



**Original: English**

No. **ICC-02/05-01/20**  
Date: **14 December 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**

**Decision on the Prosecution's second application to introduce the prior recorded  
testimony of P-0085 under Rule 68(2)(c)**

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

**The Office of the Prosecutor**

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Nazhat Shameem Khan  
Julian Nicholls

**Counsel for the Defence**

Cyril Laucci  
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**Legal Representatives of Victims**

Natalie von Wistinghausen  
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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**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**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 21 February 2022, Trial Chamber I (the ‘Chamber’) issued its ‘Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c)’ (the ‘First Decision’), setting out the general framework for the introduction of prior testimonies pursuant to this provision.<sup>1</sup> In the First Decision, the Chamber rejected the Prosecution’s application in respect of P-0085, but without prejudice to the Prosecution’s ability to file a new request at a later stage.<sup>2</sup>
2. On 30 November 2022, the Prosecution filed a new application seeking the introduction of the prior recorded testimony of P-0085 pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’) (the ‘Second Application’).<sup>3</sup>
3. On 6 December 2022, the Defence made oral submissions, opposing the Second Application (the ‘Oral Response’).<sup>4</sup>
4. During the same hearing, the Chamber inquired with the parties whether an agreement on the use of Rule 68(2)(c) of the Rules could be reached, specifically by removing certain paragraphs referring to ‘Ali Kushayb’.<sup>5</sup>
5. On 9 December 2022, the Prosecution informed the Chamber that an agreement had been reached among the parties on the introduction of the prior recorded testimony of P-0085, subject to certain conditions.<sup>6</sup>

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<sup>1</sup> ICC-02/05-01/20-603-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-603-Red.

<sup>2</sup> First Decision, ICC-02/05-01/20-603-Conf, para. 32.

<sup>3</sup> Prosecution’s re-application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0085, ICC-02/05-01/20-821-Conf, with confidential Annex A.

<sup>4</sup> Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-ENG RT, p. 59, line 5 *et seq.*

<sup>5</sup> Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-ENG RT, p. 61, line 10 *et seq.*

<sup>6</sup> Email from the Prosecution at 11:43. Specifically, the parties agreed to redact the following parts of the statement: para. 23, remove "and Ali KUSHAYB" and "and KUSHAYB"; para. 25, remove "I had seen these Land Cruisers with ‘ALI KUSHAYB in MUKJAR’"; para. 26, remove "Ali KUSHAYB among," "I saw KUSHAYB as he waved his hands in the direction of the truck and I heard him say, "Match, match," "standing to the right of KUSHAYB," "in KUSHAYB’s presence," and "and he said that KUSHAYB had whispered in this man’s ear before the order was given"; para. 29, remove "Ali KUSHAYB"; para. 33, remove "with KUSHAYB," "From my knowledge of the Janjaweed, I believe the highest ranking Janjaweed that day was KUSHAYB," and "After KUSHAYB"; para. 34, remove, "Ali KUSHAYB and"; and para. 45, remove "I heard Ali KUSHAYB was also involved in attacks on villages east of MUKJAR." "Ali KUSHAYB" and "Ali Kushayb and." The Prosecution will not rely on paragraphs 30, 42, 43 and 44 in their entirety.

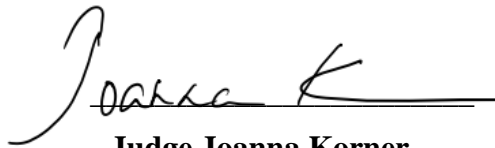
6. The Chamber refers to the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(2)(c) of the Rules.<sup>7</sup>

7. The Chamber notes that P-0085 is now clearly unavailable to testify, as demonstrated by the numerous attempts and efforts made by the Prosecution to locate the witness without any success.<sup>8</sup>

8. The Chamber further notes the Prosecution's submission that P-0085's evidence is corroborated and supported by other witnesses who have testified in the trial.<sup>9</sup>

9. The Chamber also notes the parties' agreement above.

10. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises the Prosecution to introduce P-0085's prior recorded testimony,<sup>10</sup> as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 14 December 2022

At The Hague, The Netherlands

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<sup>7</sup> First Decision, ICC-02/05-01/20-603-Conf, paras 6-7.

<sup>8</sup> Second Application, ICC-02/05-01/20-821-Conf, paras 6-13.

<sup>9</sup> Second Application, ICC-02/05-01/20-821-Conf, paras 18-28.

<sup>10</sup> See Second Application, ICC-02/05-01/20-821-Conf, Annex A. The prior recorded testimony is introduced, excluding the paragraphs and excerpts described in footnote 6 above.