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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 with public annex A

Prosecution response to the “Mémoire d’appel de la décision ICC-02/05-01/20-94”

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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 to communicate with his Defence team.¹ The Single Judge reasoned that while article 67(1)(f) gives the defendant "a right, subject to the Chamber's appreciation, to understand everything that happens in the *proceedings* against him or her", this right to interpretation did not extend to private and privileged communications between the defendant and his counsel.² Once leave to appeal was granted (with the Single Judge reformulating the issue for appeal),³ Mr Abd-Al-Rahman filed his appeal against the Article 67(1)(f) Decision on 13 August 2020, raising three grounds of appeal.⁴

2. The Prosecution requests the Appeals Chamber to reject Mr Abd-Al-Rahman's appeal. As a preliminary matter, although Mr Abd-Al-Rahman (as the appellant) disputes the Single Judge's reformulation of the appealable issue,⁵ it was his expression of the issue for appeal that had failed to identify the core issue for resolution by the Appeals Chamber, since he had misread the Article 67(1)(f) Decision.⁶ The Single Judge's reformulation of the issue was necessary and appropriately captured the issues at stake. To the extent that any aspects of the Appellant's submissions (advanced to further his issue as originally framed, particularly on the second ground of appeal) exceed the scope of the issue certified for appeal, they should be dismissed summarily.

3. Even when addressing the merits, the appeal fails to tailor arguments to the appropriate standard of review on appeal—often (mis)characterising arguments as legal errors, and without addressing the impact of those purported errors.⁷ These arguments should also be dismissed summarily.⁸ In any event, the three grounds of appeal advanced do not show

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

² [Article 67\(1\)\(f\) Decision](#), para. 15.

³ ICC-02/05-01/20-97 ("[Leave to Appeal Request](#)"), para. 7; ICC-02/05-01/20-109 ("[Leave to Appeal Decision](#)"), paras. 7 and 12.

⁴ ICC-02/05-01/20-111 OA ("[Appeal](#)").

⁵ [Appeal](#), paras. 10-19.

⁶ [Leave to Appeal Request](#), para. 7.

⁷ See [Appeal](#), paras. 22-38.

⁸ ICC-01/04-01/06-3121-Red ("[Lubanga AJ](#)"), para. 30 ("[...] the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision. If the appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance."); ICC-01/05-01/13-2275-Red ("[Bemba et al. AJ](#)"), paras. 110, 856, 878, 1356-1357.

reversible error.⁹ Rather, they misinterpret the scope of article 67(1)(f) of the Statute, contradicting its plain text, its drafting history and its underlying rationale and the heft of human rights jurisprudence. Further, the issue on this appeal would not even have arisen if Mr Abd-Al-Rahman had been appointed an appropriate Arabic speaking counsel, as seemed to have been his initial preference.¹⁰ The right to counsel, like the right to interpretation, is not unfettered. In these circumstances, dismissing the appeal and confirming the Article 67(1)(f) Decision is the correct and reasonable course of action. If the Appeals Chamber were to reject the appeal, the Prosecution requests the Chamber—as the ultimate arbiter of fairness of the proceedings—to consider whether specific measures are required in the circumstances to reinforce Mr Abd-Al-Rahman’s right to an effective defence.

II. SUBMISSIONS

A. PRELIMINARY MATTERS: SCOPE OF THE APPEAL

4. The Appellant’s attempt to alter the scope of this appeal—by disputing the Single Judge’s reformulation of the appealable issue—is unwarranted.¹¹ His submissions in this regard should be dismissed summarily. Moreover, aspects of his appeal (especially relating to the second ground of appeal) exceed its authorised scope and should also be dismissed summarily.

5. *First*, the Single Judge’s expression of the appealable issue is the only valid basis on which leave to appeal could have been given, and the Appeals Chamber properly seised. In the Leave to Appeal Decision, the Single Judge found that the issue of whether article 67(1)(f) covers a right to interpretation services for the private and privileged communications between Defence counsel and client (to be paid for by the Court) arose from the Article 67(1)(f) Decision and met the article 82(1)(d) test.¹² For clarity, and according to the Chamber’s permissible discretion,¹³ the Single Judge reframed the issue for appeal.¹⁴ This

⁹ [Appeal](#), paras. 22-27 (Ground 1), 28-32 (Ground 2), 33-37 (Ground 3).

¹⁰ ICC-02/05-01/20-11 (“Registry’s Observations”), para. 4 (noting that Mr Abd-Al-Rahman had confirmed that would like an Arabic speaking counsel).

¹¹ [Appeal](#), paras. 10-19.

¹² [Leave to Appeal Decision](#), paras. 11-14.

¹³ See ICC-02/11-01/11-572 OA5 (“[Gbagbo Confirmation AD](#)”), para. 63 (“[...] it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent.”); ICC-01/04-168 (“[DRC Extraordinary Review AD](#)”), para. 20; ICC-01/13-73 (“[Comoros Leave to Appeal Decision](#)”), para. 39; [Appeal](#), para. 13 (where Mr Abd-Al-Rahman does not dispute the Chamber’s ability to certify issues for appeal).

¹⁴ [Leave to Appeal Decision](#), para. 12 (“Whether article 67(1)(f) of the Statute gives rise to a right to interpretation 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

reframing was necessary to grant leave to appeal, since the issue for appeal proposed by Mr Abd-Al-Rahman had misinterpreted the Article 67(1)(f) Decision and would likely not have met the article 82(1)(d) criteria for leave to appeal.¹⁵

6. As the Single Judge correctly found, while Mr Abd-Al-Rahman—in his leave request—sought to link the right to interpretation under article 67(1)(f) with the question of whether he qualified for the Court’s legal aid services under article 67(1)(d),¹⁶ no such finding had been made.¹⁷ Rather, the Single Judge had found that article 67(1)(f) did not provide for a right to interpretation services for client-counsel communications.¹⁸ The decision turned on the scope of the article 67(1)(f) right and whether it includes interpretation and translation for communications with counsel.¹⁹ Separately, the Single Judge had noted that since Counsel had accepted to defend a suspect with whom he could not communicate, it was Counsel’s responsibility (and professional obligation) to ensure that his client’s communication needs were adequately satisfied, by using the legal aid funds to which the suspect was entitled.²⁰ Mr Abd-Al-Rahman’s attempt to make the Single Judge’s findings on the scope of the statutory right to interpretation conditional on eligibility for legal aid was and remains incorrect.

7. Therefore, to the extent that Mr Abd-Al-Rahman’s appeal is incorrectly premised on his proposed issue for appeal (for which leave to appeal was *not* granted)—in particular his second ground of appeal—,²¹ his submissions exceed the scope of this appeal, and should be dismissed summarily.²² Although aspects of the first and third grounds of appeal may be said to fall within the scope of the Single Judge’s reformulated issue for appeal and/or to be

communicate, and while numerous other qualified Counsel were available who did speak a language the defendant fully understands and speaks (the ‘Issue’)).

¹⁵ [Leave to Appeal Request](#), para. 7; [Leave to Appeal Decision](#), para. 7 (“[...] whether the suspect has a right to interpretation services from Arabic—the only language he speaks and understands perfectly—to at least one of the two working languages of the Court, pursuant to article 67(1)(f) of the Statute, and whether such a right should be conditional upon qualifying for the legal aid services of the Court, pursuant to article 67(1)(d) of the Statute.”)

¹⁶ ICC-02/05-01/20-7 (“[Article 67\(1\)\(f\) Request](#)”), paras. 7-12; [Leave to Appeal Request](#), para. 8.

¹⁷ [Leave to Appeal Decision](#), para. 11.

¹⁸ [Leave to Appeal Decision](#), para. 11; [Article 67\(1\)\(f\) Decision](#), para. 15.

¹⁹ [Leave to Appeal Decision](#), para. 12 (mentioning interpretation only); [Article 67\(1\)\(f\) Decision](#), para. 15 (mentioning interpretation and translation, in the context of article 67(1)(f)).

²⁰ [Leave to Appeal Decision](#), para. 11; [Article 67\(1\)\(f\) Decision](#), para. 17.

²¹ *Compare Appeal*, paras. 28-32 (alleging that the Single Judge erred in law by making the right to interpretation conditional on eligibility for legal aid) with [Leave to Appeal Request](#), para. 7. *See also Appeal*, para. 19 (basing this appeal on his formulation of the issue for appeal).

²² [Gbagbo Confirmation AD](#), paras. 61-66 (dismissing a ground of appeal, which was based on an issue for which leave to appeal was not granted).

“intrinsically linked” to it,²³ the second ground of appeal is based on a misreading of the Article 67(1)(f) Decision, which the Single Judge corrected by reframing the issue.²⁴

8. *Second*, contrary to the Appellant’s views, the reformulated issue—which concerns the scope of the statutory right to interpretation under article 67(1)(f)—is not made redundant by regulation 97(1) of the Regulations of the Court (“RoC”).²⁵ While regulation 97(1) of the RoC requires the detained person to be informed of his right to communicate fully with his defence team (including with interpretation when necessary),²⁶ it must be read subject to the Statute and the Rules.²⁷ Since regulation 97(1) of the RoC is designed only to facilitate the Court’s routine functioning,²⁸ it cannot determine the scope of the statutory right under article 67(1)(f).²⁹ That scope will be decided in this appeal, guided by the Single Judge’s rephrasing of the issue. In any event, the Appellant appears to acknowledge that the Single Judge’s reformulation was a legitimate exercise of his discretion. As he also appears to acknowledge, the Leave to Appeal Decision was sufficiently reasoned³⁰—reasoning that he disregards, and it appropriately re-stated the Single Judge’s earlier findings from the Article 67(1)(f) Decision, without modifying or altering them.³¹

9. *Third*, while the Appeals Chamber must consider all relevant aspects of the Article 67(1)(f) Decision in deciding this appeal, the Appellant raises several vague issues—forecasting various interpretation/translation requirements—which have not even arisen at this stage. They exceed the scope of the impugned decision and the appeal.³² While the Article 67(1)(f) Decision and the appeal are limited to the question of interpretation/translation for private and privileged communication with the Defence team, addressing many of the issues on the Appellant’s open-ended list would be tantamount to

²³ [Gbagbo Confirmation AD](#), para. 64; ICC-01/13-98 OA2 (“[Comoros AD](#)”), para. 56.

²⁴ [Leave to Appeal Decision](#), paras. 11-12.

²⁵ [Appeal](#), para. 12.

²⁶ 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.

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.

²⁹ ICC-01/04-01/07-776 OA7 (“[Katanga Preventive Relocation AD](#)”), para. 81 (noting, with respect to the Regulations of the Registry (“RoR”), that they cannot alter the scheme otherwise contained in the Statute and the Rules).

³⁰ [Leave to Appeal Decision](#), paras. 9-14; [Appeal](#), para. 13, citing ICC-01/04-01/06-774 OA6 (“[Lubanga Redactions AD](#)”), paras. 33-34.

³¹ Compare [Article 67\(1\)\(f\) Decision](#), paras. 13-17 with [Leave to Appeal Decision](#), paras. 9-14; [Appeal](#), para. 13, citing [Lubanga Regulation 55 AD](#), para. 92 (noting that the *Lubanga* Trial Chamber’s subsequently issued Clarification on regulation 55 substantially modified the initial decision).

³² [Appeal](#), para. 13 (listing possible interpretation relating to potential witnesses, intermediaries, resource persons and document analysis and noting “[...] Cette liste d’autres services n’a aucune prétention à l’exhaustivité”).

rendering an advisory opinion, without an appropriate first instance determination.³³ It bears noting also that the article 67(1)(f) right belongs to the accused/suspect, and not to his or her counsel.³⁴ In deciding what interpretation may be needed, only the accused's or suspect's perspective and requirement matters.

10. *Fourth*, and finally, although the Appellant argues that the Appeals Chamber must decide this appeal according to his proposed—and rejected—formulation (notwithstanding the Single Judge's reformulation), this is unfounded.³⁵ His apparent reading of the *DRC* Extraordinary Review decision—which he uses to support the argument that the Appeals Chamber's ability to consider this appeal is not limited because the Single Judge's role was restricted to “confirming” the issue that Mr Abd-Al-Rahman had proposed—is incorrect.³⁶ It also contradicts this Court's case law which limits the scope of appeals under article 82(1)(d) to what was authorised.³⁷ Likewise, his reliance on the *Comoros* appeal is inapposite: there, the Appeals Chamber found certain issues “intrinsically linked” to the issues certified for appeal, before considering them.³⁸ He has not shown that this is the case. Moreover, although the Appellant argues that the principle of “*la compétence de la compétence*” or “*Kompetenz-kompetenz*” will assist the Appeals Chamber in determining the scope of this appeal,³⁹ it will not. The Appellant conflates the questions of jurisdiction and competence⁴⁰ (which the Appeals Chamber has over these proceedings in ample measure, once leave to appeal had been granted) and the question of the proper scope of the appeal itself. The former is undisputed, the latter is what the Appeals Chamber must decide according to the Single Judge's reformulation. The Appeals Chamber is not an advisory body and cannot decide on what is not properly before it.

11. For the reasons above, the Appellant's submissions on the scope of the appeal are incorrect and should be dismissed summarily.

³³ ICC-01/04-01/07-1497 OA8 (“[Katanga Admissibility AD](#)”), para. 38; [Lubanga Regulation 55 AD](#), para. 110.

³⁴ ICC-01/04-01/07-522 OA3 (“[Katanga Language AD](#)”), para. 59 (“The subject of understanding is exclusively the accused.”); ICC-01/05-01/08-307 (“[Bemba Language Decision](#)”), para. 17 (“[...] the language requirement of ‘fully understands and speaks’ in article[s] 67(1)(a) and (f) of the Statute refers exclusively to the ‘accused’ [...] and not his Defence counsels.”); ICC-02/11-01/11-489 OA5 (“[Gbagbo Translation AD](#)”), paras. 11-12 (“[...] The Appeals Chamber underlines that ‘article 67(1)(a) and (f) of the Statute relates to the language ability and knowledge of the suspect and/or accused, not of his/her [c]ounsel and/or defence team’”). Although article 67(1)(f) uses the term “accused”, it applies equally to suspects awaiting confirmation of charges.

³⁵ [Appeal](#), paras. 14-19.

³⁶ [Appeal](#), para. 15 and [DRC Extraordinary Review AD](#), para. 20 (which does not limit the first instance chamber's role in the manner described).

³⁷ See e.g., [Gbagbo Confirmation AD](#), para. 63.

³⁸ [Appeal](#), paras. 16-17; [Comoros AD](#), para. 56.

³⁹ [Appeal](#), paras. 18-19, citing *inter alia* ICC-02/04-01/05-147 (“[Uganda Decision](#)”), paras. 22-24 (concerning a different matter of whether the chamber had jurisdiction over what was termed an “administrative dispute”).

⁴⁰ [Uganda Decision](#), para. 22; ICC-RoC46(3)-01/18-37 (“[Myanmar Jurisdiction Decision](#)”), para. 30.

B. RESPONSES TO GROUNDS OF APPEAL

12. While the Appellant alleges that all three grounds of appeal constitute errors of law, he fails to establish them as such.⁴¹ Nor does he address—let alone demonstrate—the material effect/impact of those errors. As the Appeals Chamber has held, an appellant alleging a legal error must *substantiate* that the Trial Chamber’s (or Pre-Trial Chamber’s) interpretation of the law was incorrect;⁴² merely saying so is insufficient. In addition, an appellant must *substantiate* that the decision under review would have been substantially different, had it not been for the error.⁴³ If the error and its material effect is substantiated, the Appeals Chamber “will arrive at its own conclusions as to the appropriate law and determine whether or not the [first instance] Chamber misinterpreted the law.”⁴⁴ If the appellant fails to substantiate the legal error and its material effect (as Mr Abd-Al-Rahman often fails to do), the Appeals Chamber can dismiss the argument without analysing its substance.⁴⁵ On this basis, and as shown below, the Appeals Chamber should dismiss parts of Mr Abd-Al-Rahman’s appeal.

⁴¹ [Appeal](#), paras. 20-38.

⁴² [Lubanga AJ](#), para. 31.

⁴³ [Lubanga AJ](#), para. 31.

⁴⁴ [Lubanga AJ](#), paras. 30-31.

⁴⁵ [Lubanga AJ](#), para. 30.

i. Ground 1: The Single Judge correctly interpreted the scope of article 67(1)f) of the Statute to exclude client-counsel communications

13. In his first ground of appeal, the Appellant argues that the Single Judge interpreted the word “proceedings” in article 67(1)(f) of the Statute restrictively, to exclude interpretation/translation for client-counsel communications.⁴⁶ This, according to him, was an error of law.⁴⁷ Yet he fails to show *how* the Single Judge misinterpreted the law—with the bulk of his submissions spent disputing the Registry’s observations, which, he claims, influenced the Single Judge’s decision.⁴⁸ As such, the Appellant’s submissions could be dismissed summarily.

14. Notwithstanding, considering the significance of the issue for which leave was granted for this case and others and to assist the Appeals Chamber, the Prosecution will address the crux of this appeal, *i.e.*, whether article 67(1)(f) includes interpretation/translation for client-counsel communications.

15. Article 67(1)(f) of the Statute encapsulates the right to interpretation under the Statute. Notwithstanding the use of the word “accused” in article 67(1)(f), it also applies to a suspect, like Mr Abd-Al-Rahman, awaiting confirmation of charges. It provides that an accused/suspect must

“[...] 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”.

To identify the language of reference for article 67(1)(f), the English version of the Statute uses the phrase “[the language of] the proceedings of or documents presented to the Court”, while the French version uses the phrase “*la langue employée dans toute procédure suivie devant la Cour ou dans tout document présenté à la Cour*”.⁴⁹ As the Appeals Chamber has previously held, for articles 67(1)(a) and (f) of the Statute, the point of reference is a working

⁴⁶ [Appeal](#), paras. 22-27.

⁴⁷ [Appeal](#), paras. 22-27.

⁴⁸ [Appeal](#), paras. 23-27.

⁴⁹ Article 67(1)(f), Statute. The French version states “Se faire assister gratuitement d'un interprète compétent et bénéficier des traductions nécessaires pour satisfaire aux exigences de l'équité, si la langue employée dans toute procédure suivie devant la Cour ou dans tout document présenté à la Cour n'est pas une langue qu'il comprend et parle parfaitement” (*Statut de Rome de la Cour pénale internationale*).

language of the Court.⁵⁰ In other words, court proceedings (for the purposes of article 67(1)(f)) will, in principle, be conducted in English or French.⁵¹ If an accused/suspect does not fully understand and speak the language of the Court, interpretation in the language that he fully understands and speaks is provided so he can follow court proceedings.⁵² Accordingly, since Mr Katanga “[spoke] Lingala best” and not French, the Appeals Chamber found that the Pre-Trial Chamber had erred in not allowing a Lingala interpreter in the court proceedings.⁵³

16. *First*, as the Single Judge correctly found, 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.⁵⁴ Article 67(1)(f) does not apply to private communications the accused may have with his counsel in relation to the case, but which are not part of judicial/court proceedings. This is because the accused’s or suspect’s right to interpretation under article 67(1)(f) is defined in relation to the working language of the Court, or in other words, the language used in court proceedings.⁵⁵ While article 50 of the Statute identifies these working languages as English and French, rule 41 of the RPE defines a “working language” as “that language [...] understood and spoken by the majority of those involved *in a case before the Court* and [that] any of the participants *in the proceedings* so requests”.⁵⁶ Accordingly, the Registrar ensures that interpretation services are provided *in all proceedings, inter alia*, for the working languages under rule 41 and the language of the person to whom article 58 applies, the accused, convicted or acquitted person if he or she does not fully understand and speak any of the working languages.⁵⁷

⁵⁰ [Katanga Language AD](#), para. 58.

⁵¹ Article 50(2), Statute, rule 41, Rules of Procedure and Evidence (“RPE”), regulation 40, RoC. *See also* [Katanga Language AD](#), fn. 106 (“This is even clearer in relation to paragraph (1) (f) with the addition of the phrase ‘if any of the proceedings are not in a language which the accused fully understands and speaks’.”). However, since article 50 stipulates the working languages of the Court, this also seems to be the case for paragraph (1)(a) [...]”).

⁵² [Katanga Language AD](#), paras. 58-59, 62.

⁵³ [Katanga Language AD](#), paras. 5, 19; *see also* ICC-01/04-01/07-127 (“[Katanga First Language Decision](#)”), pp. 3-4 (asking for Lingala interpretation during the proceedings); Keïta *et al.*, p. 1526; Cassesse *et al.*, p. 1138 (with respect to the ICTR/Y Statutes).

⁵⁴ [Article 67\(1\)\(f\) Decision](#), para. 15.

⁵⁵ [Katanga Language AD](#), para. 58.

⁵⁶ Article 50(2), Statute: The working language of the Court shall be English and French. Rule 41(1), RPE: For the purposes of article 50, paragraph 2, the Presidency shall authorise the use of an official language of the Court as a working language when: (a) That language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests; or (b) The Prosecutor or the defence so request. (emphasis added).

⁵⁷ Regulation 40(2), RoC.

17. In this sense, and as the Appeals Chamber has already held, the scope of an accused's right to interpretation to follow proceedings in court (or to understand the nature of the charges against him) depends on whether or not he can fully understand and speak the language used in court, or its working language.⁵⁸ This working language is defined by the Statute and the RPE. In contrast, the ability of an accused/suspect to communicate with counsel does not depend strictly on his or her knowledge of the language used in court. An accused and his counsel may choose to communicate with each other in a language other than a working language of the Court. While they may choose to communicate using the working languages, the Statute or the Rules do not require them to. Client-counsel communication does not depend on the language of reference (or working language) identified in article 67(1)(f) of the Statute. This suggests that interpretation for client-counsel communication is not viewed with the same lens as interpretation for court proceedings under article 67(1)(f).

18. *Second*, the use of the word “proceedings” in article 67(1)(f), and its common understanding, determines that interpretation/translation under article 67(1)(f) is limited to that needed for court proceedings. The word “proceedings” (or “*toute procédure suivie devant la Cour*”, in French) in article 67(1)(f) usually refers to court/judicial proceedings or more broadly, proceedings before a chamber, as seen in legal parlance,⁵⁹ and with reference to several other provisions of the Statute.⁶⁰ Indeed, the underlying rationale for according a right to interpretation/translation for court proceedings is so the accused can understand what transpires in court—and is essential to the accused being considered “present” at his trial.⁶¹ Further, the parallel right relating to translation of documents presented to Court also under

⁵⁸ [Katanga Language AD](#), paras. 58-62.

⁵⁹ See e.g., Oxford English Dictionary (“[OED](#)”, 3rd edition, June 2007): “proceedings” in law means “a legal action or process; any act done by authority of a court of law; a step taken by either party in a legal case.”; [Black’s Law Dictionary](#) (online, 11th edn (2019)), defining “proceedings” in relation to various judicial proceedings (such as civil, criminal, care and matrimonial legal proceedings); Larousse, [Le Dictionnaire Larousse en ligne](#) (online) : Procédure - “Forme suivant laquelle les procès sont conduits, instruits et jugés ou les actes d’exécution forcée accomplis”; 2017 Dictionnaires Le Robert, Procédure - [Le Grand Robert de la langue française](#) (online), “Manière de procéder juridiquement, ‘série de formalités qui doivent être successivement remplies pour aboutir à un résultat déterminé’ ”, referring to Paul Cuche, *Précis de procédure civile et commerciale*, 5e éd. Dalloz, 1931; [Le Robert](#) (dico en ligne) : Procédure - “Manière de procéder juridiquement; série de formalités qui doivent être remplies.”

⁶⁰ See e.g. with respect to the Statute, article 59 (arrest proceedings in the custodial State); article 60 (initial proceedings before the Court); article 64(3)(a) and (b) (the Trial Chamber’s functions and powers with respect to the fair and expeditious conduct of the proceedings and determining the language used at trial); article 65 (proceedings on an admission of guilt); article 68 (the participation of victims in the proceedings); article 83 (proceedings on appeal).

⁶¹ Schabas/McDermott, p. 1671, mn. 42 (“An accused who does not understand the proceedings is not ‘present’ at trial. Thus, the right to an interpreter seems axiomatic [...]”).

article 67(1)(f) is interpreted “in the context of proceedings before the Court”.⁶² It would be illogical to interpret the right to interpretation, also in the same provision, otherwise.

19. *Third*, 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 what is considered necessary interpretation under article 67(1)(f) is tied to the language used in court. As the legislative history of article 67(1)(f) shows, several previous versions used the phrase “the proceedings of or documents presented to the Court”, underscoring that necessary interpretation and translation was linked to understanding proceedings in court, or documents presented to the court.⁶³ Moreover, an early proposal from France suggests that the focus of the provision was geared towards interpretation in court.⁶⁴ Likewise, several relevant human rights texts (article 14(3)(f), International Covenant on Civil and Political Rights (ICCPR), article 6(3)(e), European Convention on Human Rights (ECHR) and article 8(2)(a), American Convention on Human Rights (ACHR)) link the right to interpretation to the accused’s need to understand the language used in court.⁶⁵ Interpretation is provided only if the accused cannot follow court proceedings in the language of the court.⁶⁶ The *ad hoc* tribunals have adopted a similar position.⁶⁷

⁶² ICC-01/05-01/13-177 (“[Bemba et al. Translation Decision](#)”), para. 6 (“[...] it also appears beyond controversy, in light of article 67(1)(f), that this right does not *per se* translate into the right to obtain the translation of any and all documents which are *used in the context of proceedings before the Court* [...]”).

⁶³ Bassiouni/Schabas, pp. 588-605 (Text transmitted by the Drafting Committee to the Committee of the Whole, the 1998 Preparatory Committee Draft, the Zutphen Draft, the 1997 Preparatory Committee Draft and the ILC Draft all use the phrase “the proceedings of or documents presented to the Court” in relation to what became article 67(1)(f)); Schabas/McDermott, p. 1671, mn. 42 (“[...] The Statute provision is essentially identical to the ILC Draft, except for the order of the phrases. These were reversed at the August 1997 session of the Preparatory Committee, and the word ‘fully’ added during the Rome Conference”).

⁶⁴ See Bassiouni/Schabas, p. 602 (outlining the French proposal on rights of the accused, which used the phrase “the proceedings of or documents presented to the Court” in relation to interpretation, but also proposed text (in square brackets) that specified that the working languages of the Court shall be English and French; that any other person *appearing before the Court*, other than counsel, could benefit from interpretation; and that counsel for an accused could apply to the Presiding Judge of a Chamber to use a language other than the two working ones or the language of the accused).

⁶⁵ Article 14(3)(f), [ICCPR](#): To have the free assistance of an interpreter if he cannot understand or speak the language used in court; article 6(3)(e), [ECHR](#): To have the free assistance of an interpreter if he cannot understand or speak the language used in court; article 8(2)(a), [ACHR](#): The right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court.

⁶⁶ General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial), CCPR/C/GC/32, 23 August 2007 (“[General Comment 32](#)”), para. 40 (“The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3(f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings [...] However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.”); Human Rights Committee (“HRC”), [Guesdon v. France](#), Communication No. 219/1986, U.N.Doc.CCPR/C/39/D/219/1986, 23 August 1990, paras. 10-11 (interpreting article 14(3)(f) ICCPR in the context of the language used in court, and

20. *Fourth*, on the germane issue of whether article 67(1)(f) grants Mr Abd-Al-Rahman an unfettered right to interpretation for all client-counsel communication, the Statute is silent on this subject. Given its specific language and rationale which tailors the requirement of interpretation to court proceedings, it cannot be interpreted to include such a sweeping purported right.⁶⁸ Contrary to the Appellant's submissions,⁶⁹ regulation 97(1) of the RoC does not furnish him with that unfettered right either. The RoC is not a source of applicable law under article 21(1) of the Statute, and the Court applies the Statute and the Rules in the first place.⁷⁰

21. As article 21(3) of the Statute requires, this interpretation of article 67(1)(f) of the Statute is also consistent with internationally recognised human rights.⁷¹ Human rights courts and bodies have not recognised an unfettered right to interpretation for client-counsel communication in provisions guaranteeing interpretation, corresponding to article 67(1)(f). For instance, the right to free interpretation applies to oral statements made at court hearings, and the right to free translation applies if necessary for a fair trial.⁷² Some decisions have expressly rejected the proposition that the right to free interpretation extends to client-counsel

rejecting an accused's request to speak his own language in court when he was proficient in the court's language).

⁶⁷ Article 21(4)(f), [ICTY Statute](#): To have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal; article 20(4)(f), [ICTR Statute](#): To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda; article 35(f), [ECCC Statute](#): To have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court; article 16(4)(g), [STL Statute](#): To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal.

⁶⁸ ICC-01/05-01/13-2276 (*"Bemba et al. SAJ"*), para. 76 ("It is clear that not every 'silence' in the legal framework of the Court constitutes a lacuna.").

⁶⁹ [Appeal](#), para. 24. *See above* para. 8.

⁷⁰ *Bemba et al. SAJ*, para. 76.

⁷¹ Article 21(3), Statute.

⁷² ECtHR: [Hermi v. Italy](#), Application no. 18114/02, 18 October 2006, para. 69 ("[The right to free assistance of an interpreter] applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused 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 or to have rendered into the court's language in order to have the benefit of a fair trial."); [Güngör v. Germany](#), Application no. 31540/96, 17 May 2001, para. 1; [Husain v. Italy](#), Application no. 18913/03, 24 February 2005 (noting that the interpretation assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself, by being able to put his version of events before the court); [Cuscani v. United Kingdom](#), Application no. 32771/96, 24 September 2002, paras. 34-40 (interpreting the right to interpretation under article 6(3)(e) ECHR in the context of the accused's ability to follow proceedings in court, and finding, on the facts of the case, that article 6(3)(e) had been violated because the judge did not verify if the interpretation provided was adequate); [Kamasinski v. Austria](#), Application no. 9783/82, 19 December 1989, para. 74 (noting that the right to free assistance of an interpreter applies to oral statements made at the trial hearing, documentary material and pre-trial proceedings); [Katritsch v. France](#), Application no. 22575/08, 4 November 2010, para. 41; [Baytar v. Turkey](#), Application no. 45440/04, 14 October 2014, para. 49; HRC: [Singarasa v. Sri Lanka](#), Communication no. 1033/2001, U.N. Doc.CCPR/C/81/D/1033/2001, 23 August 2004, para. 7.2 (noting that article 14(3)(f) ICCPR provides a right to an interpreter during the court hearing only); [Cadoret and Le Bihan v. France](#), Communication no. 221/1987, U.N. Doc. CCPR/C/41/D/221/1987, 11 April 1991, para. 5.6.

communications—stating unequivocally that article 6(3)(e) of the ECHR (the equivalent of article 67(1)(f)) applies to the relations between the accused and the judge, but not to the relations between the accused and his counsel.⁷³ There is, therefore, no explicitly established unfettered right to interpretation for privileged communications with counsel under article 67(1)(f).

22. However, some human rights decisions have recognised the difficulties faced by an accused/suspect when he cannot communicate with his or her counsel, due to differing linguistic abilities.⁷⁴ Yet, these decisions do not address the right equivalent to article 67(1)(f), but different rights of the accused/suspect, *i.e.*, his right to adequate time and facilities to prepare his defence and his right to legal assistance, the equivalents of which lie in articles 67(1)(b) and (d) respectively. In this context, they have found that in legal aid cases, it is ultimately the responsibility of the State (or the Court, in this case) to either appoint a lawyer who can communicate with the accused, or to provide an interpreter.⁷⁵ In the circumstances of the Court, this proposition would not amount to an unfettered right to a Court-funded interpreter at the disposal of the Defence team (as the Appellant suggests), since article 67(1)(f)—the only provision that ensures a standalone right to interpretation/translation—is not engaged. But rather, since the resolution is left to the judges’ discretion, the Chamber—as the ultimate guardian of the fairness of the proceedings—must decide whether other solutions are required, including appointing a different counsel.⁷⁶ Equally, the Chamber can address any shortfall in Mr Abd-Al-Rahman’s

⁷³ See [X v. Austria](#), Application no. 6185/73, 29 May 1975, p. 70 (“[...] It is undisputed that an interpreter was present at the hearing. [Article 6(3)(e)] could not be given such wide significance as to cover the relations between the accused and his counsel. Article 6(3)(e) in fact only applies to the relations between the accused and the judge.”). But see [Güngör v. Germany](#), para. 1 (seemingly addressing a request for interpretation for client-counsel communication under article 6(3)(e), without clarity, and rejecting it) and [Lagerblom v. Sweden](#), Application no. 26891/95, 14 January 2003, paras. 61-64 (addressing a request under article 6(3)(e) to replace an appointed public defence counsel with a counsel of choice so he could communicate with him, which can be distinguished from the case at hand, since Mr Abd-Al-Rahman requested Mr Laucci’s appointment as counsel).

⁷⁴ See Harris *et al.*, p. 489, fn. 1201 (citing *X v. Germany*, Application no. 1022/82, 6 EHRR 353 (1983)); [Pugžlys v. Poland](#), Application no. 446/10, 14 June 2016, paras. 80-84. See also Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (“[EU Directive](#)”), paras. 19-20 (recognising that an accused must be able to communicate with his counsel to prepare his defence, but not establishing an unfettered right to interpretation); HRC: [Harward v. Norway](#), Communication No. 451/1991, U.N. Doc. CCPR/C/51D/451/1991 (1994), 16 August 1994, paras. 9.4-9.6 (recognising that the accused had interpretation to communicate with counsel, but not an unfettered right to interpretation in the context of preparing his defence).

⁷⁵ Harris *et al.*, p. 489, fn. 1201 (citing *X v. Germany*, Application no. 1022/82, 6 EHRR 353 (1983))

⁷⁶ [Hermi v. Italy](#), para. 72 (noting that while conduct of the defence is essentially a matter between the defendant and his counsel, the courts remain the ultimate guardians of the fairness of the proceedings); [Cuscani v. United Kingdom](#), para. 39 (noting, that on the question of difficulties with interpretation, judges are required to treat an accused’s interest with “scrupulous care”); [Katritsch v. France](#), paras. 42-44; [EU Directive](#), para. 27 (noting the court’s duty of care towards suspects/accused).

communication with counsel by ordering Defence counsel to organise the available resources within the team to ensure proper interpretation. This is addressed further with respect to the third ground of appeal.⁷⁷

23. *Fifth*, the Appellant's remaining submissions under the first ground of appeal should be dismissed summarily, as they are either irrelevant, or unsubstantiated, or both.⁷⁸ The *Bemba* and *Lubanga* decisions that he cites merely underscore Mr Bemba's and Mr Lubanga's rights to interpretation/translation respectively *vis-à-vis* court proceedings under article 67(1)(f).⁷⁹ Neither decision granted interpretation to facilitate client-counsel communication. Nor is the Appellant's statement that the right to interpretation is a *sine qua non* for fair trial controversial.⁸⁰ Likewise, although he claims that the ECtHR jurisprudence relied on is irrelevant, he does not say more.⁸¹

24. The Appellant fails to show error. Accordingly, the Appeals Chamber should dismiss the first ground of appeal.

ii. Ground 2: Mr Abd-Al-Rahman's right to interpretation services was not made conditional on his qualifying for the Court's legal aid services under article 67(1)(d) of the Statute

25. The Appellant's second ground of appeal should be dismissed summarily.⁸² It exceeds the authorised scope of the appeal. As discussed above, it is based on a fundamental misreading of the Article 67(1)(f) Decision and the Leave to Appeal Decision.⁸³ Since the Appellant overlooks the express rationale of the Article 67(1)(f) Decision and disregards the Single Judge's correction of his misunderstanding in the Leave to Appeal Decision,⁸⁴ the Appeals Chamber should not consider his submissions on the matter further.

26. Even if the Appeals Chamber were to consider this ground of appeal, the Appellant fails to show an error of law—let alone its impact. Although he argues that the Single Judge

⁷⁷ See below paras. 30-36 (on the third ground of appeal).

⁷⁸ [Appeal](#), paras. 23-27.

⁷⁹ [Appeal](#), para. 23 (citing [Bemba Language Decision](#), para. 18 and ICC-01/05-01/08-76 ("[Bemba Legal Aid Decision](#)"), p. 7 and ICC-01/04-01/06-268 ("[Lubanga Language Decision](#)"), pp. 4-8).

⁸⁰ [Appeal](#), para. 23 (citing [Katanga Language AD](#), para. 41).

⁸¹ [Appeal](#), para. 26.

⁸² [Appeal](#), paras. 28-32. See above para. 7 (requesting summary dismissal of the second ground of appeal).

⁸³ See above paras. 4-11. See [Article 67\(1\)\(f\) Decision](#), paras. 13-17; [Leave to Appeal Decision](#), paras. 11-14.

⁸⁴ [Leave to Appeal Decision](#), para. 11.

incorrectly linked the right to interpretation under article 67(1)(f) to the grant of legal aid,⁸⁵ a plain reading of the Article 67(1)(f) Decision shows otherwise. The Single Judge rejected Mr Abd-Al-Rahman's request because it fell outside the scope of article 67(1)(f)—and not because it was somehow linked to his legal aid.⁸⁶ Further, as a separate matter, the Single Judge reminded Counsel of his professional obligations under the Code of Professional Conduct for counsel (“Code of Conduct”) towards his client, and in this context, noted Counsel's responsibility to use the legal aid funds (to which Mr Abd-Al-Rahman is entitled) in a manner that he was able to communicate adequately:⁸⁷ it was entirely proper for the Single Judge to do so.⁸⁸

27. The Appellant discusses the Registry's legal aid policy in some detail.⁸⁹ Yet, none of the Single Judge's findings related to it, even if the Registry may have referred to it in its observations.⁹⁰ The Appellant's submissions on this subject exceed the scope of this appeal, and should be dismissed. Moreover, if Mr Abd-Al-Rahman intends to challenge the legal aid allotted to him, this falls plainly outside the scope of this appeal. If the Chamber wishes to entertain submissions on the Registry's legal aid policy and its application in this case, the Registrar—who has been invited to provide observations on the merits of this appeal⁹¹—should be heard.

28. It is uncontroversial that an accused/suspect has two separate rights under articles 67(1)(f) and (d) respectively—one ensuring interpretation in court proceedings, and the other for legal assistance assigned by the Court if the interests of justice so require. These rights are distinct from each other—although neither right is an unfettered one.⁹² Nor should there be any reasonable dispute in this appeal on how regulation 83 of the RoC should be read.⁹³ As has been held, the Registrar retains a relatively wide margin of discretion in managing and applying the legal aid scheme, and must do so according to the Statute.⁹⁴ Notwithstanding, the Chamber has the authority to review the Registrar's decisions, while also recognising that the Registry is the organ of the Court best placed to oversee available financial resources and

⁸⁵ [Appeal](#), para. 28.

⁸⁶ [Article 67\(1\)\(f\) Decision](#), paras. 13-17.

⁸⁷ [Article 67\(1\)\(f\) Decision](#), para. 17.

⁸⁸ See article 64, Statute (where the Chamber is responsible for the fair and expeditious conduct of proceedings).

⁸⁹ [Appeal](#), paras. 29-32.

⁹⁰ Registry Observations, para. 20.

⁹¹ ICC-02/05-01/20-127 OA (“Order for Registry Submissions”).

⁹² See e.g., Schabas/McDermott, p. 1668, mn. 32.

⁹³ Regulation 83(1), RoC: “Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence [...]”.

⁹⁴ ICC-01/05-01/13-955 (“[Bemba et al. Legal Aid Decision](#)”), para. 36.

the needs of cases.⁹⁵ The Appellant does not take issue with this. In these circumstances, the Appellant's submissions interpreting regulation 83 of the RoC 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.⁹⁶

29. Therefore, even if the Appeals Chamber decides to entertain the merits of the Appellant's second ground of appeal, it should dismiss it. He fails to show error.

iii. Ground 3: The Single Judge did not consider the language skills of counsel in interpreting article 67(1)(f) of the Statute

30. In his third ground of appeal, the Appellant argues that the Single Judge erred in law since he purportedly considered the language skills of Defence counsel/team as a relevant criterion in interpreting article 67(1)(f).⁹⁷ This misreads the Article 67(1)(f) Decision again. As submitted above,⁹⁸ the Single Judge rejected Mr Abd-Al-Rahman's request under article 67(1)(f) because he correctly found that article 67(1)(f) did not apply to communication between counsel and client. In denying the request, he did not consider the Defence counsel's/team's linguistic abilities.⁹⁹ Apart from speculating that the Single Judge was influenced by the Registry's submissions, the Appellant fails to point to any specific findings in support.¹⁰⁰ As a separate matter (unrelated to his findings on article 67(1)(f)), the Single Judge found that Counsel was professionally obliged, under the Code of Conduct, *inter alia* to take into account his client's personal circumstances and specific needs and to act in good faith.¹⁰¹ Accordingly, the Single Judge noted that Counsel, having accepted to defend a suspect with whom he cannot communicate, must use the legal aid provided to ensure that Mr Abd-Al-Rahman could properly communicate with him.¹⁰² Drawing attention to Counsel's obligations towards his client (including by composing the Defence team appropriately) to

⁹⁵ [Bemba et al. Legal Aid Decision](#), paras. 31-33.

⁹⁶ [Appeal](#), paras. 31-32 (arguing that article 67(1)(f) is not conditional on eligibility for legal aid, based on the VCLT).

⁹⁷ [Appeal](#), paras. 33-38.

⁹⁸ See above paras. 4-11 (scope of appeal) and 25-29 (second ground of appeal).

⁹⁹ [Article 67\(1\)\(f\) Decision](#), para. 15.

¹⁰⁰ [Appeal](#), para. 34.

¹⁰¹ [Article 67\(1\)\(f\) Decision](#), para. 17. See e.g., Code of Conduct, Article 9(2): "In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs [...]"; Article 14(1): The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client; Article 24(2): "Counsel is personally responsible for the conduct and presentation of the client's case [...]".

¹⁰² [Article 67\(1\)\(f\) Decision](#), para. 17.

ensure he can properly communicate with him was entirely within the Single Judge's proper remit—as other Chambers have also done.¹⁰³

31. *First*, in addition to misstating the Article 67(1)(f) Decision, the Appellant also misinterprets the Appeals Chamber's previous findings in *Katanga*.¹⁰⁴ In *Katanga*, and to explain the phrase “fully understands and speaks” in article 67(1)(f), the Appeals Chamber found that the subject of that understanding is exclusively the accused.¹⁰⁵ In this sense, the linguistic competence of the defence team would be irrelevant to interpreting the standard under article 67(1)(f). However, the Single Judge made no findings in relation to article 67(1)(f) which considered the linguistic competence of the Defence team. Moreover, even when he considered Counsel's responsibility over his team (in a non-article 67(1)(f) context), he merely acknowledged Counsel's inability to communicate with the suspect, and that Counsel should ensure Mr Abd-Al-Rahman's ability to communicate.¹⁰⁶ The Appellant fails to show error.

32. *Second*, while the Registry provided information on the appointment of Mr Abd-Al-Rahman's counsel,¹⁰⁷ the Appellant's submissions challenging the neutrality of the Registry are without basis.¹⁰⁸ The Prosecution notes that the Appeals Chamber has given the Registry the opportunity to make submissions on the merits of this appeal.¹⁰⁹ Likewise, although the Appellant argues that the Registry's reference to the principle of “economy” in its legal aid policy and its concern to avoid “excessive financial impact on the Court” was incorrect,¹¹⁰ the Single Judge did not even consider this in his findings. It is the Single Judge's Decision that is the point of reference for this appeal, and not the Registry's observations. Since the Appellant's arguments take issue with the Registry's submissions, and not the impugned decision, they should be dismissed summarily.

33. *Third*, while the Appellant argues that his Counsel—despite his lack of knowledge of Arabic— was a personal choice and essential to his Defence strategy,¹¹¹ he fails to note that the right to counsel does not imply a right to a *particular* counsel as counsel. Although article 67(1)(d) of the Statute recognises an accused's right to legal assistance of his or her choosing,

¹⁰³ See e.g., ICC-01/04-01/07-304 (“[Ngudjolo Time Limits Decision](#)”), p. 5; ICC-01/04-01/07-477 (“[Ngudjolo Translation Decision](#)”), p. 3; ICC-01/04-01/07-538 (“[Ngudjolo Translation ALA Decision](#)”), pp. 6-7.

¹⁰⁴ [Appeal](#), para. 34.

¹⁰⁵ [Katanga Language AD](#), para. 59.

¹⁰⁶ [Article 67\(1\)\(f\) Decision](#), para. 17.

¹⁰⁷ Registry Observations, paras. 2-5, 19.

¹⁰⁸ [Appeal](#), para. 34.

¹⁰⁹ Order for Registry Submissions.

¹¹⁰ [Appeal](#), para. 37.

¹¹¹ [Appeal](#), para. 35.

and he or she is entitled to choice of counsel, this right is not unlimited.¹¹² As the human rights legal system underscores, the right to a counsel of a person's choosing is not absolute. Courts may override the person's choice in the interests of justice and with relevant and sufficient reasoning, and if required for the overall fairness of the proceedings.¹¹³ Equally, courts have recognised that the special nature of proceedings taken as a whole may justify specialist lawyers being appointed, even if not the accused's choice.¹¹⁴ Arguably, speaking Arabic is one such specialist skill when it is the only language an accused/suspect is able to communicate in. The *ad hoc* tribunals have also interpreted the right to counsel as a qualified one.¹¹⁵

34. In the circumstances of the present case, this qualified right to counsel must be seen in light of the information given by the Registry. It appears that following the initial appearance hearing on 15 June 2020 (where Mr Abd-Al-Rahman was represented by duty counsel), Mr Abd-Al-Rahman confirmed to representatives of the Registry that he would like an Arabic speaking counsel.¹¹⁶ He was also presented with the profiles of 39 Arabic speaking persons

¹¹² Article 67(1)(d), Statute. See also article 6(3)(c), [ECHR](#); article 14(3)(d), [ICCPR](#); article 8(2)(d) [ACHR](#). Schabas/McDermott, p. 1667 mn. 30 ("Although the accused is entitled to choice of counsel, this right cannot be unlimited. The Court may impose ethical, linguistic and other professional requirements in order to establish qualifications for counsel, as under domestic legal systems. [...]"); Schabas, pp. 1038-1040; ICC-02/05-12 ("Darfur Counsel Decision"), pp. 2-4 (appointing Arabic speaking counsel for the *Darfur* situation).

¹¹³ ECtHR: [Meftah and others v. France](#), Application no. 32911/96, 35237/97 and 34595/97, 26 July 2002, para. 45; [Dvorski v. Croatia](#), Application no. 25703/11, 20 October 2015, paras. 76-82 ("[...] The Court has consistently held that the national authorities must have regard to the defendant's wishes as to his or her choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice [...] the first step should be to assess whether it had been demonstrated in the light of the particular circumstances of each case that there were relevant and sufficient grounds for overriding or obstructing the defendant's wish as to his or her choice of legal representation. Where no such reasons exist, the Court should proceed to evaluate the overall fairness of the criminal proceedings."); [Mayzit v. Russia](#), Application no. 63378/00, 20 January 2005, paras. 65-66 ("Article 6(3)(c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured [...] the right to choose one's own counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where it is for courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them."); [Vitan v. Romania](#), Application no. 42084/02, 25 March 2008, para. 59; HRC: [Osbourne Wright and Eric Harvey v. Jamaica](#), Communication no. 459/1991, U.N.Doc.CCPR/C/55/D/459/1991, 8 November 1995, para. 10.5 ("[...] The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the case by the lawyer is not incompatible with the interests of justice.")

¹¹⁴ [Meftah and others v. France](#), para. 47.

¹¹⁵ ICTR : *Prosecutor v. Kambanda*, ICTR-97-23-A, Judgement, 19 October 2000 ("[Kambanda AJ](#)"), para. 33; *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001 ("[Akayesu AJ](#)"), para. 61 ("[...] in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel."); *Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007 ("[Nahimana et al. AJ](#)"), para. 265; ICTY: *Prosecutor v. Blagojević et al.*, IT-02-60-A, Judgement, 9 May 2007 ("[Blagojević AJ](#)"), para. 17 ("[...] the Registrar normally takes account of an accused's preferences in assigning counsel, as was done in the present case, but it is also within the Registrar's discretion to override that preference in the interests of justice.")

¹¹⁶ Registry Observations, paras. 2-4.

on the list of counsel.¹¹⁷ However, on 17 June 2020, Mr Abd-Al-Rahman requested the appointment of the present counsel to represent him,¹¹⁸ despite his inability to communicate with his client. Moreover, although Mr Abd-Al-Rahman argues that his choice to retain his present counsel was to implement a particular defence strategy, the requests on the issues that he describes as the cornerstones of this strategy have been rejected.¹¹⁹

35. Likewise, although Mr Abd-Al-Rahman argues that he cannot rely on his case manager for interpretation,¹²⁰ the Registry has described one of the team members appointed by Counsel as being “fully proficient in Arabic”.¹²¹ Moreover, the Appellant misinterprets the *Katanga* Language decision yet again. That it is the accused’s or suspect’s understanding of the language that is key to interpreting the standard under article 67(1)(f) does not mean that Counsel has no responsibility to organise his team in the manner that best serves his client’s interests.¹²² Further, it is for Counsel to organise the resources available (taking work load into account) so that Mr Abd-Al-Rahman’s requirements to communicate and to prepare his defence are met.¹²³

36. Accordingly, since the Appellant fails to show error, the Appeals Chamber should dismiss the third ground of appeal.

iv. *The Appeals Chamber should examine whether new measures are required in order to reinforce Mr Abd-Al-Rahman’s defence*

37. This appeal must fail, since article 67(1)(f) does not give an accused/suspect an unfettered right to interpretation for client-counsel communications in the manner that Mr Abd-Al-Rahman seeks. Although Mr Abd-Al-Rahman cannot be given Court-funded

¹¹⁷ Registry Observations, para. 4.

¹¹⁸ Registry Observations, para. 5.

¹¹⁹ [Appeal](#), para. 35 (describing his requests to ask the United Nations to fund the activities of the Court and to ask for priority reparations for the victims in the Darfur situation). *But see* ICC-02/05-01/20-101 (“[Article 115 Decision](#)”), para. 8 (rejecting the request, finding that “[there] is no legal basis for the Chamber to engage in the financial matters of the Court”); ICC-02/05-01/20-110 (“[Article 115 ALA Decision](#)”), paras. 12-14 (dismissing the request for leave to appeal, noting that the Request failed to spell out clearly and precisely the issue upon which leave to appeal is sought and could be dismissed *in limine*); ICC-02/05-01/20-117 (“[Reparations Decision](#)”), paras 12-13 (dismissing the request for additional principles of reparations *in limine* and noting that “there is no legal basis for the Request, it does not fall within the Counsel’s prerogatives and duties nor within the Chamber’s sphere of competence, and, accordingly, should be dismissed *in limine*” and that “it is in the interest of the parties and the victims that the parties and the Chamber focus their limited resources in dealing with the ongoing pre-trial proceedings in the most expeditious and fair possible manner.”).

¹²⁰ [Appeal](#), para. 36.

¹²¹ Registry Observations, para. 21. The Prosecution understands that this refers to the case manager.

¹²² *Contra* [Appeal](#), para. 36.

¹²³ *Contra* [Appeal](#), para. 36.

permanent interpretation to communicate with his counsel, it is the Chamber which ensures that the proceedings are fair and expeditious, and that the accused's rights are safeguarded. It is therefore for the Chamber to assess whether, in the circumstances of this case, any deficit in communication can be met by other means, including by instructing counsel to provide such adequate interpretation (by making use of existing resources or by composing his team appropriately, such as by appointing co-counsel who is fluent in the client's language), or, if required, by appointing a different counsel who would be able to communicate with Mr Abd-Al-Rahman. The Prosecution notes that human rights law allows courts to override an accused's choice of counsel, if required in the interests of justice and with relevant and sufficient reasoning.¹²⁴

38. Since the Appeals Chamber will be assisted by the Registry's submissions on this subject on appeal,¹²⁵ it will have all the relevant information before it to determine whether any of the measures referred to above may be warranted in the circumstances, and to instruct the Registry accordingly.

¹²⁴ See above para. 33.

¹²⁵ Order for Registry Submissions.

III. CONCLUSION

39. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss Mr Abd-Al-Rahman's appeal against the Article 67(1)(f) Decision and to confirm the Article 67(1)(f) Decision. It also requests the Appeals Chamber to determine whether any measures are required to reinforce Mr Abd-Al-Rahman's right to an effective defence and if so, to instruct the Registry accordingly.



Fatou Bensouda, Prosecutor

Dated this 24th day of August 2020

At The Hague, The Netherlands