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No.: ICC-02/05-01/20  
Date: 20 October 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 response to ‘Demande de la Défense d’admettre des enregistrements d’interrogatoires et documents associés en vertu de la règle 68(2)(c) du Règlement de Procédure et de Preuve’”, 16 October 2023, ICC-02/05-01/20-1033-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**

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**Registrar**

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**Counsel Support Section**

Mr Pieter Vanaverbeke

**Victims and Witnesses Section**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. INTRODUCTION

1. The Prosecution does not object to the Defence's request to introduce into evidence the prior recorded testimony of witness P-0137/D-0022 ("Witness"), pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence ("Request").<sup>1</sup>

2. The Prosecution accepts that the Witness is unavailable to testify orally and that the Defence could not have anticipated the necessity of measures under article 56 of the Statute. Additionally, although the probative value of the evidence is minimal, the Prosecution nonetheless considers that the Witness's prior recorded testimony has sufficient indicia of reliability to be submitted into evidence.

## II. CLASSIFICATION

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is classified as confidential since it is in response to a confidential filing.

## III. SUBMISSIONS

4. The Prosecution accepts that the Witness is unavailable to testify orally in these proceedings. On 15 June 2023, the Defence sought the Prosecution's assistance to contact the Witness for the purposes of an interview with the Defence.<sup>2</sup> Despite its repeated attempts, the Prosecution was not able to reach the Witness and, on 9 August 2023, informed the Defence accordingly.<sup>3</sup>

5. The Prosecution also accepts that the Defence could not have anticipated the Witness's unavailability and, therefore, the necessity of measures under article 56 of the Statute.

6. In its Request, the Defence submits that it would rely on the Witness's prior recorded testimony to prove the existence of a sophisticated system of fabrication of false evidence, aimed at misleading the Office of the Prosecutor ("OTP") and the Court

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<sup>1</sup> ICC-02/05-01/20-1028-Conf ("Request").

<sup>2</sup> Defence's email to the Prosecution on 15 June 2023 at 15:39.

<sup>3</sup> Prosecution's emails to the Defence on 20 June 2023 at 15:41 and 9 August 2023 at 10:33.

about the activities of the Government of the Sudan in Darfur.<sup>4</sup> To support the existence of such a system, the Defence refers to the Witness's interview with the OTP, during which the Witness confessed to having provided false information to the OTP.<sup>5</sup> The Defence also refers to an excerpt of the testimony of witness [REDACTED], which it submits corroborates the Witness's account.<sup>6</sup>

7. The Prosecution does not agree that the Witness's prior recorded testimony is capable of supporting the existence of such a system of fabrication of false evidence. The Witness provided minimal, if any, details with regard to such a system,<sup>7</sup> and the sole excerpt of witness [REDACTED] testimony provides little to no corroboration on this point. Nonetheless, the Prosecution considers that the Witness's prior recorded testimony has sufficient indicia of reliability to be submitted into evidence.

#### IV. CONCLUSION

8. For the above reasons, the Prosecution does not object to the admission into evidence of the Witness's prior recorded testimony under 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 October 2023

At The Hague, The Netherlands

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<sup>4</sup> Request, para. 11.

<sup>5</sup> Request, para. 10.

<sup>6</sup> Request, paras. 10-11.

<sup>7</sup> See P-0137, DAR-OTP-0220-2807 at 2834-2835, l. 877-917; P-0137, DAR-OTP-0220-2836 at 2839-2844, l. 89-254 and 2851, l. 471-480; P-0137, DAR-OTP-0078-0048 (Translation at DAR-OTP-0203-0362). The Prosecution notes that the passages cited by the Defence in fn. 10 of the Request do not support the Defence's argument, as they refer to the Witness's "escape" from the Militia/*Janjaweed*, with the assistance of the Justice and Equality Movement, rather than the Witness's confession to the OTP.