive interpretation and translation services under article 67(1)(f) of the Statute'.²² He submits that his choice of Counsel 'may have been informed by privileged discussions [...] including those related to devising and developing his defence strategy', elements of which he variously describes as 'unprecedented', 'striking' and 'novel'.²³ Mr Abd-Al-Rahman argues that the fact that his defence team 'includes an Arabic-speaking Case Manager cannot,

¹⁷ [Appeal Brief](#), para. 27.

¹⁸ [Appeal Brief](#), para. 28.

¹⁹ [Appeal Brief](#), para. 30.

²⁰ [Appeal Brief](#), para. 31.

²¹ [Appeal Brief](#), para. 31.

²² [Appeal Brief](#), para. 33.

²³ [Appeal Brief](#), para. 35.

alone, fulfil the right to receive interpretation and translation services pursuant to article 67(1)(f) of the Statute’ and emphasises the different functions of interpreters and translators and case managers.²⁴

16. Mr Abd-Al-Rahman submits that ‘[t]he 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’.²⁵ He submits that ‘the financial argument, which has not been substantiated, cannot prevail over the legal considerations and the safeguarding of [his] right to interpretation and translation services under article 67(1)(f) of the Statute’.²⁶

2. *The Prosecutor’s submissions*

17. Regarding the first ground of appeal, the Prosecutor argues that these arguments ‘could be dismissed summarily’ because Mr Abd-Al-Rahman ‘fails to show how the Single Judge misinterpreted the law’ and the bulk of his submissions dispute the Registry’s observations rather than the Impugned Decision.²⁷ She contends that, in the alternative, this ground should be rejected on its merits. She submits that the Pre-Trial Chamber was correct to find that a ‘plain textual reading of article 67(1)(f) in its proper context and considering its underlying rationale suggests that the right to interpretation, under this provision, is limited to court proceedings’ and does not extend to communications with Counsel.²⁸ The Prosecutor emphasises that article 67(1)(f) of the Statute and related legal provisions are framed in relation to the working languages of the Court (English and French), whereas client-counsel communications may take place in any language and are not viewed through the same lens as Court proceedings under article 67(1)(f) of the Statute.²⁹ She argues that ‘both the drafting history of article 67(1)(f) and the text of relevant human rights instruments (upon which article 67(1)(f) was modelled) support the understanding that

²⁴ [Appeal Brief](#), para. 36.

²⁵ [Appeal Brief](#), para. 37.

²⁶ [Appeal Brief](#), para. 37.

²⁷ [Response](#), para. 13.

²⁸ [Response](#), paras 14, 16, 18.

²⁹ [Response](#), paras 16-17.

what is considered necessary interpretation under article 67(1)(f) is tied to the language used in court'.³⁰ She argues that, given its specific language and rationale, article 67(1)(f) of the Statute cannot be interpreted as including an unfettered right to interpretation for all client-counsel communication and that this position is consistent with human rights jurisprudence.³¹

18. Regarding the second ground of appeal, the Prosecutor submits that, although Mr Abd-Al-Rahman discusses the Registry's legal aid policy in some detail, none of the findings in the Impugned Decision relate to it.³² She argues that his 'submissions interpreting regulation 83 of the [Regulations of the Court] and other legal provisions in light of articles 31 and 32 of the Vienna Convention on the Law of Treaties are unnecessary and should be dismissed'.³³

19. Regarding the third ground of appeal, the Prosecutor contends that Mr Abd-Al-Rahman's arguments are based on a misreading of the Impugned Decision, which rejected the request under article 67(1)(f) of the Statute because this provision does not apply to communication between counsel and client and not because of 'the Defence counsel's/team's linguistic abilities'.³⁴ In her view, the Pre-Trial Chamber appropriately highlighted Counsel's obligation to his client to ensure that he can properly communicate with him through the defence team.³⁵

3. *The Registrar's observations*

20. The Registrar submits that regulation 97 of the Regulations of the Court 'does not support any general right to interpretation and translation of communications between a defendant and a counsel' as it appears in the chapter regulating detention matters, is formulated in the conditional ('where necessary') and states no obligation for the Court to pay for such translation or interpretation services on behalf of counsel.³⁶ In his view, 'international human rights, which establish that the right of the accused or suspect for translation or interpretation extends only to the latter's

³⁰ [Response](#), para. 19.

³¹ [Response](#), paras 20-22.

³² [Response](#), para. 27.

³³ [Response](#), para. 28.

³⁴ [Response](#), para. 30.

³⁵ [Response](#), para. 30.

³⁶ [Registrar's Observations](#), para. 15.

relations *vis-à-vis* the Court as to guarantee the fairness of the proceedings and not to counsel-client relationship'.³⁷

21. Regarding the second ground of appeal, the Registrar notes that the Pre-Trial Chamber 'refers to legal aid in the context of counsel's obligation to "take into account the client's personal circumstances and specific needs' in order to maintain a Counsel-client relationship 'of candid exchange and trust' and 'act in good faith when dealing with the client'".³⁸ He submits that the Pre-Trial Chamber did not make legal aid a condition for provision of interpretation services.³⁹ Regarding the third ground of appeal, the Registrar highlights that the right to free choice of counsel 'is not absolute and is necessarily subject to certain limitations'.⁴⁰

C. Determination by the Appeals Chamber

(a) Scope of the appeal

22. Mr Abd-Al-Rahman argues on appeal that the issue at stake is substantially broader than that certified by the Pre-Trial Chamber 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'.⁴¹

23. The Appeals Chamber notes that the Impugned Decision did not address all aspects of the suspect's right to interpretation or translation services under article 67(1)(f) of the Statute, but focused on the limited question of whether this right includes interpretation and translation services as necessary to facilitate communication with the legal team. This decision defines the scope of the appeal. In these circumstances, it would exceed the role of the Appeals Chamber to decide on the interpretation and translation services requested by Mr Abd-Al-Rahman for

³⁷ [Registrar's Observations](#), para. 16.

³⁸ [Registrar's Observations](#), para. 22.

³⁹ [Registrar's Observations](#), para. 22.

⁴⁰ [Registrar's Observations](#), para. 26.

⁴¹ [Appeal Brief](#), para. 12.

purposes other than client/counsel communication. These arguments must be raised before and determined by the Pre-Trial Chamber in the first instance.

24. The Appeals Chamber further notes that a large part of Mr Abd-Al-Rahman's arguments under the first ground of appeal engage with the submissions of the Registrar before the Pre-Trial Chamber rather than with the reasoning and findings of the Impugned Decision.⁴² The Prosecutor suggests that this ground of appeal could be dismissed summarily on this basis.⁴³ The Appeals Chamber notes that the Appeal Brief identifies a challenged finding or legal error in the Impugned Decision (an allegedly reductive definition of the word 'proceedings', within the meaning of article 67(1)(f) of the Statute), and a large part of the arguments are relevant to showing an error in this finding, even if they are directed at the Registrar's observations. In these circumstances, the Appeals Chamber considers it necessary to address those arguments under the first ground of appeal that are relevant to the Impugned Decision.

25. Mr Abd-Al-Rahman's arguments under the second ground of appeal are based on the interpretation of article 67(1)(f) of the Statute that he advances under the first ground of appeal.⁴⁴ In his submission, the Pre-Trial Chamber made the provision of interpretation services for the purposes of communication between the person being prosecuted and his counsel contingent on eligibility for legal assistance paid by the Court and on its budget.⁴⁵ As this is the clear implication of the Pre-Trial Chamber's interpretation of article 67(1)(f) of the Statute, the Appeals Chamber considers the second ground of appeal to be intrinsically linked to the issue certified for appeal. Although the arguments raised are of limited assistance in determining the issues raised in the present appeal, they will be considered to the extent possible.

26. Mr Abd-Al-Rahman's arguments under the third ground of appeal do not relate to findings in the Impugned Decision and erroneously impute a line of reasoning apparently contained in the Registrar's first instance observations to the Pre-Trial

⁴² [Appeal Brief](#), paras 16-22.

⁴³ [Response](#), para. 13.

⁴⁴ [Appeal Brief](#), paras 28-32.

⁴⁵ [Appeal Brief](#), para. 28.

Chamber.⁴⁶ The Pre-Trial Chamber did not consider the language skills of the Lead Counsel and/or the Defence team as a relevant criterion for the right of the person being prosecuted to receive interpretation and translation services under article 67(1)(f) of the Statute, as argued by Mr Abd-Al-Rahman in the third ground of appeal. Accordingly, the third ground of appeal is dismissed *in limine*.

(b) *Whether there is a right to interpretation for the purpose of client/counsel communication*

27. Article 67(1)(f) of the Statute provides:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(f) 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; [...]⁴⁷

28. Mr Abd-Al-Rahman argues that article 67(1)(f) of the Statute must be interpreted in light of regulation 97(1) of the Regulations of the Court, which provides for the right of a 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’.⁴⁸ The Appeals Chamber is not persuaded by this argument and considers that the hierarchy of legal texts requires that regulation 97(1) of the Regulations of the Court be interpreted in light of article 67(1)(f) of the Statute, rather than the inverse, as Mr Abd-Al-Rahman suggests. Regulation 97(1), entitled ‘Communication with defence counsel’, appears in the chapter on ‘Detention matters’ in the Regulations of the Court, in the section on

⁴⁶ [Appeal Brief](#), paras 33-34: ‘This third error of law was also prompted by the Registry’s Observations’, referring to Registry’s observations on the “*Requête en vertu de l’Article 67-1-f*”, (ICC-02/05-01/20-7), 29 June 2020, ICC-02/05-01/20-11 (the ‘Registrar’s Observations before the Pre-Trial Chamber’).

⁴⁷ Rule 121(1) of the Rules of Procedure and Evidence (the ‘Rules’) provides: ‘A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67’.

⁴⁸ [Appeal Brief](#), para. 24.

‘Rights of a detained person and conditions of detention’. It does no more than specify that the detained person shall be *informed* of his or her right to communicate with counsel, *if necessary* through an interpreter. It creates neither a right to counsel, nor to interpretation. Indeed, while its text confirms the existence of a right to communicate with counsel, it does not indicate that there is a right to interpretation; nor does it elaborate on the circumstances in which interpretation may be necessary or provided at the expense of the Court. These rights are regulated in article 67 of the Statute and must be interpreted in that context.

29. Regarding article 67(1)(f) of the Statute, the Pre-Trial Chamber found:

A textual interpretation of this provision 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.⁴⁹

30. The Appeals Chamber can find no error in the Pre-Trial Chamber’s interpretation of article 67(1)(f) of the Statute. As highlighted by the Pre-Trial Chamber, this provision expressly limits the right to interpretation and translation to situations in which ‘the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks’. By its plain terms, article 67(1)(f) of the Statute relates to the proceedings and documents presented to the Court and not to communication with defence counsel. This is consistent with human rights jurisprudence concerning the corresponding provisions in human rights treaties, which confirms that the right to interpretation is linked to proceedings before the Court and does not extend to the relationship between the accused and his or her counsel.⁵⁰

31. As the right to the *free* assistance of an interpreter under article 67(1)(f) of the Statute does not cover client/counsel communications, persons with sufficient means

⁴⁹ [Impugned Decision](#), para. 15.

⁵⁰ European Commission of Human Rights, *X v. Austria*, Application no. 6185/73, 29 May 1975, para. 1; European Court of Human Rights, [Luedicke, Belkacem and Koc v. Germany](#), Application nos 6210/73, 6877/75, 7132/75, 28 November 1978, para. 48; United Nations Human Rights Committee, *Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001, 23 August 2004, para. 7.2.

to do so must pay for any interpretation services that may be necessary to facilitate communication with their legal team. In the case of persons who do not have sufficient means to pay for their legal assistance, any interpretation costs for the purpose of client/counsel communications must be considered within the scope of the legal assistance scheme.

32. Pursuant to regulation 83(1) of the Regulations of the Court, the key question in determining whether any costs in this regard should be borne by the legal assistance scheme is whether they are reasonably necessary for an effective and efficient defence.⁵¹ The Appeals Chamber observes 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.⁵² Therefore, a solution must be found that allows communication to take place.

33. In the present case, the Pre-Trial Chamber found that it is the responsibility of counsel ‘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’.⁵³ If Mr Abd-Al-Rahman considers that such arrangements are inadequate to ensure an effective and efficient defence, the appropriate application for any additional assistance considered reasonably necessary must be made to the Registrar in the first instance.

34. Finally, the Appeals Chamber understands that Mr Abd-Al-Rahman has been assigned counsel paid by the Court.⁵⁴ He was presented with a list of 39 counsel who speak Arabic, the language that he fully understands and speaks,⁵⁵ and he freely chose counsel with whom he cannot communicate.⁵⁶ While this choice of counsel has been respected, it is for the Pre-Trial Chamber to ensure that this situation does not impact

⁵¹ Regulation 83(1) provides that ‘[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including [...] translation and interpretation costs [...]’.

⁵² Article 67(1)(b) sets out the right ‘[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’ and article 67(1)(d) sets out the right ‘to conduct the defence in person or through legal assistance [...]’.

⁵³ [Impugned Decision](#), para. 17.

⁵⁴ [Appeal Brief](#), para. 26; [Impugned Decision](#), para. 17.

⁵⁵ [Impugned Decision](#), para. 5.

⁵⁶ [Response](#), para. 34, *referring to* Registrar’s Observations before the Pre-Trial Chamber, paras 4-5.

on the delivery of an effective and efficient defence on behalf of Mr Abd-Al-Rahman. Although the wording of article 67(1)(d) shows that there is no absolute right to free choice of counsel when legal assistance is paid by the Court,⁵⁷ the Rules and Regulations of the Court suggest that a person's choice of counsel must generally be respected.⁵⁸ Nonetheless, consistent with human rights jurisprudence, regulation 76(1) of the Regulations of the Court allows a chamber to appoint counsel when the interests of justice so require.⁵⁹

IV. APPROPRIATE RELIEF

35. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case it is appropriate to confirm the Impugned Decision.

Judge Ibáñez Carranza appends to this judgment a partially dissenting opinion, which sets out her views on the need for a systemic, systematic and comprehensive reading of defence rights in the Rome Statute, and related norms and regulations, given their nature as a guarantee of due process of law and the proper administration of justice

⁵⁷ Article 67(1)(d) of the Statute sets out the right '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'. The wording of this provision is virtually identical to article 14(3)(d) of the International Covenant on Civil and Political Rights (the right '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 similar to the right set out in article 6(3)(c) of the European Convention on Human Rights: 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The European Court of Human Rights has found that, while as a general rule, the accused's choice of lawyer should be respected, the national courts may override that person's choice when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice: *see Lagerblom v. Sweden*, application no. 26891/95, 14 January 2003, para. 54; *Croissant v. Germany*, application no. 13611/88, 25 September 1992, para. 29. Similarly, the United Nations Human Rights Committee has found that article 14, paragraph 3 (d) of the International Covenant on Civil and Political Rights does not entitle an accused to choose counsel free of charge: *see Saidov v. Tajikistan*, Human Rights Committee, Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001, 8 July 2004, para. 6.8. It has been observed that 'when counsel is assigned at State expense, the State has stronger interests in restricting the role of the accused in the choice of counsel, for reasons of cost, efficiency and administrative structure': *See* R. J. Wilson, 'Chapter 2: Procedural Safeguards for the Defense in International Human Rights Law', in M. Bohlander, R. Boed, R. Wilson (eds) *Defense in International Criminal Proceedings* (2006), p. 22.

⁵⁸ *See* rule 21(2) of the Rules; regulation 75 of the Regulations of the Court.

⁵⁹ Regulation 76(1) of the Regulations of the Court reads in relevant part: '[a] Chamber, following consultation with the Registrar and, when appropriate, after hearing from the person entitled to legal assistance, may appoint counsel in the circumstances specified in the Statute, Rules and these Regulations or where the interests of justice so require'.

and as internationally recognized human rights that must be read in light of article 14 of the International Covenant on Civil and Political Rights. Viewing article 67 of the Statute through this lens, Judge Ibáñez Carranza considers that interpretation may be a facility necessary for the preparation of the defence and to give effect to the right to legal assistance of the accused's choosing, especially in circumstances when the accused is detained. For the reasons set out in her partially dissenting opinion, Judge Ibáñez Carranza is of the view that, in the current circumstances, Mr Abd-Al-Rahman has the right to avail of interpretation services in order to communicate with his defence counsel for the purposes of preparing his defence, but the exercise of this right may be modulated in the manner provided by the Statute. Accordingly, Judge Ibáñez Carranza would find that the Pre-Trial Chamber erred in considering the Request under article 67(1)(f) of the Statute in isolation, as a result of which it failed in its duty to ensure adequate protection for Mr Abd-Al-Rahman's defence rights, specifically the right to communicate with his counsel and to have adequate facilities for the preparation of his defence.

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



Judge Piotr Hofmański
Presiding

Dated this 5th day of November 2020

At The Hague, The Netherlands