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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 Defence’s ‘APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE’”,
24 June 2024, ICC-02/05-01/20-1154-Conf**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence's application for an order to the Prosecution for immediate disclosure ("Application").¹ The Prosecution has met its ongoing disclosure obligation in relation to material relevant to Ja'afar ABD-AL-HAKAM ("ABD-AL-HAKAM"). There is no "necessity"² for the Chamber to intervene to order any disclosure pursuant to rule 84 of the Rules of Procedure and Evidence. To the contrary, the Application is unfounded, speculative and frivolous.

II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, this motion is classified as confidential as it responds to a filing with the same classification.

III. SUBMISSIONS

The Prosecution has met its ongoing disclosure obligation in relation to ABD-AL-HAKAM

3. The Prosecution has met its ongoing disclosure obligation, pursuant to article 67(2) of the Statute and rule 77 of the Rules, in relation to material relevant to ABD-AL-HAKAM. As previously communicated to the Defence, the Prosecution does not have a screening note or a witness statement from ABD-AL-HAKAM.³

4. The Prosecution's ongoing disclosure obligation does not require disclosure to the Defence of the fact the Prosecution met with a potential witness or whether and why the person did or did not agree to an interview with the Prosecution. The Defence has not justified any departure from this general principle. [REDACTED].

5. [REDACTED].⁴

¹ APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE, [ICC-02/05-01/20-1149-Conf](#) ("Application").

² [Application](#), paras. 12-16.

³ [Application](#), para. 6. Annex C to the Application for an Order to Prosecution to Make Immediate Disclosure, [ICC-02/05-01/20-1149-Conf-AnxC](#), p. 4.

⁴ Annex B to the Application for an Order to Prosecution to Make Immediate Disclosure, [ICC-02/05-01/20-Conf-AnxB](#). The Prosecution notes that the English translations are at [DAR-D31-00000328](#) and [DAR-D31-00000329](#).

There is no necessity for the Chamber to order any disclosure pursuant to rule 84

6. The Defence speculates, without foundation, that the Prosecution may be in possession of material from ABD-AL-HAKAM that is of “relevance to the Defence’s case that Mr Abd-Al-Rahman cannot, and could never, have been a *Janjaweed* leader.”⁵ The Defence also “cannot exclude the possibility that his statement may contain crucial exculpatory information, such as the denial of [his] role in the appointment of Ali Kushayb as Janjaweed leader and/or denial of any role played by Mr Abd-al-Rahman in the events described in the charges.”⁶

7. This speculation is entirely baseless. Leaving aside the fact the Prosecution has already informed the Defence it has no screening interview or witness statement for ABD-AL-HAKAM, a cursory review of the extensive evidence disclosed to the Defence in relation to ABD-AL-HAKAM indicates that he implicates the Accused in the charged crimes.

8. For example, the Government of Sudan’s (“GoS”) National Commission of Inquiry (“NCOI”),⁷ interviewed ABD-AL-HAKAM and two others, and indicated their statements included the following:

- a. “detainees were taken to the Deleig police area [*sic*] by the leader of the *Fursan* armed militia, Muhammad ‘Ali Kushayb, and a Lieutenant Hamdi from military intelligence”; and
- b. “[T]hey heard that the detainees were killed and buried under the supervision of Lieutenant Hamdi and the militia leader, Muhammad ‘Ali Kushayb.”

⁵ [Application](#), para. 12.

⁶ [Application](#), para. 12.

⁷ [DAR-OTP-0116-0380](#) at 0408, disclosed on 30 Oct 2020. ABD-AL-HAKAM was interviewed by the NCOI together with “Deleig Community leader, Adam Isma’il Ahmad” and “Corporal Jum’ah Fadali” and the quoted excerpts above are attributed to them jointly by the NCOI.

9. ABD-AL-HAKAM also refers to the Accused in his interview with the GoS Investigative Committee in October 2008,⁸ which also interviewed the Accused,⁹ stating, in particular, that:

- a. “[...] Ali Kushayb [...] attacked the areas of [...] Mukjar, Bundis”;¹⁰
- b. “Ali Kushayb, along with a guide, arrested about 100 to 120 people, all from Deleig, and drove them to the Deleig police station. They forced them to lie on the ground, then put them in vehicles and headed west. The people of Deleig testify that these were killed”;¹¹
- c. “In 2003, at Mukjar prison, Ali Kushayb brought people out and beat them...”;¹²
- d. “I remember that Ali Kushayb came to see me and told me that Ahmad Harun had visited them and given them ten million pounds...and so he told me to help them get the cash, and this I did”;¹³
- e. “Ali Kushayb’s forces, with which he participated in the fights following the strike against Mukjar...the government took advantage of these..and entered Arawala with them...Sindu. This force merged with the Central Reserve;¹⁴ and
- f. “Ali Kushayb is now the head of Central Reserve in Wadi Salih. Later on, Muhammad al-Manjuz fell out with Ali Kushayb and formed a border guard.”¹⁵

⁸ [DAR-OTP-0219-6920-R01](#), disclosed on 15 October 2020.

⁹ [DAR-OTP-0219-7007](#). The Prosecution notes that in his November 2006 interview with the GoS Investigative Committee, at 7008-7010, the Accused, “Ali Muhammad Ali Abd-Al-Rahman ‘Ali Kushayb’”, who describes himself as “Emir of the *Fursan* of the Mujahidin in Garsila”, refers to his presence at a security committee meeting at which “Abd-al-Hakam told us to act right away”.

¹⁰ [DAR-OTP-0219-6920-R01](#) at 6922.

¹¹ [DAR-OTP-0219-6920-R01](#) at 6924-6926.

¹² [DAR-OTP-0219-6920-R01](#) at 6929.

¹³ [DAR-OTP-0219-6920-R01](#) at 6932.

¹⁴ [DAR-OTP-0219-6920-R01](#) at 6932.

¹⁵ [DAR-OTP-0219-6920-R01](#) at 6932.

10. Given the Defence's purported interest in ABD-AL-HAKAM,¹⁶ and his relevance to the case, if the Defence was of the belief that ABD-AL-HAKAM had information that exculpates Mr Abd-Al-Rahman, it is not clear, from the information provided by the Defence, whether it took steps to seek to interview him when it had the opportunity.

11. On 11 June 2021 his arrest was reported in the Sudanese media, in an English language article that noted "Abdul Hakam is accused of masterminding crimes committed by the militia leader Ali Abdul Rahman "Kushayb" in the period between 2003-2004."¹⁷ On 3 September 2021, London based human rights organisation Redress publicly referenced reports by Sudanese newspapers that "Jaafar Abdel Hakam appeared in a video hearing before the ICC; Hakam was arrested in June 2021 on the basis of his alleged involvement in crimes against humanity in Darfur."¹⁸

12. Despite these public English language reports, and the multiple items disclosed in relation to ABD-AL-HAKAM,¹⁹ there is no indication that the Defence sought to interview him during either the Defence mission to Khartoum [REDACTED] or at any point before the [REDACTED] expiration of the six month multiple entry visas for Sudan enjoyed by Lead and Co-Counsel.²⁰

13. Instead, it is only now that the Defence raise this issue, requesting an order for immediate disclosure of material that does not exist, for which there is no proper basis to suggest exists, and only after the Defence apparently failed to take any steps to interview ABD-AL-HAKAM, who is now reportedly deceased.²¹

14. Accordingly, the Application is unfounded, speculative and frivolous.

¹⁶ [Application](#), paras. 3, 12 and 13.

¹⁷ Annex, DAR-OTP-00012034.

¹⁸ Annex, DAR-OTP-00012037.

¹⁹ [Application](#), para. 3.

²⁰ [REDACTED]. See also D-0001, [T-154-ET](#), p. 80, lines 12-18.

²¹ [Application](#), para. 3, footnote 2.

IV. CONCLUSION

15. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Application.



Karim A. A. Khan KC
Prosecutor

Dated this 28th day of June 2024

At The Hague, The Netherlands