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

Date: **9 February 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 response to Prosecution’s fourth application under rule 68(2)(b)
(witnesses P-0756, P-0816, P-0867, and P-0927), ICC-02/05-01/20-573”**

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 (“Defence”) responds to the Prosecution’s fourth application under Rule 68(2)(b) of the Rules of Procedure and Evidence (“RPE”) of 2 February 2022 (respectively, “Rule 68(2)(b)” and “Application”).¹ The Prosecution submits that the evidence of witnesses P-0756, P-0816, P-0867, and P-0927 (“Four Witnesses”)“ does not concern the acts and conduct of the accused” but relate primarily to “the charged crimes in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003, the charged crimes in Mukjar and surrounding areas in February/March 2004, and the contextual elements of crimes against humanity, as confirmed by Pre-Trial Chamber II.”² The Defence opposes the Application.

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this Response is filed as confidential, mirroring the classification of the Application. A public redacted version will be filed shortly thereafter.

3. If their evidence is to be admitted at all, it is important that the Four Witnesses testify *viva voce*, or alternatively, pursuant to Rule 68(3) of the RPE (“Rule 68(3)”). The Trial Chamber is respectfully reminded of the inherent tension between the overarching minimum guarantee that the Accused may examine, or have examined, the witnesses against him or her, contained in Article 67(1)(e) of the Rome Statute (“Article 67(1)(e)”), and the more specific terms of the subordinate Rule 68(2)(b) which significantly dilutes that very same guarantee. The texts of the Court give with one hand and take away with the other, thus calling for the utmost caution on behalf of the Chamber in striking the right balance between the principle of Article 67(1)(e) and its exception of Rule 68(2)(b).

4. Further, hearing oral evidence from the Four Witnesses will ensure that the Trial Chamber obtains the best possible evidence based on what each of them actually and independently recall. The risk that unreliable answers were given to

¹ ICC-02/05-01/20-573-Conf; public redacted version, [ICC-02/05-01/20-573-Red](#).

² ICC-02/05-01/20-573-Conf; public redacted version, [ICC-02/05-01/20-573-Red](#), paras 3-5, 8.

investigators' leading questions, for example, is too great. Further, there is a significant risk common to all Four Witnesses that their true recollections of events were tainted by the input of unknown third parties over the course of many days of interview.³ Without questioning by the Defence, the Trial Chamber risks being deprived of assistance in respect of its assessment of the reliability of the Four Witnesses' evidence on issues which, even if not always strictly related to the acts and conducts of the Accused, are nevertheless material to the evaluation of his liability for the crimes of which he is accused.

II. *Incorporation by reference of earlier submissions*

5. The Defence incorporates 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 in its response to the Prosecution's first application made pursuant to Rule 68(3) on 5 January 2022;⁴ it is submitted that the same considerations apply to the Four Witnesses.

III. *Applicable Law*

6. The Defence adopts the Prosecution's submissions on the applicable law relating to the introduction of prior recorded testimony pursuant to Rule 68(2)(b).⁵ In addition, in the *Gbagbo & Blé Goudé* case, it was held that a finding by the Trial Chamber that a statement goes to proof of a matter other than the acts and conduct of the accused does not automatically lead to its introduction. There are other considerations to be taken into account:

The conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules are that the prior recorded testimony "goes to proof of a matter other than the acts and conduct of the accused", and that it is accompanied by a declaration confirming the veracity of its content under certain formal requirements. Importantly, after finding that these conditions are met, the Chamber must not automatically allow the introduction of the prior recorded testimony, but must determine whether this is appropriate in the particular circumstances. Rule 68(2)(b)(i) of the Rules provides examples of factors that the Chamber may take into account for its determination. The Chamber must also always bear in mind the general condition of Rule 68(1) of the Rules, which prohibits introduction of prior recorded testimony where this would be prejudicial to or inconsistent with the rights of the accused.⁶

³ ICC-02/05-01/20-585-Conf, public redacted version [ICC-02/05-01/20-585-Red](#), par. 3-4; the Defence further refers to its oral submissions of 8 February 2022 on these matters (transcript not yet available).

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

⁵ ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#), paras 6-8.

⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), [ICC-02/11-01/15-573-Red](#), 9 June 2016, para. 10.

7. It is unobjectionable for the Trial Chamber, in considering whether prior recorded testimony contains sufficient indicia of reliability, to go beyond formal requirements and to assess whether problems associated with the witness's credibility are so manifest that it would be more appropriate to require the witness to be questioned at trial:

[A]ny consideration of the substance of the statement for the purposes of the determination concerning the 'sufficient indicia of reliability' is limited to establishing whether or not problems as to the credibility of the information provided by a witness in his or her prior recorded testimony are so manifest and of such nature that the questioning of the witness at trial would be more appropriate than the introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules.⁷

IV. *Submissions*

8. Before turning to an analysis of the Application with respect to each of the Four Witnesses individually, the Defence makes the following submission that is common to them all.⁸

9. All Four Witnesses gave their prior recorded testimony over the course of a number of days ([REDACTED];⁹ [REDACTED]¹⁰; [REDACTED]¹¹; [REDACTED]¹²). It is impossible for the Defence to know what conversations, if any, took place between the witnesses and others after each day's interviewing. There is nothing in any of the prior recorded testimony that suggests the Four Witnesses were warned against discussing their emerging accounts with others over the course of those days. By contrast, and as previously submitted¹³, witnesses providing *viva voce* testimony are regularly cautioned by the Trial Chamber not to discuss their evidence overnight. Neither the Defence nor the Trial Chamber can be confident, therefore, of the extent to which the witnesses' statements represent the results of pooled recollections of numerous individuals. And unlike prior recorded testimony admitted under Rule 68(3), the non-calling party cannot even attempt to test these or any other issues that

⁷ *Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's applications for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules, [ICC-02/04-01/15-596-Red](#), 18 November 2016, para. 19.

⁸ These general submissions echo those made in [ICC-02/05-01/20-576-Red](#), paras. 7-8.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ Defence response to Prosecution's first application under rule 68(2)(b) (witnesses P-0013, P-0034, P-0043 and P-0065), 6 February 2022, ICC-02/05-01/20-565; public redacted version, [ICC-02/05-01/20-585-Red](#), para. 9.

might impact on the reliability of the evidence in its examination of the witness because the witness does not appear before the Chamber at all.

10. As the Defence has argued previously,¹⁴ it would be no answer to argue that these concerns are merely speculative. The concerns are no more and no less speculative than any suggestion the Prosecution might make to the effect that the Trial Chamber can presume that the witnesses did not discuss their accounts with others over the course of the many days of interviews. The Prosecution simply does not know. For the avoidance of doubt, Mr Abd-Al-Rahman's does not advance a positive case that Prosecution investigators improperly or unprofessionally elicited the Four Witnesses' accounts. Nevertheless, his rights under Article 67(1)(e) exist irrespective of any potential lack of professionalism of the Prosecution's investigators.

11. All Four Witnesses' prior recorded testimony take the form of a witness statement (plus associated material) and not an interview transcript. As such, neither the Defence nor the Trial Chamber is in a position to know the nature and form of questions asked of the witnesses in order to elicit the information in their statements. It cannot be ascertained if questions were leading, and if so, to what extent. It cannot be ascertained what may have been said to the witnesses in order to put certain questions into context, or whether the interviewer(s) gave verbal or non-verbal cues that may, inadvertently or otherwise, have influenced the answers, or whether questions were asked in some other objectionable manner. It cannot be ascertained whether the witnesses hesitated or equivocated before providing the information in their statement. As orally submitted on 8 February 2022,¹⁵ [REDACTED] constitute additional factors that ought to be taken into account when assessing the impact the way of questioning may have had on their accounts. All of these factors would be evident, of course, when a witness provides *viva voce* testimony as their evidence-in-chief; these factors are hidden in the context of any evidence introduced pursuant to

¹⁴ ICC-02/05-01/20-585-Conf, public redacted version [ICC-02/05-01/20-585-Red](#), par. 10; the Defence further refers to its oral submissions of 8 February 2022 on these matters (transcript not yet available).

¹⁵ Defence's oral submissions of 8 February 2022 on these matters (transcript not yet available).

Rule 68(2)(b), much to the prejudice of the Accused's overarching right to examine witnesses against him as enshrined in Article 67(1)(e).

12. Even if the Trial Chamber were to be satisfied that the prior statements of the Four Witnesses do go to proof of a matter or matters other than the acts and conduct of Mr Abd-Al-Rahman, it is submitted that the aforementioned factors militate against a finding that the interests of justice are best served by the introduction of their evidence and associated materials without affording the Defence the opportunity to explore them during questioning. In all the circumstances, only by calling the Four Witnesses *viva voce*, or at least pursuant to Rule 68(3), would prejudice to Mr Abd-Al-Rahman be avoided.

P-0756

13. P-0756 is a Fur man from [REDACTED]. The Prosecution seeks the introduction of a single witness statement, signed on 27 May 2018, and of the associated material listed in Annex A (A1) to the Application.¹⁶ The Prosecution submits that P-0756's evidence relates to issues not materially in dispute and more particularly and primarily "to the contextual elements of crimes against humanity and to the charged crimes of murder and attempted murder in Mukjar and surrounding areas".¹⁷

14. The Prosecution submits that the witness' evidence pertains *inter alia* to Ahmed Harun's visit to Mukjar in February 2004 as well as his address and his role in providing ammunition to the military.¹⁸ The Defence objects to the Prosecution's characterisation of this aspect of P-0756's evidence as pertaining solely to the contextual elements of crimes against humanity and to the charged crimes of murder and attempted murder in Mukjar and surrounding areas, and submits that it relates instead to core issues materially in dispute. At the very least they are issues to which the Prosecution is to be put to strict proof.

15. The Defence notes that the Prosecution has indicated that it does not seek to introduce the hearsay reference to the alleged position of authority of "*Ali Kushayb*"

¹⁶ Application, para. 10.

¹⁷ Application, paras 4, 8, and 13.

¹⁸ Application, paras 4, 8, 11 and 13. [REDACTED].

and his presence in Mukjar in February 2004 found in [REDACTED]. However, the Defence points out that elsewhere [REDACTED], another reference to “*Ali Kushayb*” is found. This too goes to proof of matters related to the acts and conduct of the Accused;¹⁹ the Defence objects to the introduction of this paragraph of P-0756’s prior statement into evidence.

16. The conditions for the introduction of P-0756’s evidence pursuant to Rule 68(2)(b) have not been made out. Witness P-0756 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, any and all previous interviews – including screening interviews – should also be admitted as associated material. [REDACTED]²⁰. As done in the case of several witnesses, the Defence will informally request access to these records from the Prosecution.

P-0816

17. P-0816 is a Fur man from [REDACTED]. The Prosecution seeks the introduction of a single witness statement, signed on 29 January 2020, and of the associated material listed in Annex A (A2) to the Application.²¹ The Prosecution submits that P-0816’s evidence relates to issues not materially in dispute and more particularly and primarily “to the charges of crimes of murder, pillaging, destruction of property and forcible transfer of civilians between 15 and 16 August 2003 in Bindisi and surrounding areas”.²²

18. The Defence contests the Prosecution’s characterisation of P-0816’s prior recorded testimony and submits that his evidence also contains information relating to core issues that are materially in dispute. These include material on [REDACTED].²³ At the very least, the Defence submits that they are issues to which the Prosecution is to be put to strict proof.

19. Although the Defence notes that the Prosecution has indicated that it does not seek to introduce the hearsay reference to the position of authority in Garsila of “*Ali*

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ Application, para. 17.

²² Application, paras 4, 8, 18, and 21.

²³ [REDACTED].

Kushayb” found in [REDACTED], the Defence submits that the conditions for the introduction of P-0816 evidence pursuant to Rule 68(2)(b) have not been made out. Witness P-0816 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, any and all previous interviews – including in this case the screening note and [REDACTED]²⁴ – should also be admitted as associated material.

P-0867

20. P-0867 is a Fur man from [REDACTED]. The Prosecution seeks the introduction of a single witness statement, signed on 15 December 2020 listed in Annex A (A3) to the Application.²⁵ The Prosecution submits that P-0867’s evidence relates to issues not materially in dispute and more particularly and primarily “to the contextual elements of crimes against humanity and to the charged crimes of rape in Bindisi and surrounding areas”.²⁶ The Defence draws the fact that P-0867 [REDACTED] to the attention of the Chamber as an important factor for the assessment of the reliability of his evidence.

21. The Defence contests the Prosecution’s characterisation of P-0867 prior recorded testimony and submits that his evidence pertaining to the emergence of the militia/Janjaweed relates to a core issue materially in dispute, noting in particular that it speaks more broadly to the alleged relationship of the militia/Janjaweed with the Government of Sudan²⁷. The Defence further notes that P-0967 prior recorded testimony also contains hearsay evidence [REDACTED]²⁸. At the very least, the Defence submits that these are issues to which the Prosecution is to be put to strict proof.

22. The Defence notes that the Prosecution indicated that it does not seek to introduce the hearsay reference to *inter alia* the position of authority *vis à vis* the Janjaweed of “*Ali Kushayb*” found in [REDACTED]. However, the Defence notes that elsewhere in his statement, at [REDACTED], another reference to “*Ali Kushayb*”

²⁴ [REDACTED].

²⁵ Application, para. 22.

²⁶ Application, paras 4, 8, and 23.

²⁷ [REDACTED].

²⁸ [REDACTED]

is found in which the witness [REDACTED], which goes to proof of matters related to the acts and conduct of the Accused.²⁹ Consequently, the Defence objects to the introduction of this additional paragraph of P-0867's prior statement into evidence.

23. In light of the above, the conditions for the introduction of P-0867 evidence pursuant to Rule 68(2)(b) have not been made out. Witness P-0867 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, any and all previous interviews – including in this case the screening note³⁰ – should also be admitted as associated material.

P-0927

24. P-0927 is a Fur man from [REDACTED]. The Prosecution seeks the introduction of a single witness statement, signed on 9 September 2021 and of associated material listed in Annex A (A4) to the Application.³¹ The Prosecution submits that P-0927's evidence relates to issues not materially in dispute and more particularly and primarily to the charged crimes in Bindisi and surrounding areas.³²

25. The Defence contests the Prosecution's characterisation of P-0927 prior recorded testimony and submits that his evidence also contains information relating to core issues that are materially in dispute. These include the [REDACTED]³³, and [REDACTED]³⁴ which both pertain to the alleged implementation of the Government's strategy.

26. The Defence further notes that P-0927 stated that [REDACTED]³⁵. [REDACTED]. In this regard, the Defence recalls its argument about the impact of the vulnerability of witnesses on the taking of statements, set out in paragraph 11 above.

27. In light of the above, and although the Defence notes that the Prosecution has indicated that it does not seek to introduce the reference to "*Ali Kushayb*" found in [REDACTED], the conditions for the introduction of P-0927's evidence pursuant to

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ Application, para. 26.

³² Application, paras 4, 8, and 27-28.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

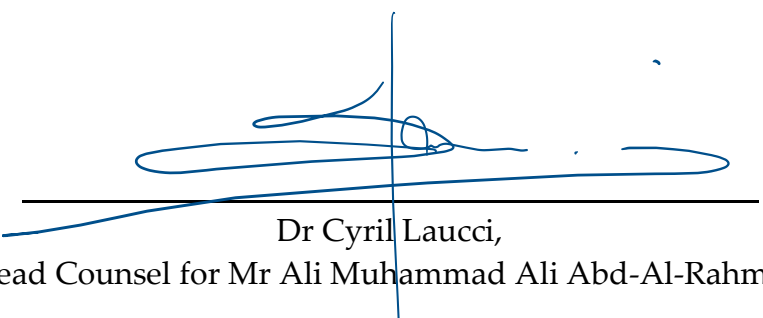
Rule 68(2)(b) have not been made out. Witness P-0927 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, any and all previous interviews – including in this case the screening note³⁶ – should also be admitted as associated material.

V. *Conclusion*

28. The Defence respectfully asks the Chamber to use its discretionary power under Rule 68(2)(b) to reject the Application in its entirety, or in the alternative, order the appearance of the Witnesses to testify *viva voce*, or in the alternative, pursuant to Rule 68(3). The Defence submits that this mode of testimony would be beneficial to the Chamber in its overall assessment of the alleged responsibility of Mr Abd-Al-Rahman in the alleged events.

THEREFORE, THE DEFENCE HEREBY PRAYS THE CHAMBER to:

- **DISMISS** the Application in its entirety; **AND**
- **ORDER** that the Four Witnesses should testify *viva voce*; **OR, IN THE ALTERNATIVE**, should testify under Rule 68(3); **AND**
- **ORDER** the introduction of any material mentioned at paragraphs 16, 19, 23, and 27 above.



Dr Cyril Laucci,
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Dated this 9th day of February 2022 at The Hague, The Netherlands

³⁶ [REDACTED].