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

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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 application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material and to introduce into evidence P-0922’s new statement under rule 68(3), ICC-02/05-01/20-652-Conf”, 6 April 2022, ICC-02/05-01/20-664-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. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s application under regulation 35 to extend the disclosure and associated deadlines concerning newly obtained material, and to introduce into evidence P-0922’s new statement under rule 68(3) (“Application”).¹ The Prosecution seeks: (i) an extension of the lapsed deadline to disclose newly obtained material relating to P-0877 and four other witness, namely P-0922, P-0979, P-0999 and P-1040 (“Four Witnesses”); (ii) leave for the addition of material related to P-0877 and the Four Witnesses to the Prosecution’s List of Evidence; and (iii) leave for the addition of witnesses P-0979, P-0999 and P-1040 to the Prosecution’s List of Witnesses. In addition, the Prosecution requests the authorisation of the Trial Chamber to introduce the newly collected evidence of P-0922 into evidence under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”).

2. Save for the request for an extension of the lapsed deadline as it relates to P-0877, the Application is opposed.

3. The Prosecution was ordered to disclose all evidence and a list of all witnesses upon which it intends to rely at trial by 5 January 2022 (“Deadline”).² It is worth revisiting the strong discouragement of late disclosure expressed by the Trial Chamber when it set the Deadline:

Any disclosure of evidence which is to be used as part of the Prosecution case after that date, *which we would discourage strongly*, and we add to that discouragement this: It may only be used in evidence with the permission of the Trial Chamber. We would obviously expect that any disclosure after 5 January would be accompanied by *a full explanation of the reason for the delay*.³

4. In its first application made pursuant to Regulation 35 of the Regulations of the Court (“RoC”), the Prosecution requested – in relevant part – for leave to extend

¹ Prosecution’s application under regulation 35 to extend to extend the disclosure and associated deadlines concerning newly obtained material and to introduce into evidence P-0922’s new statement under rule 68(3), ICC-02/05-01/20-652-Conf, 29 March 2022; public redacted version [ICC-02/05-01/20-652-Red](#).

² Status Conference, [ICC-02/05-01/20-T-013-ENG](#), pp 17-18, 78, 8 September 2021.

³ [ICC-02/05-01/20-T-013-ENG](#), p. 78 (emphasis added).

the Deadline to 28 February 2022 to disclose the witness statements and related material of, among others, P-0999 (“First Application”).⁴

5. The Trial Chamber ruled on the First Application on 24 December 2021 (“Decision”), finding that since the Prosecution had not yet conducted and/or concluded interviews of P-0999 and others, it “consider[ed] it premature to consider any request pursuant to Regulation 35 of the Regulations.”⁵ The Chamber further ruled, that once the Prosecution was in possession of the prior recorded testimony and any related material of, among others, P-0999, the Prosecution will have to apply for leave to add them to the List of Evidence and to rely on the material at trial.⁶

6. Pursuant to Regulation 23bis(2) of the Regulations of the Court (“RoC”), this Response is filed as “confidential”, mirroring the classification of the Request. A public redacted version will be filed shortly thereafter.

II. SUBMISSIONS

A. P-0877

7. The Defence does not oppose the request for an extension of the lapsed deadline as it relates to P-0877. The Court’s jurisprudence allows for the extension of deadlines when there is agreement between the Parties.⁷

B. *There is no good reason to extend the lapsed Deadline in respect of the Four Witnesses or to add P-0979, P-0999 and P-1040 to the List of Witnesses*

8. Mindful of the undesirability of repetition, Defence incorporates by reference its prior submissions on the admissibility of evidence the collection of which post-dates the confirmation of charges hearings (that is, after 26 May 2021). The Trial Chamber is respectfully referred to the *Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès* (ICC-02/05-01/20-616) of 18 March 2022

⁴ Prosecution’s request for an extension of time to disclose materials of seven witnesses and a report pursuant to regulation 35 of the Regulations of the Court, ICC-02/05-01/20-541-Conf-Exp; see also ICC-02/05-01/20-541-Conf-Exp-Corr, ICC-02/05-01/20-541-Conf-Red-Corr; public redacted version ICC-02/05-01/20-541-Red2-Corr, paras 10-12.

⁵ Decision on the Prosecution’s request for an extension of time limit to disclose and add items to its list of evidence and list of witnesses, ICC-02/05-01/20-545-Conf, para. 8.

⁶ Decision, para. 8.

⁷ *Prosecutor v. Thomas Lubanga Dyilo*, 17 December 2007, [ICC-01/04-01/06-1095](#), paras 3-4.

(“Clarification”),⁸ the *Réponse à la Requête ICC-02/05-01/20-624-Conf* of 21 March 2022 (“Response of 21 March”),⁹ paragraphs 4-9 of the 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 of 1 April 2022 (“P-0903 Application”),¹⁰ and paragraphs 6, 9 and 13 of the Defence application for a finding that the Prosecution may not call or rely on the evidence of P-0990 of 4 April 2022 (“P-0990 Application”).¹¹

9. More specifically, the Defence relies on its submissions on the four *Négligences* enumerated in paragraphs 8-33 of the *Clarification*.¹² Similarly, the Defence relies on its previous submissions set out at paragraph 20 of its Response of 21 March relating to the irrelevance and inapplicability of any arguments based on COVID-19 restrictions. Pre-Trial Chamber II has already held that, generally:

the Court’s staff and witnesses are exempt from travel restrictions due to privileges and immunities and that the impact of the Covid-19 pandemic cannot retroactively justify the Prosecutor’s delays.¹³

(a) P-0922

10. The Defence opposes the application to authorise the late disclosure of P-0922’s additional witness statement, dated [REDACTED],¹⁴ and two items of associated material. Indeed, the Defence submits that P-0922’s evidence should be excluded in its entirety. The Defence acknowledges that the Trial Chamber allowed the introduction of P-0922’s evidence under Rule 38(3)¹⁵ following the Prosecution’s fourth application under rule 68(3) of 26 January 2022 (“Fourth Application”).¹⁶ The

⁸ [ICC-02/05-01/20-636](#).

⁹ ICC-02/05-01/20-637-Conf; public redacted version [ICC-02/05-01/20-637-Red](#)

¹⁰ ICC-02/05-01/20-659-Conf; public redacted version [ICC-02/05-01/20-659-Red](#).

¹¹ ICC-02/05-01/20-661-Conf.

¹² [ICC-02/05-01/20-636](#); see also Response of 21 March, ICC-02/05-01/20-637-Conf; public redacted version [ICC-02/05-01/20-637-Red](#), para. 18.

¹³ [ICC-02/05-01/20-196](#), para. 31.

¹⁴ P-0922, DAR-OTP-0220-2864.

¹⁵ Decision on the Prosecution’s fourth and fifth request to introduce prior recorded testimonies under Rule 68(3), 21 February 2022, ICC-02/05-01/20-602-Conf; public redacted version [ICC-02/05-01/20-602-Red](#), paras 44-51 and 86.

¹⁶ Prosecution’s fourth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991, ICC-02/05-01/20-564-Conf; public redacted version [ICC-02/05-01/20-564-Red](#).

Defence's submissions on the Fourth Application were limited, however, to the mode of P-0922's potential testimony and were not intended to prejudice the right of the Defence to seek outright exclusion of his evidence. Given that the Trial Chamber is currently seized of the filings set out in paragraph 8 above, it is submitted that it is both convenient and in the interests of justice for the Defence to seek exclusion of P-0922's evidence now.

11. The Defence does not know when P-0922 was first identified as a potential witness; a note of his screening interview indicates that he was first spoken to on [REDACTED],¹⁷ well before the confirmation of charges hearings. But his first witness statement was not taken until [REDACTED] later,¹⁸ and [REDACTED] after the signing of the MoU between the OTP and the Government of Sudan. There is no valid reason why P-0922 could not have been interviewed between December 2020 and the confirmation of charges hearing in March 2021, nor more generally why it took a further [REDACTED] before the Prosecution took his first statement.

12. The time that elapsed between the identification of the investigative lead and the collection of P-0922's evidence is an important factor to be considered in the Chamber's assessment of the Prosecution's diligence.¹⁹ Here, the Prosecution's lack of diligence is manifest. It compounds the four *négligences* set out at paragraph 35 of the *Clarification*. There is no good cause demonstrating that P-0922's belatedly collected evidence of [REDACTED], and *a fortiori* of [REDACTED] – whether specifically post-confirmation of charges or otherwise – should be allowed to be relied upon by the Prosecution. This is especially so given that the belated nature of the evidence's collection cannot reasonably be characterised as being due to events beyond its control.

13. The Prosecution knew it had an obligation to demonstrate that it had acted with diligence in securing the additional evidence of P-0922. The Prosecution has failed to demonstrate that it acted with diligence and failed to provide justification

¹⁷ P-0922, DAR-OTP-0215-7229.

¹⁸ P-0922, DAR-OTP-0222-0312, statement dated [REDACTED] and disclosed 11 November 2021. *See also* Application, para. 18.

¹⁹ *Prosecutor v. Alfred Yekatom and Patrice-Édouard Ngaïssona*, 1 June 2020, [ICC-01/14-01/18-538](#), para. 18.

for the four *négligences* mentioned in the *Clarification* when he had an opportunity to do so.

14. Further, it is submitted that it would not be contrary to the interests of justice to exclude the evidence of P-0922. The witness does not give evidence that is unique. The evidence is corroborative and cumulative to the expected evidence of a significant number of *viva voce* witnesses, as the Prosecution has acknowledged in its fourth application under rule 68(3) to introduce into evidence prior recorded testimony of P-0922 and five other witnesses (“Fourth Rule 68(3) Application”).²⁰

15. In particular, the Prosecution must accept that P-0922’s evidence regarding the contextual elements of crimes against humanity is cumulative to, and corroborated by, among others, [REDACTED].²¹

16. P-0922’s evidence about the attacks on [REDACTED] is cumulative to, and corroborated by, among others, [REDACTED].

17. P-0922’s evidence regarding the charged crime of destruction of property in [REDACTED] is cumulative to, and corroborated by, among others, [REDACTED].²² Further, his evidence regarding the charged crime of forcible displacement in [REDACTED] is cumulative to, and corroborated by, among others, [REDACTED].²³

18. Finally, P-0922’s evidence regarding the alleged detention of persons at [REDACTED], and the [REDACTED], is cumulative to, and corroborated by, among others, [REDACTED].

19. It is submitted that the Trial Chamber will not be assisted by hearing from yet another witness who testifies about the same matters as a large number of other witnesses. Further, doing so will only serve to unduly prolong the presentation of the Prosecution’s case and thus of the trial as a whole. There is a common interest in

²⁰ Prosecution’s fourth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991, 26 January 2022, ICC-02/05-01/20-564-Conf; public redacted version [ICC-02/05-01/20-564-Red](#).

²¹ Fourth Rule 68(3) Application, para. 48.

²² Fourth Rule 68(3) Application, para. 50.

²³ Fourth Rule 68(3) Application, para. 50.

“trimming the fat” in terms of the volume of cumulative evidence to be adduced by the Prosecution in the course of this trial.²⁴

20. For the foregoing reasons, the Trial Chamber should find that the Prosecution cannot rely on the evidence of, and should reject the Application as it relates to, P-0922.

(b) P-0979

21. The Defence opposes the application to authorise the late disclosure of P-0979’s witness statement, dated [REDACTED],²⁵ and seven items of associated material, and the application to add P-0979 to the List of Witnesses. The Prosecution has explained that it identified P-0979 in [REDACTED],²⁶ that is, after the confirmation of charges hearings. The Prosecution does not explain how it identified P-0979 or why it was unable to identify him prior to the confirmation of charges hearing. The Prosecution further avers that “[d]espite its best efforts, [its] previous attempts to contact the witness were unsuccessful.”²⁷ The Prosecution fails to substantiate what “its best efforts” amounted to nor why they were unsuccessful.

22. The Chamber is not in a position to evaluate how good these “best efforts” were nor whether the Prosecution’s lack of success was based on failings of the Prosecution, lack of diligence, or matters truly beyond the Prosecution’s control. The Prosecution must do more than merely pay lip service to the Chambers’ requirement of a “full explanation of the reason for the delay” if the Application is to stand any chance of overcoming the Chamber’s strong discouragement of the late disclosure of evidence on which the Prosecution may seek to rely.

23. The Prosecution knew it had an obligation to demonstrate that it had acted with diligence in securing the additional evidence of P-0979. The Prosecution has failed to demonstrate that it acted with diligence and failed to provide justification

²⁴ ICC-02/05-01/20-T-022-CONF-ENG ET, 8 February 2022, pp 37-38.

²⁵ P-0979, DAR-OTP-0224-0273. The precise dates of the interview are redacted, but the interpreter certification is dated [REDACTED].

²⁶ Application, para. 20.

²⁷ Application, para. 20.

for the four *négligences* mentioned in the *Clarification* when he had an opportunity to do so.

24. Further, the Prosecution has entirely failed to explain why it is in the interests of justice to add P-0979 to its List of Witnesses after the expiry of the Deadline. The witness purports to give evidence that is no way unique, and the Prosecution does not seek to suggest otherwise. The evidence is corroborative and cumulative of the expected evidence of a number of *viva voce* and Rule 68(3) witnesses. For example, witnesses who are expected, among others, to testify about the attacks [REDACTED] include [REDACTED].

25. Witnesses who are expected, among others, to testify about the alleged detention of persons [REDACTED], include [REDACTED].

26. It is submitted that the Trial Chamber will not be assisted by hearing from yet another witness who testifies about the same matters as a large number of other witnesses. Further, doing so will only serve to unduly prolong the presentation of the Prosecution's case and thus of the trial as a whole.

27. For the foregoing reasons, the Trial Chamber should reject the Application as it relates to P-0979.

(c) P-0999

28. The Defence opposes the application to authorise the late disclosure of P-0999's audio interview of [REDACTED] and items of associated material, and the application to add P-0999 to the List of Witnesses. The Prosecution explained in the First Application that it had planned to interview P-0999 during [REDACTED], but that it had not been successful due to the (unspecified) unavailability of the witness, problems with the phone and internet network [REDACTED] and (unspecified) security considerations.²⁸ The Prosecution stated in the First Application that it would disclose the transcript of the interview in Arabic and an English translation and related materials no later than 31 January 2022. In fact, as admitted by the Prosecution at paragraph 30 of the Application, transcripts in Arabic only have been disclosed to the Defence, and then only on 25 March 2022, nearly two months after

²⁸ First Application, para. 25.

they had initially been promised. English translations will be disclosed “no later than 10 April 2022”,²⁹ so after the start of the trial.

29. The screening interview³⁰ referred to in the Application discloses that P-0999 was first spoken to on [REDACTED],³¹ some [REDACTED] after the confirmation of charges hearing. The Prosecution does not explain how it identified P-0999 or why it was unable to identify him prior to the confirmation of charges hearing. In addition to the rather unspecified challenges faced by the Prosecution in securing the witness’s evidence as set out in the First Application, it is stated that P-0999 lives [REDACTED].³² The Prosecution fails to explain why [REDACTED]. The Prosecution fails to explain why any challenges relating to an internet connection for a remote interview could not have been overcome – given the considerable technical resources at its disposal – by the expedient of using of a satellite phone. Further, given the interview took place remotely, the Prosecution is unable realistically to argue that impediments related to COVID-19 travel restrictions or the *coup d’état* could have had any bearing whatsoever on its ability to secure P-0999’s evidence.

30. The Chamber is not in a position to conduct a meaningful evaluation of the Prosecution’s claimed challenges it has faced in interviewing P-0999, nor whether any such challenges could not have been overcome sooner as a result, in whole or in part, of the Prosecution’s own failings, or lack of diligence, or lack of creativity and resourcefulness. The Prosecution has simply paid lip service to the Chambers’ requirement of a “full explanation of the reason for the delay”.

31. Further, the Prosecution has failed to convincingly explain why it is in the interests of justice to add P-0999 to its List of Witnesses after the expiry of the Deadline. The witness purports to give evidence that is no way unique about the alleged displacement of the inhabitants of surrounding villages to, and the subsequent incident in [REDACTED]. His evidence is corroborative and cumulative of the expected evidence of a number of *viva voce* and Rule 68(3) witnesses. For

²⁹ Application, para. 30.

³⁰ DAR-OTP-0219-6069

³¹ This Prosecution does not mention this fact in the Application

³² Application, para. 28.

example, witnesses who are expected, among others, to testify about the displacement of the inhabitants of surrounding villages [REDACTED] include [REDACTED].

32. Witnesses who are expected, among others, to testify about the alleged detention and mistreatment of detainees in [REDACTED] include [REDACTED]. Witnesses who are expected, among others, to testify about the alleged [REDACTED] include [REDACTED].

33. Finally, witnesses who are expected, among others, to testify about the alleged killing of [REDACTED] include [REDACTED].

34. Although the Prosecution submits that P-0999 gives evidence that is “of a unique nature” on the point of his [REDACTED], and that it is “critical with respect to establishing the identities of the victims”³³ it is submitted that this is of marginal relevance to the question of Mr Abd-Al-Rahman’s guilt or innocence. The Prosecution is not bound – and knows perfectly well that it is not bound – to prove the identities of victims in order to prove its case. Indeed, in its opening, the Prosecution stated that it “will be leading evidence relating to the murder of unidentified victims, some of whom were buried together in single graves.”³⁴

35. Once again, hearing another corroborative and cumulative witness will only serve to unnecessarily prolong the trial. The Trial Chamber should reject the Application as it relates to P-0999.

(d) P-1040

36. The Defence submits that no explanation has been provided as to why P-1040 was only contacted in [REDACTED]. Nor has the Prosecution explained why alternative and creative means of securing his evidence sooner than [REDACTED] could not have been employed. In the absence of such a showing, the Trial Chamber should be slow to find that the Prosecution has been diligent or has provided a “full explanation of the reason for the delay”.

³³ Application, para. 27.

³⁴ ICC-02/05-01/20-T-026-CONF-ENG, 5 April 2022, p. 64.

37. Further, P-1040 is yet another witness upon whom the Prosecution seeks to rely in making its case relating to the charged events in [REDACTED]. As explained in paragraphs 18 and 25 above, a large number of witnesses who are expected to testify *viva voce* or pursuant to Rule 68(3) will give evidence related to the matters outlined in paragraph 31 of the Application. The Prosecution makes no attempt to suggest that P-1040's evidence is unique in any relevant particular.

38. It is submitted that in respect of all of Four Witnesses, the interests of judicial economy militate in favour of dismissing the Application in its entirety.

Respectfully submitted,



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

Dated this 3rd day of May 2022 at The Hague, The Netherlands.