



Original: **English**

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

Date: **2 February 2022**

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

PUBLIC

**Public Redacted Version of
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**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s third application under Rule 68(3) of 21 January 2022 (“Third Application”).¹ As the Prosecution states in the Third Application, the evidence of witnesses P-0657, P-0673, P-0843 and P-0954 (“Four Witnesses”) relate primarily *inter alia* to the identity of Mr Abd-Al-Rahman, who is allegedly also known as “Ali Kushayb”.² Evidence of the identity of “Ali Kushayb” goes to the very heart of this case. Identification of “Ali Kushayb” as Mr Abd-Al-Rahman is hotly contested.

2. It is important that each of the Four Witnesses testify *viva voce* to ensure that the Trial Chamber obtains the best possible evidence relating to identification, based on what each of the Four Witnesses actually and independently recall. Admitting lengthy witness statements to stand in large part as the witnesses’ evidence-in-chief will not serve this purpose since it is impossible to know how the witness statements were actually taken. The risk that unreliable answers were given to investigators’ leading questions, for example, or that the witnesses’ true recollections of events were tainted by the input of unknown third parties over the course of (invariably) many days of interview is too great.

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this Response is classified “Confidential”, mirroring the classification of the Third Application. A public redacted version is filed simultaneously.

Adoption by reference of earlier submissions

4. The Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman’s appeal rights, the general observations made with respect to the protection of the relevant witnesses’ statements in its response to the Prosecution’s First Application made pursuant to Rule 68(3) on 5 January 2022;³ it is submitted that the same considerations apply to the Four Witnesses that are the subject of the Third Application.

¹ ICC-02/05-01/20-555-Conf; public redacted version [ICC-02/05-01/20-555-Red](#).

² ICC-02/05-01/20-555-Conf; public redacted version [ICC-02/05-01/20-555-Red](#), para. 3.

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

5. Additionally, the Defence adopts by reference, for the record and to preserve Mr Abd-Al-Rahman's appeal rights, its submissions made about the absence of a valid Article 4(2) special agreement between the Court and Sudan, and the inadequate legal value of the Agreement on Cooperation signed on 10 May 2021.⁴ This submission relates exclusively to witness P-0954, whose statement was taken [REDACTED], during which time the available evidence would suggest the witness was living in [REDACTED].⁵ It is understood that the witness statement was also taken in [REDACTED], pre-dating the signing of the Agreement on Cooperation.

The Third Response

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

7. The evidence of each of the Four Witnesses takes the form of a witness statement and not an interview transcript. Other related materials are listed in Annex A to the Third Application. As such, neither the Defence nor the Trial Chamber is in a position to know the nature and form of questions asked of the witnesses in order to elicit the information in their respective statements. It cannot be ascertained if questions were leading. It cannot be ascertained what may have been said to each witness in order to put certain questions into context, or whether the interviewer gave verbal or non-verbal cues that may, inadvertently or otherwise, have influenced the answers, or whether questions were asked in some other objectionable manner. It cannot be ascertained whether the witnesses hesitated or equivocated before providing the information in their statements. All of these factors would be evident, of course, when a witness provides *viva voce* testimony as their evidence-in-chief; these factors are hidden, to the prejudice of the Accused, in the context of a Rule 68(3) procedure.

⁴ ICC-02/05-01/20-481-Conf; public redacted version [ICC-02/05-01/20-481-Red](#); ICC-02/05-01/20-485-Conf; public redacted version [ICC-02/05-01/20-485-Red](#); ICC-02/05-01/20-568-Conf, paras. 9-11.

⁵ [REDACTED]

8. Moreover, each of the Four Witnesses gave their statements over the course of a number of days ([REDACTED];⁶ P-0673: [REDACTED];⁷ [REDACTED];⁸ [REDACTED]⁹). There is simply no way of knowing what conversations took place between the witnesses and others after each day's interviewing. There is nothing in any of the statements that suggests the Four Witnesses were warned against discussing their emerging account with others over the course of those days. By contrast, of course, witnesses providing *viva voce* testimony are routinely warned by the Trial Chamber not to discuss their evidence overnight. Neither the Defence nor the Trial Chamber can be confident, therefore, of the extent to which the witnesses' statements represent the results of pooled recollections of numerous individuals. And if it were to be suggested that this can be explored in cross-examination, the Defence submits that it would be asking the witnesses – for the most part – too much to remember whether they discussed an interview that took place some several years earlier with others. The potential prejudice to the Accused is plain.

9. To the extent the Prosecution argue that using Rule 68(3) will streamline proceedings, the Defence notes the assessment that for each of witnesses P-0657, P-0673 and P-0843, only two hours might be saved, given that one hour of "limited supplementary examination" will be required. This represents one-third of the estimated time needed if Rule 68(3) of the Rules is not applied.

10. In *Gbagbo and Blé Goudé*, the Trial Chamber assessed comparable potential time saving as nugatory:

The Chamber further notes that the Prosecutor states in the Amendments that she would require, if the Application is granted as amended, one hour for the supplementary examination of each witness, which is one third or one half of the estimated time needed if Rule 68(3) of the Rules is not applied. Considering that it cannot be stated that the introduction of prior recorded testimony would reduce the time needed for examination by the Defence, and considering that time would be spent on litigation on issues of procedure, the Chamber assesses potential time savings as low, if not negligible.¹⁰

⁶ [REDACTED]

⁷ [REDACTED]

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the "Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for

11. All of these factors militate, it is submitted, against reliance on these four lengthy statements to stand, in large part, as the witnesses' evidence-in-chief. In all the circumstances, only by calling the Four Witnesses *viva voce* would prejudice to Mr Abd-Al-Rahman be avoided.

P-0657

12. The nature and content of P-0657's prior statement relates in most relevant part to the identity, position and individual criminal responsibility of a man he was told is "Ali Kushayb". [REDACTED]¹¹ [REDACTED]¹² [REDACTED]¹³ [REDACTED]¹⁴

13. The witness provides evidence of [REDACTED],¹⁵ [REDACTED].¹⁶ [REDACTED]¹⁷

14. Since the Prosecution alleges that Mr Abd-Al-Rahman and "Ali Kushayb" are the same person, all of this evidence is very much contested. It goes to the heart of the Prosecution's case. The witness should be called *viva voce*.

P-0673

15. The nature and content of P-0673's prior statement also relates in most relevant part to the identity, position and individual criminal responsibility of a man he was told is "Ali Kushayb". He [REDACTED].¹⁸ [REDACTED]¹⁹ [REDACTED]²⁰ [REDACTED]²¹

16. Since the Prosecution alleges that Mr Abd-Al-Rahman and "Ali Kushayb" are the same person, all of this evidence is very much contested. It goes to the heart of the Prosecution's case. The witness should be called *viva voce*.

Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1), ICC-02/11-01/15-870, 7 April 2017, para. 15.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

P-0843

17. The nature and content of P-0843's prior statement also relates in most relevant part to the identity, position and individual criminal responsibility of a man she was told is "Ali Kushayb". [REDACTED]²² [REDACTED]²³ [REDACTED]²⁴ [REDACTED].²⁵ [REDACTED]²⁶

18. Moreover, there are good grounds for concluding that P-0843 has a profound personal interest in seeing Mr Abd-Al-Rahman convicted. [REDACTED]²⁷ [REDACTED]²⁸ [REDACTED].

19. Lest it be argued that the Defence is simply insisting that Witness P-0843 undergo a test of her memory in examination-in-chief, it will be noted that her statement is relatively recent: it was taken [REDACTED].

20. Once again, given that the Prosecution alleges that Mr Abd-Al-Rahman and "Ali Kushayb" are the same person, all of this evidence is very much contested. It goes to the heart of the Prosecution's case. The witness should be called *viva voce*.

P-0954

21. The OTP seeks to submit into evidence the prior statement of P-0954 and requests the Chamber two hours to conduct a supplementary *viva voce* examination of the witness.²⁹

22. P-0954's prior statement relates *inter alia* to the alleged background and position of authority of a man known as "Ali Kushayb" in 2003 and 2004.³⁰ The statement also purports to provide information on [REDACTED].³¹ The witness further claims [REDACTED].³² Finally, the Defence understands that [REDACTED].³³

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Third Application, paras 1, 26-32.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

23. Although P-0954 purports to provide a [REDACTED].³⁴ Further, the Defence notes that the basis of knowledge regarding the position of authority and area of operation of “Ali Kushayb” and clarifications about the witness’s interactions with that man are identified as issues for which the OTP seeks to conduct a supplementary examination.³⁵

24. Further, the Defence submits that, contrary to the Prosecution’s arguments,³⁶ P-0954’s evidence [REDACTED].

25. Like for the three other witnesses, the Defence submits that, given that the Prosecution alleges that Mr Abd-Al-Rahman and “Ali Kushayb” are the same person, all of this evidence is very much contested. It goes to the heart of the Prosecution’s case. The witness should be called *viva voce*.

Conclusion

26. The Defence respectfully asks the Chamber to use its discretionary power under Rule 68(3) of the Rules³⁷ to reject the Request and order the appearance of the Four Witnesses to testify *viva voce*. The Defence submits that this mode of testimony would be beneficial to the Chamber in its assessment of the alleged responsibility of Mr Abd-Al-Rahman in the alleged events.

27. It would be highly paradoxical to call OTP core witnesses of the alleged link between “Ali Kushayb” and Mr Abd-Al-Rahman, i.e. the first and foremost important issue for determination at trial, to appear pursuant to Rule 68(3) of the Rules and keep examination-in-chief for witnesses of other issues. The evidence of the alias is extremely scarce. It has already been largely rebutted at the confirmation hearing and the Pre-Trial Chamber was left with no choice other than confirming the charges and committing Mr Abd-Al-Rahman to trial by deferring to the Trial Chamber the burden of assessing that evidence and whether it can fulfil the

³⁴ [REDACTED].

³⁵ Third Application, paras 30-31.

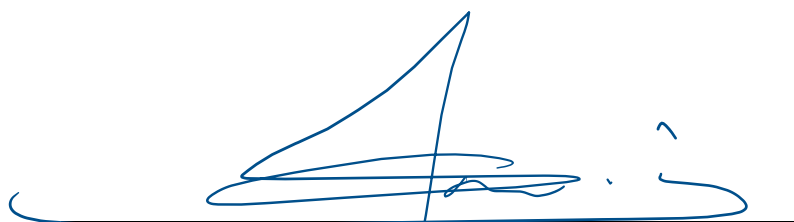
³⁶ Third Application, paras 3, 27.

³⁷ Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, “Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceeding relating to the evidence of Witnesses P-0087 and P-0088”, [ICC-02/11-01/15-950-Red](#), 6 June 2017, par. 90.

applicable standard of proof beyond reasonable doubt: “It will be the responsibility of the Trial Chamber, in the context of its assessment of the admissibility and reliability of the entire evidentiary basis, to detect and closely analyse each and every alleged instance of inconsistency, and their impact on the Prosecutor’s narrative and theory of the case”³⁸. The Defence’s application for leave to appeal the Confirmation Decision on this aspect³⁹ having been denied,⁴⁰ it remains highly vulnerable to reversal by the Appeals Chamber as part of a future appeal. It is respectfully submitted that the Trial Chamber would not carry the specific burden deferred upon it by the Confirmation Decision and would take a major risk by allowing the appearance of any witness relating to the proof of the alleged link between “Ali Kushayb” and Mr Abd-Al-Rahman pursuant to Rule 68(3) of the Rules.

THEREFORE, THE DEFENCE HEREBY PRAYS THE CHAMBER to:

- **DISMISS** the Third Application in its entirety; **AND**
- **FIND** that the Four Witnesses should testify *viva voce*.



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

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

³⁸ [ICC-02/05-01/20-433-Corr](#), par. 59.

³⁹ [ICC-02/05-01/20-465](#), par. 34-48.

⁴⁰ [ICC-02/05-01/20-517](#), par. 34-37.