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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 redacted version of

**Decision on the Prosecution's tenth application to introduce prior recorded
testimonies under Rule 68(3)**

To be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Victims Participation and Reparations
Section**

Other

I. Procedural history

1. On 20 January 2022, Trial Chamber I ('the Chamber') issued its first decision on the Prosecution's application to introduce prior recorded testimonies under Rule 68(3) of the Rules of Procedure and Evidence (the 'Rules'), setting out the general framework for the introduction of prior testimonies pursuant to this provision.¹
2. The Chamber has since issued a series of decisions dealing with subsequent Rule 68(3) applications.²
3. On 23 March 2022, the Prosecution filed its tenth application to introduce the prior recorded testimonies of witnesses P-0103, P-0112 and P-0117 pursuant to Rule 68(3) of the Rules (the 'Tenth Application').³
4. On 30 March 2022, the Defence filed its response to the Tenth Application (the 'Response'), objecting to the application in respect of all witnesses.⁴

¹ First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-559-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-559-Red (hereinafter: 'First Rule 68(3) Decision').

² Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-588-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red (hereinafter: 'Second Rule 68(3) Decision'); 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. A public redacted version was notified on the same day, ICC-02/05-01/20-602-Red (hereinafter: 'Third Rule 68(3) Decision'); Decision on the Prosecution's sixth request to introduce prior recorded testimonies under Rule 68(3), 16 March 2022, ICC-02/05-01/20-630-Conf. A public redacted version was notified the same day, ICC-02/05-01/20-630-Red; Decision on the Prosecution's seventh application to introduce prior recorded testimonies under Rule 68(3), 18 March 2022, ICC-02/05-01/20-635-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-635-Red (hereinafter: 'Fifth Rule 68(3) Decision'); Decision on the Prosecution's eighth application to introduce prior recorded testimonies under Rule 68(3), 29 March 2022, ICC-02/05-01/20-649-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-649-Red (hereinafter: 'Sixth Rule 68(3) Decision'); Seventh Decision on Prosecution's applications to introduce prior recorded testimonies under Rule 68(3), 29 March 2022, ICC-02/05-01/20-651-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-651-Red.

³ Prosecution's tenth application under rule 68(3) to introduce into evidence the prior recorded testimony of witnesses P-0103, P-0112 and P-0117, 22 March 2022, ICC-02/05-01/20-642-Conf (notified on 23 March 2022). A public redacted version was notified on 28 March 2022, ICC-02/05-01/20-642-Red.

⁴ 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, ICC-02/05-01/20-654-Conf. A public redacted version was notified on 1 April 2022, ICC-02/05-01/20-654-Red.

II. Analysis

5. The Chamber incorporates by reference the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.⁵

A. General objections raised by the Defence

6. Despite the Chamber's many admonitions in respect of raising arguments that have previously been rejected,⁶ and despite the Defence's assurance to the Chamber that it would no longer engage in such practice,⁷ the Defence again refers to its previous submissions on the witness statement-taking process.⁸ The Chamber deeply regrets the Defence's persistent and flagrant disregard of its previous rulings on the matter.⁹ It should be noted that from hereon, any repetition of matters upon which the Chamber has already ruled, will be disregarded.

⁵ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

⁶ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 18; First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), 2 March 2022, ICC-02/05-01/20-612-Conf, para. 21. A public redacted version was notified on the same day, ICC-02/05-01/20-612-Red (hereinafter: 'First Rule 68(2)(b) Decision'); Fifth Rule 68(3) Decision, ICC-02/05-01/20-635-Conf, para. 6 ; Transcript of hearing, 8 March 2022, ICC-02/05-01/20-T-024-CONF-ENG, p. 23 lines 6-8.

⁷ Transcript of hearing, 8 March 2022, ICC-02/05-01/20-T-024-CONF-ENG, p. 23 line 16 to p. 24, line 4.

⁸ Response, ICC-02/05-01/20-654-Conf, *referring to* Transcript of hearing, 8 February 2022, ICC-02/05-01/20-T-022-CONF-ENG, p. 11, lines 21-25 to p. 21, line 15; Defence Response to Prosecution's third application under rule 68(3) (witnesses P-0657, P-0673, P-0843 and P-0954), ICC-02/05-01/20-560, 2 February 2022, ICC-02/05-01/20-576-Conf, paras 7-11. A public redacted version was notified on the same day, ICC-02/05-01/20-576-Red; Defence response to Prosecution's eighth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0092, P-0591, P-0714, P-0935, and P-0955, ICC-02/05-01/20-627-Conf, 17 March 2022, ICC-02/05-01/20-633-Conf, para. 5. A public redacted version was notified on the same day, ICC-02/05-01/20-633-Red.

⁹ Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 59; Transcript of hearing, 8 February 2022, ICC-02/05-01/20-T-022-CONF-ENG, p. 17, line 21 to p. 18, line 3; Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, paras 13-15; First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Conf, para. 25; Fifth Rule 68(3) Decision, ICC-02/05-01/20-635-Conf, paras 8-13; Sixth Rule 68(3) Decision, ICC-02/05-01/20-649-Conf, paras 5-6.

B. The prior recorded testimonies

P-0103

7. P-0103, a [REDACTED], provides testimony on the contextual elements of war crimes, including in relation to the existence of a non-international armed conflict.¹⁰ He also provides evidence on the contextual elements of crimes against humanity.¹¹

8. As regards the accused, the witness's evidence refers to his knowledge of Ali Kushayb,¹² and provides the following evidence on Mr Abd-Al-Rahman's individual criminal responsibility: (i) the accused's alleged position of authority as senior Militia/*Janjaweed* leader;¹³ (ii) the accused's alleged cooperation with senior officials of the Government of Sudan ('GoS');¹⁴ his alleged support to GoS forces and (iii) the accused's role as a member of the Popular Defence Forces ('PDF') and responsibility for the recruitment of PDF members.¹⁵

9. The prior recorded testimony of P-0103 is comprised of seven transcripts of interviews. The Prosecution also seeks to introduce related material, namely an atlas, two reports of an interview with [REDACTED], and [REDACTED].¹⁶

10. The Prosecution requests two hours to conduct a supplementary examination (instead of the nine hours estimated for *viva voce* examination).¹⁷

11. The Chamber notes the Prosecution's submission that P-0103's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*. This concerns in particular the contextual elements of war crimes;¹⁸ the contextual

¹⁰ Tenth Application, ICC-02/05-01/20-642-Conf, para. 10.

¹¹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 11.

¹² Tenth Application, ICC-02/05-01/20-642-Conf, para. 12, *referring to* DAR-OTP-0120-0203 at 0217, lines 536-542.

¹³ Tenth Application, ICC-02/05-01/20-642-Conf, para. 12, *referring to* DAR-OTP-0120-0203 at 0217-0219, lines 570-615.

¹⁴ Tenth Application, ICC-02/05-01/20-642-Conf, para. 12, *referring to* DAR-OTP-0120-0203 at 0218, lines 600-611.

¹⁵ Tenth Application, ICC-02/05-01/20-642-Conf, para. 12, *referring to* DAR-OTP-0120-0203 at 0217, lines 570-574; DAR-OTP-0120-0244, lines 46-49.

¹⁶ Tenth Application, ICC-02/05-01/20-642-Conf, para. 13. *See also* Annex A to Prosecution's tenth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses, ICC-02/05-01/20-642-Conf-AnxA, p. 2.

¹⁷ Tenth Application, ICC-02/05-01/20-642-Conf, paras. 14-15.

¹⁸ Tenth Application, ICC-02/05-01/20-642-Conf, para. 31, *referring to* P-0012, P-0029, P-0131, P-0547, P-0643, P-0769, P-0883, P-0905, P-0976, P-0992, and P-0994.

elements of crimes against humanity;¹⁹ the accused's nickname of Ali Kushayb,²⁰ and the accused's position of authority.²¹ The Chamber notes the Prosecution's submission that P-0103's evidence supports the agreed fact that Mr Abd-Al-Rahman was a member of the SAF and part of the Medical Corps.²² The Chamber further notes that the Prosecution has identified P-0103 as a self-incriminatory witness who may be subject to assurances pursuant to Rule 74 of the Rules.²³

12. The Defence objects to the introduction of P-0103's evidence pursuant to Rule 68(3) of the Rules because his testimony is 'unique among those on the Prosecution's witness list in terms of [REDACTED]'.²⁴ The Defence further notes that the witness claims to have met 'Ali Kushayb' many times, that he was in the PDF, and that he 'recruited his tribe'.²⁵ Moreover, the Defence argues that 'the fact the witness's testimony is to be adduced pursuant to the protections afforded under Rule 74 of the Rules further militates against this application succeeding.'²⁶

13. Although the Chamber could not find any indication of a direct interaction or particular proximity between the witness and the accused, the Chamber finds that P-0103's knowledge of 'Ali Kushayb'²⁷ combined with [REDACTED], place him in a distinctive position *vis-a-vis* other expected [REDACTED] witnesses.

14. The Chamber accepts the Defence's argument that P-0103 provides unique and detailed evidence on [REDACTED] in the armed conflict in Darfur.²⁸

¹⁹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 32, *referring to* P-0769, P-0874, P-0883, P-0921, P-0976, and P-1021.

²⁰ Tenth Application, ICC-02/05-01/20-642-Conf, para. 33, *referring to* P-0012, P-0643, P-0769, P-0874, P-0879, P-0885, P-0903, P-0905, P-0921, P-0932, P-0990, P-0994, and P-1021.

²¹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 34, *referring to* P-0131, P-0547, P-0643, P-0874, P-0883, P-0885, P-0905, and P-0932.

²² Tenth Application, ICC-02/05-01/20-642-Conf, para. 35, *referring to* Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, ICC-02/05-01/20-504-AnxA, facts 10 and 15.

²³ Redacted version of Annex 1 to the Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Anx1-Red, p. 7.

²⁴ Response, ICC-02/05-01/20-654-Conf, para. 6.

²⁵ Response, ICC-02/05-01/20-654-Conf, para. 7, *referring to* DAR-OTP-0120-0203 at 02117.

²⁶ Response, ICC-02/05-01/20-654-Conf, para. 9.

²⁷ DAR-OTP-0120-0203 at 02117.

²⁸ Response, ICC-02/05-01/20-654-Conf, para. 6, *referring to* DAR-OTP-0120-0141 at 0150 and 0155; DAR-OTP-0120-0161 at 0164-0165; DAR-OTP-0120-0167 at 0168; DAR-OTP-0120-0186 at 0195-0196; DAR-OTP-0120-0203 at 0210, 284-289 and 0218; DAR-OTP 0120-0244 at 0253-0254.

15. Although the factors discussed above are not, *per se*, an obstacle to authorising the introduction of evidence under Rule 68(3) of the Rules, in the instant case, the Chamber finds that the nature of P-0103's evidence and [REDACTED] make it preferable that his testimony be heard entirely *viva voce*.

P-0112

16. P-0112, [REDACTED], provides evidence on the contextual elements of war crimes,²⁹ as well on the contextual elements of crimes against humanity, including in relation to the deliberate failure to investigate and prosecute the Militia/*Janjaweed* for crimes committed in West Darfur.³⁰

17. As regards the accused, the witness's evidence refers to Mr Abd-Al-Rahman's alleged position of authority as a Militia/*Janjaweed* leader,³¹ his alleged role in the recruitment of Militia/*Janjaweed*,³² and his involvement with the PDF.³³

18. The prior recorded testimony of P-0112 is comprised of two witness statements and ten transcripts of interviews. The Prosecution also seeks to introduce the following related material: a sketch; two maps; [REDACTED] ; two satellite images; two photographs; a list of documents to be copied by investigators; [REDACTED] ; three certificates of completed training; a certificate of participation in a Red Cross training on Law of Armed Conflicts; a certification of completion of compulsory national services; and the agreement on statement of limited use, pursuant to Article 55(2) of the Rome Statute.³⁴

²⁹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 17.

³⁰ Tenth Application, ICC-02/05-01/20-642-Conf, para. 18, *referring to* DAR-OTP-0215-4903-R02 at 4915-4916, lines 383-429.

³¹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 19, *referring to* DAR-OTP-0125-0002-R02, paras 10-13.

³² Tenth Application, ICC-02/05-01/20-642-Conf, para. 19, *referring to* DAR-OTP-0125-0002-R02, paras 10-13.

³³ Tenth Application, ICC-02/05-01/20-642-Conf, para. 19, *referring to* DAR-OTP-0125-0002-R02, paras 120-121.

³⁴ Tenth Application, ICC-02/05-01/20-642-Conf, para. 21. *See also* Annex A to Prosecution's tenth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses, ICC-02/05-01/20-642-Conf-AnxA, pp. 3-6.

19. The Prosecution requests two hours to conduct a supplementary examination (instead of the six hours estimated for *viva voce* examination).³⁵

20. The Chamber notes the Prosecution's submission that P-0112's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*. This concerns in particular the contextual elements of war crimes;³⁶ the contextual elements of crimes against humanity;³⁷ and the accused's position of authority.³⁸

21. The Defence objects to the introduction of P-0112's evidence pursuant to Rule 68(3) on the grounds that his testimony '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 [REDACTED].'³⁹ The Defence avers that P-0112 gives evidence on the identity, background, and alleged position of 'Ali Kushayb'.⁴⁰

22. As noted by the Defence,⁴¹ the Prosecution has identified P-0112 as a self-incriminatory witness who may be subject to assurances pursuant to Rule 74 of the Rules.⁴² With regard to the identity of the accused, the Chamber notes, as does the Defence,⁴³ that P-0112's evidence is based largely on hearsay.⁴⁴ However, the Chamber finds that P-0112 does provide unique and detailed evidence on [REDACTED] and the integration of the Militia/*Janjaweed* into the GoS forces.⁴⁵

23. Although the factors discussed above are not, *per se*, an obstacle to authorising the introduction of evidence under Rule 68(3) of the Rules, in the instant case, the

³⁵ Tenth Application, ICC-02/05-01/20-642-Conf, paras 22-23.

³⁶ Tenth Application, ICC-02/05-01/20-642-Conf, para. 31, *referring to* P-0012, P-0029, P-0131, P-0547, P-0643, P-0769, P-0883, P-0905, P-0976, P-0992, and P-0994.

³⁷ Tenth Application, ICC-02/05-01/20-642-Conf, para. 32, *referring to* P-0769, P-0874, P-0883, P-0921, P-0976, and P-1021.

³⁸ Tenth Application, ICC-02/05-01/20-642-Conf, para. 34, *referring to* P-0131, P-0547, P-0643, P-0874, P-0883, P-0885, P-0905, and P-0932.

³⁹ Response, ICC-02/05-01/20-654-Conf, para. 11.

⁴⁰ Response, ICC-02/05-01/20-654-Conf, para. 11, *referring to* DAR-OTP-0125-0002-R02, paras 12, 120-121.

⁴¹ Response, ICC-02/05-01/20-654-Conf, para. 12.

⁴² Redacted version of Annex 1 to the Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Anx1-Red, p. 10.

⁴³ Response, ICC-02/05-01/20-654-Conf, para. 11.

⁴⁴ DAR-OTP-0125-0002-R02, paras 12, 120-121.

⁴⁵ DAR-OTP-0125-0002-R02, para. 64, 70-75 and 107; DAR-OTP-0214-0582-R02, para. 44.

Chamber finds that the nature of P-0112's evidence and his position as [REDACTED] makes it preferable that his testimony be heard entirely *viva voce*.

P-0117

24. P-0117, [REDACTED], provides evidence on the contextual elements of war crimes, the contextual elements of crimes against humanity, as well as a description of the roles of, and relationship among, key figures, such as former President Al-Bashir, former Vice-President Taha, former Minister of the Interior Hussein, and Ahmad Harun.⁴⁶

25. As regards the accused, the Prosecution submits that the witness's evidence is relevant for establishing that Mr Abd-Al-Rahman is Ali Kushayb.⁴⁷ P-0117 also refers to the accused's alleged position of authority.⁴⁸

26. The prior recorded testimony of P-0117 is comprised of two witness statements. The Prosecution also seeks to introduce the following related material: 79 documents shown to the witness by the Prosecution's investigators and described by the witness; items DAR-OTP-0118-0372 to DAR-OTP-0118-1544; one documentary titled 'Meet the Janjaweed'; one presentation concerning the JEM attack in Omdurman; and 83 photographs relating to attacks on Silea, Suruj, and Sirba.⁴⁹

27. The Prosecution requests one and a half hours to conduct a supplementary examination (instead of the six hours estimated for *viva voce* examination).⁵⁰

28. The Chamber notes the Prosecution's submission that P-0117's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva*

⁴⁶ Tenth Application, ICC-02/05-01/20-642-Conf, para. 25.

⁴⁷ Tenth Application, ICC-02/05-01/20-642-Conf, para. 26, *referring to* DAR-OTP-0128-0042-R03, para. 189.

⁴⁸ Tenth Application, ICC-02/05-01/20-642-Conf, para. 26, *referring to* DAR-OTP-0128-0042-R03, paras 192-193.

⁴⁹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 27. *See also* Annex A to Prosecution's tenth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses, ICC-02/05-01/20-642-Conf-AnxA, pp. 7-25.

⁵⁰ Tenth Application, ICC-02/05-01/20-642-Conf, paras 27-28.

voce. This concerns in particular the contextual elements of war crimes;⁵¹ the contextual elements of crimes against humanity;⁵² and the accused's nickname of Ali Kushayb.⁵³

29. The Defence objects to the introduction of P-0117's evidence pursuant to Rule 68(3) of the Rules because the nature and content of his testimony relate to 'Ali Kushayb' and there is 'a great deal of evidence of multiple close interactions with "Ali Kushayb"'.⁵⁴ The Defence claims there are a number of inconsistencies in P-0117's evidence on Ali Kushayb and argues that the Prosecution is trying to hide these inconsistencies by seeking the introduction of the witness's testimony under Rule 68(3) of the Rules, rather than calling the witness to testify *viva voce*.⁵⁵

30. With regard to the acts and conduct of the accused, the Chamber notes that the Prosecution has indicated that it intends to adduce *viva voce* testimonies of witnesses who provide more extensive evidence on this topic.⁵⁶ The Chamber further notes the Prosecution's submission that information provided by the witness on the accused's identity corroborates the agreed biographical fact that Mr Abd-Al-Rahman was a member of the SAF and part of the Medical Corps.⁵⁷

31. The Chamber notes in this regard that P-0117's evidence is not unique or otherwise particularly significant in the body of the expected evidence on the aforesaid charged crimes. In fact, P-0117's evidence on the accused is of a general nature,⁵⁸ and does not mention any direct interaction or particular proximity with Mr Abd-Al-Rahman.

⁵¹ Tenth Application, ICC-02/05-01/20-642-Conf, para. 31, *referring to* P-0012, P-0029, P-0131, P-0547, P-0643, P-0769, P-0883, P-0905, P-0976, P-0992, and P-0994.

⁵² Tenth Application, ICC-02/05-01/20-642-Conf, para. 32, *referring to* P-0769, P-0874, P-0883, P-0921, P-0976, and P-1021.

⁵³ Tenth Application, ICC-02/05-01/20-642-Conf, para. 33, *referring to* P-0012, P-0643, P-0769, P-0874, P-0879, P-0885, P-0903, P-0905, P-0921, P-0932, P-0990, P-0994, and P-1021.

⁵⁴ Response, ICC-02/05-01/20-654-Conf, para. 14.

⁵⁵ Response, ICC-02/05-01/20-654-Conf, para. 16.

⁵⁶ Tenth Application, ICC-02/05-01/20-642-Conf, *referring to* P-0012, P-0643, P-0769, P-0874, P-0879, P-0885, P-0903, P-0905, P-0921, P-0932, P-0990, P-0994, and P-1021.

⁵⁷ Tenth Application, ICC-02/05-01/20-642-Conf, para. 35, *referring to* Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, ICC-02/05-01/20-504-AnxA, facts 10 and 15.

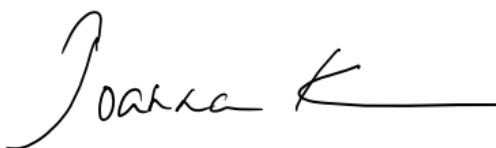
⁵⁸ DAR-OTP-0128-0042-R03, paras 189-193.

32. The Chamber is satisfied that the introduction of P-0117's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. Moreover, the Defence will have adequate opportunity to question P-0117 on what it deems are 'major inconsistencies between his evidence and the rest of the Prosecution's case'.⁵⁹

C. Timing and scope of supplementary examination and cross-examination

33. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the Prosecution must streamline its examination in order to complete the formalities under this provision and conduct any supplementary questioning of P-0117 within one hour.

34. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber rejects the application in respect of witnesses P-0103 and P-0112, and authorises the introduction of the prior recorded testimony of P-0117, identified in the Tenth Application and its annex, pursuant to Rule 68(3) of the Rules. The Chamber's preliminary ruling is subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 4 April 2022

At The Hague, The Netherlands

⁵⁹ Response, ICC-02/05-01/20-654-Conf, para. 16.