

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 11 July 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 twelfth application under rule 68(3) to
introduce into evidence prior recorded testimony of witnesses P-0028, P-0913, and
P-0932, ICC-02/05-01/20-706-Conf”, 4 July 2022, ICC-02/05-01/20-709-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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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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 twelfth application under Rule 68(3) of the Rules of Procedure and Evidence (respectively, "Twelfth Application" and "Rules").¹ Through the Twelfth Application, the Prosecution seeks the introduction into evidence of the statements and associated material ("prior recorded testimonies") of witnesses P-0028, P-0913, and P-0932 ("Three Witnesses") *in lieu* of their *viva voce* examination-in-chief, and requests the Chamber to grant one hour for a limited supplementary of each of the Three Witnesses.²
2. The Defence submits that it is essential that all Three Witnesses testify *viva voce*.
3. Pursuant to Regulation 23bis(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

4. While taking note of the Trial Chamber ("Chamber")'s finding on the applicability of the uniqueness criterion in its assessment of applications pertaining to the introduction into evidence of prior recorded testimonies of witnesses pursuant to Rule 68(3) of the Rules and mindful that its use falls within the realm of the Chamber's discretionary power, the Defence respectfully submits that the application of the criterion is of utmost relevance when assessing the admissibility of evidence pertaining to the hotly contested issue that is the identification of Mr. Abd-Al-Rahman as "Ali Kushayb".³ This is even more so the case with respect to Witness P-0913.
5. First and with regard to Witness P-0028, the Defence notes that the Prosecution justifies the introduction into evidence of his prior recorded testimony on the ground it pertains *inter alia* to crimes committed during the attack on Mukjar and surrounding areas in August 2003 by Militia/Janjaweed, allegedly led by Mr.

¹ ICC-02/05-01/20-706-Conf and its public redacted version [ICC-02/05-01/20-706-Red](#).

² ICC-02/05-01/20-706-Conf and its public redacted version [ICC-02/05-01/20-706-Red](#), paras 15, 25, 34.

³ [ICC-02/05-01/20-699-Red](#), par. 24.

Abd-Al-Rahman, and on the alleged direct involvement of the latter in some of the crimes.⁴ The Defence submits that evidence purporting to pertain to “Ali Kushayb⁵”’s role in uncharged events falls outside the scope of the charges and cannot serve as a foundation for the admission into evidence of P-0028’s prior recorded testimony.

6. Second and with regard to Witness P-0913, the defence submits that this witness gives testimony and produces associated exhibits that are both highly prejudicial and highly contested. Witness P-0913 is [REDACTED] and [REDACTED]. He is uniquely placed to testify about [REDACTED]. He is notably a key witness who purports to testify about the person he identifies as “*Ali Kushayb*” [REDACTED]. Even if not strictly speaking unique, this is highly prejudicial material in reference to which the Prosecution is put to strict proof. P-0913 evidence directly implicates *Ali Kushayb* (Mr Abd-Al-Rahman, if the Prosecution’s submissions are to be believed) in some of the most serious incidents of which the Accused is charged, and more particularly in the treatment and execution of detainees in Mukjar in March 2004 [REDACTED] and in the attack against Kodoom and Bindisi and related alleged crimes [REDACTED]. The witness is not a peripheral or minor player in the case against Mr Abd-Al-Rahman. His evidence is not merely “cumulative and corroborative”. He is a central, key witness, whose evidence is hotly contested. It is respectfully submitted that, just as it would be unconscionable for such an important witness to testify under analogous circumstances in a domestic trial for murder and torture, so would it be unconscionable for his testimony to be introduced pursuant to Rule 68(3) before this Court.

7. Finally and with respect to all Three Witnesses, the Defence submits that their evidence should be heard *viva voce* as their evidence and announced *viva voce* appearance previously gave grounds to the Prosecution and the Chamber to justify the admission into evidence of the evidence of other witnesses pursuant to Rule 68(3) of the Rules. In this regard, the Defence incorporates by reference its

⁴ ICC-02/05-01/20-706-Conf and its public redacted version [ICC-02/05-01/20-706-Red](#), par. 10.

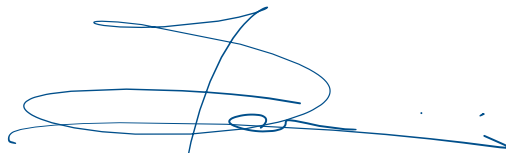
⁵ As mentioned in [REDACTED].

submissions on the reliance by the Prosecution and the Chamber of witnesses on the list expected to testify *viva voce* ("Viva Voce Pool") to justify the introduction into evidence pursuant to Rule 68(3) of the Rules of witnesses whose evidence is deemed and found to be "cumulative to and corroborative of" those witnesses from the *Viva Voce Pool*.⁶ By way of examples, the Three Witnesses were cited by the Chamber as being in the *Viva Voce Pool* to justify the introduction into evidence pursuant to Rule 68(3) of the Rules of the cumulative and corroborative testimony the following seventeen witnesses: P-0117, P-0675, P-0720, P-0892, P-0955, P-0015, P-0918, P-0119, P-0060, P-0697, P-0106, P-0850, P-0736, P-0726, P-0606, P-0917, and P-0991.⁷ The Defence recalls that it expressed, in its submissions dated 27 June 2022, deep concerns about the impact of constant changes in the mode of introduction of evidence on the legality of the decisions of admission pursuant to Rule 68(3) of the Rules and more generally on the rights of Mr Ali Muhammad Ali Abd-Al-Rahman to a fair trial.⁸

Commented [GV1]: This is a ref to the email No PUB RED. Does not seem harmful to leave it ? However we mentioned in the email that it was "submitted" confidential

FOR THE FOREGOING REASONS, THE DEFENCE REQUESTS THAT THE CHAMBER DISMISS the Twelfth Application with regard to the admission of the prior recorded testimony of Witnesses P-0028, P-0913, P-0932.

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



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

Dated this 11th day of July 2022 at The Hague, The Netherlands

⁶ [REDACTED].

⁷ [REDACTED]

⁸ [REDACTED].