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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 redacted version of

**Decision on the Prosecution's applications to add witnesses and items to its List
of Witnesses and List of Evidence and to rely on recently collected evidence**

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

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I. PROCEDURAL HISTORY

1. On 8 September 2021, Trial Chamber I (the ‘Chamber’) set the commencement date of trial and corresponding deadlines thereto, including the deadline to disclose all evidence it intends to rely on at trial, and provide a list of witnesses (hereinafter ‘LoW’) and list of evidence (hereinafter ‘LoE’) by 5 January 2022.¹
2. On 16 December 2021, the Prosecution filed a request seeking an extension of time limit, beyond the 5 January 2022 deadline,² to disclose and add items to the LoW and LoE (hereinafter ‘First Regulation 35 Application’).³
3. On 24 December 2021, the Chamber partially granted the First Regulation 35 Application (hereinafter ‘First Decision’).⁴
4. On 5 January 2022, the Prosecution filed its LoW and LoE.⁵
5. On 10 March 2022, the Prosecution filed a request seeking authorisation to add witnesses and related material to its list of witnesses and list of evidence (hereinafter ‘Second Regulation 35 Application’). The Prosecution requests to add witnesses P-0916, P-1047, P-1061 and P-1062 to its LoW, as well as material related to P-0878, P-0916 and P-1047 to its LoE.⁶ The Defence agreed to the addition of witnesses P-1061 and P-1062 to the LoW, but opposed the remainder of the Second Regulation 35 Application (hereinafter ‘Second Response’).⁷

¹ Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

² Transcript of the hearing, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

³ 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. A confidential redacted version was notified on that same date, ICC-02/05-01/20-541-Conf-Red. *Corrigenda* were notified on 23 December 2021, ICC-02/05-01/20-541-Conf-Exp-Corr, ICC-02/05-01/20-541-Conf-Red-Corr. A public redacted version is also available, ICC-02/05-01/20-541-Red2-Corr.

⁴ 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.

⁵ Prosecution’s submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551 + Conf-Exp-Anxs 1 and 2 & Conf-Anx3 and Conf-Anx1-Red & Conf-Anx2-Red.

⁶ Prosecution’s application under regulation 35 to extend the disclosure and witness list deadlines, ICC-02/05-01/20-624-Conf. A public redacted version was notified on 15 March 2022, ICC-02/05-01/20-624-Red.

⁷ Réponse à la Requête ICC-02/05-01/20-624-Conf, 21 March 2022, ICC-02/05-01/20-637-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-637-Red.

6. On 15 March 2022, the Prosecution filed an application pursuant to Rule 68(3) of the Rules of Procedure and Evidence (hereinafter ‘Rules’), seeking authorisation to introduce into evidence the prior recorded testimonies of several witnesses, including P-0916 (hereinafter ‘Ninth Rule 68(3) Application’).⁸ The Defence responded orally to the Ninth Rule 68(3) Application.⁹

7. On 18 March 2022, the Defence clarified some of the arguments elaborated in its pre-trial brief in respect of the admissibility of the Prosecution’s evidence (hereinafter ‘First Admissibility Objection’).¹⁰ As instructed by the Chamber, it filed additional submissions on this matter as well as an application for a finding of non-reliance on certain evidence, particularly the testimony of P-0903 which the Defence submits should be excluded (hereinafter ‘Second Admissibility Objection’; together, ‘General Admissibility Objections’).¹¹ The Prosecution responded to the General Admissibility Objections (hereinafter ‘Response to the General Admissibility Objection’).¹²

8. On 29 March 2022, the Prosecution filed another application seeking authorisation to add witnesses and related material to its LoW and LoE as well as to introduce newly collected evidence (hereinafter ‘Third Regulation 35 Application’).¹³ The Defence made observations to the Third Regulation 35 Application (hereinafter ‘Third Response’).¹⁴

⁸ Prosecution’s ninth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0041, P-0675, P-0720, P-0892 and P-0916, ICC-02/05-01/20-629-Conf with Confidential Annex A. A public redacted version was notified on 17 March 2022, ICC-02/05-01/20-629-Red.

⁹ Transcript of hearing, 23 March 2022, ICC-02/05-01/20-T-025-CONF-ENG, p. 47, line 11 to p. 48, line 3.

¹⁰ Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès (ICC-02/05-01/20-616), ICC-02/05-01/20-636, *referring to* Mémoire préalable au procès, 4 March 2022, ICC-02/05-01/20-616, para. 27.

¹¹ 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. A public redacted version was notified on 4 April 2022, ICC-02/05-01/20-659-Red. *See* E-mail from the Chamber, 25 March 2022 at 8:37.

¹² Prosecution’s Consolidated Response to the Defence Requests to Exclude Witnesses P-0903 (ICC-02/05-01/20-659-Red) and P-0990 (ICC-02/05-01/20-661-Conf), 7 April 2022, ICC-02/05-01/20-665-Conf.

¹³ 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 (with annex ICC-02/05-01/20-652-Conf-AnxA). A public redacted version was notified on 31 March 2022, ICC-02/05-01/20-652-Red.

¹⁴ 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

9. On 4 April 2022, the Prosecution filed an urgent application seeking authorisation to add a document concerning P-0903 (hereinafter ‘Fourth Regulation 35 Application’).¹⁵ The Defence made observations to the Fourth Regulation 35 Application.¹⁶

10. On the same day, the Defence filed an application for a finding that the Prosecution may not call or rely on the evidence of witness P-0990.¹⁷

II. ANALYSIS

11. The present decision decides on the aforesaid general objections made by the Defence vis-à-vis evidence obtained after the confirmation of charges hearing, particularly as regards P-0903 and P-0990. It also decides on various applications made by the Prosecution pursuant to Regulation 35 of the Regulations of the Court (hereinafter ‘Regulations’).

A. General objections to admissibility of evidence acquired post-confirmation

12. The Defence generally objects to reliance in trial on any evidence obtained by the Prosecution after the confirmation of charges hearing in May 2021. In the Defence’s submission, the collection of this evidence is inexcusably late and beyond the limited scope authorised for such.¹⁸ The Defence notes, in particular, that evidence obtained after the confirmation hearing, relates to matters which were clearly known to be the subject of dispute by the Defence from the commencement of proceedings – in particular the identity of Mr Abd-Al-Rahman and the alias ‘Ali Kushayb’.¹⁹

13. In its response, the Prosecution argues that the General Admissibility Objection should be dismissed because i) Rule 64(1) of the Rules does not require a case-by-case

statement under rule 68(3), ICC-02/05-01/20-652-Conf, 6 April 2022 (notified on 7 April 2022), ICC-02/05-01/20-664-Conf. *See* Email from the Chamber, 31 March 2022, at 16:33.

¹⁵ Prosecution’s urgent application under regulation 35 for variation of time limits related to the introduction of a document concerning Witness P-0903, ICC-02/05-01/20-662-Conf.

¹⁶ Email from the Defence, 7 April 2022, at 11:16.

¹⁷ Application for a finding that the Prosecution may not call or rely on the evidence of P-0990, ICC-02/05-01/20-661-Conf.

¹⁸ First Admissibility Objection, ICC-02/05-01/20-636, paras 4, 28-33; Second Admissibility Objection, ICC-02/05-01/20-659-Conf, paras 4-9.

¹⁹ First Admissibility Objection, ICC-02/05-01/20-636, paras 2, 27.

advance determination on the admissibility of the evidence of each witness,²⁰ and ii) the Prosecution is under no obligation to justify calling witnesses identified after the confirmation of charges, provided it complies with the deadlines set by the Chamber.²¹

14. Notwithstanding the instructions by the Chamber to address the aforesaid general objections (in order to avoid repetitive litigation throughout the trial), the Defence submits that the Chamber should not rule on the admissibility of the evidence in abstract.²² Whilst acknowledging that the jurisprudence of the Court permits continued investigation and collection of evidence by the Prosecution when justified,²³ the Defence claims that the reasons provided by the Prosecution for its delayed investigation and introduction of evidence amount to negligence.²⁴

15. The over-arching Defence submission – which is not dependent on the circumstances surrounding the obtaining of any specific, witness or documentary, evidence – is that **any** evidence obtained after the confirmation of charges, should automatically be excluded. In respect of this matter, a discrete determination as per paragraph 26 of the Directions on the conduct of proceedings is appropriate, in order to streamline the submission of the evidence at trial.²⁵ The issue hinges on the question whether a rule exists, within the statutory framework of the Court, which prevents the Prosecution from investigating after the confirmation of charges hearing or from relying on evidence obtained from such investigation.

16. Article 54(1)(a) of the Rome Statute (the ‘Statute’) mandates the Prosecution to:

[in] order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

The aforesaid provision does not contain any limitation of the Prosecution’s powers based on the stage of the proceedings.

²⁰ Response to the General Admissibility Objection, ICC-02/05-01/20-665-Conf, paras 4-8.

²¹ Response to the General Admissibility Objection, ICC-02/05-01/20-665-Conf, paras 9-15.

²² First Admissibility Objection, ICC-02/05-01/20-636, paras 5, 35; Second Admissibility Objection, ICC-02/05-01/20-659-Conf, paras 7-9; Transcript of hearing, 5 April 2022, Transcript of hearing, 5 April 2022, ICC-02/05-01/20-T-026-CONF-ENG, p. 89, line 25 to p. 90, line 5; p. 91, lines 19-21.

²³ First Admissibility Objection, ICC-02/05-01/20-636, paras 6-7 and jurisprudence references therein.

²⁴ First Admissibility Objection, ICC-02/05-01/20-636, para. 6; Transcript of hearing, 5 April 2022, Transcript of hearing, ICC-02/05-01/20-T-026-CONF-ENG, p. 93, lines 7-10.

²⁵ Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478.

17. Indeed, the Defence bases the General Admissibility Objection on the jurisprudence of the Court.²⁶ First, the Defence relies on a 2006 Appeals Chamber judgment, in particular on an excerpt stating that ‘ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing’.²⁷ However, the Appeals Chamber, in the same judgment, in fact found the opposite of what is asserted by the Defence: ‘[t]he Prosecutor’s investigation may be continued beyond the confirmation hearing’.²⁸

18. Additionally, the Defence cites a range of decisions which discussed the Prosecution’s diligence in obtaining specific evidence. It did so for the purpose of deciding on a request for amendment to the charges under Article 61(9) of the Statute,²⁹ or on a request to add items to the list of evidence (or a witness to the list of witnesses).³⁰ None of the decisions cited found the Prosecution to be barred from investigation after the confirmation of charges hearing, and one decision cited by the Defence in fact found the opposite.³¹

19. Having considered the relevant jurisprudence, the Chamber is satisfied that the Prosecution is not barred from continuing investigation after confirmation and is not in principle barred from seeking to rely, at trial, on evidence so obtained. The only potential ‘cut-off date’ for the Prosecution – regardless of when evidence was obtained – is the date set out by the Chamber for the provision of a LoW and a LoE in advance of the trial, bearing in mind the rights of the accused to have adequate time for the preparation of his defence. In the instant case, the Chamber established a deadline of 5 January 2022 for the disclosure and submission of the LoW and LoE. Accordingly the

²⁶ First Admissibility Objection, ICC-02/05-01/20-636, para. 6; Second Admissibility Objection, ICC-02/05-01/20-659-Conf, paras 4-6.

²⁷ Appeals Chamber, *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 (OA3), para. 54 (hereinafter: ‘Lubanga Judgment’).

²⁸ Lubanga Judgment, ICC-01/04-01/06-568 (OA3), para. 2.

²⁹ Pre-Trial Chamber II, *Prosecutor vs. William Samoei Ruto and Joshua Arap Sang*, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 16 August 2013, ICC-01/09-01/11-859 (hereinafter: ‘Ruto and Sang Decision’); Pre-Trial Chamber II, *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaissona*, Decision on the Prosecutor's request to amend the charges against Alfred Yekatom, 1 June 2020, ICC-01/14-01/18-538.

³⁰ Trial Chamber III, *Prosecutor v. Paul Gicheru*, Decision on the Prosecution Request for Delayed Disclosure and Variation of Time Limits with Regard to a Prosecution Witness, 12 November 2021, ICC-01/09-01/20-218-Red.

³¹ Ruto and Sang Decision, ICC-01/09-01/11-859, para. 34.

over-arching objection made by the Defence is rejected. This is without prejudice to the Chamber's eventual determination on the formal submission and admissibility of individual items of evidence.

20. In light of this determination, the Prosecution may call witnesses P-0903 and P-0990. For items to be added after the 5 January 2022 deadline, as will be analysed below, the standard already adopted by the Chamber in the First Decision applies.³²

21. Any application pursuant to Regulation 35 of the Regulations must be evaluated bearing in mind the rights of the accused.³³ In doing so, the Chamber may grant such an application, albeit with additional safeguards to guarantee the accused's right to have adequate time to prepare his defence. One such safeguard is that a newly added witness is called to testify at a later stage of the trial.³⁴

B. The Prosecution Applications

22. The Chamber incorporates by reference the general framework applicable to the assessment of a request of a time limit pursuant to Regulation 35(2) of the Regulations.³⁵ It further incorporates the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.³⁶

1. Second Regulation 35 Application

23. The Chamber notes the Defence's submissions that the Second Regulation 35 Application should be rejected *in limine*. It submits that the Chamber has already rejected the Prosecution's request for an extension of time to submit the evidence concerned on grounds that it was premature and that the Prosecution did not provide the information necessary for the Chamber's determination of the matter.³⁷

³² First Decision, ICC-02/05-01/20-545-Conf, para. 3.

³³ First Decision, ICC-02/05-01/20-545-Conf, para. 5.

³⁴ Trial Chamber V(B), *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832, para. 14; Trial Chamber V(A), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 5 September 2013, ICC-01/09-01/11-899-Red, para. 19.

³⁵ First Decision, ICC-02/05-01/20-545-Conf, para. 3.

³⁶ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

³⁷ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 14.

24. The Defence's submissions in this regard are inapposite. In the First Decision, the Chamber noted that in respect of P-0999, P-0916, P-0878, P-0921 and P-1047, it was premature to consider any request pursuant to Regulation 35 of the Regulations, as the Prosecution was yet to interview the individuals concerned. The Chamber stated that when the Prosecution had in its possession the prior recorded testimony of the witnesses, as well as any related material it wishes to rely on at trial,³⁸ it would have to apply for leave of the Chamber to add them to the LoE and rely on them at trial.³⁹ Thus, the Chamber clearly foresaw the present Second Regulation 35 Application when it instructed the Prosecution to reapply for leave.⁴⁰

25. The Defence further contends that the justifications advanced by the Prosecution, namely the *coup d'état* of 25 October 2021 and the travel restrictions related to the Covid-19 pandemic, do not constitute valid reasons for granting an extension of time limit. It submits that the Prosecution therefore fails to demonstrate good cause for the extension of the time limit.⁴¹

26. In this regard, and as already decided upon by the Chamber in the First Decision,⁴² the ongoing situation in Sudan after the *coup d'état* on 25 October 2021, as well as the Covid-19 pandemic and resulting travel restrictions in principle justify the extension of a time limit.

27. Nonetheless, the Chamber will evaluate the Second Regulation 35 Application bearing in mind the nature of the evidence for which an extension of time limit is sought, while giving due regard to the rights of the accused.⁴³

P-1061 and P-1062

28. The Chamber notes that the Defence does not oppose the Second Regulation 35 Application in respect of P-1061 and P-1062.⁴⁴ The Chamber also notes that both are

³⁸ With the exception of the transcripts of the first interview of the Prosecution with P-0921, which had already been disclosed to the Defence at the time of the First Regulation 35 Application. *See* First Regulation 35 Application, ICC-02/05-01/20-541-Conf-Red, para. 36.

³⁹ First Decision, ICC-02/05-01/20-545-Conf, para. 8.

⁴⁰ First Decision, ICC-02/05-01/20-545-Conf, para. 8.

⁴¹ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 17.

⁴² First Decision, ICC-02/05-01/20-545-Conf, para. 5.

⁴³ First Decision, ICC-02/05-01/20-545-Conf, para. 5.

⁴⁴ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 16. *See also* Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 13.

forensic experts who were involved in the biometric examination of the accused, and thus related to the Netherlands Forensic Institute Report that is already in the LoE and which was dealt with in the First Decision.⁴⁵

P-0878

29. The Chamber notes the Defence's submissions that adding P-0878 at this stage would be prejudicial and that an extension of time limit cannot be granted for the sole purpose of 'correcting' prior erroneous statements made by a witness.⁴⁶

30. The Chamber notes, however, that P-0878 was already included in the LoW filed on 5 January 2022.⁴⁷ The Second Regulation 35 Application is thus limited to the addition of a second written statement to the LoE. The Chamber notes that the second statement was disclosed to the Defence on 25 February 2022 and the Arabic translation on 4 March 2022.⁴⁸ As noted by the Prosecution, the core of the witness's evidence was already in the LoE within the prescribed time limit. Moreover, the Chamber rejects the Defence's submission that the sole purpose of the introduction of this second statement is to correct erroneous information. P-0878 also provides additional evidence related to the Militia/*Janjaweed*, which is relevant to the charges.⁴⁹

P-1047

31. As regards P-1047, the Defence submits the late addition of his testimony would cause devastating harm to the interests of justice.⁵⁰ The Defence argues that, considering [REDACTED], would far exceed that of Mr Abd-Al-Rahman. The Defence avers that allowing the addition of such evidence, which in its view is unjustified, would allow the Sudanese authorities [REDACTED], to change the truth in their favour and against the accused.⁵¹ The Defence further submits that the addition of P-1047's

⁴⁵ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, paras 31-32; First Decision, ICC-02/05-01/20-545-Conf, para. 9(a).

⁴⁶ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, paras 24, 26.

⁴⁷ 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. 2 (hereinafter: 'Annex 1').

⁴⁸ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 26.

⁴⁹ DAR-OTP-0224-0071; Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, paras 23-24.

⁵⁰ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 22.

⁵¹ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 31.

evidence does not serve the interests of justice as it is merely corroborative of other Prosecution witnesses.⁵²

32. As noted above,⁵³ in principle, the Second Regulation 35 Application is justified. Moreover, as regards any prejudice caused to the accused, the Chamber notes the Defence's submission that P-1047's evidence is corroborative of and cumulative to that of other evidence to be heard on trial.⁵⁴ The Chamber however rejects the Defence's argument that the addition of P-1047's testimony would not serve the interests of justice, particularly since, as noted by the Defence, this witness [REDACTED] at the time of the charges.⁵⁵ The Chamber notes in this regard the Prosecution's submissions that P-1047 provides evidence that is relevant to its case.⁵⁶

33. In respect of the prejudice that could be caused to the accused, the Chamber notes that the Defence was already on notice, at the latest since 16 December 2021 (when the Prosecution filed its First Regulation 35 Application), of P-1047's expected testimony, including its anticipated relevance to the Prosecution case.⁵⁷ The Chamber also notes that the Prosecution disclosed to the Defence the draft transcripts of the interview with P-1047 on 4 March 2022.⁵⁸

P-0916

34. In relation to P-0916, the Chamber notes the Defence's submission that the addition of this witness at this stage is not justified as the Prosecution only contacted P-0916 after the hearing on the confirmation of charges, mainly to supplement its evidence on the alias of 'Ali Kushayb'. The Defence argues this cannot be qualified as a valid reason outside of the Prosecution's control.⁵⁹

⁵² Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 32.

⁵³ See paragraph 21 above.

⁵⁴ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 32.

⁵⁵ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 31.

⁵⁶ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, paras 27-28. The transcripts of P-1047 interviews are available at DAR-OTP-0220-2120, DAR-OTP-0220-2142, DAR-OTP-0220-2160, DAR-OTP-0220-2181, DAR-OTP-0220-2199, DAR-OTP-0220-2206, DAR-OTP-0220-2226.

⁵⁷ First Regulation 35 Application, ICC-02/05-01/20-541-Conf-Red, paras 31-39. See also Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 29.

⁵⁸ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 30.

⁵⁹ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 28.

35. As noted above,⁶⁰ in principle, the Second Regulation 35 Application is justified. Moreover, as regards any prejudice caused to the accused, and as submitted by the Defence,⁶¹ P-0916's evidence is corroborative of and cumulative to that of other evidence to be heard on trial. The Chamber, however, rejects the Defence's argument that the addition of P-0916's testimony is not necessary and would not serve the interests of justice. The Chamber also notes the Prosecution's submissions that P-0916 provides evidence that is relevant to its case.⁶²

36. Moreover, the Chamber observes that the Defence was already on notice, no later than 16 December 2021 (when the Prosecution filed its First Regulation 35 Application), of P-0916's expected testimony, including the anticipated relevance to the Prosecution's case.⁶³ The Chamber also notes that the Prosecution disclosed P-0916's statement on 25 February 2022.⁶⁴

37. In respect of P-0916 and P-1047, the Prosecution proposes to call them to testify at a later stage of the trial, so as to mitigate any prejudice to the accused.⁶⁵ In order to allow the Defence adequate time to prepare, the Chamber deems that P-0878 shall also be called at a later stage of the proceedings, and not before August 2022.

38. In light of the above, no prejudice is caused to the Defence by the addition of the witnesses and material included in the Second Regulation 35 Application.

2. Rule 68(3) Application in respect of P-0916

39. P-0916, [REDACTED], provides evidence on the background of the conflict in Darfur, and particularly Mukjar, including the alleged rebel attacks in that location and subsequent Government of Sudan ('GoS') presence and arrest and execution of Fur males.⁶⁶

⁶⁰ See paragraph 21 above.

⁶¹ Response to Second Regulation 35 Application, ICC-02/05-01/20-637-Conf, para. 29, referring to Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf.

⁶² Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, paras 19-20. The statement of P-0916 is at DAR-OTP-0224-0023.

⁶³ First Regulation 35 Application, ICC-02/05-01/20-541-Conf-Red, paras 31-39. See also Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 21.

⁶⁴ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 22.

⁶⁵ Second Regulation 35 Application, ICC-02/05-01/20-624-Conf, para. 35.

⁶⁶ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 34-35.

40. As regards the accused, P-0916 refers to his background and alleged role as leader of the Militia/*Janjaweed* and his presence in Mukjar in 2003-2004. She refers in particular to an alleged meeting between the accused and Harun and other high-ranking officials. P-0916 also refers to the accused's alleged presence and participation in attacks in Mukjar and Sindu operation. P-0916 also provides information on his identity.⁶⁷

41. In addition to the witness statement, the Prosecution seeks to introduce charts and sketches used during the interview, as well as a list of alleged victims of the crimes.⁶⁸

42. The Prosecution requests one hour to conduct a supplementary examination of the witness (instead of the estimated 4.5 hours).⁶⁹

43. The Chamber notes the Prosecution's submission that P-0916's evidence on the alleged position of the accused,⁷⁰ including his alleged leadership in the Militia/*Janjaweed*,⁷¹ the charges of murder and attempted murder,⁷² persecution,⁷³ and her evidence on the alleged attacks in Kodoom, Bindisi and surrounding areas,⁷⁴ is corroborative of, and cumulative to, the expected evidence of other witnesses due to testify *viva voce*.

44. In its oral submissions, the Defence referred to parts of P-0916's testimony that it submits warrant hearing her testimony entirely *viva voce*. In particular, the Chamber notes that in the paragraphs referred to by the Defence,⁷⁵ P-0916 does appear to provide unique evidence on the alleged crimes. In particular, as a [REDACTED] P-0916

⁶⁷ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, paras 34-35.

⁶⁸ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 36 and Annex A.

⁶⁹ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, paras 37-38.

⁷⁰ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 41, referring to P-0012, P-0874, P-0877 and P-0921

⁷¹ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 49, referring to P-0012, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

⁷² Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 44, referring to P-0012, P-0028, P-0029, P-0129, P-0188, P-0877, P-0885, P-0903, P-0905, P-0913, P-0919, P-0931, P-0932, P-0976, P-0984, P-0992.

⁷³ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 45, referring to P-0029, P-0129, P-0188, P-0877, P-0885, P-0903, P-0913, P-0919, P-0976, P-0984 and P-0990.

⁷⁴ Ninth Rule 68(3) Application, ICC-02/05-01/20-629-Conf, para. 47, referring to P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0921, P-1021 and P-0878.

⁷⁵ Transcript of hearing, ICC-02/05-01/20-T-025-CONF-ENG, p. 47, lines 12-17, referring to DAR-OTP-0224-0023, paras 36-39, 41-50, 56-60, 64-67, 74-76, 81, 101.

provides first-hand evidence related to many alleged victims she [REDACTED]. However, her evidence on the accused is not significant. For example, P-0916 states as regards Ali Kushayb that ‘people were talking about him’,⁷⁶ or that it ‘is common knowledge but I learned this from friends and relatives.’⁷⁷ In relation to his identity she states ‘the man who was identified to me as Ali KUSHAYB’, and that someone else had told her ‘the man was Ali KUSHAYB’.⁷⁸ As regards Ahmed Harun, P-0916 states in a paragraph referred to by the Defence that she ‘didn’t know anything about HARUN’.⁷⁹

45. Accordingly, the Chamber is satisfied that the introduction of P-0916’s prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused and the accused’s alleged leadership role in the Militia/*Janjaweed* and participation in the alleged crimes.

46. 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-0916 within the estimated hour requested.

3. *Third Regulation 35 Application*

47. The Chamber notes the Prosecution’s submission that it has made every effort to mitigate the effects of both the ongoing pandemic and the change in regime in Sudan to comply with its disclosure obligations.⁸⁰ The Chamber further notes that the material related to P-0877, P-0922, P-0979, P-0999 and P-1040 has been disclosed to the Defence.⁸¹

⁷⁶ DAR-OTP-0224-0023, para. 36.

⁷⁷ DAR-OTP-0224-0023, para. 38.

⁷⁸ DAR-OTP-0224-0023, paras 56-57.

⁷⁹ DAR-OTP-0224-0023, para. 39.

⁸⁰ Second Application, ICC-02/05-01/20-652-Conf, para. 9.

⁸¹ *See* Second Application, ICC-02/05-01/20-652-Conf, fn. 8. The Chamber notes that the disclosure of the remaining material related to those witnesses took place on 5 April 2022. In this regard, the Chambers recalls its previous ruling where it determined that translations are regarded as accessories of items included in the list of evidence, and that their late addition is ultimately for the benefit of the Defence and those participating in court, *see* First Decision, ICC-02/05-01/20-545-Conf, para. 6.

48. The Defence incorporates by reference its General Admissibility Objections in relation to P-0979, P-0999 and P-1040 whilst submitting that there is no good cause to extend the lapsed deadline to add those witnesses to the Prosecution's LoW.⁸² In this regard, the Chamber refers to its above ruling on the matter.⁸³ As for the specific objections regarding each of the witnesses, the Chamber addresses them in the case-by-case analysis below.

49. Finally, the Chamber notes that, with regard to P-0877 and P-0922, the Third Regulation 35 Application was submitted in light of the Chamber's First Decision, namely the 'premature' nature of submissions regarding extension of time limit of testimonies not yet obtained.⁸⁴ In this respect, the Prosecution, in light of the aforesaid instructions, filed the Third Regulation 35 Application in respect of recently interviewed witnesses and newly collected material.

P-0877

50. P-0877 is a witness already included on the LoW and the request concerns material related to a recent supplementary interview. The Chamber notes that, despite the Prosecution's effort to conduct an additional interview of P-0877 earlier, it was prevented from doing so for reasons outside its control.⁸⁵ Furthermore, the Defence does not oppose the Third Regulation 35 Application in respect of P-0877.⁸⁶

P-0922

51. P-0922 is a witness already included on the LoW and the request concerns material related to a recent supplementary interview. P-0922 is a civilian who in the second statement confirmed [REDACTED]. The second statement focuses on detailing the content of [REDACTED] as well as on clarifying some information previously provided.⁸⁷

⁸² Third Response, ICC-02/05-01/20-664-Conf, paras 8-9.

⁸³ See above analysis under 'General objections to admissibility of evidence acquired post-confirmation'.

⁸⁴ First Decision, ICC-02/05-01/20-545-Conf, para. 8.

⁸⁵ Second Application, ICC-02/05-01/20-652-Conf, para. 11.

⁸⁶ Third Response, ICC-02/05-01/20-664-Conf, para. 7.

⁸⁷ Second Application, ICC-02/05-01/20-652-Conf, para. 16, referring to DAR-OTP-0220-2864-R01, paras 13, 29-37, 41-43.

52. In addition to the second statement, the Prosecution seeks to introduce hand drawn sketches as related material.⁸⁸

53. The Defence opposes the application regarding this witness and submits that the additional statement and its related material should be excluded in its entirety.⁸⁹ It argues that this witness could have been interviewed between [REDACTED] (when he was first spoken to) and the confirmation of charges hearing. In essence, the Defence stresses the lengthy period the Prosecution undertook between identifying the investigative lead and obtaining P-0922's evidence.⁹⁰

54. At the outset, the Chamber refers to its above finding at the General Admissibility Objections for the Defence's challenge to the late collection of evidence.

55. The Chamber is satisfied that P-0922's second statement would assist the determination of the truth, particularly since this witness provides information related to [REDACTED] as well as to alleged executions. Moreover, as regards any prejudice caused to the accused, the Chamber notes the Defence's submission that P-0922's evidence is corroborative of and cumulative to that of other evidence to be heard on trial.⁹¹ Above all – and contrary to the Defence's submission⁹² – the Chamber is satisfied that the introduction of this second statement serves the interests of justice as it clarifies some key aspects of the witness's previous account, in particular that (i) [REDACTED];⁹³ (ii) [REDACTED] the loading of detainees onto vehicles which left towards Garsila and heard the sound of a gunshot about 10 minutes later; and (iii) clarifies information related to *Umdah Zarruq*'s execution.⁹⁴

56. The Chamber notes that P-0922 was already included in the LoW filed on 5 January 2022.⁹⁵ The Chamber further notes that P-0922's first statement and the transcript of the video addressed in the second statement were disclosed to the Defence

⁸⁸ Second Application, ICC-02/05-01/20-652-Conf, para. 17 and Annex A.

⁸⁹ Third Response, ICC-02/05-01/20-664-Conf, para. 10.

⁹⁰ Third Response, ICC-02/05-01/20-664-Conf, paras 11-12.

⁹¹ Third Response, ICC-02/05-01/20-664-Conf, paras 14-18.

⁹² Third Response, ICC-02/05-01/20-664-Conf, para. 19.

⁹³ Note that this point was among the Defence's previous objections to the introduction of this testimony pursuant to Rule 68(3) of the Rules, *see* ICC-02/05-01/20-T-022-CONF-ENG, p. 24, lines 15-20. The Defence referred specifically to paragraphs 17, 27-29, 70, 76-77, 85-89 of the witness first statement.

⁹⁴ DAR-OTP-0220-2864-R01, paras 29-37.

⁹⁵ Annex 1, ICC-02/05-01/20-551-Conf-Anx1-Red, p. 11.

prior to the 5 January 2022 deadline.⁹⁶ Hence, the Defence was on notice of the core evidentiary purpose of this witness within the set deadline. The second statement was disclosed on 18 March 2022.⁹⁷ Although the Chamber notes that P-0922 is expected to testify on 10 May 2022, the Defence will still have reasonable time to prepare, particularly since several weeks of adjournment are foreseen before the date of testimony.⁹⁸

57. The Chamber further notes that in respect of P-0922's first statement and its associated material, the Chamber already authorised its introduction pursuant to Rule 68(3) of the Rules.⁹⁹ The Chamber's general assessment of the first statement, including the caveat on the indirect nature of the evidence provided by P-0922,¹⁰⁰ equally applies to his second statement, which as noted above, provides further detail and clarifications to P-0922's first statement.

P-0979

58. The Chamber notes the Prosecution's submission that, despite efforts to conduct an interview of P-0979 earlier, it was prevented from doing so for reasons outside its control.¹⁰¹

59. The Defence opposes the application regarding this witness and submits that the Prosecution fails to provide reasons for its late identification of P-0979 as a potential witness as well as to substantiate what it claims to be 'its best effort' to contact the witness.¹⁰² In the Defence's submission, the Prosecution's lack of a full reasoning for the delay amounts to negligence which cannot serve as good cause to grant the application.¹⁰³

⁹⁶ Second Application, ICC-02/05-01/20-652-Conf, para. 18, *referring to* DAR-OTP-0222-0312-R01; DAR-OTP-0221-2009; DAR-OTP-0126-0065 (video); DAR-OTP-0221-2067 (transcript) and its English translation DAR-OTP-0221-2082.

⁹⁷ *See* DAR-OTP-0220-2864-R01. Arabic translation on 25 March 2022, DAR-OTP-0220-3021-R01.

⁹⁸ The Chamber notes that the trial will be adjourned from 15 to 24 April 2022 and then again from 30 April to 8 May 2022.

⁹⁹ 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, paras 44-51. A public redacted version was filed on the same date, ICC-02/05-01/20-602-Red.

¹⁰⁰ *See* paragraph 50 of the decision.

¹⁰¹ Second Application, ICC-02/05-01/20-652-Conf, para. 20.

¹⁰² Third Response, ICC-02/05-01/20-664-Conf, para. 21.

¹⁰³ Third Response, ICC-02/05-01/20-664-Conf, paras 22-23.

60. As noted above,¹⁰⁴ and in light of the reasons provided by the Prosecution, in principle, the Regulation 35 application in respect of P-0922 is justified. The Chamber is persuaded, contrary to the Defence's submission,¹⁰⁵ that P-0979's testimony could serve the interests of justice, particularly since this witness provides detailed information on alleged attacks on Kodoom, [REDACTED].¹⁰⁶ The witness further discusses Ali Kushayb's allegedly executing detainees and causing [REDACTED].¹⁰⁷ Lastly, P-0979 confirms [REDACTED].¹⁰⁸

61. As regards any prejudice caused to the accused, the Chamber notes the Defence's own submission that P-0979's evidence is corroborative of and cumulative to that of other evidence to be heard on trial.¹⁰⁹ The Chamber further notes that P-0979's statement and associated material were disclosed on 29 March 2022.¹¹⁰ The Chamber further notes the Prosecution expects to call the witness at a later stage of the trial,¹¹¹ which gives the Defence reasonable time to prepare and mitigates any prejudice it would encounter with this new addition.

P-0999

62. P-0999, [REDACTED], is an eye-witness of the alleged crimes in Deleig. P-0999 provides specific account on the GoS and Militia/*Janjaweed* alleged attacks – led by Mr Abd-Al-Rahman – as well as on Mr Abd-Al-Rahman's profile.¹¹²

63. The Defence opposes the application regarding this witness and submits that the Prosecution had previously envisaged disclosure regarding this witness 'no later than 31 January 2022' whilst, in fact, by the time of the filing of the Third Regulation 35

¹⁰⁴ See paragraph 21 above.

¹⁰⁵ Third Response, ICC-02/05-01/20-664-Conf, para. 26.

¹⁰⁶ Second Application, ICC-02/05-01/20-652-Conf, paras 20-22. See DAR-OTP-0224-0273-R01, paras 55-64, 66, 101-132.

¹⁰⁷ Second Application, ICC-02/05-01/20-652-Conf, para. 22. See DAR-OTP-0224-0273-R01, paras 109-117; DAR-OTP-0224-0307-R01 (annex D – photograph).

¹⁰⁸ Second Application, ICC-02/05-01/20-652-Conf, para. 22, referring to DAR-OTP-0217-0279.

¹⁰⁹ Third Response, ICC-02/05-01/20-664-Conf, paras 24-25.

¹¹⁰ DAR-OTP-0224-0273-R01 (statement); associated material: DAR-OTP-0224-0302-R01 (photograph), DAR-OTP-0224-0303-R01 (colour chart) and photographs DAR-OTP-0224-0304-R01, DAR-OTP-0224-0305-R01, DAR-OTP-0224-0306-R01, DAR-OTP-0224-0307-R01. Arabic translation disclosed on 5 April 2022, DAR-OTP-0222-4984-R01.

¹¹¹ Second Application, ICC-02/05-01/20-652-Conf, para. 36.

¹¹² Second Application, ICC-02/05-01/20-652-Conf, para. 24, referring to DAR-OTP-0220-3067-R01, lines 15-19. See DAR-OTP-0224-0322-R01, lines 23-39.

Application, only the Arabic transcript had been disclosed.¹¹³ It further avers that there has been an unjustified lengthy period for the Prosecution to secure this evidence.¹¹⁴

64. As noted above,¹¹⁵ and in light of the reasons provided by the Prosecution, in principle, the Regulation 35 application in respect of P-0999 is justified. Moreover, in the case of P-0922, and despite the Defence's submissions to the contrary,¹¹⁶ the Prosecution has sufficiently justified its application. The Chamber notes in particular that the witness [REDACTED].¹¹⁷ The Defence's arguments related to the need of further explanation in this regard are inapposite, as internal arrangements to secure an interview (even a remote one) in such circumstances are usually more challenging with regard to [REDACTED].¹¹⁸

65. The Chamber is persuaded, contrary to the Defence's submission,¹¹⁹ that P-0999's evidence could serve the interests of justice, particularly since this witness provides unique information on displacement of civilians, which might be valuable to assist in the determination of the truth, given his [REDACTED] and his own experience as a displaced person.¹²⁰ Additionally, as noted by the Prosecution, this evidence might be useful to establish the scope of the Deleig incident and the identity of the related victims, as [REDACTED].¹²¹

66. As regards any prejudice caused to the accused, the Chamber notes the Defence's own submission that P-0999's evidence is corroborative of and cumulative to that of other evidence to be heard on trial.¹²² The Chamber further notes that P-0999's Arabic transcripts were disclosed on 25 March 2022¹²³ and associated material on 29 March 2022.¹²⁴ In particular, the [REDACTED] above mentioned was disclosed to the

¹¹³ Third Response, ICC-02/05-01/20-664-Conf, para. 28.

¹¹⁴ Third Response, ICC-02/05-01/20-664-Conf, para. 29.

¹¹⁵ See paragraph 21 above.

¹¹⁶ Third Response, ICC-02/05-01/20-664-Conf, para. 29.

¹¹⁷ Second Application, ICC-02/05-01/20-652-Conf, para. 28. See e.g. DAR-OTP-0220-3128.

¹¹⁸ See e.g. DAR-OTP-0224-0397, lines 11-12, 70-71 (reporting connection issues).

¹¹⁹ Third Response, ICC-02/05-01/20-664-Conf, para. 35.

¹²⁰ Second Application, ICC-02/05-01/20-652-Conf, para. 25, referring to DAR-OTP-0220-3067-R01, lines 15-24; P-0999, DAR-OTP-0220-3073-R01, lines 28-36.

¹²¹ Second Application, ICC-02/05-01/20-652-Conf, para. 27, referring to DAR-OTP-0220-3083-R01, lines 246-274; DAR-OTP-0220-3093, lines 7-225; DAR-OTP-0220-3111-R01, lines 18-285. See also DAR-OTP-0220-3502.

¹²² Third Response, ICC-02/05-01/20-664-Conf, paras 31-33.

¹²³ English translations disclosed on 5 April 2022.

¹²⁴ DAR-OTP-0224-0136 ([REDACTED]).

Defence within the disclosure deadline¹²⁵ and the Prosecution relied on it in an annex of its trial brief.¹²⁶ P-0999's screening note was also disclosed within the deadline.¹²⁷ Lastly, the witness is expected to be called at a later stage of the trial,¹²⁸ which gives the Defence reasonable time to prepare and mitigates any prejudice it would encounter with this new addition.

P-1040

67. The Chamber notes the Prosecution's submission that, despite efforts to conduct an interview of P-1040 earlier, reasons outside its control prevented it from doing so.¹²⁹

68. The Defence opposes the application regarding this witness and submits that no explanation has been provided as to the reasons for the Prosecution contacting this witness only in October 2021.¹³⁰ In its view, the Prosecution's lack of diligence should be taken into account in denying the application.¹³¹

69. As noted above,¹³² and in light of the reasons provided by the Prosecution, in principle, the Regulation 35 application in respect of P-1040 is justified. The Chamber is satisfied that P-1040's testimony could serve the interests of justice, particularly since this witness provides information on the alleged attacks on [REDACTED] in 2003 by the Militia/*Janjaweed* – after which the witness had to flee.¹³³ The witness account might provide further assistance for the determination of the truth in relation to the [REDACTED] incidents. In particular, the security situation in [REDACTED] upon his arrival, the control of checkpoints by the Popular Defence Forces, [REDACTED].¹³⁴

¹²⁵ DAR-OTP-0218-0240, at 0249 (disclosed on 29 March 2021) and DAR-OTP-0218-0413 at 0421 (disclosed on 25 March 2021). (draft) English translation at DAR-OTP-0219-2611 at 2618, disclosed on 28 March 2021.

¹²⁶ Annex 23 to the Public Redacted Version of Corrected Version of "Prosecution's Trial Brief", 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr, 4 February 2022, ICC-02/05-01/20-550-Anx23-Corr-Red.

¹²⁷ DAR-OTP-0219-6069.

¹²⁸ Second Application, ICC-02/05-01/20-652-Conf, para. 36.

¹²⁹ Second Application, ICC-02/05-01/20-652-Conf, para. 31.

¹³⁰ Third Response, ICC-02/05-01/20-664-Conf, para. 36.

¹³¹ Third Response, ICC-02/05-01/20-664-Conf, para. 36.

¹³² See paragraph 21 above.

¹³³ Second Application, ICC-02/05-01/20-652-Conf, para. 31. See DAR-OTP-0224-0184-R01, paras 24-38.

¹³⁴ Second Application, ICC-02/05-01/20-652-Conf, para. 31. See DAR-OTP-0224-0184-R01, paras 39-57, 64, 66.

70. As regards any prejudice caused to the accused, the Chamber notes the Defence's own submission that P-1040's evidence is corroborative of and cumulative to that of other evidence to be heard on trial.¹³⁵ The Chamber further notes that P-1040's statement and associated material were disclosed on 18 March 2022,¹³⁶ whilst the witness is expected to be called at a later stage of the trial,¹³⁷ which gives the Defence reasonable time to prepare and mitigates any prejudice it would encounter with this new addition.

71. In light of the above, no prejudice is caused to the Defence by the addition of the aforesaid witnesses and material included in the Third Regulation 35 Application.

4. Fourth Regulation 35 Application

72. In the Fourth Regulation 35 Application, the Prosecution requests the Chamber to authorise an extension of the time limit to submit a photograph of P-0903's [REDACTED]¹³⁸ and the addition of this item to the Prosecution's LoE.¹³⁹

73. The Chamber notes that the Prosecution inadvertently failed to disclose the photograph in question and disclosed it to the Defence as soon as it discovered it.¹⁴⁰ The Prosecution argues that the accused's rights under Article 67 of the Statute will not be materially impacted by this late disclosure because the witness's [REDACTED] was already known to the Defence through his statement.¹⁴¹

74. The Defence does not object to the Fourth Regulation 35 Application.¹⁴² Accordingly, the Chamber deems that the addition of one photograph will cause no prejudice to the accused.

III. CONCLUSION

75. In light of the above, the Chamber:

¹³⁵ Third Response, ICC-02/05-01/20-664-Conf, para. 37.

¹³⁶ DAR-OTP-0224-0184-R01. Arabic translation disclosed on 29 March 2022, DAR-OTP-0220-3146-R01.

¹³⁷ Second Application, ICC-02/05-01/20-652-Conf, para. 36.

¹³⁸ DAR-OTP-0222-5010.

¹³⁹ Fourth Regulation 35 Application, ICC-02/05-01/20-662-Conf, para. 2.

¹⁴⁰ Fourth Regulation 35 Application, ICC-02/05-01/20-662-Conf, para. 6.

¹⁴¹ Fourth Regulation 35 Application, ICC-02/05-01/20-662-Conf, paras 9-10, *referring to* DAR-OTP-0221-0436, para. 50.

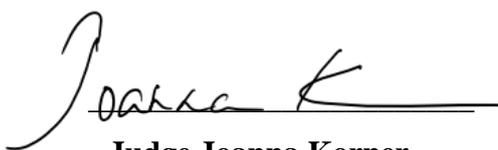
¹⁴² Email from the Defence, 7 April 2022, 11:16.

- a. Rejects the Defence request to exclude evidence obtained after the confirmation hearing, particularly witnesses P-0903 and P-0990;
- b. Grants the Second Regulation 35 Application in respect of P-1061, P-1062, P-0878, P-1047 and P-0916;
- c. Grants the Third Regulation 35 Application in respect of P-0877, P-0922, P-0979, P-0999 and P-1040;
- d. Grants the Fourth Regulation 35 Application in respect of P-0903;
- e. Authorises the introduction of the prior recorded testimonies of P-0916 and P-0922, pursuant to Rule 68(3) of the Rules.

76. The Chamber's preliminary ruling pursuant to Rule 68(3) of the Rules is subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.

77. P-1061, P-1062, P-0878, P-1047, P-0916, P-0979, P-0999 and P-1040 are to be called at a later stage of the proceedings, and not before August 2022.

78. The Chamber instructs the Prosecution to file an updated LoW and LoE immediately, and no later than 7 days after notification of this decision.

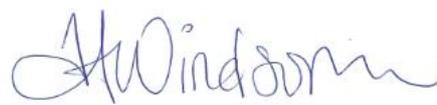


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 11 April 2022

At The Hague, The Netherlands