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

Date: **4 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 additional submissions on the admissibility of Prosecution evidence collected after the confirmation of charges hearing, and application for a finding that the Prosecution may not call or rely on the evidence of P-0903”, 1 April 2022, ICC-02/05-01/20-659-Conf

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. On 4 March 2022, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) filed its *Mémoire préalable au procès* (“*Mémoire*”).¹ At paragraph 27 of the *Mémoire*, the Defence affirmed that it:

contestera enfin l'admission des preuves collectées par le [Bureau du Procureur] après [l'audience de confirmation des charges] qui portent sur des sujets dont la contestation par la Défense était claire et connue dès le début de la procédure. Dans cette catégorie entrent notamment les éléments de preuve de l'identité entre Mr Abd-Al-Rahman et l'alias « Ali Kushayb ».

2. On 18 March 2022, following an undertaking to provide further submissions to clarify its arguments regarding the admissibility of Prosecution evidence collected after the confirmation of charges hearing (that is, after 26 May 2021), the Defence filed its *Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès* (ICC-02/05-01/20-616) (“*Clarification*”).²

3. On 23 March 2022, during the last status conference prior to the start of the trial, the Trial Chamber invited additional written submissions from the Parties.³ The Defence now files its additional submissions. The Defence will not repeat the overarching arguments of principle and law set out in the *Clarification*. Instead, and in view of its position that the Trial Chamber must decide on the admissibility of evidence that post-dates the confirmation of charges hearing on a case-by-case basis, the Defence will largely focus the instant submissions on why the Prosecution may not call or rely on the evidence of witness P-0903. [REDACTED]. Since he is due to testify *viva voce* the Trial Chamber has not yet received any submissions on the admissibility of his evidence.

¹ [ICC-02/05-01/20-616](#).

² [ICC-02/05-01/20-636](#).

³ ICC-02/05-01/20-T-025-CONF-ENG ET, p. 54.

II. SUBMISSIONS

(a) *The need for a case-by-case approach*

4. By way of an answer to the Presiding Judge's question to Lead Counsel during the last status conference – "...what at the moment I'm at a loss to understand is why you say there's any cutoff date"⁴ – it bears reiterating that it is now a well-established principle that the Prosecution's right to continue to investigate post-confirmation of charges is not without its limits. Nearly nine years ago, in the *Ruto and Sang* case, the Single Judge of Pre-Trial Chamber II stated that she

is cognizant that the Prosecutor is not barred, under the legal framework of the Court, from continuing her investigation post confirmation of charges when needed for her case and for the principal goal of determining the truth. This power is inherent in the Prosecutor's discretion to conduct her investigation, as provided by the legal texts of the Court. However, the exercise of such discretion should be diligent and professional and should also not lead to abuse.⁵

5. In the *Yekatom and Ngaïssona* case, it was held that the time that had elapsed between the identification of investigative leads and the collection of evidence is one of the factors to be taken into account in the assessment of the Prosecution's diligence.⁶

6. More recently, in the *Gicheru* case, Trial Chamber III found that:

Whilst the Prosecution has the right to continue investigating post confirmation and even to undertake new investigative steps, it is not entitled to complete all investigations that were commenced before the start of the trial.⁷

The Judge rebuked the Prosecution for having failed to submit any explanation as to why it contacted the Witness so late in the proceedings or why it was not possible to

⁴ ICC-02/05-01/20-T-025-CONF-ENG ET, p. 50.

⁵ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 16 August 2013, [ICC-01/09-01/11-859](#), para. 34.

⁶ *Prosecutor v. Alfred Yekatom and Patrice-Édouard Ngaïssona*, 1 June 2020, [ICC-01/14-01/18-538](#), para. 18.

⁷ *Prosecutor v. Paul Gicheru*, 12 November 2021, [ICC-01/09-01/20-218-Red](#), para. 9.

do so earlier,⁸ and ultimately rejected the Prosecution's request made under Regulation 35 of the Regulations of the Court.

7. In addition, Rule 64(1) of the Rules of Procedure and Evidence ("Rules") provides that a determination on the admissibility of evidence shall be made "*at the time when the evidence is submitted to a Chamber*". A preliminary blanket determination on a specific ground of challenge, as was issued in the past in respect of evidence the confidentiality of which was not protected in compliance with the Court's rules governing the security of information,⁹ must not prevent a case-by-case determination on each individual piece of evidence submitted by the Prosecution pursuant to Rule 64(1) of the Rules. Blanket rulings on these issues are therefore destined to become redundant with forthcoming individual determinations under Rule 64(2) of the Rules.

8. Further, declining to adopt the case-by-case approach would entail the risk of the Trial Chamber making a ruling on admissibility without it being in a position to consider the concrete impact of the late collection and submission of evidence on, *inter alia*, the right of the Accused to have sufficient time to prepare for trial.

9. In sum, the Defence submits that, in order for the Trial Chamber to arrive at a proper decision in full respect of Rule 64(1) of the Rules on whether particular evidence collected post-confirmation of charges can and should be admitted, it is necessary to assess the merits of each individual case. It is not enough for the Trial Chamber to merely make a blanket finding that post-confirmation of charges evidence is in principle admissible and to stop its enquiry there.

(b) *The case-by-case approach as applied to P-0903*

10. Taking the requisite case-by-case approach, an assessment of the chronology of the Prosecution's investigations *vis-à-vis* witness P-0903 demonstrates that the Prosecution has acted with neither diligence nor professionalism.

11. The Prosecution has been willing and able to conduct its investigations in Sudan since the signing of a Memorandum of Understanding ("MoU") between the

⁸ *Prosecutor v. Paul Gicheru*, 12 November 2021, [ICC-01/09-01/20-218-Red](#), para. 10.

⁹ [ICC-02/05-01/20-T-017-RED-ENG](#), p. 47, ligne 9 à p. 48, ligne 21

OTP and the Government of Sudan on 14 February 2021.¹⁰ But for the reasons already detailed in the *Clarification*,¹¹ the absence of any particular agreement between the OTP and the Government of Sudan prior to February 2021 is not a valid reason for the Prosecution's inactivity since it is the direct result of the Prosecution's and the Court's negligence over sixteen years.

12. The Defence does not know when P-0903 was first identified as a potential witness, but the first document in which he is referenced is a note of his screening interview, dated [REDACTED],¹² some [REDACTED] Mr Abd-Al-Rahman's initial appearance on 15 June 2020, and [REDACTED] the confirmation of charges hearing. It was not disclosed to the Defence until [REDACTED].

13. According to an Investigation Report, the next time P-0903 was contacted was on [REDACTED],¹³ [REDACTED] the confirmation of charges hearing, and [REDACTED] the signing of the MoU. This report makes no reference to taking a statement from the witness; it relates simply to the clarification of a date that the witness provided earlier. The report was only disclosed to the Defence [REDACTED].

14. P-0903's witness statement was finally taken [REDACTED],¹⁴ [REDACTED] the signing of the MoU. It was disclosed to the Defence [REDACTED].

15. It is submitted that there is no good reason why contact with P-0903 could not have been made [REDACTED]. Nor is there good reason why, the investigative lead having been identified, it took another [REDACTED] before he was interviewed. At the very least, there was ample opportunity to interview him [REDACTED] and the confirmation of charges hearing in May 2021.

16. The reasons clearly cannot be found in [REDACTED].¹⁵ The reasons for that have already been explained [REDACTED].¹⁶

¹⁰ Prosecution's second request for the authorisation of non-disclosure of witness identities, 26 February 2021, ICC-02/05-01/20-287-Conf-Exp, public redacted version [ICC-02/05-01/20-287-Red2](#), para. 38.

¹¹ [ICC-02/05-01/20-636](#), paras 27-35.

¹² [REDACTED].

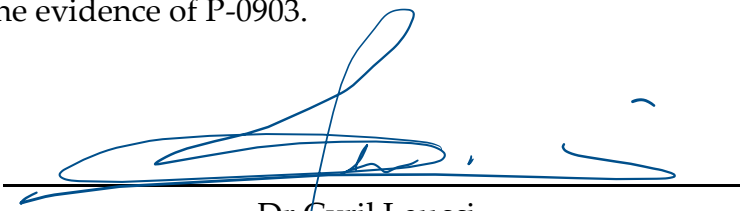
¹³ [REDACTED].

¹⁴ [REDACTED].

17. Had the Prosecution acted with the requisite diligence and professionalism, a special agreement under Article 4(2) of the Rome Statute would have been entered into with Sudan as early as 2005, allowing the Prosecution to take steps to conduct an interview with P-0903 before the confirmation of charges hearing.

18. The time that elapsed between the identification of the investigative lead and the collection of P-0903's evidence is an important factor to be taken into account in the assessment of the Prosecution's diligence. Here, the Prosecution's lack of diligence is manifest. It compounds the four *negligences* set out at paragraph 35 of the *Clarification*. Moreover, it is submitted that the unjustifiable delays in disclosing P-0903's evidence to the Defence further serve to demonstrate the lack of the Prosecution's diligence and professionalism. The Prosecution is not entitled to complete all investigations that were commenced before the start of the trial or, it is submitted, before the confirmation of charges hearing. It would be unconscionable and contrary to the Court's well-established case law to reward the Prosecution for its delays by allowing it to call P-0903 and rely on his evidence.

FOR THE FOREGOING REASONS, THE DEFENCE HEREBY REQUESTS THAT THE CHAMBER DECIDE that, on the particular merits, the Prosecution may not call or rely on the evidence of P-0903.



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

Dated this 4th day of April 2022 at The Hague, The Netherlands

¹⁵ [REDACTED].

¹⁶ [REDACTED].