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

Date: **19 August 2020**

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

Prosecution response to the request for suspensive effect

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I. INTRODUCTION

1. On 10 July 2020, the Single Judge of Pre-Trial Chamber II rejected Mr Abd-Al-Rahman's request, under article 67(1)(f) of the Statute, to order the Registry to provide interpretation and translation services so as to communicate with his Defence team.¹ On 13 August 2020, Mr Abd-Al-Rahman filed his appeal against the Article 67(1)(f) Decision.² In his appeal, Mr Abd-Al-Rahman also sought—under article 82(3) of the Statute—to suspend the effect of the Article 67(1)(f) Decision, asking the Appeals Chamber, at a minimum, to order the Registry to provide interpretation services in the interim while the appeal is pending.³ According to Mr Abd-Al-Rahman, the Registry remains obliged, during the pending appeal, to provide interpretation under rule 20(1)(b) of the Rules of Procedure and Evidence ("RPE"),⁴ regulation 97(1) of the Regulations of the Court ("RoC")⁵ and regulations 57 and 58 of the Regulations of the Registry ("RoR").⁶

2. At this stage, pursuant to the Appeals Chamber's order,⁷ the Prosecution responds only to the request for suspensive effect.⁸ Mr Abd-Al-Rahman's request for suspensive effect is unwarranted: his requested relief of interpretation pending the appeal is irrelevant to his request for suspensive effect. Suspending the effect of the Article 67(1)(f) Decision will not result in the interpretation he now seeks. Moreover, Mr Abd-Al-Rahman fails to show that implementing the Article 67(1)(f) Decision during the pending appeal would lead to consequences—let alone any prejudice—that may be irreversible, should the Appeals Chamber grant the appeal.⁹ His submissions on the potential irreversible effects of not granting suspensive effect are speculative—more so, since he acknowledges that he continues to rely on a member of his Defence team to provide him the interpretation he

¹ ICC-02/05-01/20-94 ("Article 67(1)(f) Decision"), paras. 13-17.

² ICC-02/05-01/20-111 OA ("Appeal"); ICC-02/05-01/20-97 ("Leave to Appeal Request"); ICC-02/05-01/20-109 ("Leave to Appeal Decision").

³ Appeal, paras. 39-41.

⁴ Rule 20(1)(b), RPE: Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence.

⁵ Regulation 97(1), RoC: A detained person shall be informed of his or her right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68.

⁶ Regulation 57 (1), RoR: The Registry shall provide interpretation, translation, editing and revision services in accordance with the provisions of the Statute, Rules, Regulations of the Court, and these Regulations; Regulation 58 (3), RoR: Requests for interpretation services involving languages other than the working languages of the Court shall set out the reasons why the interpretation of such languages is required. Such requests should be made at least ten calendar days prior to the event requiring interpretation.

⁷ ICC-02/05-01/20-119 OA ("Order").

⁸ Appeal, paras. 39-41. The Prosecution will respond separately to the merits of the appeal, pursuant to Regulation 65(5), RoC.

⁹ Appeal, paras. 39-41. See e.g., ICC-01/05-01/08-817 OA3 ("Bemba Suspensive Effect AD"), para. 11.

needs.¹⁰ In any event, contrary to his submissions, the various provisions of the Court's subsidiary texts that Mr Abd-Al-Rahman cites do not entitle him to interpretation on a provisional basis in the manner he describes.¹¹

3. Therefore, the Prosecution requests the Appeals Chamber to reject Mr Abd-Al-Rahman's request for suspensive effect.

II. SUBMISSIONS

4. As article 82(3) of the Statute states, an appeal does not of itself have suspensive effect.¹² Rather, whether granting suspensive effect in an appeal is warranted depends on the Appeals Chamber's discretion, and is decided in the specific circumstances of a case.¹³ Moreover, as the case law of this Court demonstrates, granting suspensive effect in an appeal is considered necessary only, when not doing so would lead to consequences that "would be very difficult to correct and may be irreversible".¹⁴

5. Mr Abd-Al-Rahman's request for suspensive effect is unjustified.

6. *First*, Mr Abd-Al-Rahman's attempt to secure interpretation on an interim basis through his request for suspensive effect is incorrect. Even if *arguendo*, the Appeals Chamber were to suspend the effect of the Article 67(1)(f) Decision, this would not automatically result in Mr Abd-Al-Rahman getting the interpretation that he seeks, even if on a provisional basis. Rather, suspending the effect of the decision would put Mr Abd-Al-Rahman in the position he was in before the Article 67(1)(f) Decision had been rendered. Since the Single Judge had not granted him interpretation based on the various provisions of the RPE, RoC and RoR that he now relies on, this requested relief (advanced in the request for suspensive effect) is irrelevant to the issue of suspensive effect. On this basis alone, this aspect of Mr Abd-Al-Rahman's request for suspensive effect should be dismissed *in limine*.

¹⁰ [Appeal](#), paras. 39, 41. *See also* ICC-02/05-01/20-11 ("Registry Observations"), para. 21 (confirming that one of the team members appointed by Counsel is fully proficient in Arabic).

¹¹ *Contra* [Appeal](#), paras. 39-41.

¹² Article 82(3), Statute: An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

¹³ [Bemba Suspensive Effect AD](#), para. 6; ICC-01/04-01/06-1347 OA9 OA10 ("[Lubanga Suspensive Effect AD](#)"), para. 10; ICC-01/04-01/06-1444 OA12 ("[Lubanga Interim Release Suspensive Effect AD](#)"), para. 8; ICC-01/09-01/11-391 OA3 OA4 ("[Ruto & Sang Suspensive Effect AD](#)"), para. 9.

¹⁴ [Bemba Suspensive Effect AD](#), para. 11 ("[...] In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal'." citations omitted).

7. *Second*, regarding the substantive issue of suspensive effect, Mr Abd-Al-Rahman fails to show that implementing the Article 67(1)(f) Decision during the appeal would lead to irreversible consequences, should the Appeals Chamber grant his appeal.

8. Although he argues that not granting suspensive effect would create “*une situation irréversible*” since the Defence would be purportedly deprived of interpretation services for an extended time, he fails to show that this is, in fact, the case.¹⁵ To the contrary, as Mr Abd-Al-Rahman himself acknowledges, he continues to benefit from interpretation provided by one member of his Defence team.¹⁶ That this member of the Defence team may have other responsibilities within the team is not a sufficient basis to grant suspensive effect. Team members often have multiple assignments, and it remains Counsel’s obligation to organise the work load and available resources (including for interpretation) to serve his client’s interests best.¹⁷ Moreover, the Appeals Chamber is able to reverse, confirm or amend the Article 67(1)(f) Decision on appeal. Therefore, irrespective of what arrangements are made for interpretation at this stage,¹⁸ if the Appeals Chamber ultimately grants Mr Abd-Al-Rahman’s appeal, the arrangements for interpretation can be re-organised according to the Chamber’s instructions.¹⁹ Further, Mr Abd-Al-Rahman fails to show in concrete terms how preparing his defence would be affected, if at all, under the current arrangements.²⁰

9. *Third*, although Mr Abd-Al-Rahman relies on various provisions of the RPE, the RoC and the RoR to argue that they oblige the Registry to provide interpretation services during the pending appeal,²¹ they do not readily support this proposition.

10. For instance, Mr Abd-Al-Rahman’s reliance on rule 20(1)(b) of the RPE—a generic provision outlining the Registrar’s responsibilities²²—is inapposite. Further, the Single Judge rejected Mr Abd-Al-Rahman’s request under rule 20(1)(b), since *inter alia* it sought “to

¹⁵ [Appeal](#), para. 41.

¹⁶ [Appeal](#), paras. 39, 41.

¹⁷ See e.g., Article 9(2), Code of Professional Conduct for counsel: “In his or her relations with the client, counsel shall take into account the client’s personal circumstances and specific needs [...]”; Article 24(2): “Counsel is personally responsible for the conduct and presentation of the client’s case [...]”.

¹⁸ Article 83(2), Statute.

¹⁹ See by analogy [Bemba Suspensive Effect AD](#), para. 11 (finding that arguments that commencing the hearing of evidence would be an inadequate use of the Court’s resources did not justify granting suspensive effect); [Ruto & Sang Suspensive Effect AD](#), para. 10; ICC-01/04-01/06-1290 OA11 (“[Lubanga Disclosure Suspensive Effect AD](#)”), para. 8 (finding that if the appeal relating to additional disclosure obligations was successful, the Trial Chamber could make any necessary adjustments at that time to ensure fairness of the proceedings).

²⁰ [Appeal](#), para. 41.

²¹ [Appeal](#), paras. 40-41.

²² Rule 20(1)(b), RPE.

litigate anew, or in parallel” the same matter decided in the Article 67(1)(f) Decision now under appeal.²³

11. Moreover, regulation 97(1) of the RoC (the provision Mr Abd-Al-Rahman primarily relies on) does not oblige the Registry to provide interpretation to Mr Abd-Al-Rahman during the appeal.²⁴ Rather, as its plain text suggests, it requires that a detained person is “informed of his or her right to communicate fully, where necessary with the assistance of an interpreter” with his or her defence counsel and assistants.²⁵ In this sense, that the Registry or the Defence did not mention this provision in their observations before the Pre-Trial Chamber was irrelevant to the Single Judge’s determination, and more so, to this request for suspensive effect.²⁶

12. Significantly, an unqualified and independent right to interpretation for communications with counsel cannot be read into regulation 97(1) of the RoC. The RoC must be “read subject to the Statute and the Rules”²⁷ and are designed to facilitate the routine functioning of the Court,²⁸ not to confer specific statutory rights. The substantive right, if any, would lie in article 67 of the Statute: the parameters of which will be determined on the merits of this appeal. For the same reasons, relying on regulations 57 and 58 of the RoR²⁹ is also incorrect.

²³ ICC-02/05-01/20-112 (“[Rule 20 Decision](#)”), para. 12 (“[...] The only significant difference between the initial claim and the present Request is that this time, the Defence has relied on Rule 20(1)(b) of the Rules instead of article 67(1)(f) of the Statute. The Single Judge deprecates such practice [...]”).

²⁴ *Contra* [Appeal](#), paras. 40-41. Regulation 97(1), RoC.

²⁵ Regulation 97(1), RoC (emphasis added).

²⁶ *Contra* [Appeal](#), para. 40.

²⁷ Regulation 1(1), RoC; ICC-01/04-01/06-2205 OA15 OA16 (“[Lubanga Regulation 55 AD](#)”), para. 90.

²⁸ ICC-01/04-01/07-675 OA7 (“[Katanga J. Pikis Dis Op](#)”), para. 7 (“[...] The functions of the Registrar and range of authority are defined by the Statute, and their discharge is procedurally regulated by the Rules. Authority for taking any steps before the Chamber must derive therefrom. The Regulations of the Court are, in accordance with article 52(1) of the Statute, designed to facilitate the routine functioning of the Court, in other words to regulate the conduct of the judicial process. They cannot confer power to take part in judicial proceedings when none is given by the Statute or the Rules.”); ICC-01/04-01/07-776 OA7 ([Katanga Preventive Relocation AD](#)”), para. 81 (noting, with respect to the RoR, that they cannot alter the scheme otherwise contained in the Statute and the RPE).

²⁹ Regulations 57 and 58, RoR.

III. CONCLUSION

13. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to reject the request for suspensive effect.



Fatou Bensouda, Prosecutor

Dated this 19th day of August 2020

At The Hague, The Netherlands