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

Date: **18 March 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 eighth application under rule 68(3) to
introduce into evidence prior recorded testimony of witnesses P-0092, P-0591, P-
0714, P-0935, and P-0955, ICC-02/05-01/20-627-Conf”
(17 March 2022, ICC-02/05-01/20-633-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:

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1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) responds to the Prosecution’s eighth application under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) (“Eighth Application”).¹ The Eighth Application is seeking the admission of the evidence of witnesses P-0092, P-0591, P-0714, P-0935, and P-0955 pursuant to Rule 68(3) of the Rules *in lieu* of their *viva voce* examination-in-chief and requests the Chamber to grant one hour for a supplementary *viva voce* questioning of each witness.²

2. The Defence submits that it is essential that Witnesses P-0092, P-0591, P-0935, and P-0955 (“Four 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 the Five Witnesses independently recall.

3. The Defence does not oppose the admission of the evidence of Witness P-0714 pursuant to Rule 68(3) of the Rules.

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

The Eighth Response

5. Before turning to an analysis of the Eighth Application with respect to each of the Four Witnesses individually, the Defence adopts by reference its earlier submissions, common to all proposed Rule 68 witnesses.³

6. As previously mentioned,⁴ the Defence notes the Trial Chamber’s rejection of its overarching objections in its confidential Decision on the Prosecution’s fourth and fifth requests to introduce prior recorded testimonies under Rule 68(3), dated 21

¹ ICC-02/05-01/20-627-Conf and its public redacted version [ICC-02/05-01/20-627-Red](#).

² ICC-02/05-01/20-627-Conf and its public redacted version [ICC-02/05-01/20-627-Red](#), paras 1, 3, 14, 20, 25, 30, 35, and 47.

³ ICC-02/05-01/20-T-022-CONF-ENG, p. 11, lines 21-25 to p. 21, line 15 (public redacted version not yet available). [ICC-02/05-01/20-576-Red](#), paras 7-11.

⁴ ICC-02/05-01/20-621-Conf and its public redacted version [ICC-02/05-01/20-621-Red](#).

February 2022 (“Decision”).⁵ In this regard and absent a decision on the Prosecution’s Seventh Request, the Defence adopts by reference its additional submissions on the impact of uncontrolled questioning and interference on witness’ accounts caused by third parties on the reliability of prior evidence of witnesses, set out in its Response to the Prosecution’s seventh application under Rule 68(3), dated 8 March 2022. In these submissions, the Defence respectfully requested the Chamber to apply the principle of precaution – particularly warranted in the case of vulnerable witnesses such as [REDACTED] – when considering the Rule 68(3) applications and requested that the concerned witnesses give their evidence-in-chief *viva voce*.⁶

7. 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*”, citing its earlier decision of 8 February 2022⁸. As previously stated⁹, the Defence acknowledges this finding but urges the Trial Chamber, as it has done in its past decisions on previous 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)¹⁰ 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), and five witnesses (P-0027, P-

⁵ [ICC-02/05-01/20-602-Red](#), paras 13-15.

⁶ ICC-02/05-01/20-621-Conf and its public redacted version ICC-02/05-01/20-621-Red, par. 7-18.

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

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

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

¹⁰ *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.

0585, P-0894, P-0895, and P-0926) respectively, *viva voce* on the ground that they provided “unique” evidence and, for P-0843, P-0954, P-0027, due to their alleged particularly close interaction with “*Ali Kushayb*”.¹¹ This uniqueness criterion applies to the Four Witnesses.

P-0092

8. The Defence requests P-0092 to be called to testify *viva voce* for the following reasons. The nature and content of P-0092’s prior witness statement and associated items, identified in Annex A(A1) of the Request, relates in most relevant part to the identity, background, alleged position of a man understood by the witness to be “*Ali Kosheib*” and his alleged role in the charged Bindisi crimes¹², uncharged Sindu crimes – albeit based on anonymous hearsay¹³, charged Deleig crimes¹⁴, and uncharged crimes in Arawalla¹⁵.

9. The witness purports to provide information on “*Ali Kosheib*”’s tribal affiliation, physical appearance, and background.¹⁶ In particular, he describes him, without specifying its basis of knowledge, as an “*Agid Al-Kheil* of the Fursan nominated by all the tribes in Garsila”, as a *Bashmarga* commander/*agid* and recalls hearing “*Ali Kosheib*” introducing himself as “*Agid Ougada* of the Fursan”.¹⁷ The witness further describes “*Ali Kosheib*”’s alleged relation with Ja’far Abd-Al-Hakam and with the Government of Sudan, in particular with regard to the procurement of weapons and role in the distribution of weapons to his men.¹⁸ The witness further recalls seeing the man understood by him to be “*Ali Kosheib*” in various areas of Garsila, including in the military compound.¹⁹ P-0092 claims that “*Ali Kosheib*” was amongst the men who [REDACTED], [REDACTED], [REDACTED], [REDACTED].²⁰

¹¹ [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.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

P-0092's evidence is unique in so far it describes the presence of "Ali Kosheib" at a meeting purported to focus on reconciliation which took place in Amar in 2003 after the attack on Bindisi, in the presence of *umdah* and *sheikhs*.²¹ The witness claims to have heard "Ali Kosheib" addressing his men, identified as *Bashmarga*, and telling them *inter alia* [REDACTED]²². The Defence notes that the Prosecution identified *inter alia* the following issues as topics of relevance for a supplementary examination: "Ali Kushayb"'s physical description and position as a leader of the militia/Janjaweed, his role in relation to the witness' arrest, detention, torture, interrogation in Garsila and transfer to Deleig and his involvement in the distribution of weapons to militia/Janjaweed and collaboration with the Government of Sudan.²³ The wealth of details provided by Witness P-0092 in support of the alleged identification of Mr Abd-Al-Rahman as "Ali Kushayb" and his alleged presence and speech at the Amar meeting and Witness P-0092's [REDACTED]²⁴ together fulfil the uniqueness criterion applied by the Chamber. Witness P-0092 should thus be called to testify *viva voce* under that criterion.

P-0591

10. The Defence requests P-0591 to be called to testify *viva voce* for the following reasons. The nature and content of P-0591's statement and associated items, identified in Annex A(A2) of the Request, relates *inter alia* to the identity and background of "Ali Kushayb" and his role in the alleged Deleig charges²⁵ and in uncharged crimes in the Deleig area in August 2004.²⁶

11. The witness describes that the man understood by him to be "Ali Kushayb" was also known as [REDACTED].²⁷ P-0591's evidence is unique in so far as the witness claims to have seen "Ali Kushayb" addressing a crowd of Janjaweed and

²¹ [REDACTED].

²² [REDACTED].

²³ Eighth Application, par. 92.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

Janjaweed leaders in Waro on 27 May 2003, in presence of the military police.²⁸ According to the witness, “*Ali Kushayb*” told the crowd he was “in charge”, accused all inhabitants to be rebels, and told the Janjaweed: “I want you to own these villages”.²⁹ The witness claims that “*Ali Kushayb*” further told the Janjaweed that he could provide them with what they needed, that if someone resisted they could kill him, and that they could let their cattle graze in the farms of the Fur inhabitants.³⁰ The witness claims that the Arab took possession of the inhabitants’ animals and took over their farms following “*Ali Kushayb*”’s visit.³¹ The witness purports to describe the man understood by him to be “*Ali Kushayb*” as being in charge of the Janjaweed and the PDF in Deleig around March 2004.³² The witness claims to have seen “*Ali Kushayb*” beat detainees, including one with the back of an axe, near the Deleig police station.³³ He further purports to describe seeing the detainees being loaded onto vehicles by PDF soldiers in the presence of “*Ali Kushayb*” and driven away.³⁴ “*Ali Kushayb*” is said to have remained at the police station “during the whole operation” with PDF/Janjaweed soldiers.³⁵ “*Ali Kushayb*”’s identity and background and his presence and role during the Deleig incident in March 2004 have been identified by the Prosecution as two issues of relevance for a supplementary examination of the witness.³⁶ The wealth of details provided by Witness P-0591 in support of the alleged identification of Mr Abd-Al-Rahman as “*Ali Kushayb*” and his alleged presence on 27 May 2003 in Waro fulfils the uniqueness criterion applied by the Chamber. Witness P-0591 should thus be called to testify *viva voce* under that criterion.

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ Eighth Application par. 20.

P-0935

12. The Defence requests P-0935 to be called to testify *viva voce* for the following reasons. The nature and content of P-0935's prior statement and associated items, identified in Annex A(A4), relates in most relevant parts to the identity and background of a man known to the witness under the name Ali Mohamad Ali Abdulrahman and "*Ali Kushayb*"³⁷, his role in the alleged Deleig charges³⁸, his role in the uncharged Sindu attack³⁹, his role in uncharged attacks and participation in uncharged killings⁴⁰, as well as his role in uncharged attacks against rebel bases around Garsila.⁴¹

13. The witness purports to describe "*Ali Kushayb*" as a retired soldier who opened a pharmacy in Garsila and claims to have known him since 2001-2002.⁴² He added that "*Ali Kushayb*" [REDACTED].⁴³ The witness further describes "*Ali Kushayb*" as the government-appointed leader of the Janjaweed" and refers to him [REDACTED].⁴⁴ He claims, without specifying its basis of knowledge, that "*Ali Kushayb*" had "direct access to the government in Khartoum", and in particular to Minister Hussein and [REDACTED].⁴⁵ The witness also claims to have seen "*Ali Kushayb*" collecting boxes of weapons from the Garsila base, being present at the base while Janjaweed were collecting weapons, and heard from soldiers that he also collected land cruisers.⁴⁶ [REDACTED].⁴⁷ [REDACTED].⁴⁸ The Defence finally notes that the witness' evidence on the identity and background of the man known to him as "*Ali Kushayb*", his role in the arrest and detention of Fur males at the Garsila SAF base, and transfer to Deleig have been identified by the Prosecution as issues of relevance for a limited supplementary examination.⁴⁹ The wealth of details provided

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 Eight Application, par. 30.

by Witness P-0935 in support of the alleged identification of Mr Abd-Al-Rahman as “*Ali Kushayb*” and his alleged “almightiness” over Janjaweed militias fulfils the uniqueness criterion applied by the Chamber. Witness P-0935 should thus be called to testify *viva voce*.

P-0955

14. The Defence requests P-0955 to be called to testify *viva voce* for the following reasons. The nature and content of the prior statement of P-0955 and associated items, identified in Annex A(A5), relates in most relevant parts to the physical description and background⁵⁰, position of authority⁵¹, role in the alleged Deleig charges⁵², and role in events occurring during an uncharged house search in Garsila on 8 March 2004⁵³ of the man known to the witness as “*Ali Kushayb*”.

15. The witness claims he heard about the identity of the man known to him as “*Ali Kushayb*” [REDACTED], who knew him from the Gaba market where he would sell animal medicines, as well as [REDACTED].⁵⁴ According to the witness, “*Ali Kushayb*” had a pharmacy near Garsila market and he saw him there on several occasions between 2004 and 2010.⁵⁵ The witness provides details about the physical appearance of “*Ali Kushayb*” based on his encounter with him in Deleig⁵⁶ and [REDACTED].⁵⁷ The witness purports to describe “*Ali Kushayb*”, based on hearsay, as “leader of the Janjaweed”.⁵⁸ On 5 March 2004, the witness claims that he saw the man known to him as “*Ali Kushayb*” entering the house where [REDACTED].⁵⁹ The Defence notes that “*Ali Kushayb*”’s presence and role during the Deleig incident is one of the issues identified by the Prosecution for a limited supplementary examination of the witness.⁶⁰ The wealth of details provided by Witness P-0955 in

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

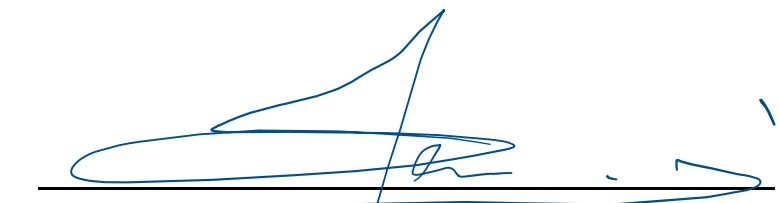
⁵⁹ [REDACTED].

⁶⁰ Eighth Application, par. 35.

support of the alleged identification of Mr Abd-Al-Rahman as “*Ali Kushayb*” and his direct implication into home searches in Garsila – though uncharged - fulfils the uniqueness criterion applied by the Chamber. Witness P-0955 should thus be called to testify *viva voce*.

THEREFORE, THE DEFENCE HEREBY REQUESTS THAT THE CHAMBER DISMISS the Eighth Application with regard to the admission of the prior recorded testimony of Witnesses P-0092, P-0591, P-0935, and P-0955.

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



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

Dated this 18th day of March 2022 at The Hague, The Netherlands