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

Date: **1st April 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 tenth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0103, P-0112 and P-0117, ICC-02/05-01/20-642-Conf”
30 March 2022, ICC-02/05-01/20-654**

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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Section**

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s tenth application under Rule 68(3) of the Rules of Procedure and Evidence (respectively, “Tenth Application” and “Rules”).¹ By the Tenth Application the Prosecution seeks the introduction into evidence of the prior recorded testimony of witnesses P-0103, P-0112 and P-0117 (“Three Witnesses”) *in lieu* of their *viva voce* examination-in-chief, and requests the Chamber to grant between one-and-a-half and two hours for a supplementary *viva voce* questioning of each witness.²

2. The Defence submits that it is essential that the Three Witnesses testify *viva voce* to ensure that the Trial Chamber obtains the best possible evidence relating to the purported identification of “*Ali Kushayb*” as Mr Abd-Al-Rahman, based on what each of the Three Witnesses independently recall.

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

Submissions

4. Before turning to an analysis of the Tenth Application with respect to each of the Three Witnesses individually, the Defence adopts by reference its earlier submissions, common to all proposed Rule 68 witnesses.³

5. With regard to its overarching arguments related to evidence of the alleged identity and individual criminal responsibility of Mr Abd-Al-Rahman, the Defence takes note of the Trial Chamber’s finding in the Decision that “*the Rome Statute [...] and Rule 68(3) of the Rules clearly foresee the introduction of prior recorded testimony for fact witnesses and on issues concerning the acts and conducts of the accused*”⁴, citing its earlier decision of 8 February 2022⁵. As previously stated⁶, the Defence

¹ ICC-02/05-01/20-642-Conf and its public redacted version [ICC-02/05-01/20-642-Red](#).

² ICC-02/05-01/20-642-Conf and its public redacted version [ICC-02/05-01/20-642-Red](#), paras 14-15, 22-23, 28-29.

³ ICC-02/05-01/20-T-022-CONF-ENG, p. 11, lines 21-25 to p. 21, line 15 (public redacted version not yet available). [ICC-02/05-01/20-576-Red](#), paras 7-11.

⁴ [ICC-02/05-01/20-602-Red](#), par. 7.

⁵ [ICC-02/05-01/20-588-Red](#), par. 8.

acknowledges this finding but urges the Trial Chamber, as it has done in its past decisions on previous 68(3) applications, to exercise its discretionary power when assessing on a case-by-case basis requests for introduction of evidence pursuant to Rule 68(3)⁷ and more particularly, evidence pertaining to the hotly contested issue that is the identification of Mr Abd-Al-Rahman as “*Ali Kushayb*”. In this respect, the Defence notes that in its earlier decisions, the Trial Chamber rejected the Prosecution’s requests in part and deemed it preferable to hear the evidence of two witnesses (P-0843 and P-0954), one witness (P-0884), and five witnesses (P-0027, P-0585, P-0894, P-0895, and P-0926) respectively, *viva voce* on the ground that they provided “unique” evidence and, for P-0843, P-0954, P-0027, due to their alleged particularly close interaction with “*Ali Kushayb*”.⁸ This uniqueness criterion applies to the Three Witnesses.

P-0103

6. The Defence requests that P-0103 provide the entirety of his testimony *viva voce* for the following reasons. The witness, [REDACTED], is unique among those on the Prosecution’s witness list in terms of [REDACTED]. The nature and content of the seven transcripts of his single interview, conducted [REDACTED] with the OTP and four associated exhibits, identified in Annex A (A1) of the Tenth Application, demonstrate that the witness provides unique evidence of [REDACTED].⁹ He also purports to give evidence of the identity, background, and alleged position of a man he understood to be “*Ali Khushayb*” and his alleged role in the charged Mukjar crimes, and uncharged Sindu crimes.

⁶ [ICC-02/05-01/20-601-Red](#), par. 9.

⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the “Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088”, [ICC-02/11-01/15-950-Red](#), 6 June 2017, par. 90.

⁸ [ICC-02/05-01/20-588-Red](#), paras 72, 78; [ICC-02/05-01/20-602-Red](#), paras 35, 36; [ICC-02/05-01/20-630-Red](#), paras 23-24, 78, 80, 166, 169, 177, 178, 189-193.

⁹ [REDACTED].

7. The witness states that he [REDACTED],¹⁰ that he was [REDACTED],¹¹ and that [REDACTED] although this evidence was elicited through a very leading question.¹² In addition, the witness provides evidence of [REDACTED],¹³ of the practice of conscripting militia fighters into the ranks of GoS Forces,¹⁴ and of the purported coordination between the Popular Defence Forces and the Border Intelligence with the SAF.¹⁵

8. P-0103 provides further evidence that is unique [REDACTED] relating to the support purportedly provided by Mr Abd-al-Rahman to GoS Forces, most notably following a rebel attack on the police station at Mukjar in August 2003.¹⁶

9. Moreover, [REDACTED]¹⁷ [REDACTED]. Justice cannot be served that way.

10. The nature of the evidence that P-0103 purports to provide against Mr Abd-Al-Rahman as “*Ali Kushayb*”, [REDACTED] and his likely individual responsibility in the commission of the crimes together fulfil the uniqueness criterion applied by the Chamber. He should thus be called to provide the entirety of his testimony *viva voce*.

P-0112

11. The Defence requests that P-0112 provide the entirety of his testimony *viva voce* for the following reasons. The witness, [REDACTED], is unique among those on the Prosecution’s witness list in terms of his ability to provide evidence of GoS coordination with and support for the militia/*Janjaweed* in joint operations within the SAF. The nature and content of the two witness statements and ten transcripts of his single interview, conducted [REDACTED] with the OTP and 21 associated exhibits, identified in Annex A (A2) of the Tenth Application, demonstrate that the witness provides unique evidence of [REDACTED]¹⁸ and the integration of militia/*Janjaweed*

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

into the GoS Forces.¹⁹ He also purports to give evidence of the identity, background, and alleged position of a man he understood to be “*Ali Kushayb*”²⁰ albeit the evidence is largely hearsay. The witness states that “*Ali Kushayb*” [REDACTED],²¹ and that he was [REDACTED]²² The Prosecution’s case being that Mr Abd-Al-Rahman is “*Ali Kushayb*” this is evidence that is very much in dispute.

12. Moreover, [REDACTED]²³ [REDACTED].

13. The nature of the evidence that P-0112 purports to provide against Mr Abd-Al-Rahman as “*Ali Kushayb*” and his [REDACTED] together fulfil the uniqueness criterion applied by the Chamber. He should thus be called to provide the entirety of his testimony *viva voce*.

P-0117

14. The Defence requests that P-0117 provide the entirety of his testimony *viva voce* for the following reasons. The nature and content of P-0117’s two witness statements and 163 associated exhibits, identified in Annex A (A3) of the Tenth Application, relate *inter alia* to the identity, background, and alleged position of a man understood by the witness to be “*Ali Kushayb*”.²⁴ The witness provides a great deal of evidence of [REDACTED], which factors militate in favour of his testimony being given wholly *viva voce*.

15. The witness claims to know Mr Abd-Al-Rahman, a man also known to him under the alias “*Ali Kushayb*”.²⁵ According to P-0117, [REDACTED].²⁶ [REDACTED].²⁷ [REDACTED].²⁸ The witness further claims that “*Ali Kushayb*” [REDACTED].²⁹ In addition, the witness purports to recall seeing “*Ali Kushayb*” [REDACTED].³⁰ Although the witness heard that “*Ali Kushayb*” [REDACTED].³¹ The

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

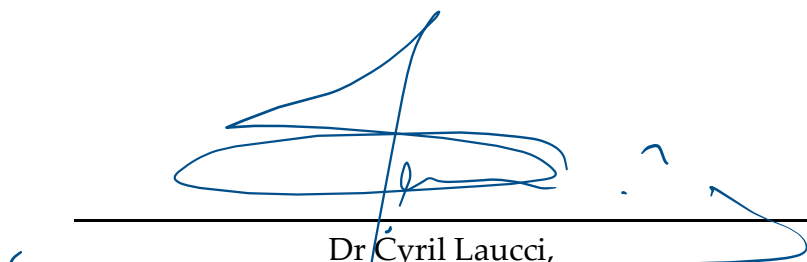
witness stated that although he had not read the arrest warrant against “*Ali Kushayb*” at [REDACTED], he had heard about it in the media.³²

16. The simple summary of P-0117’s statement provided in the above paragraph as of itself reveals the major inconsistencies between his evidence and the rest of the Prosecution’s case. P-0117 simply does not fit into the picture that the Prosecution is trying to present to the Chamber. By trying to avoid his *viva voce* appearance, the Prosecution is trying to avoid placing the major inconsistencies into the light, while eliciting some aspects of his evidence that may fit its case. This would not serve the purpose of a fair determination of the truth and the Chamber must have a full opportunity to hear P-0117 and measure by itself the numerous inconsistencies in his evidence.

17. The Defence submits that the broad scope of details and wide-ranging nature of P-0117’s evidence of the purported identification of Mr Abd-Al-Rahman as “*Ali Kushayb*” and on [REDACTED] together fulfil the uniqueness criterion applied by the Chamber and warrant his being called to testify entirely *viva voce*.

FOR THE FOREGOING REASONS, THE DEFENCE REQUESTS THAT THE CHAMBER DISMISS the Tenth Application with regard to the admission of the prior recorded testimony of Witnesses P-0103, P-0112 and P-0117.

AND FIND that the Three Witnesses should testify entirely *viva voce*.



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

Dated this 1st day of April 2022 at The Hague, The Netherlands.

³¹ [REDACTED].

³² [REDACTED].