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No.: ICC-02/05-01/20  
Date: 20 January 2023

**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 “Prosecution’s request for reconsideration of the ‘Decision on the Prosecution’s second application to introduce a prior recorded testimony under Rule 68(2)(c)’, 2 May 2022, ICC-02/05-01/20-680”, 19 January 2023, ICC-02/05-01/20-851-Conf**

**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 Anand 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. The Prosecution requests that Trial Chamber I (“Chamber”) reconsider its “Decision on the Prosecution’s second application to introduce a prior recorded testimony under Rule 68(2)(c)” (“Decision”),<sup>1</sup> based on new facts detailed below, and authorise the introduction into evidence of the statement and associated material (“Prior Recorded Testimony”)<sup>2</sup> of witness P-0954 pursuant to articles 69(2) and 69(4) of the Rome Statute (“Statute”), and rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”).

2. Since the Chamber issued the Decision, the Prosecution has agreed with the Defence not to rely on the parts of P-0954’s Prior Recorded Testimony that go to the acts and conduct of the Accused or his identity, as detailed below.<sup>3</sup> On this basis, the Defence has indicated that it does not object to the introduction of the Prior Recorded Testimony of P-0954.

3. The Prior Recorded Testimony of P-0954 is therefore admissible under rule 68(2)(c) of the Rules because: (i) the witness has become unavailable to testify; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute; (iii) the Prior Recorded Testimony is relevant and probative, and has sufficient indicia of reliability; and (iv) the introduction of the Prior Recorded Testimony into evidence would not be prejudicial to or inconsistent with the rights of Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”).

## II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this application and its annex are filed as confidential, because they contain sensitive information

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<sup>1</sup> [ICC-02/05-01/20-680-Conf.](#)

<sup>2</sup> Annex A lists the prior recorded testimony of P-0954 which comprises the witness’ statement (at I) and associated material (at III). Material related to the proof of unavailability of P-0954 is listed at item II. Hyperlinks to this material are also included, following the Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 47.

<sup>3</sup> See below, para 16.

regarding the identity of P-0954. A public redacted version of the application will be filed as soon as practicable.

### III. PROCEDURAL HISTORY

5. The Prosecution initially requested to introduce P-0954's Prior Recorded Testimony into evidence pursuant to rule 68(3) of the Rules.<sup>4</sup> This request was rejected by the Chamber on the basis that his evidence appeared to be "unique and different to that of other witnesses expected to testify about the accused and his identity and his individual criminal responsibility."<sup>5</sup>

6. After receiving notice of the witness' death, the Prosecution then requested to introduce P-0954's Prior Recorded Testimony into evidence pursuant to rule 68(2)(c) of the Rules.<sup>6</sup> The Chamber noted that the previous rejection of the rule 68(3) request alone could not bar the new application.<sup>7</sup> However, the Chamber denied the Prosecution's request on the basis that P-0954's evidence was unique and could not be supplemented by that of other witnesses who would testify *viva voce*, noting that greater caution was required when considering statements made by "insider" witnesses.<sup>8</sup>

### IV. SUBMISSIONS

#### A. *The reconsideration request is justified*

7. As previously established in the Court's jurisprudence, a reconsideration request may be granted when new or previously unavailable information requires the Chamber to reconsider its previous ruling.<sup>9</sup>

<sup>4</sup> [ICC-02/05-01/20-560-Conf](#), paras. 26-33, 37-38, 40, 43.

<sup>5</sup> [ICC-02/05-01/20-588-Conf](#), para. 78.

<sup>6</sup> [ICC-02/05-01/20-656-Conf](#).

<sup>7</sup> [ICC-02/05-01/20-680-Conf](#), para. 11.

<sup>8</sup> [ICC-02/05-01/20-680-Conf](#), paras. 11, 14.

<sup>9</sup> In *Bemba*, for instance, Trial Chamber III decided that it "will not revisit its previous decisions in the absence of new facts or circumstances that *may influence that decision*". See *Bemba* Decision on the "Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo", 2 September 2011, [ICC-01/05-01/08-1691](#), para 17 (emphasis added). See also *Katanga* Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"' (ICC-01/04-01/07-3821-Red), 26 June 2019, [ICC-01/04-01/07-3833](#), para 25; *Ruto & Sang* Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, [ICC-01/09-01/11-1813](#), para 19; *Kenyatta* Decision on the Prosecution's motion for reconsideration of the decision

8. In the current case, as detailed below,<sup>10</sup> the request is based on the presentation of new information to the Chamber, namely, the Prosecution's indication that it will not rely on the parts of P-0954's Prior Recorded Testimony that go to the identity and acts and conduct of the Accused, and the Defence's position that it therefore does not object to the request.

9. Since these parts of P-0954's Prior Recorded Testimony informed the Chamber's previous decision to reject its introduction into evidence,<sup>11</sup> the new information affects the basis on which the Decision was rendered, and the reconsideration request is therefore justified.

*B. P-0954's Prior Recorded Statement, with the exclusion of parts that go to the acts and conducts of the Accused, can be introduced into evidence pursuant to rule 68(2)(c) of the Rules*

10. The Prosecution seeks to submit into evidence P-0954's Prior Recorded Testimony, including the associated material listed in Annex A to this application. P-0954's Prior Recorded Testimony consists of one witness statement and one associated item that is referred to in the witness statement and relates to information and events discussed therein.

11. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(c) of the Rules, as set out at paragraphs 5 to 11 of its first application under rule 68(2)(c).<sup>12</sup>

12. The Prosecution also relies on its previous submissions regarding the proof of P-0954's death, the impossibility for the Prosecution to anticipate this event, and the

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excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, [ICC-01/09-02/11-863](#), para 11; *Ongwen* Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, 26 March 2018, [ICC-02/04-01/15-1210](#), para. 6; *Ongwen* Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, [ICC-02/04-01/15-1259](#), paras. 12-13.

<sup>10</sup> See below, para. 16.

<sup>11</sup> [ICC-02/05-01/20-680-Conf](#), paras. 11, 14.

<sup>12</sup> Prosecution's application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witnesses P-0026, P-0083, P-0085, P-0087 and P-0116, [ICC-02/05-01/20-578-Red](#), paras. 5-11.

reliability of the witness' Prior Recorded Testimony,<sup>13</sup> as well as on the Chamber's previous findings regarding these points.<sup>14</sup>

(i) *P-0954's Prior Recorded Testimony is relevant and probative*

13. P-0954, [REDACTED], provided testimony regarding the support of the Government of Sudan ("GoS") for the Militia/*Janjaweed* with weapons, ammunition and clothing,<sup>15</sup> including the [REDACTED] arming and funding of Militia/*Janjaweed*.<sup>16</sup>

14. In addition, P-0954 provided information regarding the command structure and functions of the [REDACTED] of the Sudanese Armed Forces ("SAF").<sup>17</sup> P-0954 further described the chain of command in the [REDACTED] and the close coordination between the PDF, SAF and the Militia/*Janjaweed*.<sup>18</sup> P-0954's associated material consists of a handwritten example of [REDACTED].<sup>19</sup>

15. P-0954's prior recorded testimony is relevant to, *inter alia*, the contextual elements of war crimes<sup>20</sup> and crimes against humanity.<sup>21</sup>

(ii) *The Prosecution does not intend to rely on the parts of P-0954's statement that go to the acts and conduct of the Accused or his identity*

16. Taking into account the Chamber's considerations in its Decision, the Prosecution does not intend to rely on the following excerpts of P-0954's statement, which go to his insider knowledge about Ali Kushayb's identity, role and his cooperation with GoS forces during the charged period:

a. Paragraphs 34, 35, and 49 to 60 in their entirety;

<sup>13</sup> Prosecution's second application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0954, 30 March 2022, [ICC-02/05-01/20-656-Conf](#), paras. 6-7, 11-12.

<sup>14</sup> [ICC-02/05-01/20-680-Conf](#), para. 12.

<sup>15</sup> P-0954, DAR-OTP-0221-0571 at 0574, para. 20, 0575-0576, para. 24, 27, 0578, paras. 34-37, 0579-0580, paras. 40, 42, 0580, para. 43, 0581-0584, paras. 50-56.

<sup>16</sup> P-0954, DAR-OTP-0221-0571 at 0573, paras. 14-15, 0575, para. 23, 0581-0582, paras. 50-51.

<sup>17</sup> P-0954, DAR-OTP-0221-0571 at 0575, para. 23, 0578, para. 33, 0580, para. 46, 0581, paras. 47-48.

<sup>18</sup> P-0954, DAR-OTP-0221-0571 at 0575-0576, paras. 24, 26-27, 0578, para. 33, 0579-0580, paras. 40-46, 0581-0584, paras. 50-56.

<sup>19</sup> DAR-OTP-0221-0587. *See also* P-0954, DAR-OTP-0221-0571 at 0578, paras. 31-32, 0583.

<sup>20</sup> P-0954, DAR-OTP-0221-0571 at 0575-0576, paras. 24, 26-27, 0578, para. 33, 0579-0780, paras. 40, 42, 0580, para. 46, 0581-0584, paras. 50-56.

<sup>21</sup> P-0954, DAR-OTP-0221-0571 at 0575-0576, para. 24, 0579-0580, paras. 40, 42, 0581-0584, paras. 50-56.

- b. Paragraph 24, the bullet point: “- Emir Ali KUSHAYB, who operated in the following areas Arawala, Bindisi, Kodoom, Garsila, Mukjar, Deleig, Sindu. In fact, it is in all Wadi Salih. I have been informed of this later when [REDACTED] after 1995. Ali KUSHAYB and his men were supported by Arms, Ammunitions and other equipment from the [REDACTED]. This is during the period from 2003 until [REDACTED] 2006.”;
- c. Paragraph 41, the bullet point: “a. Emir Ali KUSHAYB; Wadi Salih (Garsila and Deleig) His visits were during the period from 2003 to 2004 or 2005 to [REDACTED].”;
- d. At page 0581, the tile “Ali KUSHAYB”.

17. Without these excerpts, the testimony provided by P-0954 simply details the role and structure of the PDF and the SAF, and their involvement in the distribution of weapons and ammunition throughout the Darfur conflict—topics which have been widely discussed during trial and are not uniquely provided by this witness. As such, the evidence provided by P-0954 ceases to be “unique” and is also removed of assertions which would invite greater caution from the Chamber given the possibility of the witness having “a motive to assign responsibility” for his own actions to others.<sup>22</sup>

*(iii) The introduction of P-0954’s Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused*

18. The introduction of P-0954’s evidence, stripped of the references indicated above, has been agreed to by the Defence.<sup>23</sup>

19. The evidence provided by P-0954 regarding the contextual elements of war crimes and crimes against humanity is cumulative to, and corroborated by, in particular, P-0011, P-0029, P-0547, P-0643, P-0769, P-0874, P-0883, P-0885, P-0905, P-

<sup>22</sup> [ICC-02/05-01/20-680-Conf](#), paras. 11, 14.

<sup>23</sup> E-mail of 18 January 2023, 13:29h.

0921, P-0984, and P-1021, who have already testified before the Chamber or will provide testimony shortly.

**V. RELIEF REQUESTED**

20. For the foregoing reasons, the Prosecution requests that the Chamber reconsiders its Decision and authorises the introduction of P-0954's Prior Recorded Testimony into evidence pursuant to rule 68(2)(c) of the Rules.



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

Dated this 20<sup>th</sup> day of January 2023

At The Hague, The Netherlands