



Original: **English**

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

Date: **2 May 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
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, 4 April 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:

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr Julian Nicholls

Counsel for Mr Ali Muhammad Ali

Abd-Al-Rahman

Dr Cyril Laucci, Lead Counsel
Mr Iain Edwards, Associate Counsel

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Nasser Mohamed Amin Abdalla
Mr. Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

I. INTRODUCTION

1. On 4 March 2022, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) filed its *Mémoire préalable au procès* (“*Mémoire*”).¹ At paragraph 27 of the *Mémoire*, the Defence affirmed that it:

contestera enfin l'admission des preuves collectées par le [Bureau du Procureur] après [l'audience de confirmation des charges] qui portent sur des sujets dont la contestation par la Défense était claire et connue dès le début de la procédure. Dans cette catégorie entrent notamment les éléments de preuve de l'identité entre Mr Abd-Al-Rahman et l'alias « Ali Kushayb ».

2. On 18 March 2022, following an undertaking to provide further submissions to clarify its arguments regarding the admissibility of Prosecution evidence collected after the confirmation of charges hearing (that is, after 26 May 2021), the Defence filed its *Clarification relative au paragraphe 27 du Mémoire de la Défense préalable au procès* (ICC-02/05-01/20-616) (“*Clarification*”).²

3. On 1 April 2022, pursuant to the Trial Chamber’s invitation of 23 March 2022,³ the Defence filed additional submissions on the admissibility of Prosecution evidence collected after the confirmation of charges hearing, and an application for a finding that the Prosecution may not call or rely on the evidence of Witness P-0903 (“P-0903 Application”).⁴ The Defence will not repeat the overarching arguments of principle set out in the *Clarification*. Further, the Defence incorporates by reference its submissions set out in the *Clarification* and at paragraphs 4-9 of the P-0903 Application. These form an integral part of the present submission with respect to Witness P-0990.

4. In view of its position that the Trial Chamber must decide on the admissibility of evidence that post-dates the confirmation of charges hearing on a case-by-case basis, the Defence will focus the instant submissions on why the Prosecution may not call or rely on the evidence of witness P-0990. This witness is scheduled to testify

¹ [ICC-02/05-01/20-616](#).

² [ICC-02/05-01/20-636](#).

³ ICC-02/05-01/20-T-025-CONF-ENG ET, p. 54.

⁴ ICC-02/05-01/20-659-Conf.

on or about 11-12 May 2022.⁵ Since he is due to testify *viva voce* the Trial Chamber has not yet received any submissions on the admissibility of his evidence.⁶

II. SUBMISSIONS

The case-by-case approach as applied to P-0990

5. Taking the requisite case-by-case approach, an assessment of the chronology of the Prosecution's investigations *vis-à-vis* witness P-0990 demonstrates that the Prosecution has acted with neither diligence nor professionalism.

6. The Prosecution has been willing and able to conduct its investigations in Sudan since the signing of a Memorandum of Understanding ("MoU") between the OTP and the Government of Sudan on 14 February 2021.⁷ But for the reasons already detailed in the *Clarification*,⁸ the absence of any particular agreement between the OTP and the Government of Sudan prior to February 2021 is not a valid reason for the Prosecution's inactivity since it is the direct result of the Prosecution's and the Court's negligence in not concluding a special agreement with Sudan under Article 4(2) of the Rome Statute over a period of sixteen years, since the March 2005 referral of the situation in Darfur by the UN Security Council in Resolution 1593.

7. The Defence does not know when P-0990 was first identified as a potential witness, but a note of his screening interview is dated [REDACTED],⁹ some [REDACTED] months after Mr Abd-Al-Rahman's initial appearance on 15 June 2020, some [REDACTED] months after the signing of the MoU, and [REDACTED] months

⁵ [REDACTED].

⁶ The only litigation to date involving P-0990 related to a requested extension of the time limit to serve the Arabic translation of the witness's statement, *see* 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", 16 December 2021, ICC-02/05-01/20-541-Conf-Exp, public redacted version [ICC-02/05-01/20-541-Red2-Corr](#). The Defence did not object to the limited request made in respect of P-0990 but stated in terms that its position was without prejudice to any submissions it might make in the future on admissibility: "*La présente Réponse se limite aux demandes formulées dans la Requête. Elle est sans préjudice de la position que la Défense prendra relativement à l'admissibilité en preuve des documents concernés si le BdP demande à les inclure à son inventaire de preuves pour le procès.*" Réponse à la Requête ICC-02/05-01/20-541-Conf-Red, 22 December 2022, ICC-02/05-01/20-544-Conf, public redacted version [ICC-02/05-01/20-544-Red](#).

⁷ Prosecution's second request for the authorisation of non-disclosure of witness identities, 26 February 2021, ICC-02/05-01/20-287-Conf-Exp, public redacted version [ICC-02/05-01/20-287-Red2](#), para. 38.

⁸ [ICC-02/05-01/20-636](#), paras 27-35.

⁹ [REDACTED].

after the confirmation of charges hearing. It was not disclosed to the Defence until [REDACTED].¹⁰

8. P-0990's witness statement appears to have been finalised on [REDACTED],¹¹ [REDACTED] months after the signing of the MoU and [REDACTED] months after the confirmation of charges hearing. It was disclosed to the Defence on [REDACTED] as part of disclosure package no. 89.

9. There is no evidence that the Prosecution was unable to negotiate a special agreement with Sudan pursuant to Article 4(2) of the Rome Statute and carry out its investigative activities in Sudan between Resolution 1593 in March 2005 and at least April 2007, when admittedly cooperation with Sudan became problematic as a result of the warrants of arrest issued against Ahmad Muhammad Harun and Mr Abd-Al-Rahman.¹² Nor is there evidence that the Prosecution was unable to do so between the revolution of 2019 and February 2021, especially when it became aware that Mr Abd-Al-Rahman was trying to surrender to the Court, as of December 2019. There is no evidence that the Government of Sudan was not cooperating with the Court during these periods. However, the Prosecution and the Court failed to enter into a special agreement with Sudan pursuant to Article 4(2) of the Rome Statute. It is submitted that there is no valid reason why contact with P-0990 was not made, or could not have been made, in this period following Resolution 1593 up to April 2007 or since August 2019.

10. There is no valid reason why P-0990 was not identified and interviewed in the period of 11 months between June 2020 (following Mr Abd-Al-Rahman's initial appearance) and the confirmation of charges hearing in May 2021, much less in the [REDACTED] months to his screening interview in [REDACTED].

11. There is no valid reason why P-0990 was not identified and interviewed in the three months between the signing of the MoU in February 2021 and the confirmation

¹⁰ ICC-02/05-01/20-541-Conf-Red, public redacted version [ICC-02/05-01/20-541-Red2-Corr](#), fn. 12.

¹¹ DAR-OTP-0223-0217-R-01. For reasons that are unclear to the Defence, the date(s) and place of interview are redacted. However, the date of 22 December 2021 is indicated in the Ringtail metadata.

¹² ICC-02/05-01/20-563-Conf and its public redacted version [ICC-02/05-01/20-563-Red](#), par. 37,

of charges hearing in May 2021, much less in the seven months to his screening interview in [REDACTED].

12. Further, there is no valid reason why, the investigative lead having been identified, it took another [REDACTED] months before P-0990 was interviewed for his statement.

13. The excuses provided by the Prosecution relating to matters beyond its control arising out of the *coup d'état* in Sudan of 25 October 2021, and in “renewed travel restrictions imposed as a result of the ongoing COVID-19 pandemic”¹³ provide no explanation for the Prosecution’s inactivity in terms of obtaining P-0990’s statement in the month between [REDACTED] and 25 October 2021. Although the *coup d'état* of 25 October 2021 was neither predictable nor under the control of the Prosecution, it cannot provide an *ex post facto* excuse for not having advanced its investigation in the absence of a special agreement with Sudan between 2005 and February 2021. According to the Prosecution, between 2005 and, at least, 2007¹⁴, the Government of Sudan was cooperating, but the Prosecution and the Court did not do what they should have done as of 2005, that is entering a special agreement with Sudan pursuant to Article 4(2) of the Rome Statute. Had the Prosecution or the Court signed a special agreement with Sudan as required under Article 4(2) of the Statute between March 2005 and April 2007 or after August 2019, and had it acted with diligence in advancing its investigations on the basis of such a special agreement, then the *coup d'état* could conceivably provide some justification for the Prosecution not having been able to complete its investigation despite its best endeavours. But those best endeavours have not been demonstrated. Instead, the Prosecution submission comes after 16 years of negligence.

¹³ 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, 16 December 2021, ICC-02/05-01/20-541-Conf-Exp; public redacted version [ICC-02/05-01/20-541-Red2-Corr](#), para. 2, *see also* paras 10-15.

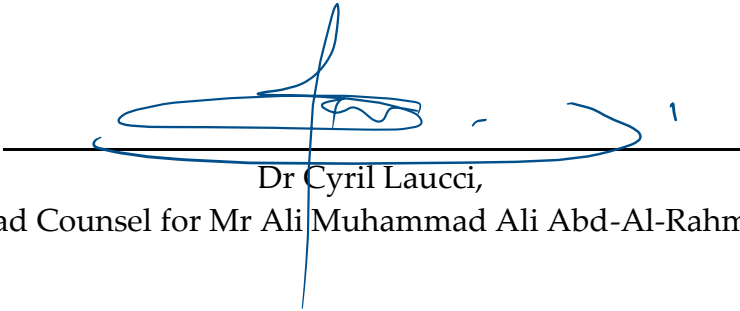
¹⁴ ICC-02/05-01/20-563-Conf and its public redacted version [ICC-02/05-01/20-563-Red2](#), par. 37.

14. The Trial Chamber is further respectfully referred to the Defence's submissions as set out in paragraph 31 of the *Clarification* with respect to the COVID-19 pandemic.¹⁵

15. The time that elapsed between the identification of the investigative lead and the collection of P-0990's evidence is an important factor to be taken into account in the assessment of the Prosecution's diligence.¹⁶ Here, the Prosecution's lack of diligence is manifest. It compounds the four *negligences* set out at paragraph 35 of the *Clarification*. Moreover, it is submitted that the unjustifiable delay in disclosing P-0990's screening interview to the Defence further serves to demonstrate the lack of the Prosecution's diligence and professionalism. The case law establishes that the Prosecution is not entitled to complete all investigations that were commenced before the start of the trial,¹⁷ and certainly not, it is submitted, after the confirmation of charges hearing. To be exceptionally authorized to do so, the Prosecution must demonstrate good cause due to events beyond its control. In the present case, the Prosecution has only demonstrated a lack of diligence and professionalism, amounting to negligence, over a period of 16 years.

16. In common with P-0903, it would be unconscionable and contrary to the Court's well-established case law to reward the Prosecution for its delays by allowing it to call P-0990 and rely on his evidence.

FOR THE FOREGOING REASONS, THE DEFENCE HEREBY REQUESTS THAT THE CHAMBER DECIDE that, on the particular merits, the Prosecution may not call or rely on the evidence of P-0990.



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

Dated this 2nd day of May 2022 at The Hague, The Netherlands

¹⁵ [ICC-02/05-01/20-636](#), par. 31.

¹⁶ *Prosecutor v. Alfred Yekatom and Patrice-Édouard Ngaïssona*, 1 June 2020, [ICC-01/14-01/18-538](#), para. 18.

¹⁷ *Prosecutor v. Paul Gicheru*, 12 November 2021, [ICC-01/09-01/20-218-Red](#), paras 9-10.