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

Date: **2 June 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 eleventh application under rule 68(3) to
introduce into evidence prior recorded testimony of witnesses P-0007, P-0012 and
P-0718, ICC-02/05-01/20-694-Conf”, 1 June 2022, ICC-02/05-01/20-698-Conf**

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:

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Ms Nazhat Shameem Khan
Mr Julian Nicholls

**Counsel for Mr Ali Muhammad Ali
Abd-Al-Rahman**

Dr Cyril Laucci, Lead Counsel
Mr Iain Edwards, Associate Counsel

Legal Representatives of Victims

Ms Natalie von Wistinghausen
Mr Nasser Mohamed Amin Abdalla
Mr. Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s eleventh application under Rule 68(3) of the Rules of Procedure and Evidence (respectively, “Eleventh Application” and “Rules”).¹ Through the Eleventh Application, the Prosecution seeks the introduction into evidence of the statements and associated material (“prior recorded testimonies”) of witnesses P-0007, P-0012 and P-0718 *in lieu* of their *viva voce* examination-in-chief, and requests the Chamber to grant time for limited supplementary questioning.²

2. The Defence does not oppose the application insofar as it relates to P-0007, but underscores that this witness must in any event appear in court to be cross-examined. Additional submissions arguing the inappropriateness of P-0007’s evidence being admitted via Rule 68(2)(B) have been sent to the Trial Chamber by email.

3. However, it is submitted that it is essential that P-0012 and P-0718 (“Two Witnesses”) testify *viva voce* to ensure that the Trial Chamber obtains the best possible evidence relating to the purported identification of “*Ali Kushayb*” as Mr Abd-Al-Rahman, based on what each of them independently recall.

4. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this Response is classified “Confidential”, mirroring the classification of the Eleventh Application. A public redacted version will be filed shortly thereafter.

Submissions

5. At the outset, the Defence submits that the Prosecution has failed to provide any justification for the late filing of its Eleventh Application. The Defence recalls that the Chamber had set a deadline of 5 January 2022, later extended to 3 February 2022, for the Prosecution to indicate if it sought leave to introduce the prior recorded testimony of witnesses under Rule 68(3) of the Rules.³ The present request was filed almost 4 months after the extended deadline, and contains no real explanation – apart from a short and generalised reference to the objective of enhancement of the

¹ ICC-02/05-01/20-684-Conf and its public redacted version [ICC-02/05-01/20-694-Red](#).

² ICC-02/05-01/20-684-Conf and its public redacted version [ICC-02/05-01/20-694-Red](#), paras 1, 15, 22, 24, 29.

³ [ICC-01/05-01/20-478](#), par. 46; [ICC-02/05-01/20-T-017-Red-ENG WT](#), p. 29, lines 1-17.

expeditiousness of the proceedings⁴ – justifying the late filing of an additional request of the kind. Further, whilst being mindful of the need for flexibility regarding the scheduling of witnesses, the Defence respectfully submits that it cannot be expected to demonstrate a similar level of flexibility with regard to motions relating to the mode of appearance of witnesses which are significantly out of time.

6. With regard to its overarching arguments related to evidence of the alleged identity and individual criminal responsibility of Mr Abd-Al-Rahman, the Defence takes note of the Trial Chamber’s finding in the Decision that “*the Rome Statute [...] and Rule 68(3) of the Rules clearly foresee the introduction of prior recorded testimony for fact witnesses and on issues concerning the acts and conducts of the accused*”⁵, citing its earlier decision of 8 February 2022⁶. As previously stated⁷, the Defence acknowledges this finding but urges the Trial Chamber, as it has done in its past decisions on previous Rule 68(3) applications, to exercise its discretionary power when assessing on a case-by-case basis requests for introduction of evidence pursuant to Rule 68(3)⁸ and more particularly, evidence pertaining to the hotly contested issue that is the identification of Mr Abd-Al-Rahman as “*Ali Kushayb*”. In this respect, the Defence notes that in its earlier decisions, the Trial Chamber rejected the Prosecution’s requests in part and deemed it preferable to hear the evidence of two witnesses (P-0843 and P-0954), one witness (P-0884), five witnesses (P-0027, P-0585, P-0894, P-0895, and P-0926), and two witnesses (P-0103 and P-0112) respectively, *viva voce* on the ground that they provided “unique” evidence and, for

⁴ ICC-02/05-01/20-684-Conf and its public redacted version [ICC-02/05-01/20-694-Red](#), par. 4.

⁵ [ICC-02/05-01/20-602-Red](#), par. 7.

⁶ [ICC-02/05-01/20-588-Red](#), par. 8.

⁷ [ICC-02/05-01/20-601-Red](#), par. 9.

⁸ *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 proceedings relating to the evidence of Witnesses P-0087 and P-0088”, [ICC-02/11-01/15-950-Red](#), 6 June 2017, par. 90.

P-0843, P-0954, P-0027, due to their alleged particularly close interaction with “*Ali Kushayb*”.⁹ This uniqueness criterion applies to the Two Witnesses.

P-0012

7. [REDACTED] The Defence requests that P-0012 provide the entirety of his testimony *viva voce* for the following reasons. The nature and content of his witness statement, conducted from [REDACTED] with the OTP, and the associated material, identified in Annex A (A2) of the Eleventh Application, demonstrate that the witness provides unique evidence on the position of authority of a man known to him as “*Ali Kushayb*”, on the large lump sum received by the *aqids*, and more generally their relationships with the Government of Sudan, and on his alleged role in the August 2003 Bindisi attack.¹⁰ In addition and as laid out below, the witness provides evidence of [REDACTED], which militates in favour of his testimony being given wholly *viva voce*.

8. The witness purports in particular to give evidence of the identity, physical appearance and uniform, military background, and alleged position of a man he understood to be “*Ali Kushayb*”.¹¹ The witness provides particularly prejudicial and contested evidence that “*Ali Kushayb*”’s real name is Ali Muhammad Ali and that he hails from Al Deain in Eastern Darfur.¹² The witness added that the Arabs [of the region] used to refer to him as the “slave of the Rizeigat”.¹³ He describes “*Ali Kushayb*” as the “*aqid ogada* for the whole Wadi Salih [REDACTED]”.¹⁴ He proceeds to provide specific details about the date of his appointment in this role, the identity of the individuals responsible for this appointment, including Ja’far Abd-Al-Hakam, and recounts a conflict between “*Ali Kushayb*” and Al-Dayf Samih over the appointment of *aqid ogada* for the Wadi Saleh area.¹⁵ The witness adds that “*Ali*

⁹ [ICC-02/05-01/20-588-Red](#), paras 72, 78; [ICC-02/05-01/20-602-Red](#), paras 35, 36; [ICC-02/05-01/20-630-Red](#), paras 23-24, 78, 80, 166, 169, 177, 178, 189-193; [ICC-02/05-01/20-660-Red](#), paras 14-15, 22-23, 34.

¹⁰ [REDACTED]. With regard to the specific references to “*Ali Kushayb*”’s position au authority, see para. 7 below.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

Kushayb” received “political decisions” taken by Jafaar Abd-Al-Hakam, whom he describes as a politician.¹⁶ The witness further describes “*Ali Kushayb*” as the “head or *Gaid* of the *Fursan* for the four regions of Wadi Salih – Garsila, Bendisi, Mukjar, and Zame Bayaa”, gives details about his position of authority over the PDF, and his relationship with the Government of Sudan during joint operations.¹⁷ With regard to the latter, the witness describes “*Ali Kushayb*” as the “mediator between the *aqid*’s and the politicians” and adds that he was in receipt of weapons, salaries, and uniforms “to be given to the other *aqid*’s” as well as a vehicle and a Thuraya.¹⁸ He further provides information more generally on his position of authority over Arabs in the area, including their use of the term “*Ali Kushayb*’s war”.¹⁹ The witness also identifies the names of “*Ali Kushayb*”’s subordinates.²⁰ The witness further claims [REDACTED].²¹ The witness also claims [REDACTED]²² and recounts his role in the uncharged August 2003 attack against Mukjar and in related crimes.²³

9. The Defence submits that the aforementioned issues are fundamental issues in dispute and that the nature of the evidence that P-0012 purports to provide against Mr Abd-Al-Rahman as “*Ali Kushayb*”, most notably his evidence purporting to identify “*Ali Kushayb*” as really being called Ali Muhammad Ali manifestly fulfils the uniqueness criterion as applied by the Chamber, and in any event require that, in the interests of justice, the Prosecution’s application should be denied. The witness should be called to provide the entirety of his testimony *viva voce*.

P-0718

10. The Defence requests that P-0718 provide the entirety of his testimony *viva voce* for the following reasons. The nature and content of P-0718 single witness statement and 5 associated materials, identified in Annex A (A3) of the Eleventh Application, demonstrate that the witness provides unique evidence on the identity,

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED].

physical description, background and position of authority of a man known to him as “*Ali Kushayb*”²⁴, on his role in the alleged Deleig arrest and executions in March 2004, and more particularly on the release of detainees.²⁵

11. The witness claims he identified the man known to him as “*Ali Kushayb*” through [REDACTED] and referred to him as the “leader of the Janjaweed”.²⁶ The witness states that [REDACTED].²⁷ The witness further states that “*Ali Kushayb*” carried a stick in his hand, shorter than a walking stick and thinner on one end, which – according to unknown sources – was a “sort of status symbol for senior military personnel to signify promotion”.²⁸

12. The witness recalls [REDACTED].²⁹ He further claims that the man known to him as “*Ali Kushayb*” “called [detainees] criminals and slaves and asked where they were from” as well as their names.³⁰ The witness also claims that [REDACTED].³¹

13. The Defence submits that the aforementioned issues are fundamental issues in dispute and that the nature of the evidence that P-0718 purports to provide against Mr Abd-Al-Rahman as “*Ali Kushayb*” fulfil the uniqueness criterion as applied by the Chamber, and in any event require that, in the interests of justice, the Prosecution’s application should be denied. The witness should be called to provide the entirety of his testimony *viva voce*.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

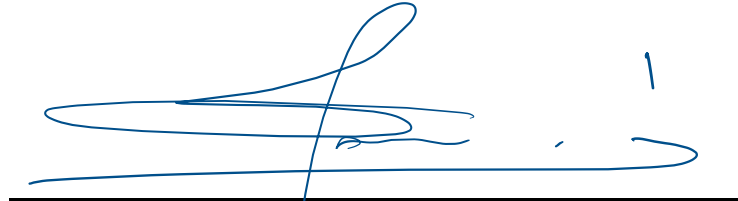
²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

FOR THE FOREGOING REASONS, THE DEFENCE REQUESTS THAT THE CHAMBER DISMISS the Eleventh Application with regard to the admission of the prior recorded testimony of Witnesses P-0012 and P-0718,

AND FIND that the Two Witnesses should testify entirely *viva voce*.



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

Dated this 2nd June 2022 at The Hague, The Netherlands