



Original: **English**

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 second application under rule 68(2)(b)
(witnesses P-0118 and P-0290), ICC-02/05-01/20-567", 7 February 2022

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 second application under Rule 68(2)(b) of the Rules of Procedure and Evidence of 28 January 2022 (respectively, “Rule 68(2)(b)” and “Application”).¹ The Prosecution submits that the evidence of witnesses P-0118 and P-0290 (“Witnesses”) “do not concern the acts and conduct of the accused” but are relied on primarily to establish “the contextual elements of war crimes and 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 Witnesses both testify *viva voce*, or alternatively, pursuant to 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, 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 two Witnesses will ensure that the Trial Chamber obtains the best possible evidence based on what each of them actually and independently recall. In the case of P-0118, admitting a lengthy witness statement without permitting the Defence the opportunity to question him thereon would undermine that objective since it is impossible to know how the statement was actually taken. The risk that unreliable answers were given to investigators’ leading questions, for example, is too great. In the case of P-0290, this particular risk

¹ ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#)

² ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#), para. 3.

is somewhat reduced, although not eliminated. But there is a significant risk common to both Witnesses that their true recollections of events were tainted by the input of unknown third parties over the course of many days of interview. Without questioning by the Defence, the Trial Chamber risks being deprived of assistance in respect of its assessment of the reliability of the 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;³ it is submitted that the same considerations apply to both Witnesses that are the subject of the instant Application.

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).⁴ 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

³ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

⁴ ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#), paras 6-8.

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.⁵

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.⁶

IV. *Submissions*

8. Before turning to an analysis of the Application with respect to each of the Witnesses individually, the Defence makes the following submission that is common to them both.⁷

9. Both Witnesses gave their prior recorded testimony over the course of a number of days ([REDACTED]⁸ [REDACTED]⁹). There is simply no way of knowing what conversations 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 Witnesses were warned against discussing their emerging accounts with others over the course of those days. By contrast, of course, witnesses providing *viva voce* testimony are routinely warned 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 might impact on the reliability of the evidence in its

⁵ *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.

⁶ *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.

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

⁸ [REDACTED].

⁹ [REDACTED].

examination of the witness because the witness does not appear before the Chamber at all.

10. As the Defence has argued previously,¹⁰ 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.

11. Even if the Trial Chamber were to be satisfied that the prior recorded testimony of the Witnesses does go to proof of a matter or matters other than the acts and conduct of Mr Abd-Al-Rahman, it is submitted that this factor militates 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 this factor during questioning. In all the circumstances, only by calling the Witnesses *viva voce*, or at least pursuant to Rule 68(3), would prejudice to Mr Abd-Al-Rahman be avoided.

P-0118

12. P-0118 is [REDACTED]. The Prosecution seeks the introduction of a single witness statement, signed on [REDACTED], and of the associated material listed in Annex A (A1) to the Application. The Prosecution submits that P-0118's evidence relates to issues not materially in dispute and more particularly and primarily "to the contextual elements of war crimes and crimes against humanity".¹¹ The evidence would indicate that, at the time his statement was taken, the witness was living in [REDACTED], and the interview was conducted in [REDACTED].¹² The Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman's appeal rights, its submissions made about the absence of a valid Article 4(2) special

¹⁰ 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, para. 10.

¹¹ ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#), paras 7, 10, 22. See also ICC-02.05-01/20-551-Conf-Anx2-Red.

¹² [REDACTED]. The place of interview is redacted in DAR-OTP-0125-0665-R03, but the Trial Chamber will have an unredacted version and will know the location.

agreement between the Court and [REDACTED], and [REDACTED].¹³ In any event, P-0118's statement clearly pre-dates [REDACTED].

13. P-0018's prior recorded testimony takes 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 witness in order to elicit the information in his statement. 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 witness in order to put certain questions into context, or whether the interviewer 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 witness hesitated or equivocated before providing the information in his statement. 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 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).

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 no leading questions were used during the witnesses' interviews. For the avoidance of doubt, Mr Abd-Al-Rahman's does not advance a positive case that Prosecution investigators improperly or unprofessionally elicited P-0018's account. Nevertheless, his rights under Article 67(1)(e) exist irrespective of any potential lack of professionalism of the Prosecution's investigators.

15. The Prosecution submits that that the witness's evidence pertains *inter alia* to the funding of militias/Janjaweed by the Government of Sudan or by means of looting undertaken with the knowledge of the Government of Sudan.¹⁴ The Defence

¹³ ICC-02/05-01/20-481-Conf; public redacted version [ICC-02/05-01/20-481-Red](#); ICC-02/05-01/20-485-Conf; public redacted version [ICC-02/05-01/20-485-Red](#); ICC-02/05-01/20-568-Conf, paras. 9-11.

¹⁴ ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#), para. 10.

objects to the Prosecution's characterisation of this aspect of P-0118's evidence as pertaining solely to the contextual elements of crimes against humanity, 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.

16. The Defence notes that P-0118's evidence also pertains to the alleged recruitment and training of militias/Janjaweed by the Government of Sudan,¹⁵ the [REDACTED],¹⁶ [REDACTED] and the planning and implementation of the State policy of the Government of Sudan.¹⁷ It is the Defence's position that these issues, all of which have been identified as issues of relevance in P-0118's statement by the Prosecution,¹⁸ are all critical issues that are materially in dispute. In particular, [REDACTED] is a live issue that formed one of the two main aspects of the Defence's submissions at the Hearing on the Confirmation of Charges¹⁹. At the very least, these are issues, especially the latter one, to which the Prosecution is to be put to strict proof.

17. [REDACTED] his information about "*Ali Kushayb*" or Mr Abd-Al-Rahman is remarkably limited.

18. The Defence finally submits that the references to P-0118's [REDACTED]²⁰ constitute indicia of credibility problems with his evidence. [REDACTED] But these are sufficiently manifest and of such a nature with respect to Witness P-0118 that they militate in favour of a finding that oral testimony from that witness would be more appropriate than the introduction of his prior recorded testimony under Rule 68(2)(b).²¹ A thorough cross-examination is required.

19. The conditions for the introduction of P-0018's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, notwithstanding the argument related to Article 4(2), he should be called *viva voce*,

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ ICC-02.05-01/20-551-Conf-Anx2-Red.

¹⁹ [REDACTED].

²⁰ [REDACTED]

²¹ *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.

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.

P-0290

20. The Prosecution seeks the introduction of ten transcripts and eight items of associated material listed in Annex A (A2) to the Application. The Prosecution submits that P-0290's evidence relates to issues not materially in dispute and more particularly and primarily "to the contextual elements of war crimes and crimes against humanity".²²

21. The evidence indicates that, at the time his statement was taken, the witness was living in [REDACTED], and that the interview was conducted in [REDACTED]. The Defence refers to its submissions set out in paragraphs 5-11 of its Response to Request ICC-02/05-01/20-555-Conf of 31 January 2022. The Chamber's ruling thereon is pending at the time of filing, but the Defence submits that P-0290's prior recorded testimony cannot be introduced because it was collected in [REDACTED] at a time when the Court had no legal basis to undertake its activities on its territory pursuant to Article 4(2) of the Statute.

22. The Defence disputes the Prosecution's characterisation of P-0290's prior recorded testimony and submits that his evidence contains a great deal of material relating to core issues that are materially in dispute. [REDACTED].²³ The witness's evidence also addresses the use of public resources from the Government of Sudan to recruit, train, arm, and fund the militias/Janjaweed, beginning in 2003, the awareness of Government of Sudan officials of alleged militia/Janjaweed crimes in Darfur, and [REDACTED]. In particular, [REDACTED] is a live issue that formed one of the two main aspects of the Defence's submissions at the Hearing on the Confirmation of Charges²⁴. Although these issues have also been previously

²² ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#), paras 7, 14, 22.

²³ [REDACTED].

²⁴ [REDACTED].

identified by the Prosecution, they are not framed as such in the Request.²⁵ At the very least they are issues to which the Prosecution is to be put to strict proof.

23. Finally, the Defence submits that there are serious indicia of credibility problems with P-0290's evidence. [REDACTED], [REDACTED].²⁶ [REDACTED].²⁷ The extent to which these factors impact, or may impact, on P-0290's credibility are sufficiently manifest and of such a nature that they militate in favour of a finding that oral testimony would be more appropriate than the introduction of his prior recorded testimony under Rule 68(2)(b).²⁸ A thorough cross-examination is both warranted and necessary.

24. The conditions for the introduction of P-0290 evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, notwithstanding the argument related to Article 4(2), he 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.

V. Conclusion

25. 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**
- **FIND** that the Witnesses' prior recorded testimony cannot be introduced before the Court;

²⁵ [REDACTED]; ICC-02/05-01/20-567-Conf; public redacted version [ICC-02/05-01/20-567-Red](#), para. 14; ICC-02/05-01/20-551-Conf-Anx2-Red.

²⁶ [REDACTED].

²⁷ [REDACTED].

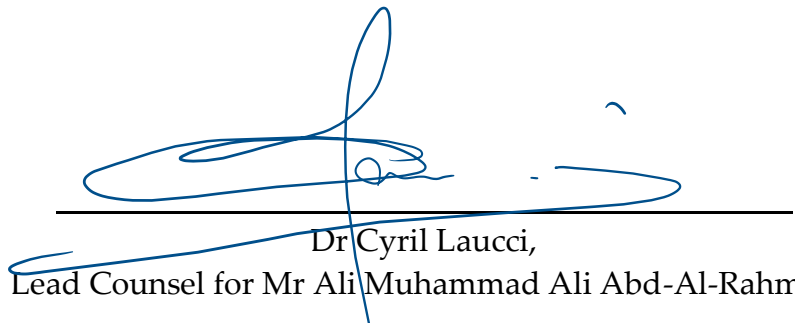
²⁸ *Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's applications for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016, para. 19.

OR, IN THE ALTERNATIVE,

- **ORDER** that the Witnesses should testify *viva voce*;

OR, IN THE ALTERNATIVE,

- **ORDER** that the Witnesses should testify under Rule 68(3); **AND**
- **ORDER** the disclosure of any material mentioned at paragraphs 19 and 24 above.



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

Dated this 9th day of February 2022 at The Hague, The Netherlands.