

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-01/20  
Date: 18 October 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")**

**Confidential  
With Confidential Annex A**

**Prosecution's sixth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0008, P-0028, P-0041 and P-0675**

**Source:** Office of the Prosecutor

**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 KC  
Ms Nazhat Shameem Khan  
Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci  
Mr Iain Edwards

**Legal Representatives of the Victims**

Ms Natalie von Wistinghausen  
Mr Anad Shah

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. INTRODUCTION

1. Pursuant to article 69(2) and 69(4) of the Rome Statute ("Statute") and rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules"), the Prosecution requests that Trial Chamber I ("Chamber"): (i) introduce into evidence the statements and associated material ("Prior Recorded Testimonies")<sup>1</sup> of P-0008, P-0028, P-0041 and P-0675 ("Four Witnesses"); (ii) designate the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations required pursuant to rule 68(2)(b)(ii) and 68(2)(b)(iii); and (iii) authorise remote certifications<sup>2</sup> due to the current challenges imposed by the ongoing COVID-19 pandemic<sup>3</sup> and travel restrictions affecting the Netherlands,<sup>4</sup> among other places.

2. Granting the Application would serve the interests of justice by enhancing the expeditiousness of the proceedings, obviating the unnecessary appearance of witnesses and saving valuable court time and resources.

3. As submitted below, the Prosecution will not seek to rely on the passages of the Prior Recorded Testimonies that concern either the acts and conduct of Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman")<sup>5</sup> or that otherwise go to his background and identity, since these are issues materially in dispute in the present

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<sup>1</sup> Annex A (A1 to A4) lists the prior recorded testimonies of the Four Witnesses which comprise their witness statements (at Part I) and associated material (at Part II). The material related to the witness's prior recorded testimony which the Prosecution does not seek to introduce into evidence, is also included (at Part III), where applicable. Hyperlinks to this material are also included. See Directions on the Conduct of Proceedings, [ICC-02/05-01/20-478](#), para. 47.

<sup>2</sup> This Application is submitted in accordance with [Directions on the Conduct of Proceedings](#), paras. 46-48.

<sup>3</sup> *Al Hassan* Rule 68(2)(b) Decision, [ICC-01/12-01/18-1111-Red](#), para. 18.

<sup>4</sup> DutchNews.nl, *As Schiphol plans to cancel hundreds of flights, what are your rights?*, 22 June 2022. Available at: <https://www.dutchnews.nl/news/2022/06/as-schiphol-plans-to-cancel-hundreds-of-flights-what-are-your-rights/>, accessed on 18 July 2022. DutchNews.nl, *Schiphol asks airlines to cancel flights as long queues build again*, 12 September 2022. Available at: <https://www.dutchnews.nl/news/2022/09/schiphol-asks-airlines-to-cancel-flights-as-long-queues-build-again/>.

<sup>5</sup> *Ongwen* Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, TC IX, [ICC-02/04-01/15-1294](#), paras. 4-5, 9 and 20, 2 July 2018. *Ntaganda* Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf, [ICC-01/04-02/06-1667-Red](#), TC VI, 27 February 2017, para. 11.

case.<sup>6</sup> As such, their introduction into evidence is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, since the Prior Recorded Testimonies are of a cumulative or corroborative nature and bear sufficient indicia of reliability.<sup>7</sup>

## II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Application and its Annex A are filed as confidential, since they contain information that may identify the Four Witnesses. A public redacted version will be filed as soon as practicable.

## III. SUBMISSIONS

5. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(b) of the Rules, as set out in the first application under rule 68(2)(b).<sup>8</sup>

6. The Prosecution also submits that the Chamber's previous decisions authorising the introduction of the Four Witnesses' Prior Recorded Testimony into evidence pursuant to rule 68(3) of the Rules,<sup>9</sup> do not bar the present request, since the Prosecution will not seek to rely on the parts of the witnesses' statements that go to the issues identified by the Defence as core to their case.

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<sup>6</sup> Information that simply confirms the facts agreed upon between the Parties have not been excluded from introduction into evidence. Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#).

<sup>7</sup> Rule 68(2)(b)(i) of the Rules.

<sup>8</sup> First Rule 68(2)(b) Application, [ICC-02/05-01/20-565-Red](#), paras. 6-8.

<sup>9</sup> Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, [ICC-02/05-1/20-588-Conf](#); 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](#); Decision on the Prosecution's twelfth application to introduce prior recorded testimonies under Rule 68(3), 12 July 2022, [ICC-02/05-01/20-711-Conf](#);

A. Overview of the Prior Recorded Testimonies of P-0008, P-0028, P-0041 and P-0675

7. The Prior Recorded Testimonies of the Four Witnesses relate primarily to the crimes committed in Mukjar and surrounding areas on or about February and March 2004 (Counts 12 to 21).<sup>10</sup>

8. In addition to the statements of the Four Witnesses, the Prosecution seeks to introduce into evidence the associated material which forms an integral part of their Prior Recorded Testimonies, as listed in Annex A to the Application.<sup>11</sup>

(i) *Prior Recorded Testimony of P-0008*

9. The Prosecution refers to the previously provided summary of P-0008's evidence and annexes.<sup>12</sup>

10. Should the Chamber admit P-0008's prior testimony into evidence, the Prosecution will not rely on (i) paragraph 17, in which the witness identifies Mr Abd-Al-Rahman as the head of the PDF and the Militia/*Janjaweed* in Mukjar; (ii) paragraph 26, in which the witness presents hearsay information about Mr Abd-Al-Rahman being responsible for attacks on villages east of Mukjar and the subsequent arrest of Fur people; (iii) paragraph 35, in which the witness presents hearsay information about Mr Abd-Al-Rahman maltreating a prisoner; (iv) paragraph 37, which provides hearsay evidence of Mr Abd-Al-Rahman's presence in a meeting prior to the Sindu operation; and (v) paragraphs 41-43 and 45, in which P-0008 provides evidence on Ali Kushayb's involvement with the Sindu operation.

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<sup>10</sup> Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 23 November 2021, [ICC-02/05-01/20-433-Corr](#), p. 42-45, 58-63.

<sup>11</sup> See Annex A (Part II of A1 to A4). Where applicable, the Prosecution includes in the Annex the English translations of items referred to in the Associated Material.

<sup>12</sup> Prosecution's second application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0008, P-0044, P-0105, P-0114, and P-0755, 12 January 2022, [ICC-02/05-01/20-555-Conf](#), paras. 8-11

(ii) *Prior Recorded Testimony of P-0028*

11. The Prosecution refers to the previously provided summary of P-0028's evidence and annexes.<sup>13</sup>

12. Should the Chamber admit P-0028's prior testimony into evidence, the Prosecution will not rely on (i) paragraphs 33, 36 and 37, in which the witness implicates Mr Abd-Al-Rahman in attacks on Mukjar and surrounding villages in early August 2003; (ii) paragraph 35, in which the witness describes the Accused; (iii) paragraphs 40 and 42, in which P-0028 implicates Mr Abd-Al-Rahman in the attacks on Kodoom, Bindisi and surrounding villages; (iv) paragraph 51, in which Mr Abd-Al-Rahman is presented as responsible for the arrest of internally displaced people in Mukjar on August 2003; (v) paragraphs 59 and 62, in which Mr Abd-Al-Rahman is mentioned as participating on preparations to the Sindu operation; and (vi) paragraphs 66-68, in which Mr Abd-Al-Rahman is associated to extrajudicial killings in Mukjar in 2004.

(iii) *Prior Recorded Testimony of P-0041*

13. The Prosecution refers to the previously provided summary of P-0041's evidence and annexes.<sup>14</sup>

14. Should the Chamber admit P-0041's Prior Recorded Testimony into evidence, the Prosecution will not rely on (i) paragraphs 23, 24 and 26 of DAR-OTP-0216-0033, in which the witness presents evidence of Mr Abd-Al-Rahman's role as a Militia/*Janjaweed* leader; and (ii) paragraph 52 of DAR-OTP-0216-0033 and paragraph 13 of DAR-OTP-0096-0002, in which the witness identifies Mr Abd-Al-Rahman as a participant in a meeting with Ahmad Harun in Mukjar in early 2004.

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<sup>13</sup> Prosecution's twelfth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0028, P-0913 and P-0932, 23 June 2022, [ICC-02/05-01/20-706-Conf](#), paras. 9-14.

<sup>14</sup> 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, 15 March 2022, [ICC-02/05-01/20-629-Conf](#), paras. 9-12.

(iv) *Prior Recorded Testimony of P-0675*

15. The Prosecution refers to the previously provided summary of P-0675's evidence and annexes.<sup>15</sup>

16. Should the Chamber admit P-0675's Prior Recorded Testimony into evidence, the Prosecution will not rely on (i) paragraphs 46 and 48, in which the witness presents hearsay evidence of Ali Kushayb holding meetings with GoS Forces and Militia/*Janjaweed* and with Ja'afar Abd-Al-Hakam in Deleig; (ii) paragraph 47, which presents hearsay evidence on Mr Abd-Al-Rahman prominence within the military; (iii) paragraph 100, which describes a meeting between Mr Abd-Al-Rahman and Abdallah Torshein and provides a description of the Accused; (iv) paragraph 104, which places Ali Kushayb in a meeting with Ahmad Harun in Mukjar between February-March 2004; (v) paragraph 106, in which the witness provides information about a possible subordinate to Mr Abd-Al-Rahman; and (vi) paragraphs 108 and 124, which implicate the Accused in the torture and execution of people detained in Mukjar in 2004.

B. *The Prior Recorded Testimonies are admissible under rule 68(2)(b)*

17. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(2)(b) of the Rules, are relevant, reliable and probative,<sup>16</sup> as it has already been established by the Chamber.<sup>17</sup>

18. All Four Witnesses have given their statements voluntarily and acknowledged that they record their best recollections of events.<sup>18</sup> The Prior Recorded testimonies

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<sup>15</sup> 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, 15 March 2022, [ICC-02/05-01/20-629-Conf](#), paras. 15-18.

<sup>16</sup> *Gbagbo & Blé Goudé* Prosecution's Rule 68(2)(b) Application, [ICC-02/11-01/15-950-Red](#), para. 22.

<sup>17</sup> See decisions referred to in footnote 9.

<sup>18</sup> P-0008, DAR-OTP-0088-0085 at 0100; P-0028, DAR-OTP-0094-0423 at 0444; P-0041, DAR-OTP-0206-0033 at 0055, DAR-OTP-0096-0002 at 0007; P-0675, DAR-OTP-0206-0173 at 0214.

were also collected with the assistance of interpreters.<sup>19</sup> All Prior Recorded Testimonies are internally consistent<sup>20</sup> and, accordingly, have the necessary indicia of reliability for introduction into evidence.

C. The Prior Recorded Testimonies of the Four Witnesses are cumulative and corroborative of evidence to be provided by viva voce witnesses

19. The evidence provided by the Four Witnesses with respect to several central aspects relevant to the Mukjar and surrounding areas incident, is corroborative of, and cumulative to, evidence provided or to be provided by *viva voce*, such as:

- a. On the preparation to and participation in the Sindu operation, P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0979, P-0990;
- b. On the subsequent displacement of people to Mukjar, P-0877, P-0885, P-0903, P-0905, P-0919, P-0990;
- c. On the arrest of Fur males in Mukjar in checkpoints and house-to-house searches and their detention at the Mukjar police station, P-0029, P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0979, P-0984, P-0990, P-1040; and
- d. On the execution of detainees, P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0984, P-0990, P-1040. In addition, P-0008 makes direct reference to P-0129, who has already testified, as the source of the information he provides.

20. Evidence provided by P-0028 on crimes committed by Militia/*Janjaweed* during attacks on Mukjar and surrounding areas in August 2003 and the subsequent detention and arrest of displaced persons in Mukjar at the same period is

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<sup>19</sup> P-0008, DAR-OTP-0088-0085 at 0101; P-0028, DAR-OTP-0094-0423 at 0444; P-0041, DAR-OTP-0206-0033 at 0056, DAR-OTP-0096-0002 at 0007; P-0675, DAR-OTP-0206-0173 at 0215.

<sup>20</sup> *Ntaganda* Prosecution Rule 68(2)(b) Application, [ICC-01/04-02/06-1730-Red](#), para. 13; *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), paras. 17-19; *Gbagbo & Blé Goudé* Appeals Judgment on Rule 68(2)(b) Decision, [ICC-02/11-01/15-744 OA 8](#), para. 3.



corroborative of evidence provided or to be provided by P-0878, P-0913, P-0917, P-0918 and P-0922, among others.

21. P-0008's evidence on a meeting of GoS high-ranking officials in Mukjar in August 2008 is corroborated by *viva voce* witnesses, including, P-0878 and P-0874.

22. P-0041's evidence on a rebel attack on Mukjar police station in August 2003 is cumulative to evidence provided by *viva voce* witnesses, including, P-0878, P-0874 and P-1021.

23. Evidence provided by the Four Witnesses on contextual elements of crimes against humanity is also corroborative of, and cumulative to, the evidence provided or to be provided by, among others, *viva voce* witnesses P-0547, P-0643, P-0769, P-0878, P-0884, P-0903, P-0905, P-0921, P-0935, P-0984 and P-1021.

D. *The introduction of the Prior Recorded Testimonies of the Four Witnesses is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman*

24. The introduction of the Prior Recorded Testimonies of the Four Witnesses into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, as they are reliable and the Prosecution has indicated it does intend to rely on the passages that do go to the acts and conducts of the Accused<sup>21</sup> or to the issue of the identity of the Accused, which is materially in dispute between the parties.<sup>22</sup>

25. Furthermore, the Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the Prior Recorded Testimonies of these witnesses, lead contradictory evidence during the Defence case or advance arguments regarding the weight to be attributed to the Prior Recorded Testimonies to the extent that discrepancies with any other evidence exist.

<sup>21</sup> *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), para. 12; *Gbagbo & Blé Goudé* Rule 68(2)(b) Decision, [ICC-02/11-01/15-950-Red](#), paras. 19-20, 29, 36-37; *Ntaganda* Rule 68(2)(b) Decision, [ICC-01/04-02/06-1715-Red](#), paras. 13-14.

<sup>22</sup> *Ongwen* Rule 68(2)(b) Decision on Prosecution Witnesses, [ICC-02/04-01/15-596-Red](#), para. 15.

#### IV. CONCLUSION

26. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application subject to the fulfilment of the further conditions of rule 68(2)(b) of the Rules.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 19<sup>th</sup> day of October 2022

At The Hague, The Netherlands