

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-01/20**
Date: **07 February 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 “Prosecution’s fifth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0020, P-0601 and P-0606” 2 February 2022, ICC-02/05-01/20-574-Conf

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pursuant to article 69(2) and (4) of the Rome Statute, and rule 68(3) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”): (i) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)¹ of witnesses P-0020, P-0601, and P-0606 (“Three Witnesses”);² and (ii) grant the time requested in the paragraphs below for *viva voce* questioning of each witness (“Application”).³

2. Granting the Application will enhance the expeditiousness of the proceedings by reducing the length of the Three Witnesses’ in-court testimony from 12 hours to three, thus saving approximately nine hours of court time.⁴

3. The introduction into evidence of the Prior Recorded Testimonies is not prejudicial to, or inconsistent with the rights of Mr Abd-Al-Rahman, as the Three Witnesses will be available for cross examination by the Defence and any further questioning by the Chamber.

4. Should the request to conduct a supplementary examination be granted, the Prosecution would elicit further focused *viva voce* evidence on certain issues that require clarification or elaboration as set out below. The Prosecution will ensure that the Three Witnesses are not asked merely to repeat information already provided in their Prior Recorded Testimonies.

¹ Annex A (A1 to A3) lists the prior recorded testimonies of the Three Witnesses which comprise their witness statements (at I) and associated material (at II). The material related to the witness’s prior recorded testimony which the Prosecution does not seek to introduce into evidence is also included (at III). Hyperlinks to this material are also included. See Directions on the Conduct of Proceedings, [ICC-02/05-01/20-478](#), para. 47.

² The Prosecution has reassessed its position on the mode of testimony of these Three Witnesses previously [REDACTED] and changed it from rule 68(2)(b) to rule 68(3) of the Rules.

³ This Application is submitted in accordance with [Directions on the Conduct of Proceedings](#), paras. 46–48.

⁴ Under Article 64 (3)(a), the Chamber shall, “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings.” See also Chambers Practice Manual (2019), p. i (“The overall question of the expeditiousness of proceedings is one of considerable complexity and the conduct and readiness of all parties and participants to Court proceedings play a crucial role—the commitment to expediency must, in this regard, be a collective one.”); *Katanga* Unlawful Detention and Stay of Proceedings Appeals Judgment, [ICC-01/04-01/07-2259](#), para. 43 (“The Appeals Chamber observes that expeditiousness is a recurrent theme in the Court’s legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants.[...]”). See also *Ntaganda* Rule 68(3) Decision, [ICC-01/04-02/06-961](#), para 13; *Gbagbo & Blé Goudé* Rules 68(2)(b) and 68(3) Decision, [ICC-02/11-01/15-573](#), paras. 25, 42.

II. CLASSIFICATION

5. Pursuant to regulation 23bis(1) of the Regulations of the Court, this Application and Annex A are classified as confidential, since they contain confidential information that identifies the Three Witnesses. A public redacted version of the Application will be filed as soon as practicable.

III. SUBMISSIONS

6. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(3) of the Rules, as set out in its first application under rule 68(3).⁵

7. In addition to the statements of the Three Witnesses, the Prosecution seeks to introduce into evidence the associated material for each of the Three Witnesses⁶ which forms an integral part of their Prior Recorded Testimonies.⁷ These items are also necessary to fully comprehend the accounts of the Three Witnesses, because they are discussed and/or clarified in their testimonies. The introduction of this material is supported by Trial Chamber VI's finding in *Ntaganda* that "exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."⁸

A. Overview of the Prior Recorded Testimonies of Witnesses P-0020, P-0601 and P-0606

8. The Prior Recorded Testimonies of the Three Witnesses relate primarily to the contextual elements of war crimes and crimes against humanity, the charges of persecution, and the charged crime of destruction of property (count 5) in Bindisi on or about 15 and 16 August 2003.⁹

⁵ First Rule 68(3) Application, ICC-02/05-01/20-547-Conf, paras. 7- 9.

⁶ See Annex A (Part II of A1 to A3). Where applicable, the Prosecution includes in the Annex, the English translations of items referred to in the Associated Material.

⁷ See *Yekatom & Ngaissona* Decision on the Prosecution Requests under Rule 68(3), [ICC-01/14-01/18-907-Red](#), para. 26.

⁸ *Ntaganda* Transcript of 20 June 2016, [ICC-01/04-02/06-T-105-Red-ENG](#) ET, p. 94, l. 2-7. See also *Ntaganda* Decision on Prosecution Application under Rule 68, [ICC-01/04-02/06-1205](#), para. 7; *Ntaganda* Decision on Rule 68, [ICC-01/04-02/06-1029](#), paras. 23, 35; *Ruto & Sang* Decision on the Admission of Prior Recorded Testimony, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33.

⁹ Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), paras. 61-67, 94.

(i) *Prior Recorded Testimony of P-0020*

9. The Prosecution seeks to submit into evidence P-0020's prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0020's prior recorded testimony consists of one witness statement and one associated item that relates to information and events discussed in the statement.

10. P-0020, a Fur [REDACTED],¹⁰ provides testimony on the contextual elements of war crimes, in particular in relation to the existence of an armed conflict of non-international character, including the attack on Al Fasher airport in April 2003 by the Sudan Liberation Movement/Army ("SLM/A"),¹¹ and the organisational requirement of the SLM/A.¹²

11. P-0020's testimony is also relevant to the contextual elements of crimes against humanity, including, *inter alia*: (i) the existence of a counter-insurgency campaign of the Government of Sudan ("GoS"),¹³ also targeting the Fur and Zaghawa;¹⁴ (ii) the structure and function of the Sudanese Armed Forces ("SAF"),¹⁵ the Security Committees and the National Security Council;¹⁶ and (iii) the role of Ahmad Harun ("Harun") in furthering the GoS State policy,¹⁷ [REDACTED],¹⁸ and the distribution of weapons and ammunition, carried out with Harun's knowledge.¹⁹ P-0020 also recounts [REDACTED].²⁰ P-0020 interpreted this as an encouragement to attack civilians and destroy the area.²¹

12. P-0020's testimony is also relevant to establish that Mr Abd-al-Rahman is Ali Kushayb, as the witness describes meeting Mr Abd-Al-Rahman in Garsila while he was dressed in a PDF uniform and also hearing from unidentified sources that Mr Abd-Al-Rahman had been a sergeant in the SAF, who retired and was later identified as responsible for the mass killings in Bindisi, Mukjar and Deleig.²²

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

13. P-0020's associated material consists [REDACTED].²³

The Prosecution requests one hour for its limited supplementary examination of P-0020

14. The Prosecution seeks one hour to conduct a streamlined supplementary examination of P-0020, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court, on topics including: (i) the functions of the National Security Council; (ii) [REDACTED]; and (iii) the identification of Mr Abd-Al-Rahman as Ali Kushayb.

15. The Prosecution estimates that it would require four hours for the direct examination of P-0020, if his prior recorded testimony is not introduced through rule 68(3) of the Rules. The introduction of P-0020's prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by three hours.

(ii) Prior Recorded Testimony of P-0601

16. The Prosecution seeks to submit into evidence P-0601's prior recorded testimony, inclusive of the associated material listed in Annex A (A2) to this Application. P-0601's prior recorded testimony consists of one witness statement and one associated item that relates to information and events discussed in the statement.

17. P-0601, a [REDACTED] civilian, provides testimony on the contextual elements of crimes against humanity and the charges of persecution. P-0601 indicates that, following the rebel attacks in Bindisi and Mukjar, respectively on 1 and 8 August 2003,²⁴ GoS Officials and Militia/*Janjaweed* held a gathering in Mukjar on 9 August 2003, during which comments were made to "clear the area".²⁵ This was interpreted by P-0601 as meaning killing all villagers and taking their belongings.²⁶

18. P-0601 also provides evidence on the attack on Bindisi and surrounding villages by GoS Forces²⁷ and Militia/*Janjaweed* on 15 and 16 August 2003.²⁸ The witness recounts the arrival of attackers to North Bindisi on 15 August 2003, where they spent the night,²⁹ before

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

proceeding to attack South Bindisi the following day.³⁰ The witness further describes the crime of destruction of property³¹ during this attack.

19. P-0601's account is also relevant, *inter alia*, to (i) establish that Mr Abd-Al-Rahman is Ali Kushayb; and (ii) Mr Abd-Al-Rahman's individual criminal responsibility, as it provides evidence on Mr Abd-Al-Rahman's network of co-perpetrators,³² including Hamuda Hamdan ("Hamdan"),³³ a subordinate of the Accused.³⁴

20. P-0601's associated material consists of a sketch map drawn by the witness depicting locations in Bindisi and Mukjar Localities, such as the towns of Mukjar, Bindisi and Hay Jebel, and a market in the village of Daguinia.³⁵

The Prosecution requests one hour for its limited supplementary examination of P-0601

21. The Prosecution seeks one hour to conduct a streamlined supplementary examination of P-0601, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court, on topics including: (i) the GoS policy to target civilians; (ii) the attack on Bindisi on 15 and 16 August 2003, including the crime of destruction of property during the attack; and (iii) Mr Abd-Al-Rahman's position of authority.

22. If his prior recorded testimony is not introduced under rule 68(3), the Prosecution estimates that it would require 4 hours for the direct examination of P-0601. The introduction of P-0601's prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by three hours.

(iii) Prior Recorded Testimony of P-0606

23. The Prosecution seeks to submit into evidence P-0606's prior recorded testimony, inclusive of the associated material listed in Annex A (A3) to this Application. P-0606's prior recorded testimony consists of one witness statement and twelve associated items that relate to information and events discussed in the statement.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

24. P-0606, a Fur civilian, provides testimony on the contextual elements of crimes against humanity, including in relation to: (i) the widespread and systematic nature of the attack, as indicated by the attacks carried out on Magan village, in the Mukjar Locality, in August and September 2003;³⁶ and (ii) the GoS failure to investigate and prosecute crimes committed by GoS Forces, as demonstrated by the failed attempts of members of the GoS Forces to intervene in the commission of crimes, prevented from doing so by their commanders.³⁷

25. P-0606's account is also relevant to the charges of persecution, as confirmed by the GoS Forces and Militia/*Janjaweed*'s perception of Fur males as rebels or rebel sympathisers,³⁸ and the murder of *Umdahs* by GoS Forces and Militia/*Janjaweed*.³⁹ The witness also describes [REDACTED].⁴⁰ [REDACTED].⁴¹

26. P-0606's account is relevant, *inter alia*, to establish (i) that Mr Abd-Al-Rahman is Ali Kushayb and (ii) Mr Abd-Al-Rahman's individual criminal responsibility, as it provides evidence that (a) [REDACTED], Al-Dayf Samih introduced himself as Mr Abd-Al-Rahman's deputy,⁴² and (b) the training of new Militia/*Janjaweed* recruits depended on Mr Abd-Al-Rahman's needs.⁴³

27. P-0606's associated material consists of: (i) one authorisation given by P-0606 to the Office of the Prosecutor to obtain [REDACTED];⁴⁴ (ii) maps of the villages of Magan⁴⁵ and Umm Dukhum⁴⁶ drawn by P-0606; (iii) a [REDACTED];⁴⁷ (iv) [REDACTED];⁴⁸ (v) [REDACTED];⁴⁹ (vi) [REDACTED];⁵⁰ (vii) certificates of participation of P-0606 in the work of an [REDACTED];⁵¹ and (viii) a photograph showing the scars that resulted from the P-0606's [REDACTED].⁵²

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

The Prosecution requests one hour for its limited supplementary examination of P-0606

28. The Prosecution seeks one hour to conduct a streamlined supplementary examination of P-0606, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court, on topics including: (i) the deliberate failure to investigate and prosecute crimes committed by Militia/*Janjaweed*; (ii) the murder of *Umdahs* and Fur males during the charged period; (iii) Mr Abd-Al-Rahman's position of authority; and (iv) the identity of Mr Abd-Al-Rahman.

29. If his prior recorded testimony is not introduced under rule 68(3), the Prosecution estimates it would require four hours for the direct examination of P-0606. The introduction of P-0606's prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by three hours.

B. *The Prior Recorded Testimonies of the Three Witnesses are cumulative to and corroborative of evidence to be provided by viva voce witnesses*

30. The Prior Recorded Testimonies of the Three Witnesses on the charged crimes are cumulative in nature and are corroborative of the evidence provided by other Prosecution witnesses,⁵³ as described in the following paragraphs.

31. The Prior Recorded Testimonies of the Three Witnesses on the contextual elements of crimes against humanity are cumulative in nature and corroborative of the evidence⁵⁴ that will be provided by *viva voce* witnesses, in particular, [REDACTED].⁵⁵

32. P-0020's testimony on the contextual elements of war crimes is cumulative to, and corroborative of, the evidence that will be provided by *viva voce* witnesses, in particular, [REDACTED].⁵⁶

33. P-0601's and P-0606's evidence on persecution will also be elicited, *inter alia*, by *viva voce* witnesses, in particular [REDACTED].⁵⁷

⁵³ See Bemba Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

⁵⁴ *Ibid.*

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

34. P-0601's evidence on the charged attack in Bindisi and surrounding areas and the crime of destruction of property will also be elicited, *inter alia*, by *viva voce* witnesses, including [REDACTED].⁵⁸

35. P-0020's evidence on biographical facts related to Mr Abd-Al-Rahman and the associated nickname "Ali Kushayb" is cumulative to, and corroborative of, the evidence that will be provided by *viva voce* witnesses, including [REDACTED].⁵⁹ Moreover, these assertions are also supported by at least two biographical facts related to the Accused and agreed on by the Defence and the Prosecution, i.e. that he was a member of the Sudanese Armed Forces until early to middle 1990s, and upon retirement from the Sudanese Armed Forces lived in Garsila.
60

36. P-0601's and P-0606's evidence on Mr Abd-Al-Rahman's position of authority establishing that he is Ali Kushayb is also cumulative to, and corroborative of, evidence to the provided by *viva voce* witnesses, in particular [REDACTED].⁶¹

37. P-0601's and P-0606's evidence on Mr Abd-Al-Rahman's individual criminal responsibility will also be elicited, *inter alia*, by *viva voce* witnesses, in particular [REDACTED].⁶²

38. In addition to the agreed facts relating to the background of Mr Abd-Al-Rahman, P-0601 and P-0606 provide evidence that he was a leader of the Militia/*Janjaweed*.⁶³ This evidence is corroborative of and cumulative to the evidence to be provided by *viva voce* witnesses,⁶⁴ who the Defence will be able to fully examine. Moreover, rule 68(3) of the Rules does not preclude the admission of evidence which goes to the acts and conduct of the Accused.⁶⁵

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ *Abd-Al-Rahman* Agreed Facts 10 and 15, Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, [ICC-02/05-01/20-504-AnxA](#).

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ *Gbagbo and Blé Goudé* Rule 68 Appeals Decision, [ICC-02/11-01/15-744](#), para. 69.

C. *The Prior Recorded Testimonies of the Three Witnesses are relevant, reliable and probative to the case*

39. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(3) of the Rules are relevant, reliable and probative.⁶⁶ In addition to being mainly corroborative in nature and internally consistent, the Prior Recorded Testimonies of all Three Witnesses bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.⁶⁷ All Three Witnesses have signed their statements, attesting to the fact that they were given voluntarily and are true to their best knowledge and recollection of the events.⁶⁸ The Prior Recorded Testimonies also bear the interpreters' signature and certification that the interviews were orally translated into a language that the witnesses speak and understand.⁶⁹

D. *The introduction of the Prior Recorded Testimonies of the Three Witnesses is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman*

40. The introduction of the Prior Recorded Testimonies of the Three Witnesses into evidence would not be prejudicial to or inconsistent with the rights of the Accused since, pursuant to rule 68(3), the Three Witnesses will appear before the Trial Chamber, their evidence will only be introduced upon their consent, and the Parties, the Common Legal Representative of Victims and the Chamber will have an opportunity to examine them during the proceedings.

41. The Defence has been consulted on the Prosecution's Application for the admission into evidence of the Prior Recorded Testimonies of the Three Witnesses, pursuant to rule 68(3), but opposed it.⁷⁰ This, however, does not militate against the admission into evidence of Prior Recorded Testimonies, nor indicates that this would be prejudicial to, or inconsistent with, the rights of the Accused.⁷¹

⁶⁶ See paras. 7, 10-12, 17-19 and 24-26 above.

⁶⁷ *Ntaganda* Rule 68(3) Preliminary Ruling, [ICC-01/04-02/06-1640-Red](#), para. 9.

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ See Email from the Defence, [REDACTED].

⁷¹ *Ongwen* Rule 68(2)(b) Decision on Defence Witnesses, [ICC-02/04-01/15-1322-Red](#), paras. 6-7, 9-10.

IV. CONCLUSION

42. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application subject to the fulfilment of the further conditions of rule 68(3) of the Rules.



Karim A. A. Khan QC
Prosecutor

Dated this 7th day of February 2022

At The Hague, The Netherlands