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

Date: **31 January 2022**

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’s Response to Request ICC-02/05-01/20-555-Conf**

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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1. By the present submission (“the 2nd Response”), the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) hereby responds to the 2nd Application under Rule 68(3) of the Rules of Procedure and Evidence (“RPE”) filed by the Office of the Prosecutor (“OTP”) on 12 January 2022 (“the 2nd Application”).¹

2. The 2nd Response is submitted on 31 January 2022, following an extension of time limit authorised by Honourable Trial Chamber I (“the Chamber”) on 19 January 2022² at the request of the Defence.³

3. Pursuant to Regulation 23bis(2) of the Regulations of the Court (“RoC”), the 2nd Response is classified “Confidential”, mirroring the classification of the 2nd Application. A public redacted version will be filed shortly thereafter.

Referral to the 1st Response

4. As a matter of consistency, the Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman’s appeal rights, the general observations made with respect to the protection of the relevant witnesses’ statements and/or transcripts of interviews in its response to the 1st Application on 5 January 2022 (“the 1st Response”),⁴ which also apply to the five witnesses referred to in the 2nd Application.

The 2nd Response

5. In addition to the abovementioned general observation, the Defence observes, with respect to the written statement and/or prior recorded testimony of Witnesses P-0008, P-0044 and P-0105 and related evidence, that these seem to have been collected in [REDACTED] in [REDACTED], when [REDACTED] was not yet a State Party to the Rome Statute. The exact location of the witnesses’ interviews is redacted, so that the Defence can have no certainty. But the Chamber is informed of the location of their interview and is hereby invited, should it be in [REDACTED], to consider the following.

¹ ICC-02/05-01/20-555-Conf ; public redacted version [ICC-02/05-01/20-555-Red](#).

² Email from Trial Chamber I, 19 January 2022, 13.19.

³ Email from the Defence, 18 January 2022, 18.21.

⁴ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

6. [REDACTED] became a State Party to the Rome Statute on [REDACTED].⁵ Pursuant to Article 4(2) of the Rome Statute, to be authorised to exercise its functions and powers, including investigations and the collection of evidence, in [REDACTED] prior to that date, the Court had to rely on a special agreement (in French, “*une convention*”) with [REDACTED]. No such agreement is registered within the United Nations Treaties Series.

7. By e-mail of 12 January 2022, the Defence enquired with the Registry about the existence of a special agreement with [REDACTED] authorising the Court to perform activities on its territory prior to [REDACTED]⁶. On 17 January 2022, the Registry responded that an [REDACTED] existed with [REDACTED] “since [REDACTED]”. The Registry further indicated that it was unable to share a copy of this [REDACTED] with [REDACTED] and needed first to enquire with the [REDACTED] authorities whether they authorise the sharing of that information with the Defence.⁷ The Defence informed the Registry that this information was required for the purpose of the present Response, which was then due for Monday 24 January 2022.⁸ This was the reason why the Defence applied to the Chamber on 18 January 2022⁹ for an extension of time limit to submit the present response by 31st January 2022, instead of 24 January 2022. On 24 January 2022, the Registry advised that it had not received response from the [REDACTED] authorities¹⁰ and committed to inform the Defence immediately upon receipt of a response.¹¹ The absence of update since implies that no response was received. The Defence uses the present opportunity to thank the Registry for its ongoing efforts on this matter.

8. Pending disclosure of the aforesaid [REDACTED] between the Court and [REDACTED], the Defence submits that it is unlikely that it would equate to a valid “special agreement” (“*une convention*”) or fulfil the formal requirements of a convention such as the one contemplated under Article 4(2) of the Statute. Without

⁵ List of States Parties: [REDACTED].

⁶ Email to Counsel Support Section, 12 January 2022, 11.53.

⁷ Email from Counsel Support Section, 17 January 2022, 10.45.

⁸ Email to Counsel Support Section, 17 January 2022, 12.18.

⁹ Email from the Defence, 18 January 2022, 18.21.

¹⁰ Email from Counsel Support Section, 24 January 2022, 15.37.

¹¹ Email from Counsel Support Section, 24 January 2022, 15.49.

reading it, the fact that it is not public in violation of, *inter alia*, the obligations of the Court and [REDACTED] under Article 102(1) of the United Nations Charter, already provides a strong basis to submit that this [REDACTED] does not fulfil the requirements of a convention or special agreement under Article 4(2) of the Statute.

9. This issue is similar to the issue already raised by the Defence in relation to the absence of Article 4(2) special agreement and the legal value of the Agreement on Cooperation signed on 10 May 2021 between the Court and Sudan. The Chamber dismissed the submissions of the Defence on this aspect on 21 January 2022 (“Decision #561”).¹² The Chamber relied, *inter alia*, on Article 14 of the Agreement between the United Nations and the Court (“UN-ICC Agreement”)¹³ and a comparison with other agreements entered by the Court with respect to witness protection¹⁴. Having had no opportunity to address these two arguments before the issuance of Decision #561, the Defence uses the present opportunity to answer them briefly with respect to the [REDACTED] with [REDACTED].

10. Article 14 of the UN-ICC Agreement provides that the Court and the United Nations may enter consultation on the registration of “other agreements concluded by the Court”. This provision by no means reverses the general obligation to register agreements with the United Nations pursuant to Article 102(1) of the United Nations Charter, as binding on the Court pursuant to Articles 2(2) and 2(3) of the UN-ICC Agreement. Quite the opposite, it provides the possibility of making exceptions to that obligation, where justified, on the basis of a consultation with the United Nations. In the specific case of witness protection agreements, a valid justification for that exception is found in the legal texts of the Court themselves, in particular the “Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” of 21 March 2011.¹⁵ By comparison, there is no legal basis in the legal texts of the Court for not registering the Agreement on Cooperation of 10 May 2021

¹² ICC-02/05-01/20-561-Conf; Public redacted version [ICC-02/05-01/20-561-Red](#), par. 19-39.

¹³ ICC-02/05-01/20-561-Conf; Public redacted version [ICC-02/05-01/20-561-Red](#), par. 25.

¹⁴ ICC-02/05-01/20-561-Conf; Public redacted version [ICC-02/05-01/20-561-Red](#), par. 26.

¹⁵ *Prosecutor v. Bosco Ntaganda*, 3 July 2015, [ICC-01/04-02/06-698](#), Confidential Annex A : “Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection”, 21 March 2011, [REDACTED].

between the Court and Sudan. There was thus no room for entering a consultation with the United Nations on its non-registration pursuant to Article 14 of the UN-ICC Agreement. No such consultation had ever been mentioned in the extensive judicial debate on this issue. Applying the same criteria to the [REDACTED] between the Court and [REDACTED], there was again no legal basis for opening a consultation with the United Nations under Article 14 of the UN-ICC Agreement on its non-registration. The Defence may elect to make further submissions on the [REDACTED] by way of an addendum to the 2nd Response after disclosure of the [REDACTED].

11. The Defence's request for leave to appeal Decision #561 is pending on the day of submission of the 2nd Response.¹⁶ Absent a final ruling on these issues, the Defence thus has no choice other than reiterating its earlier submissions with respect to the absence of valid Article 4(2) special agreement between the Court and [REDACTED] at the time when the relevant witnesses' statements and/or interviews and related evidence were collected on the territory of [REDACTED], before it became a State Party on [REDACTED]. In the absence of Article 4(2) Agreement, the investigations on the territory of [REDACTED] had no legal basis, thus making that all evidence collected in [REDACTED] until [REDACTED] is not admissible before the Court. As a result and irrespective of its individual submissions related thereto, the Defence asks the Chamber to declare inadmissible the statements and/or transcripts of interview of witnesses P-0008, P-0044 and P-0105 and their related evidence mentioned in the 2nd Application.

12. The Defence now turns to the individual analysis of the 2nd Application with respect to each witness.

P-0008

13. The Defence notes that the nature and content of P-0008's prior statement relates *inter alia* to [REDACTED] in relation to the alleged incidents in Mukjar in [REDACTED]. The Defence further points out that, in most instances, the witness

¹⁶ ICC-02/05-01/20-566-Conf; Public redacted version ICC-02/05-01/20-566-Red, par. 7-9.

[REDACTED].¹⁷ The Defence also notes that the OTP asserts that the witness provides information on [REDACTED]¹⁸ while the witness alludes [REDACTED]¹⁹ which is not charged. The witness' knowledge and the timing [REDACTED] are identified as two of the issues for which the OTP seeks a supplementary examination²⁰.

14. The Defence submits that the contestation of the alias is a core and disputed issue to its case. Evidence, such as P-0008's prior statement, which purports to incriminate Mr Ali Muhammad Ali Abd-Al-Rahman²¹ while [REDACTED], warrants to be called *viva voce*, including for the purpose of the witness' examination-in-chief.

P-0044

15. The Defence notes that the nature and content of P-0044's prior statement and associated item, identified in Annex A2 of the Request as an investigation note ("Note"), relates *inter alia* to the [REDACTED] at the time of relevance to the charges, and more particularly between [REDACTED]. Although the witness provides a [REDACTED], P-0044 [REDACTED]²². In the Note which the OTP seeks to submit into evidence pursuant to Rule 68(3) of the Rules, the witness [REDACTED]²³.

16. The Defence further notes that the information provided by P-0044 concerning [REDACTED] differs from [REDACTED] and that in both cases the witnesses [REDACTED]²⁴.

17. The Defence also notes that the OTP asserts that the witness provides information on [REDACTED]²⁵ while the witness [REDACTED]²⁶.

18. In this regard, the Defence notes that [REDACTED] are all identified as issues for which the OTP seeks a supplementary examination.²⁷

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ 2nd Application, par. 13.

²¹ 2nd Application, par. 8-10, 13.

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ 2nd Application, par. 20.

19. The Defence further submits that the [REDACTED], confirmed by the OTP's request to seek clarification on the matter during a supplementary examination, illustrates the importance of calling the witness *viva voce* as [REDACTED] their statements are not corroborative on a point of relevance to the charges and call for a thorough examination of the witnesses' respective accounts. The additional information that could be obtained through the proposed further examination would be impossible for the Chamber to assess, absent a complete examination-in-chief.

20. The Defence submits that the contestation of the alias is a core and disputed issue to its case and that evidence, such as P-0044's prior statement and associated material, which purports to incriminate Mr Ali Muhammad Ali Abd-Al-Rahman²⁸ while [REDACTED], warrants to be called *viva voce*, including for the purpose of the witness' examination-in-chief.

P-0105

21. The Defence notes that the nature and content of P-0105's prior statement and associated item, identified in Annex A3 of the Request, relates *inter alia* to [REDACTED] at the time of relevance to the charges, and more precisely in [REDACTED]²⁹. The evidence also pertains to the alleged [REDACTED]³⁰ and [REDACTED]³¹.

22. Although the witness provides [REDACTED]³², the witness [REDACTED]³³. Further, the witness [REDACTED].

23. The Defence argues that, similarly to P-0008 and P-0044's prior statements, P-0105's evidence refers to [REDACTED]³⁴. However, his evidence seems to pertain to events taking place in [REDACTED]³⁵, which are not charged. As mentioned above,

²⁸ 2nd Application, par. 16, 18.

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ [REDACTED]

³² [REDACTED]

³³ [REDACTED]

³⁴ [REDACTED]

³⁵ [REDACTED]

[REDACTED]. The Defence therefore submits that [REDACTED] militate in favour of calling these witnesses *viva voce* for the reasons laid out in paragraph 20.

24. The Defence submits that the contestation of the alias is a core and disputed issue to its case and that evidence, such as P-0105's prior statement, which purports to incriminate Mr Ali Muhammad Ali Abd-Al-Rahman³⁶ while [REDACTED], warrants to be called *viva voce*, including for the purpose of the witness' examination-in-chief.

P-0114

25. The Defence notes that the nature and content of P-0114's prior statement and associated items, identified in Annex A4 of the Request, relates *inter alia* to the alleged [REDACTED]³⁷.

26. P-0114 mentions [REDACTED]. The interviews, which the OTP seeks to introduce through Rule 68(3) of the Rules³⁸, do not specify [REDACTED]³⁹. Further, they are presented in the form of [REDACTED]⁴⁰. The part of P-0114's prior statement [REDACTED].⁴¹ The [REDACTED] is also highlighted by the OTP in so far that it seeks to clarify this point through a potential supplementary examination⁴².

27. The Defence submits that the contestation of the alias is a core and disputed issue to its case and that evidence, such as P-0114's prior statement, which purports to incriminate Mr Ali Muhammad Ali Abd-Al-Rahman⁴³ while [REDACTED], warrants to be called *viva voce*, including for the purpose of the witness' examination-in-chief.

P-0755

28. The Defence notes that the nature and content of P-0755's prior statement and associated items, identified in Annex A5 of the Request, relates *inter alia* to the alleged position of a man the witness was told was known as 'Ali Kushayb' and his

³⁶ 2nd Application, par. 23-24.

³⁷ [REDACTED].

³⁸ 2nd Application, par. 29, 26-27.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² 2nd Application, par. 39.

⁴³ 2nd Application, par. 30-32, 34.

alleged role in the events of relevance to the Mukjar charges. [REDACTED]⁴⁴ ‘Ali Kushayb’ is also said to have been present at a public meeting with Ahmad Harun in February 2004 [REDACTED] during which Harun [REDACTED]⁴⁵ The witness [REDACTED]⁴⁶

29. The witness also states [REDACTED].

30. The Defence submits that the contestation of the alias is a core and disputed issue to its case and that evidence, such as P-0755’s prior statement, which purports to incriminate Mr Ali Muhammad Ali Abd-Al-Rahman [REDACTED], warrants to be called *viva voce*, including for the purpose of the witness’ examination-in-chief.

Conclusion

31. The Defence respectfully asks the Chamber to use its discretionary power under Rule 68(3) of the Rules⁴⁷ to reject the Request and order the appearance of witnesses P-0114 and P-0775 *viva voce*. Should the Chamber find that evidence from witnesses P-0008, P-0044, P-0105 is receivable and that they can appear at trial, the Defence also asks for their appearance *viva voce*. The Defence submits that this mode of testimony would be beneficial to the Chamber in its assessment of the alleged responsibility of Mr. Ali Muhammad Ali Abd-Al-Rahman in the alleged events.

THEREFORE, THE DEFENCE HEREBY PRAYS THE CHAMBER to:

- (i) **DISMISS** the 2nd Application in its entirety;
- (ii) **DECIDE** that witnesses P-0114 and P-0755 shall appear *viva voce*, including for the purpose of their examination-in-chief ; **AND**
- (iii) **FIND** that the testimony of witnesses P-0008, P-0044 and P-0105, should they have been interviewed in [REDACTED], is not admissible before the Court for the reasons mentioned at paragraphs 6-12 above;
- (iv) **DECIDE** that witnesses P-0008, P-0044 and P-0105 cannot appear at trial and shall be struck out from the OTP witnesses list; **OR**

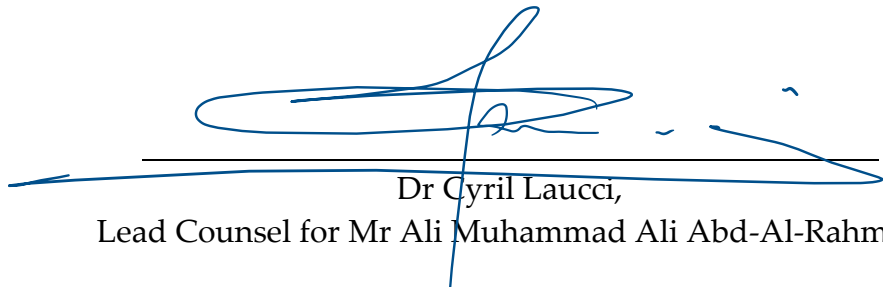
⁴⁴ P-0775, DAR-OTP-0211-0072 at 0082, par. 35.

⁴⁵ P-0775, DAR-OTP-0211-0072 at 0087-0089, par. 50-57.

⁴⁶ P-0775, DAR-OTP-0211-0072 at 0089, par. 57.

⁴⁷ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 7, 12; see also *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 6 June 2017, [ICC-02/11-01/15-950-Red](#), par. 90.

- (v) As an alternative to (iii) and (iv) above, **DECIDE** that witnesses P-0008, P-0044 and P-0105 shall appear *viva voce*, including for the purpose of their examination-in-chief.



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

Dated this 31st day of January 2022 at The Hague, The Netherlands