



Original: **English**

No.: **ICC-02/05-01/20**
Date: **13 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 fifth application under rule 68(2)(b)
(witnesses P-0096, P-0120, and P-0558), ICC-02/05-01/20-579
(ICC-02/05-01/20-592-Conf, 11 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 fifth application under Rule 68(2)(b) of the Rules of Procedure and Evidence (“RPE”) of 3 February 2022 (respectively, “Rule 68(2)(b)” and “Application”).¹ The Prosecution submits that the evidence of witnesses P-0096, P-0120, and P-0558 (“Three Witnesses”) “does not concern the acts and conduct of the accused” but relate primarily to “the contextual elements of crimes against humanity.”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. It is important that the Three 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 the part 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 Three Witnesses will ensure that the Trial Chamber obtains the best possible evidence based on what each of them actually and independently recall. With regard to P-0096 and P-0120, the risk that unreliable answers were given to investigators’ leading questions, for example, is too great³. Further, there is a significant risk common to all Three Witnesses that their

¹ ICC-02/05-01/20-579-Conf; public redacted version, [ICC-02/05-01/20-579-Red](#).

² ICC-02/05-01/20-579-Conf; public redacted version, [ICC-02/05-01/20-579-Red](#), paras 3 and 7.

³ See in particular the Defence oral submissions of 8 February 2022 on these matters, ICC-02/05-01/20-T-022-CONF-ENG ET, p. 12, lines 18-25, p. 13, lines 1-25, p. 14, lines 1-14.

true recollections of events were tainted by the input of unknown third parties over the course of many days of interview.⁴ With regard to P-0558, for which 18 transcripts of interviews are provided, the Defence notes that the witness was not cautioned at the end of each interview against discussing the content of his interview with third parties. Without questioning by the Defence, the Trial Chamber risks being deprived of assistance in respect of its assessment of the reliability of the Three 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' prior evidence in its response to the Prosecution's first application made pursuant to Rule 68(3) on 5 January 2022;⁵ it is submitted that the same considerations apply to all Three 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).⁶ 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

⁴ 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, ICC-02/05-01/20-T-022-CONF-ENG ET, p. 17, lines 6-20, p. 18, lines 4-21.

⁵ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

⁶ 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.⁷

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.⁸

IV. *Submissions*

8. Before turning to an analysis of the Application with respect to each of the Three Witnesses individually, the Defence makes the following submission that is common to them all.⁹

9. All Three Witnesses gave their prior recorded testimony over the course of a number of days ([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. As previously noted for P-0558, there is nothing in the prior recorded testimony that suggests that any of the Three Witnesses were warned against discussing their emerging accounts with others over the course of those days. By contrast, and as previously submitted,¹³ 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

⁷ *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.

⁸ *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.

⁹ These general submissions echo those made in [ICC-02/05-01/20-576-Red](#), paras. 7-8.

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, para. 9; public redacted version, [ICC-02/05-01/20-585-Red](#).

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 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 Three Witnesses' accounts. Nevertheless, his rights under Article 67(1)(e) exist irrespective of any potential lack of professionalism of the Prosecution's investigators.

11. Further, the prior recorded testimony of P-0096 and P-0120 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. All of these factors would be evident, of course, when a witness is called to provide *viva voce* testimony; these factors are hidden in the context of any evidence introduced pursuant to Rule 68(2)(b), much to the prejudice

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, ICC-02/05-01/20-T-022-CONF-ENG ET, p. 17, lines 6-20, p. 18, lines 4-21.

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 Three 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 Three Witnesses *viva voce*, or at least pursuant to Rule 68(3), would prejudice to Mr Abd-Al-Rahman be avoided.

P-0096

13. P-0096 is [REDACTED].¹⁵ The Prosecution seeks the introduction of a single witness statement, [REDACTED], and of the associated material listed in Annex A (A1) to the Application.¹⁶ The Prosecution submits that P-0096's evidence relates to issues not materially in dispute and more particularly "the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population in Darfur, and the use of public resources by the GoS to recruit and fund the Militia/*Janjaweed*."¹⁷

14. The place of interview of Witness P-0096 is not disclosed, thus preventing the Defence from assessing the impact of that information on the receivability of his evidence. 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 receivability of evidence collected on the territory of Non-States Parties in the absence of special agreement under Article 4(2) of the Rome Statute in force at the time of the interviews.¹⁸

15. The Defence objects to the Prosecution's characterisation of these aspects of P-0120's evidence as pertaining solely to the contextual elements of crimes against

¹⁵ P-0096, DAR-OTP-0214-0113, p. 1; paras 7-8.

¹⁶ Application, para. 9.

¹⁷ Application, para. 9.

¹⁸ ICC-02/05-01/20-568-Conf; public redacted version ICC-02/05-01/20-568-Red, par. 5-11.

humanity and submits that they relate to core issues materially in dispute. These include evidence of the alleged coordination between the GoS Forces and *Janjaweed* in joint operations,¹⁹ a historical relationship of cooperation, including through arming,²⁰ the provision of uniforms,²¹ and of recruitment,²² and of the alleged failure of military and police authorities to punish criminal acts by members of the *Janjaweed* and/or limit civilian casualties.²³ At the very least these are issues to which the Prosecution is to be put to strict proof.

16. The conditions for the introduction of P-0096's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, he should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, all previous interviews, if any – including screening interviews and [REDACTED] – should also be admitted as associated material.

P-0120

17. P-0120 is [REDACTED]²⁴. The Prosecution seeks the introduction of a single witness statement, [REDACTED], and of the associated material listed in Annex A (A2) to the Application.²⁵ The Prosecution submits that P-0120's evidence relates to issues not materially in dispute and more particularly "to the contextual elements of crimes against humanity, in particular the involvement of senior GoS Officials, including Harun and Hussein, in the counter-insurgency campaign".²⁶

18. The Defence objects to the Prosecution's characterisation of these aspects of P-0120's evidence as pertaining solely to the contextual elements of crimes against humanity and submits that they relate instead to core issues materially in dispute, notably [REDACTED]²⁷, and the arming and mobilisation of militias/Janjaweed by

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ Application, para. 12.

²⁶ Application, paras 4, 12, and 22.

²⁷ [REDACTED]

the Government of Sudan²⁸ . [REDACTED]²⁹. At the very least and considering the source of knowledge of P-0120, they are issues to which the Prosecution is to be put to strict proof.

19. The conditions for the introduction of P-0120's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, he should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, all previous interviews, if any – including screening interviews and [REDACTED] – should also be admitted as associated material.

P-0558

20. P-0558 is [REDACTED]. The Prosecution seeks the introduction of 18 transcribed statements and of the associated material listed in Annex A (A3) to the Application.³⁰ The Prosecution submits that P-0558's evidence relates to issues not materially in dispute and more particularly to “ (i) the use of public resources to recruit, fund and arm the Militia/Janjaweed, including the involvement of Harun, (ii) the integration of the Militia/Janjaweed into the GoS Forces, (iii) the deliberate failure of the GoS to investigate and prosecute crimes committed by the Militia/Janjaweed in Darfur, and (iv) the deliberate exclusion of members of the Fur, Zaghawa and Masalit tribes from sensitive positions in the GoS”.³¹

21. The Defence contests the Prosecution's characterisation of P-0558's prior recorded testimony and submits that his evidence on the aforementioned themes relate to core issues in dispute, and more particularly to numerous aspects of the alleged implementation of the Government of Sudan's strategy in West Darfur. P-0558's evidence relates to other core issues such as [REDACTED]³². At the very least, the Defence submits that they are issues to which the Prosecution is to be put to strict proof.

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ Application, para. 15.

³¹ Application, paras 4, 16, and 22.

³² [REDACTED]

22. The Defence notes that the Prosecution has indicated that it does not seek to introduce the hearsay reference to the position of authority *vis à vis* the Militias/Janjaweed of “*Ali Kushayb*” as well as to his position of authority in the Mukjar locality in 2003-2004 found at lines 48 to 95 and 166 to 233 respectively of his transcribed statement dated 11 May 2016.³³ The Defence notes that the name “*Kushayb*” was first raised by the interviewer who subsequently asked the witness several questions about this person.³⁴ The Defence further notes that P-0558 stated that his knowledge about “*Kushayb*”, and more particularly his area of operations and position *vis à vis* the Militias/Janjaweed and in Mukjar, derives from [REDACTED].³⁵ In addition, the Defence objects to the introduction of the evidence found [REDACTED].³⁶

23. Finally, the Defence notes that P-0558 [REDACTED].³⁷ [REDACTED].³⁸ Distinct from demonstrating any specific probative value of this aspect of P-0558’s evidence at this stage, the Defence submits that the gravity of these allegations and the seriousness with which it should be approached [REDACTED] strongly militates in favour of the witness testifying *viva voce*.

24. Consequently, the Defence submits that the conditions for the introduction of P-0558’s evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, he should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, all previous interviews – including in this case the screening notes and the witness’ [REDACTED], which for the latter have been disclosed to the Defence³⁹ – should also be admitted as associated material. With regard to the screening notes, the Defence observes that [REDACTED]⁴⁰, they are not listed in Annex A (A3) nor have they been disclosed to the Defence.

³³ Application, paras 18 and 22.

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

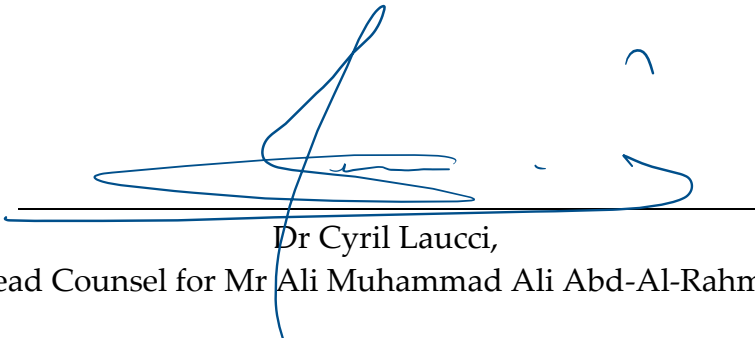
⁴⁰ [REDACTED]

V. Conclusion

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 Three 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 Three 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, and 24 above.



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

Dated this 13th day of February 2022 at The Hague, The Netherlands