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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. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI
KUSHAYB”)***

Public Document

Observations on a Video Disclosed by the Office of the Prosecutor

Source: The 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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Introduction

1. This filing (“Observations”) constitutes the Defence’s observations on video footage (“[video](#)”)¹ allegedly corresponding to an event that occurred on 23 January 2020 and was reported in a document (“Annex 3”)² annexed to the response of the Office of the Prosecutor (“OTP”) to the initial application for the release of Mr Ali Muhamad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”).

Context of the disclosure of the video

2. At the very end of the hearing of 25 October 2021, which had been convened in accordance with rule 118(3) of the Rules of Procedure and Evidence (“RPE”),³ the OTP informed the Honourable Trial Chamber I, the Defence, and the distinguished Legal Representatives of Victims (“LRVs”) who were in attendance, of a video it had found attached to “Annex 3” to its response to the initial application for the release of Mr Abd-Al-Rahman.⁴ The new development followed an express request to this effect to the OTP by the Honourable Presiding Judge.⁵

3. Shortly after the end of the hearing, the OTP sent the Defence an email containing a link to the [video](#).⁶ Formal disclosure of the video, transcribed in Arabic and translated into English,⁷ has since been made⁸ at the request of the Honourable Trial Chamber I.⁹ The Defence was granted leave, at its request, to respond to the video by means of these Observations.¹⁰

Description of the [video](#)

4. The [video](#) shows a man (“Speaker”) standing, dressed in a grey shirt and trousers, and speaking in public to an audience in Arabic. The Speaker is filmed close

¹ DAR-OTP-0215-2697.

² [ICC-02/05-01/20-95-Anx3](#).

³ [ICC-02/05-01/20-T-015-FRA](#), p. 20, lines 7-12.

⁴ [ICC-02/05-01/20-95-Anx3](#).

⁵ [ICC-02/05-01/20-T-015-FRA](#), p. 15, lines 4-7.

⁶ Email from the OTP on 25 October 2021 at 18.18.

⁷ DAR-OTP-0215-7145 (Arabic transcript; DAR-OTP-0215-7148 (English translation).

⁸ ICC-02/05-01/20-498.

⁹ Email from the Honourable Trial Chamber I on 26 October 2021 at 13.26.

¹⁰ Email from the Honourable Trial Chamber I on 26 October 2021 at 15.46.

up and facing the camera and he bears a clear resemblance to Mr Abd-Al-Rahman, although he is not identified. The setting is outdoors, under a tree and close to yellow ochre-coloured buildings. The only audience members visible are those standing behind him. Most of them are wearing white agbadas and turbans. At 00:05 seconds into the [video](#), two uniformed men can be seen among the audience: one in a light-blue uniform and a beret and another in a cream-coloured uniform. Although no women are visible, female voices can be heard periodically punctuating the Speaker's words with "*Allahu Akbar*".

5. The [video](#) itself is not dated and gives no indication of where it was shot.

6. The Defence refers to the English version of the transcript for the content of the Speaker's speech.¹¹ The speech is addressed to teachers of both sexes. The Defence is able to ascertain that the speech is periodically emphatic, praising the teaching profession¹² and making allusions to religion and poetry.¹³ The Speaker does not introduce himself. He talks about a "Security Committee"¹⁴ of which he seems to be a member. He refers contemptuously to the "so-called Forces of Freedom and Change".¹⁵ The name "*Rehed al-Birdi*", which is where Mr Abd-Al-Rahman lives, is mentioned several times.¹⁶ The Speaker seems to be reacting to the disparaging remarks made about Rehed al-Birdi and the teaching profession by the "Forces of Freedom and Change".¹⁷ At one point, the tone of the speech is threatening towards the "Forces of Freedom and Change" and anyone who denigrates Rehed al-Birdi and teachers, talking about "stabbing or killing" anyone who did so¹⁸ or taking them to Prime Minister Hamdok.¹⁹ The audience responds with regular chants of "*Allahu Akbar*"

¹¹ DAR-OTP-0215-7148.

¹² DAR-OTP-0215-7148, lines 12-14, 16, 25, 27, 38, 45-46, 53-60.

¹³ DAR-OTP-0215-7148, lines 3-8, 10-14, 25.

¹⁴ DAR-OTP-0215-7148, lines 17-18, 29-30.

¹⁵ DAR-OTP-0215-7148, lines 23-24, 44-46.

¹⁶ DAR-OTP-0215-7148, lines 14, 31, 33, 35, 45.

¹⁷ DAR-OTP-0215-7148, lines 44-46.

¹⁸ DAR-OTP-0215-7148, lines 45-46.

¹⁹ DAR-OTP-0215-7148, lines 49-50.

which seem to be meant as a sign of approval. There is no mention of “*Ali Kushayb*”, the Court or human rights activists.

7. The Defence would also point out that the [video](#) is produced in support of Annex 3 which is an article by the non-governmental organization Darfur Network for Monitoring and Documentation dated 28 February 2020,²⁰ into which it is inset. Annex 3 alleges that Mr Abd-Al-Rahman “commonly known as Ali Kushayb, who was a senior Janjaweed commander”, spoke, on 23 February 2020, before a crowd in Rehed al-Birdi to “remind that he is the one with power and no one should question his power”, to state that “no one has a right to speak about corruption and that killing is not a problem because he had killed more than these two Human Rights Defenders”; “that he can even kill them in front of Abdallah Hamdok”, and that “nothing would be done to him”.²¹ A reasonable interpretation of Annex 3 is that it assumes, but does not expressly state, that the speaker in the [video](#) is Mr Abd-Al-Rahman.

Observations

8. It should be noted that the description of the event given in Annex 3, into which the [video](#) is inset and which it is supposed to illustrate, in no way corresponds to the content of the [video](#): there is no mention of “*Ali Kushayb*”, allegations of corruption or of human rights activists; the Speaker does not allude to any form of personal power he might enjoy; nowhere does he speak of killing anyone in front of the Prime Minister, rather he talks of bringing before the Prime Minister those who denigrate Rehed al-Birdi and/or the teaching profession. The statement: “I’d have stabbed and killed any individual who mocked Rehed al-Birdi or denigrated the teacher”²² could be described as threatening. It could also be considered to be another figure of speech of the kind used by the Speaker.²³ In any event, the statement is couched in vague (“any individual”) and indefinite terms, does not target any person in particular and appears

²⁰ [ICC-02/05-01/20-95-Anx3](#).

²¹ [ICC-02/05-01/20-95-Anx3](#), p. 2.

²² DAR-OTP-0215-7148, lines 45-46.

²³ DAR-OTP-0215-7148, lines 3-8, 10-14, 25.

to express nothing more than strong disapproval of the “Forces of Freedom and Change” or those who denigrate Rehed al-Birdi and/or the teaching profession.

9. The Defence notes that the “Forces of Freedom and Change” is a coalition of Sudanese civil society organizations, founded in January 2019, which played a key role in the overthrow of Omar Al-Bashir’s regime in 2019 and supports the transition to a civilian government.²⁴

10. It can therefore be concluded, based on the [video](#), that the Speaker is expressing a strong political opinion, shared by his audience, against the “Forces of Freedom and Change” and that he is reacting to alleged verbal attacks on Rehed al-Birdi and its teachers. However, nothing in the [video](#) substantiates the allegations made in Annex 3 that Mr Abd-Al-Rahman is also known as “Ali Kushayb”; that he was a Janjaweed leader; that this speech was made in January 2020; that he spoke about corruption; and/or that he threatened to kill two human rights activists. Far from substantiating the allegations in Annex 3, the mismatch between the allegations and the content of the [video](#) rather bolsters the most serious reservations already expressed by the Defence regarding the reliability of Annex 3.²⁵

11. Furthermore, the appearance at 00:05 seconds into the [video](#) of uniformed people listening peacefully to the Speaker renders the date of 23 February 2020, as alleged in Annex 3, completely irreconcilable with the idea that the Speaker might be Mr Abd-Al-Rahman. On that date, as confirmed by the OTP, Mr Abd-Al-Rahman was subject to a warrant of arrest issued by the Sudanese authorities on 2 December 2019²⁶ and was on the run in order to surrender to the Court.²⁷ It is therefore out of the question that he would appear as a free man in January 2020 to deliver a speech in public, facing the camera, in the presence of two uniformed people identified in Annex 3 as “Chief Executive Officer” and “Director of Police Chief in the Locality”.²⁸

²⁴ Wikipedia: [Forces of Freedom and Change](#).

²⁵ [ICC-02/05-01/20-100](#), para. 9; ICC-02/05-01/20-495, paras. 7-8; [ICC-02/05-01/20-T-015-FRA](#), p. 6, line 9-p. 12, line 28.

²⁶ [ICC-02/05-01/20-95](#), para. 17.

²⁷ ICC-02/05-01/20-495-Conf-AnxA; DAR-OTP-0215-7063-R01 Document.

²⁸ [ICC-02/05-01/20-95-Anx3](#), p. 2.

Either the speech in the [video](#) was made on a different and unspecified date or the Speaker is not Mr Abd-Al-Rahman in spite of the resemblance. In either case, Annex 3 is clearly erroneous.

12. Regardless of the date on which it was produced and the specific event to which it relates, the [video](#), together with other previous submissions,²⁹ conclusively establishes that Annex 3 is not remotely credible and is a crude forgery. The [video](#), which is meant to confirm the content of Annex 3, does not contain what the annex claims it does. Far from supporting the view, as grounds for his continued detention, that Mr Abd-Al-Rahman's release could represent a risk to investigations, victims and/or witnesses, the [video](#) actually constitutes additional and exculpatory evidence of the unreliability of Annex 3 which is, however, the only piece of evidence on which the OTP relies to establish its case under article 58(1)(b)(ii) of the Statute.

13. Had it not been for the insight of the Honourable Trial Chamber I,³⁰ the existence of the [video](#) would still be unknown.³¹ Now that the video has emerged and has refuted Annex 3, the Court and the Honourable Trial Chamber I would be failing in their duty to uphold the guarantees of a fair trial by continuing Mr Abd-Al-Rahman's detention based on this single annex which has no probative value. The Defence wishes to thank the Honourable Trial Chamber I for its vigilance and wisdom, and moves the Chamber to take the appropriate action in relation to the disclosure of the [video](#) by definitively dismissing Annex 3 as inadmissible on the grounds that it lacks any probative value, and finding that there is no longer any reason to believe that Mr Abd-Al-Rahman's release to the territory of the host State, subject to the appropriate conditions to ensure that he remains available to the Court, could represent any risk whatsoever to the security of investigations, victims and/or witnesses under article 58(1)(b)(ii) of the Statute.

²⁹ [ICC-02/05-01/20-100](#), para. 9; ICC-02/05-01/20-495, paras. 7-8; [ICC-02/05-01/20-T-015-FRA](#), p. 6, line 9-p. 12, line 28.

³⁰ [ICC-02/05-01/20-T-015-FRA](#), p. 15, lines 4-7.

³¹ [ICC-02/05-01/20-T-015-FRA](#), p. 15, line 10.

FOR THESE REASONS AND THE REASONS PREVIOUSLY STATED IN THE RESPONSE TO THE OBSERVATIONS ON THE REVIEW OF DETENTION,³² the Defence reiterates its request that the Honourable Trial Chamber I order the release of Mr Abd-Al-Rahman to the territory of the host State subject to those conditions it may consider necessary and sufficient to ensure that he remains available to the Court.

[signed]

Mr Cyril Laucci
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahaman

Dated this 28 October 2021
at The Hague, Netherlands

³² ICC-02/05-01/20-495.