



Original: **English**

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

Date: **7 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 the  
Defence response to Prosecution’s first application under rule 68(2)(b) (witnesses  
P-0013, P-0034, P-0043 and P-0065), ICC-02/05-01/20-565 (6 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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**REGISTRY**

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Mr Pieter Vanaverbeke

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Mr Nigel Verrill

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**Victims Participation and Reparations  
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## I. *Introduction*

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s first application under Rule 68(2)(b) of the Rules of Procedure and Evidence of 26 January 2022 (respectively, “Rule 68(2)(b)” and “Application”).<sup>1</sup> The Prosecution submits that the evidence of witnesses P-0013, P-0034, P-0043 and P-0065 (“Four Witnesses”) “do not concern the acts and conduct of the Accused” but are relied on primarily to establish “the contextual elements of war crimes and crimes against humanity...as confirmed by Pre-Trial Chamber II.”<sup>2</sup> The Defence opposes the Application.

2. By virtue of 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. If their evidence is to be admitted at all, it is important that each of the Four Witnesses testify *viva voce*, or alternatively, pursuant to 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, 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 behalf 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 Four Witnesses will ensure that the Trial Chamber obtains the best possible evidence based on what each of them actually and independently recall. Admitting lengthy statements without permitting the Defence the opportunity to question the Four Witnesses thereon will undermine that objective since it is impossible to know how the witness statements were actually taken. The risk that unreliable answers were given to investigators’ leading

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<sup>1</sup> ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#)

<sup>2</sup> ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#), para. 3.

questions, for example, or that the witnesses' true recollections of events were tainted by the input of unknown third parties over the course of (invariably) many days of interview is too great. Without questioning by the Defence, the Trial Chamber risks being deprived of assistance in respect of its assessment of the reliability of the 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' statements in its response to the Prosecution's first application made pursuant to Rule 68(3) on 5 January 2022;<sup>3</sup> it is submitted that the same considerations apply to the Four 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).<sup>4</sup> 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.<sup>5</sup>

<sup>3</sup> ICC-02/05-01/20-549-Conf; public redacted version [ICC-02/05-01/20-549-Red](#), par. 14-15.

<sup>4</sup> ICC-02/05-01/20-565-Conf; public redacted version [ICC-02/05-01/20-565-Red](#), paras 6-8.

<sup>5</sup> *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.

#### IV. *Submissions*

7. Before turning to an analysis of the Application with respect to each of the Four Witnesses individually, the Defence makes the following submissions that are common to all of the witnesses.<sup>6</sup>

8. The evidence of each of the Four 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 respective 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 each witness in order to put certain questions into context, or whether the interviewer 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 statements. All of these factors would be evident, of course, when a witness provides *viva voce* testimony as their evidence-in-chief; 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).

9. Moreover, each of the Four Witnesses gave their statements over the course of a number of days ([REDACTED];<sup>7</sup> [REDACTED];<sup>8</sup> [REDACTED];<sup>9</sup> [REDACTED]<sup>10</sup>). There is simply no way of knowing what conversations took place between the witnesses and others after each day's interviewing. There is nothing in any of the statements that suggests the Four Witnesses were warned against discussing their emerging accounts with others over the course of those days. By contrast, of course, witnesses providing *viva voce* testimony are routinely warned by the Trial Chamber

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<sup>6</sup> These general submissions echo those made in [ICC-02/05-01/20-576-Red](#), paras. 7-8.

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

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.

10. 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 no leading questions were used during the witnesses' interviews, for example, or that it can be presumed that the witnesses did not discuss their accounts with others over the course of the many days of interviews. The Prosecution simply cannot 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 Four Witnesses' accounts. Nevertheless, his rights under Article 67(1)(e) exist irrespective of any potential lack of professionalism of the Prosecution's investigators.

11. Even if the Trial Chamber were to be satisfied that the prior recorded testimony of the Four Witnesses does 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 the statements and associated materials without affording the Defence the opportunity to explore these factors during questioning. In all the circumstances, only by calling the Four Witnesses *viva voce*, or at least pursuant to Rule 68(3), would prejudice to Mr Abd-Al-Rahman be avoided.

**P-0013**

12. The Prosecution seeks the introduction of a single witness statement and of the associated material listed in Annex A (A1) to the Application. The evidence indicates that, at the time his statement was taken, the witness was living in

[REDACTED], and that the interview was conducted in [REDACTED].<sup>11</sup> The Defence refers to its submissions set out in paragraphs 5-11 of its Response to Request ICC-02/05-01/20-555-Conf of 31 January 2022.<sup>12</sup> The Chamber's ruling thereon is pending at the time of filing, but the Defence submits that P-0013's prior recorded testimony cannot be introduced because it was collected in [REDACTED] at a time when the Court had no legal basis to undertake its activities on its territory pursuant to Article 4(2) of the Statute.

13. Although not addressed in the Application, it is clear that P-0013's witness statement goes to proof of Mr Abd-Al-Rahman's alleged acts and conduct. [REDACTED]<sup>13</sup> [REDACTED]. This feature of P-0013's evidence goes to the individual criminal responsibility of the person the Prosecution alleges is Mr Abd-Al-Rahman. At the very least, it goes to [REDACTED].

14. In addition, P-0013 gives evidence of the cooperation and collaboration between the militia/Janjaweed and Government of Sudan ("GoS") Forces in attacks within the Wadi Salih and Mujkar localities.<sup>14</sup> This is a critical issue that is materially in dispute. At the very least it is an issue to which the Prosecution is to be put to strict proof.

15. The conditions for the introduction of P-0013's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, notwithstanding the argument related to Article 4(2), P-0013 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, the previous interviews to which reference is made at paragraph 64 of his statement should also be admitted as associated material.

#### **P-0034**

16. The Prosecution seeks the introduction of a single witness statement and of the associated material listed in Annex A (A2) to the Application. The evidence indicates that the interview was conducted in [REDACTED]. [REDACTED] is not a

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<sup>11</sup> [REDACTED].

<sup>12</sup> ICC-02/05-01/20-568-Conf; public redacted version [ICC-02/05-01/20-568-Red](#).

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

State Party to the Rome Statute. The Defence is unaware of any valid “special agreement” (“*une convention*”) that fulfils the formal requirements of a convention such as the one contemplated under Article 4(2) of the Statute. The Defence again incorporates its submissions set out in paragraphs 5-11 of its Response to Request ICC-02/05-01/20-555-Conf of 31 January 2022<sup>15</sup>. The Chamber’s ruling thereon is pending at the time of filing, but the Defence submits that P-0034’s prior recorded testimony cannot be introduced because it was collected at a time when the Court had no legal basis to undertake its activities on the territory of [REDACTED] pursuant to Article 4(2) of the Statute.

17. P-0034 gives evidence of [REDACTED]<sup>16</sup> It is out of the question that such evidence should be allowed to be introduced unchallenged.

18. In addition, P-0034 gives evidence of [REDACTED],<sup>17</sup> [REDACTED],<sup>18</sup> the purported recruitment of militia, including the involvement of the Popular Defence Forces,<sup>19</sup> and the purported funding, arming and training of militias.<sup>20</sup> He gives evidence of the use of militia in operations and of the cooperation and collaboration between the militia/Janjaweed and GoS Forces.<sup>21</sup> [REDACTED]<sup>22</sup> These are all critical issues that are materially in dispute. At the very least they are issues to which the Prosecution is to be put to strict proof. Despite his position and experience, it is noteworthy that he makes absolutely no mention of “*Ali Kushayb*” or of Mr Abd-Al-Rahman.

19. The conditions for the introduction of P-0034’s evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, notwithstanding the argument related to Article 4(2), P-0013 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the

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<sup>15</sup> ICC-02/05-01/20-568-Conf; public redacted version [ICC-02/05-01/20-568-Red](#).

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].



introduction of his evidence, any and all previous interviews – including screening interviews – should also be admitted as associated material.

**P-0043**

20. The Prosecution seeks the introduction of a single witness statement and of the associated material listed in Annex A (A3) to the Application.

21. The introduction of P-0043's prior recorded testimony is opposed on the grounds that the statement has insufficient indicia of reliability; indeed there are cogent indicia of unreliability. The witness is untruthful. [REDACTED]<sup>23</sup> This is simply an acknowledgment that he is prepared to lie when he considers that it is in his interests to do so. [REDACTED] the Defence does criticise the dishonest manner in which he tried to achieve his goal. It is submitted that, [REDACTED], he had every incentive to concoct and maintain a new story [REDACTED]. His whole account must consequently be treated with the utmost caution.

22. [REDACTED]<sup>24</sup> [REDACTED]. That claim should be treated with great circumspection. [REDACTED]. The unlikelihood that this is a truthful account provides a strong basis to believe that the witness is untruthful and unreliable.

23. Further, the witness purports to give evidence about a GoS attack on [REDACTED].<sup>25</sup> The Prosecution has not indicated whether it relies on this evidence for any purported contextual value in demonstrating elements of war crimes or crimes against humanity; the Defence presumes that its silence indicates that no such reliance is placed on this evidence. In any event (assuming for the sake of argument that it is true) the alleged attack took place [REDACTED]. Taken at its highest, the probative value of P-0043's evidence of this alleged attack is extremely limited.

24. The conditions for the introduction of P-0043's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, P-0043 should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the introduction of his evidence, any and all previous interviews – including screening interviews – should also be admitted as associated material.

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<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

**P-0065**

25. The Prosecution seeks the introduction of a single witness statement and of the associated material listed in Annex A (A4) to the Application. As with P-0013, the evidence indicates that, at the time his statement was taken, the witness was living in [REDACTED], and that the interview was conducted in [REDACTED].<sup>26</sup> The Defence refers to its submissions set out in paragraphs 5-11 of its Response to Request ICC-02/05-01/20-555-Conf of 31 January 2022.<sup>27</sup> The Chamber's ruling thereon is pending at the time of filing, but the Defence submits that P-0065's prior recorded testimony cannot be introduced because it was collected in [REDACTED] at a time when the Court had no legal basis to undertake its activities on its territory pursuant to Article 4(2) of the Statute.

26. P-0065 is [REDACTED]<sup>28</sup> [REDACTED]<sup>29</sup> [REDACTED]<sup>30</sup> and [REDACTED]<sup>31</sup> including the alleged recruitment of Janjaweed.<sup>32</sup> He also gives evidence about *inter alia* the [REDACTED],<sup>33</sup> [REDACTED],<sup>34</sup> [REDACTED],<sup>35</sup> and the purported recruitment of Arab militias and the [REDACTED].<sup>36</sup> These are all critical issues that are materially in dispute. At the very least they are issues to which the Prosecution is to be put to strict proof. As with P-0034, given P-0065's position and experience, it is noteworthy that he makes absolutely no mention of "*Ali Kushayb*" or of Mr Abd-Al-Rahman.

27. The conditions for the introduction of P-0065's evidence pursuant to Rule 68(2)(b) have not been made out. If his evidence is to be admitted at all, notwithstanding the argument related to Article 4(2), he should be called *viva voce*, or alternatively, under Rule 68(3). Finally, irrespective of the modality of the

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<sup>26</sup> [REDACTED].

<sup>27</sup> ICC-02/05-01/20-568-Conf; public redacted version [ICC-02/05-01/20-568-Red](#).

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED].

introduction of his evidence, any and all previous interviews – including screening interviews – should also be admitted as associated material.

**V. Conclusion**

28. 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 Four 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:**

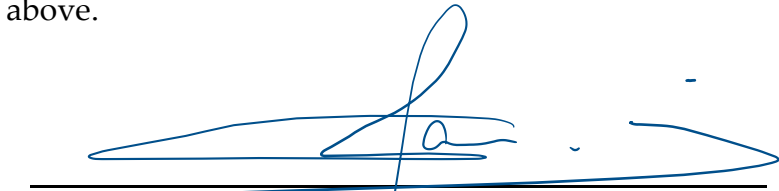
- **DISMISS** the Application in its entirety; **AND**
- **FIND** that the Four Witnesses' prior recorded testimony cannot be introduced before the Court;

**OR, IN THE ALTERNATIVE,**

- **ORDER** that the Four Witnesses should testify *viva voce*;

**OR, IN THE ALTERNATIVE,**

- **ORDER** that the Four Witnesses should testify under Rule 68(3); **AND**
- **ORDER** the disclosure of any material mentioned at paragraphs 15, 19, 24 and 27 above.


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

Dated this 7<sup>th</sup> day of February 2022 at The Hague, The Netherlands