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No.: **ICC-02/05-01/20**
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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 second application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0118 and P-0290” 28 January 2022

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I. INTRODUCTION

1. Pursuant to article 69(2) and (4) of the Rome Statute (“Statute”) and rule 68(2)(b) of the Rules of Evidence and Procedure (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”): (i) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)¹ of P-0118 and P-0290 (“Two Witnesses”); (ii) designate the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations required pursuant to rule 68(2)(b)(ii); and (iii) authorise remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic² (“Application”).³

2. Granting the Application will enhance the expeditiousness of the proceedings, obviate the unnecessary appearance of witnesses, save valuable court time and resources, and serve the interests of justice.⁴

3. As submitted, the Prior Recorded Testimonies of the Two Witnesses do not concern the acts and conduct of the accused and relate primarily to the contextual

¹ Annex A (A1 to A2) lists the prior recorded testimonies of the Two 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 *Abd-Al- Rahman (“Ali Kushayb”)*, Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 47 (“Directions on the Conduct of Proceedings”).

² *Al Hassan*, Public redacted version of the Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, TC X, 29 October 2020, [ICC-01/12-01/18-1111-Red](#), para. 18 (“*Al Hassan*, rule 68(2)(b) decision”).

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

⁴ Pursuant to 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*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”, AC, 15 July 2010, [ICC-01/04-01/07-2259 OA10](#), 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*, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, TC VI, 29 October 2015, [ICC-01/04-02/06-961](#), para. 13; *Gbagbo & Blé Goudé*, Decision on Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), TC I, 9 June 2016, [ICC-02/11-01/15-573](#), paras. 25, 42.

elements of war crimes and crimes against humanity, as confirmed by Pre-Trial Chamber II.⁵

4. As set out below, the Prior Recorded Testimonies of the Two Witnesses are relevant, reliable and probative. The introduction into evidence of these testimonies is not prejudicial to or inconsistent with the rights of the accused, are of a cumulative or corroborative nature, and are limited to evidence of issues that are not materially in dispute.

II. CLASSIFICATION

5. Pursuant to regulation 23bis(1) of the Regulations of the Court, this Application and its Annex A are filed as confidential, since they contain confidential information that identifies the Two 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(2)(b) of the Rules, as set out at paragraphs 6 to 8 of the first application under rule 68(2)(b).⁶

A. Overview of the Prior Recorded Testimonies of P-0118 and P-0290

7. The Prior Recorded Testimonies of the Two Witnesses relate primarily to the contextual elements of war crimes and crimes against humanity.⁷

8. In addition to the testimonies of the Two Witnesses, the Prosecution seeks to introduce into evidence the associated material for each of the Two Witnesses,⁸ which

⁵ Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), paras. 61-67.

⁶ Prosecution's first application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0013, P-0034, P-0043, and P-0065, 26 January 2022, [ICC-02/05-01/20-565-Conf](#), paras. 6-8.

⁷ [REDACTED].

⁸ See Annex A (Part II of A1 to A2). Where applicable, the Prosecution includes in the Annex, the English translations of items referred to in the Associated Material.

forms an integral part of their Prior Recorded Testimonies.⁹ These items are also necessary to fully comprehend the accounts of the Two Witnesses, because they are discussed and/or clarified in their testimonies.¹⁰ The introduction of this material is supported by Trial Chamber VI's finding that "exhibits associated with these recordings are also admissible so long as 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."¹¹

(i) *Prior Recorded Testimony of P-0118*

9. The Prosecution seeks to submit into evidence P-0118's prior recorded testimony, inclusive of the associated material listed in Annex A (A1) to this Application. P-0118's prior recorded testimony comprises a single witness statement and 13 associated items that were used and explained by the witness in his statement, and relate to information and events discussed therein.

10. P-0118, [REDACTED] former officer in the Sudanese Armed Forces ("SAF"), provides testimony on the contextual elements of war crimes, including the integration of Militia/*Janjaweed* into the forces from the government of Sudan ("GoS Forces")^{12,13} the attack on the airport of Al Fasher in April 2003 conducted by the

⁹ See *Yekatom & Ngaissona*, Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-1577 and P-0287, and the Ngaissona Defence Motion to Limit the Scope, TC V, 1 April 2021, [ICC-01/14-01/18-907-Red](#), para. 26.

¹⁰ *Ruto & Sang*, Public Redact Version of Corrigendum: Decision on the Admission of Prior Recorded Testimony, TC V(a), 19 August 2015, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33. See also *Ntaganda*, Transcript of 20 June 2016, [ICC-01/04-02/06-T-105-Red-ENG ET](#), p. 94, l. 2-7; *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, TC VI, 11 March 2016, [ICC-01/04-02/06-1205](#), para. 7; *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0022, P-0041 and P-0103, TC VI, 20 November 2015, [ICC-01/04-02/06-1029](#), paras. 23, 35.

¹¹ *Ruto & Sang*, Decision on the Admission of Prior Recorded Testimony, TC V(a), 19 August 2015, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33. See also *Ntaganda*, Transcript of 20 June 2016, [ICC-01/04-02/06-T-105-Red-ENG ET](#), p. 94, l. 2-7; *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, TC VI, 11 March 2016, [ICC-01/04-02/06-1205](#), para. 7; *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0022, P-0041 and P-0103, TC VI, 20 November 2015, [ICC-01/04-02/06-1029](#), paras. 23, 35.

¹² [REDACTED].

¹³ [REDACTED].

Sudan Liberation Movement/Army (“SLM/A”);¹⁴ and the GoS attacks on rebel bases, including with the support of the Sudanese Air Force.¹⁵ P-0118’s testimony is also relevant to the contextual elements of crimes against humanity, including in relation to the supply of vehicles,¹⁶ and funding of Militia/*Janjaweed* either directly by the GoS¹⁷ or by means of looting, with the knowledge of the GoS.¹⁸

11. P-0118’s associated material consists of: (i) notes concerning [REDACTED];¹⁹ (ii) an organisational diagram depicting the chain of command of the GoS decision making process for Darfur operations between 2002 and 2005;²⁰ (iii) an organisational diagram of the Sudanese military structure in the period 2002-2005;²¹ (iv) an organisational diagram of the [REDACTED];²² (v) an organisational diagram concerning the [REDACTED];²³ (vi) an organisational diagram of the structure of the [REDACTED];²⁴ (vii) an organisational diagram depicting the structure of the chain of command of the [REDACTED];²⁵ (viii) notes delineating the SAF classification system;²⁶ (ix) notes delineating the format of SAF correspondence;²⁷ (x) notes delineating the format of SAF messages;²⁸ (xi) notes depicting a typical military identification card;²⁹ (xii) a sketch of the National Security motif;³⁰ and (xiii) an Acknowledgment consisting of the waiver of rights pursuant to article 55(2) of the Rome Statute.³¹

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

The Prosecution will not rely on information contained in P-0118's prior recorded testimony which goes to proof of acts and conduct of the accused

12. P-0118 provides in a single reference hearsay evidence that Mr Abd-Al-Rahman was one of the leading Militia/*Janjaweed* leaders.³² The Prosecution does not seek to introduce this portion of P-0118's Prior Recorded Testimonies (i.e. paragraph 198 of P-0118 statement) into evidence. With the exclusion of this portion, the reminder of P-0118's Prior Recorder Testimonies go to proof of matters other than the acts and conduct of the accused as required by rule 68(2)(b) of the Rules.

(ii) *Prior Recorded Testimony of P-0290*

13. The Prosecution seeks to submit into evidence P-0290's prior recorded testimony, inclusive of the associated material listed in Annex A (A2) to this Application. P-0290's prior recorded testimony comprises ten transcripts and eight associated items that were used and explained by the witness in his transcripts and relate to information and events discussed therein.

14. P-0290, a former [REDACTED] in the SAF, provides testimony on the contextual elements of war crimes, including the existence of a non-international armed conflict ("NIAC") and the structure and composition of the GoS Forces.³³ P-0290's testimony is also relevant to the contextual elements of crimes against humanity, including in relation to the funding,³⁴ recruitment,³⁵ and legitimisation of the Militia/*Janjaweed* by the GoS, demonstrated by the issuance of GoS identification cards and supply of uniforms to members of the Militia/*Janjaweed*.³⁶

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED]

³⁵ [REDACTED].

³⁶ [REDACTED].

15. P-0290's associated material consists of: (i) a list of members recruited into the [REDACTED];³⁷ (ii) a book containing the Sudanese law governing the SAF;³⁸ (iii) an agreement on a statement of limited use pursuant to article 54(3)(d) of the Rome Statute signed by P-0290;³⁹ (iv) an e-mail relating to the deployment of 65 officers of [REDACTED] in Darfur;⁴⁰ (v) a letter relating to the [REDACTED];⁴¹ and (vi) three documents constituting the [REDACTED].⁴²

B. The Prior Recorded Testimonies are admissible under rule 68(2)(b)

16. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(2)(b) of the Rules, are relevant, reliable and probative.⁴³

17. The Two Witnesses have given their testimonies voluntarily and acknowledged that they record their best recollections of events.⁴⁴ As both witnesses were interviewed pursuant to article 55(2) of the Rome Statute, they were properly informed of their rights.⁴⁵ The Prior Recorded Testimonies were also collected with the assistance of interpreters, and each witness confirmed they heard and understood the translation.⁴⁶ The Prior Recorded Testimonies of the Two Witnesses are internally consistent.⁴⁷ Accordingly, the Prior Recorded Testimonies have the necessary indicia of reliability, for introduction into evidence.

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ *Gbagbo & Blé Goudé*, Public Redacted version of 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", TC I, 6 June 2017, [ICC-02/11-01/15-950-Red](#), para. 22.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ *Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 58(2)(b), TC VI, 18 January 2017, [ICC-01/04-02/06-1730-Red](#), para. 13; *Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, TC IX, 18 November 2016, [ICC-02/04-01/15-596-Red](#),

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

18. The Prior Recorded Testimonies of the Two Witnesses on the contextual elements of war crimes and crimes against humanity are cumulative in nature and corroborative of the evidence,⁴⁸ as described in the following paragraphs.

19. P-0118's and P-0290's evidence on the contextual elements of war crimes is corroborative of, and cumulative to, the evidence to be provided by, in particular, witnesses [REDACTED],⁴⁹ [REDACTED],⁵⁰ [REDACTED],⁵¹ [REDACTED],⁵² [REDACTED],⁵³ [REDACTED],⁵⁴ [REDACTED],⁵⁵ [REDACTED],⁵⁶ [REDACTED],⁵⁷ [REDACTED],⁵⁸ and [REDACTED].⁵⁹

20. P-0118's and P-0290's evidence on the contextual elements of crimes against humanity is corroborative of, and cumulative to, the evidence to be provided by, in particular, witnesses [REDACTED],⁶⁰ [REDACTED],⁶¹ [REDACTED],⁶² [REDACTED],⁶³ [REDACTED],⁶⁴ [REDACTED],⁶⁵ [REDACTED],⁶⁶ [REDACTED],⁶⁷

paras. 17-19 ("Ongwen, rule 68(2)(b) decision"); *Gbagbo & Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", Appeals, 1 November 2016, [ICC-02/11-01/15-744 OA 8](#), para. 3.

⁴⁸ See *Bemba*, Judgment on the appeals of Mr Jeanne Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", AC, 3 May 2011, [ICC-01/05-01/05 1386 OA 5 OA 6](#), para. 78.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

[REDACTED],⁶⁸ [REDACTED],⁶⁹ [REDACTED],⁷⁰ [REDACTED],⁷¹ and [REDACTED].⁷²

D. The introduction of the Prior Recorded Testimonies of the Two Witnesses is not prejudicial to or inconsistent with the rights of the accused

21. The Defence was consulted on the Prosecution's application for the admission into evidence of the Prior Recorded Testimonies of the Two Witnesses, pursuant to rule 68(2)(b), but opposed it.⁷³

22. Nonetheless, the introduction of the Prior Recorded Testimonies of the Two Witnesses into evidence would not be prejudicial to or inconsistent with the rights of the accused, given the limited nature of the testimony of each witness relating to the contextual elements of war crimes and crimes against humanity, which are issues not materially in dispute⁷⁴ between the parties, as is evident from the facts agreed upon by the Parties.⁷⁵ Furthermore, the Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the Prior Recorded Testimonies of these witnesses, lead contradictory evidence during the Defence case, or - to the extent that discrepancies exist with any other evidence - advance arguments on the weight to be attributed to the Prior Recorded Testimonies.

E. Request to designate the Legal Counsel of the Registry or any appropriate person delegated by him to witness the declarations required under rule 68(2)(b)(ii) and to authorise remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ See Emails from the Defence, "RE: Provisional list of Rule 68 witnesses", on 20 January 2022, 10:24 and 26 January 2022, 7:08.

⁷⁴ *Ongwen*, rule 68(2)(b) decision, para. 15; *Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", AC, 3 May 2011, [ICC-01/05-01/08-1386 OA 5 OA 6](#), para. 78.

⁷⁵ Agreed Facts 1-6 and 11, Annex A to First Joint Submission on Agreed Facts, [ICC-02/05-01/20-291-Anx A](#).

23. Prior recorded testimony may only be introduced under rule 68(2)(b) if the testifying person declares that it is true and correct through the formalities specified in sub-rules (ii) and (iii). In order to satisfy these requirements, the Prosecution requests that the Chamber designate Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations required pursuant to rule 68(2)(b)(ii) and (iii) for the purpose of this case, and authorise remote certifications due to the current challenges imposed by the ongoing COVID-19 pandemic.⁷⁶

IV. CONCLUSION

24. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application subject to the fulfilment of the further conditions of rule 68(2)(b) of the Rules.



Karim A.A. Khan QC
Prosecutor

Dated this 31st day of January 2022

At The Hague, The Netherlands

⁷⁶ *Al Hassan*, [rule 68\(2\)\(b\) decision](#), para. 18.