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No.: **ICC-02/05-01/20**
Date: **16 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 third application under rule 68(2)(b)
(witnesses P-0010, P-0016, P-0039 and P-0040), ICC-02/05-01/20-571
(ICC-02/05-01/20-595-Conf, 14 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 third 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-0010, P-0016, P-0039 and P-0040 (“Four Witnesses”) “do not concern the acts and conduct of Mr Abd-Al-Rahman” but “relate primarily to the background of the armed conflict in Darfur and the contextual elements of crimes against humanity.”² With the only caveat mentioned at paragraphs 5-6 below, the Defence does not oppose the request to introduce the evidence of witnesses P-0010³ and P-0016⁴ under Rule 68(2)(b), but does oppose the Application with regards to the remaining two witnesses (“Two Witnesses”).

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 Two 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 found in Rule 68(2)(b).

¹ ICC-02/05-01/20-571-Conf; public redacted version, [ICC-02/05-01/20-571-Red](#).

² ICC-02/05-01/20-571-Conf; public redacted version, [ICC-02/05-01/20-571-Red](#), paras 3 and 7.

³ As previously indicated, see ICC-02/05-01/20-571-Conf; public redacted version, [ICC-02/05-01/20-571-Red](#), para. 30.

⁴ In light of the Prosecution’s indication that it will not seek to rely on the contents of para. 40 of P-0016’s witness statement, see ICC-02/05-01/20-571-Conf; public redacted version, [ICC-02/05-01/20-571-Red](#), para. 15

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. The risk that unreliable answers were given to investigators' leading questions, for example, is too great.⁵ Moreover, there is a significant risk common to both of the Two Witnesses that their true recollections of events were tainted by the input of unknown third parties over the course of many days of interview.⁶ Without questioning by the Defence, the Trial Chamber risks being deprived of assistance in respect of its assessment of the reliability of the Two 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;⁷ it is submitted that the same considerations apply to the Four Witnesses.

6. The Defence further incorporates by reference, for the record and to preserve Mr Abd-Al-Rahman's appeal rights, its earlier submissions regarding the receivability of evidence, including witness' statements, collected on the territory of Non-States Parties at the time when there was no special agreement in force authorizing the Court to exercise its functions and mandate on their territory, pursuant to Article 4(2) of the Rome Statute. The Defence submissions have been dismissed by the Chamber on 8 February 2022⁸. The Defence's application for leave to appeal that decision⁹ is pending before the Chamber at the time of submitting the

⁵ See in particular the Defence oral submissions of 8 February 2022 on these matters, ICC-02/05-01/20-T-022-CONF-ENG ET, pp 12-14.

⁶ ICC-02/05-01/20-585-Conf, public redacted version [ICC-02/05-01/20-585-Red](#), par. 3-4; see also oral submissions of 8 February 2022 on these matters, ICC-02/05-01/20-T-022-CONF-ENG ET, pp 17-18.

⁷ ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

⁸ ICC-02/05-01/20-588-Conf; public redacted version [ICC-02/05-01/20-588-Red](#).

⁹ [ICC-02/05-01/20-593](#).

present Response. The written statements of the Four Witnesses have been collected in [REDACTED] at a time¹⁰ when it was not a State Party and where the existence and validity of a special agreement authorizing the Court to perform its functions and mandate on its territory is yet to be confirmed¹¹. Should leave to appeal be granted and should the Honourable Appeals Chamber find in favour of the Defence's submissions on that aspect, the Defence may apply for an exclusion of the Four Witnesses' evidence under that ground.

III. *Applicable Law*

7. 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).¹² 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.¹³

8. 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:

¹⁰ [REDACTED].

¹¹ ICC-02/05-01/20-568-Conf; public redacted version [ICC-02/05-01/20-568-Red](#), par. 5-11.

¹² ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#), paras 6-8.

¹³ *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.

[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.¹⁴

IV. *Submissions*

9. Before turning to an analysis of the Application with respect to the Two Witnesses individually, the Defence makes the following submission that is common to them all.¹⁵

10. The Two Witnesses gave their prior recorded testimony over the course of five days of interview in [REDACTED] ([REDACTED];¹⁶ [REDACTED]¹⁷). 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 the prior recorded testimony that suggests that either of the Two Witnesses were warned against discussing their emerging accounts with others over the course of those days. By contrast, and as previously submitted,¹⁸ 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 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.

¹⁴ *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.

¹⁵ These general submissions echo those made in [ICC-02/05-01/20-576-Red](#), paras. 7-8.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ 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](#). See also oral submissions of 8 February 2022 on these matters, ICC-02/05-01/20-T-022-CONF-ENG ET.

11. As the Defence has argued previously,¹⁹ 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.

12. Further, the prior recorded testimony of the Two Witnesses 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 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 of the Accused's overarching right to examine witnesses against him as enshrined in Article 67(1)(e).

13. For the avoidance of doubt, Mr Abd-Al-Rahman's does not advance a positive case that Prosecution investigators improperly or unprofessionally elicited the Two Witnesses' accounts. Nevertheless, his rights under Article 67(1)(e) exist irrespective of any potential lack of professionalism of the Prosecution's investigators.

14. Even if the Trial Chamber were to be satisfied that the prior statements of the Two 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

¹⁹ 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, pp 17-18.

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

P-0039

15. P-0039 is [REDACTED].²⁰ The Prosecution seeks the introduction of a single witness statement, signed on 11 February 2006, and of the associated material listed in Annex A (A3) to the Application.²¹ The Prosecution submits that P-0039's evidence relates to issues not materially in dispute²² but is "relevant, *inter alia*, to the contextual elements of crimes against humanity, in particular the GoS supplying and supporting the Militia/Janjaweed."²³

16. The Defence objects to the Prosecution's characterisation of these aspects of P-0039's evidence as pertaining solely to the contextual elements of crimes against humanity and submits that they do indeed relate to core issues materially in dispute. These include evidence of the alleged coordination between GoS Forces and the *Janjaweed* in operations against Beida town and surrounding areas,²⁴ that the police (acting under the instructions of the GoS) "should no longer entertain complaints from villagers because there was a war",²⁵ that the GoS armed,²⁶ trained and paid the militia,²⁷ and provided uniforms.²⁸ The witness provides an account of the recruitment of the militia into the GoS Popular Defence Forces,²⁹ and of alleged visits to Beida by high-ranking officials from the GoS, notably "Abd-al-Rahim Muhammad Husayn", the former Interior Minister³⁰ (although the witness does not mention

²⁰ [REDACTED].

²¹ Application, para. 16.

²² Application, para. 4.

²³ Application, para. 16.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

Ahmad Muhammad Harun).³¹ These issues all relate to core issues materially in dispute, or which are at the very least issues to which the Prosecution is to be put to strict proof.

17. The conditions for the introduction of P-0039'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 immigration records – should also be admitted as associated material.

P-0040

18. P-0040 is [REDACTED].³² The Prosecution seeks the introduction of a single witness statement, signed on 19 February 2006, and of the associated material listed in Annex A (A4) to the Application.³³ The Prosecution submits that P-0040's evidence relates to issues not materially in dispute³⁴ but which is "relevant, *inter alia*, to the understanding of the background of the armed conflict in Darfur, including local administrative and tribal structures, and the contextual elements of war crimes and crimes against humanity, particularly GoS support for the Militia/Janjaweed."³⁵

19. The Defence objects to the Prosecution's characterisation of these aspects of P-0040's evidence as pertaining solely to the contextual elements of war crimes and crimes against humanity. The Defence submits that a number of aspects of his evidence do indeed relate to core issues materially in dispute. The witness purports to make the link between the PDF (*Difa Shabi*) and *Janjaweed*,³⁶ and provides details of the distribution by the GoS of uniforms, weapons, identification cards, and vehicles.³⁷ The witness also describes training of the *Janjaweed*,³⁸ and [REDACTED]³⁹

³¹ *Contra* Application, para. 17.

³² [REDACTED].

³³ Application, para. 19.

³⁴ Application, para. 4.

³⁵ Application, para. 19.

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

[REDACTED].⁴⁰ These issues all relate to core issues materially in dispute, or which are at the very least issues to which the Prosecution is to be put to strict proof.

20. The conditions for the introduction of P-0040'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 immigration records – should also be admitted as associated material.

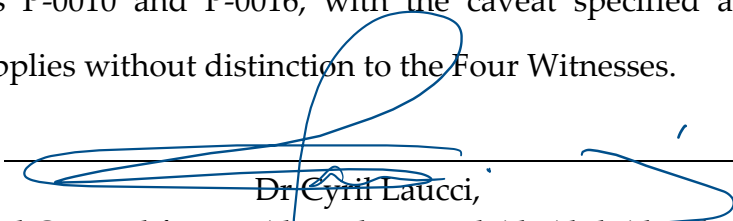
V. Conclusion

21. The Defence respectfully asks the Chamber to use its discretionary power under Rule 68(2)(b) to reject the Application with respect to the Two Witnesses P-0039 and P-0040, or in the alternative, order their appearance 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:

- **ORDER** that the Two Witnesses P-0039 and P-0040 should testify *viva voce*; **OR, IN THE ALTERNATIVE**, should testify under Rule 68(3);
- **ORDER** the introduction of any material mentioned at paragraphs 17 and 20 above.

The Defence does not oppose the granting of the Application with respect to the other witnesses P-0010 and P-0016, with the caveat specified at paragraphs 5-6 above, which applies without distinction to the Four Witnesses.


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

Dated this 16th day of February 2022 at The Hague, The Netherlands

⁴⁰ [REDACTED].