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

Date: **9 July 2024**

TRIAL CHAMBER I

Before : Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

PUBLIC

**Public Redacted Version of Defence Reply to “Prosecution Response
Regarding Four Items Objected to in the Defence Bar Table Motion”**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman replies, with the leave of the Trial Chamber,¹ to the “Prosecution’s Response regarding four items objected to in the Defence Bar Table Motion” of 29 May 2024 (“Response”).²

2. The arguments raised in the Response are factually and legally unfounded. They should be rejected.

II. THE THREE SCREENING NOTES

3. The three screening notes should be admitted by the Trial Chamber. Contrary to the Prosecution’s assertion in the Response, the Trial Chamber has not previously refused any Defence requests for admission of these notes. This is not a case where an argument of *res judicata* can properly be advanced. Whilst it is right that it was seized of Defence requests for the admission of screening notes, among other things, of witnesses P-0040, P-0816 and P-0096,³ the Chamber did not rule on the substance of their admissibility in its second bar table motion decision (“Decision”).⁴

4. The most cursory study of paragraphs 99-101 of the Decision reveals that the Trial Chamber understood that the relief requested by the Defence in its responses to the three Prosecution applications under Rule 68(2)(b) was for admission of screening interviews and immigration records as associated material following an order for disclosure of the same. The Chamber found that since it was in possession of no information that the Prosecution had failed to disclose this associated material, no order for disclosure appeared necessary. The Chamber did not thereafter go on to

¹ Email from Chamber’s Legal Officer, 31 May 2024, 15:43

² ICC-02/05-01/20-1137-Conf

³ Response, footnote 12.

⁴ Public redacted version of the Second Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-625-Red](#), paras 99-101.

consider the question of the admissibility of the material. The same point can be made in respect of the Chamber's first bar table motion decision.⁵

5. It is appropriate to note that the Prosecution never sought to reply to the Defence's requests for admission of the screening notes of witnesses P-0040, P-0816 and P-0096 as associated material as auxiliary relief to the Defence's principal request that these witnesses be called under Rule 68(3), or *viva voce*.

6. Against that background, it is clear that the Defence's request for admission of the screening notes in its bar table motion is in no way a renewed request.⁶

7. In addition, the Defence wishes to correct the suggestion that it seeks admission of these three screening notes in order to impeach or challenge the credibility of witnesses P-0040, P-0816 and P-0096.⁷ On the contrary, it is clear from the Annex to the Defence's bar table motion that admission of the screening notes is sought in order to demonstrate that, even at a time more proximate to the events in question than their OTP statements, none of the three witnesses mentioned the involvement of the Accused or of *Ali Kushayb*, even though the names of other alleged perpetrators were volunteered. This argument, and the weight to be attached to the evidence upon which the argument is founded, will be a matter for the Chamber "as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute."⁸ It is not a point that ought to be determined now when assessing simple admission of the screening notes via the bar table.

⁵ Public redacted version of the First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-612-Red](#), paras 71-73, cited at Response, footnote 10.

⁶ *Contra* Response, para. 1.

⁷ *Contra* Response, paras 5 and 11. Paragraph 8(iii) of the bar table cover filing mentions that the screening notes are relevant to the evaluation of the witnesses' credibility; the Prosecution has – wrongly – inferred that the Defence calls the witnesses' credibility into question.

⁸ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 25

8. Consequently, no point of fundamental unfairness to the witnesses or prejudice to the fair evaluation of their evidence arises.⁹

III. THE INVESTIGATION NOTE

9. The investigation note¹⁰ should be admitted by the Trial Chamber. The Defence recognises, of course, that it did not cross-examine P-0917 because, in a filing of 27 October 2022, no objection was taken to her evidence coming in under Rule 68(2)(b).¹¹ At that time, the Defence expected that [REDACTED] P-0868, would be called to testify and it was through him, naturally, that the Defence always intended to introduce the investigation note. P-0868, was always the more appropriate witness to cross-examine on the investigation note because the note recorded a conversation that he [REDACTED] had had with the Prosecution investigator.

10. Unfortunately, and as correctly recalled in the Response,¹² the Defence was deprived of that cross-examination opportunity because [REDACTED] on Sunday, 20 November 2022, a day or two before he was due to give evidence.¹³ By this date, the Trial Chamber had already ruled that P-0917's evidence would be admitted through Rule 68(2)(b).¹⁴ Consequently, the only possible procedure by which the investigation note could be submitted was via the bar table.

11. The Defence would be prejudiced were it to be deprived of the opportunity to have the investigation note admitted because of a tactical decision [REDACTED] over which the Defence had no control. The Trial Chamber should be slow to conclude that the imperative to avoid any prejudice to the "fair evaluation of P-0917's evidence" outweighs the imperative to avoid prejudice to the Defence in disallowing the chance to make submissions on inferences that may be open to the Trial Chamber. In any

⁹ *Contra* Response, para. 11-12.

¹⁰ DAR-OTP-0222-5176.

¹¹ Defence consolidated response to Prosecution's sixth, seventh and eighth applications under rule 68(2)(b), ICC-02/05-01/20-792-Conf, paras 3-5.

¹² Response, para. 15.

¹³ Email [REDACTED] 20 November 2022 at 10:23 hours.

¹⁴ Decision on the Prosecution's sixth, seventh and eighth applications to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-808-Red, 7 November 2022.

event, the decision not to allow the admission of the investigation note should not be taken now; once again, the weight to be attached to the evidence upon which such a submission might be founded will be a matter for the Chamber “as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute.”¹⁵

Respectfully submitted,



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

Dated this 9 July 2024

At The Hague, The Netherlands.

¹⁵ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 25