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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 fourth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991” 26 January 2022

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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 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 witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991 (“Six Witnesses”); and (ii) grant the time requested in the paragraphs below for *viva voce* questioning of each witness (“Application”).²

2. Granting the Application will enhance the expeditiousness of the proceedings by reducing the length of the Six Witnesses’ in-court testimony from 22 hours to 6, thus saving approximately 16 hours of court time.³

3. As set out below, the Prior Recorded Testimonies of the Six Witnesses are relevant, reliable and probative. The Prior Recorded Testimonies of the Six Witnesses relate primarily to the contextual elements of both war crimes and crimes against humanity,⁴ persecution,⁵ as well as charged crimes in Koodom, Bindisi and surrounding areas on or about 15 and 16 August 2003,⁶ such as murder (Counts 2-3), destruction of property (Count 5) and forcible displacement of civilians (Count 10).⁷

4. Should the Chamber grant the request to conduct a limited supplementary *viva voce* examination, the Prosecution would elicit further focused evidence on certain

¹ Annex A (A1 to A6) lists the prior recorded testimonies of the Six Witnesses which consist of their witness statements (at I) and associated material (at II). The material related to each witness’s prior recorded testimony which the Prosecution does not seek to introduce into evidence is included (at III). Hyperlinks to this material are also included. See Conduct of Proceedings Directions, [ICC-02/05-01/20-478](#), para. 47.

² This Application is submitted in accordance with the [Conduct of Proceedings Directions](#), paras. 46-48.

³ Under article 64(3)(a) of the Statute, 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.

⁴ Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), paras. 61-68.

⁵ [Confirmation Decision](#), paras. 94, 104, 113, 133.

⁶ [Confirmation Decision](#), paras. 86-94.

⁷ [Confirmation Decision](#), paras. 94, 133.

issues that require clarification or elaboration as set out below. The Prosecution will ensure that the Six Witnesses are not asked merely to repeat information already provided in their Prior Recorded Testimonies.

5. 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 Six Witnesses will be available, *inter alia*, for cross examination by the Defence and any further questioning by the Chamber.

II. CLASSIFICATION

6. Pursuant to regulation 23bis(1) of the Regulations of the Court, this Application and Annex A are classified as confidential, because they contain sensitive information regarding the identities of the Six Witnesses. A public redacted version of the Application will be filed as soon as practicable.

III. SUBMISSIONS

7. 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).⁸ The associated material which the Prosecution seeks to introduce into evidence for each of the Six Witnesses⁹ forms an integral part of their Prior Recorded Testimonies.¹⁰ These items are also necessary to fully comprehend the accounts of the Six Witnesses, because they discuss and clarify the items in their statements when required. 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

⁸ First Rule 68(3) Application, [ICC-02/05-01/20-547-Conf](#), paras. 7- 9.

⁹ See Annex A (Part II of A1 to A6). Where applicable, the Prosecution includes the English translations of items referred to in the Associated Material.

¹⁰ See *Yekatom & Ngaissona* Decision on the Prosecution Requests under Rule 68(3), [ICC-01/14-01/18-907-Red](#), para. 26.

the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”¹¹

A. Overview of the Prior Recorded Testimonies of Witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991

(i) Prior Recorded Testimony of P-0001

8. The Prosecution seeks to submit into evidence P-0001’s prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0001’s prior recorded testimony consists of one witness statement and one associated item that relates to information and events discussed in the statement. P-0001’s prior recorded testimony is relevant to, *inter alia*, background information on the Darfur conflict¹² and the contextual elements of war crimes¹³ and crimes against humanity.¹⁴

9. P-0001, [REDACTED].¹⁵ P-0001 also provides his views on the decision-making process in relation to military operations in Sudan and the role of officials in the GoS (“GoS Officials”) in events in Darfur.¹⁶ The witness also describes the role and structures¹⁷ of forces of the GoS, including intelligence agencies,¹⁸ and joint military operations conducted by GoS Forces and Militia/*Janjaweed*.¹⁹ P-0001 also provides evidence on the definition and role of the *Janjaweed*²⁰ and the mobilisation of the

¹¹ 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.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED], the GoS forces included the Sudanese Armed Forces, also known as the Sudanese People’s Armed Forces, the Popular Defence Forces, the Central Reserve Forces, the Popular Police Forces, and the Sudanese Police (together, “GoS Forces”). [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

Militia/*Janjaweed* through the Popular Defence Forces (“PDF”).²¹ P-0001 also provides his knowledge of rebel groups operating in Darfur.²²

10. P-0001’s associated material consists of the [REDACTED].²³

The Prosecution requests one hour for its limited supplementary examination of P-0001

11. Should the Chamber grant the request to admit P-0001’s prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.²⁴

12. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0001’s testimony, including in particular: [REDACTED] (iii) his knowledge of the role of the Militia/*Janjaweed*, including its mobilisation through the Popular Defence Forces (“PDF”).

13. The Prosecution estimates that it would require four hours for direct examination of P-0001, if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for the limited supplementary *viva voce* examination of P-0001 would shorten the in-court testimony by three hours.

(ii) *Prior Recorded Testimony of Witness of P-0581*

14. The Prosecution seeks to submit into evidence P-0581’s prior recorded testimony, including the associated material listed in Annex A (A2) to this Application. P-0581’s prior recorded testimony consists of one witness statement and 13 associated items that relate to information and events discussed in the statement. P-0581’s prior

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ *Lubanga* Rule 68 Decision, [ICC-01/04-01/06-1603](#), para. 25; *Lubanga* Hearing Transcript on 7 July 2009, [ICC-01/04-01/06-T-205-Red3](#), p. 19, l. 11; *Katanga* Rule 68 Decision, [ICC-01/04-01/07-2233-Corr](#), paras.16-17; *Ntaganda* Hearing Transcript on 27 June 2016, [ICC-01/04-02/06-T-110-Red2-ENG](#), p. 34, l. 8-13; *Gbabgo & Blé Goude* Annex A to Conduct of Proceedings Decision, [ICC-02/11-01/15-498-AnxA](#), para. 40.

recorded testimony relates, *inter alia*, to establishing Mr Abd-Al-Rahman's identity²⁵ and the contextual elements of crimes against humanity.²⁶

15. P-0581, [REDACTED],²⁷ provides information regarding local administrative structures in Mukjar,²⁸ the presence of GoS Forces, including the Sudanese Armed Forces ("SAF") and Police,²⁹ and the rebel attack on Mukjar in 2002.³⁰ P-0581 also describes the arrival of Ahmad Harun ("Harun") in Mukjar in August 2003 to meet with GoS Officials, including Ja'afar Abd-Al-Hakam, Abdullah Al-Tayyib Muhammad Torshein ("Torshein") and Abdullah Himeidan ("Himeidan").³¹ P-0581 also witnessed Harun's speech in Mukjar in August 2003 in which he accused members of the Fur tribe of being rebels and initiating the rebellion.³²

16. P-0581 further describes the attack on Mukjar and surrounding areas in August 2003 by GoS Forces and the Militia/*Janjaweed* led by Mr Abd-Al-Rahman³³ and the detention of civilian males in Mukjar's primary school, [REDACTED] and *Umdah* Yahya.³⁴ P-0581 saw prisoners being loaded into vehicles by Mr Abd-Al-Rahman whom he later heard were executed and buried in mass graves.³⁵ P-0581 also heard about women being raped in Mukjar.³⁶ P-0581 also provides evidence regarding the link between Mr Abd-Al-Rahman and the nickname "Ali Kushayb", including his physical description and background.³⁷

17. P-0581's associated material consists of: (i) [REDACTED];³⁸ (ii) a chart used by P-0581 to identify the head coverings worn by the Militia/*Janjaweed*;³⁹ (iii) a colour chart

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

referenced by P-0581 throughout his statement to identify the colour of uniforms worn by GoS Forces, Militia/*Janjaweed* and members of rebel armed groups;⁴⁰ and (iv) [REDACTED]⁴¹ [REDACTED]⁴² [REDACTED].

The Prosecution requests one hour for its limited supplementary examination of P-0581

18. Should the Chamber grant the request to admit P-0581's prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.⁴³

19. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0581's testimony, including in particular: (a) further details regarding the meeting of GoS Officials and Harun's speech in Mukjar in August 2003; (b) the timeline of the attacks on Mukjar, including [REDACTED] circumstances surrounding *Umdah* Yahya's death; (c) Mr Abd-Al-Rahman's presence and interactions with GoS Officials, GoS Forces and the Militia/*Janjaweed* in Mukjar; and (d) P-0581's knowledge regarding Mr Abd-Al-Rahman's background and physical appearance.

20. The Prosecution estimates that it would require three hours for direct examination of P-0581 if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for the limited supplementary *viva voce* examination of P-0581 would shorten the in-court testimony of P-0581 by two hours.

(iii) Prior Recorded Testimony of P-0884

21. The Prosecution seeks to submit into evidence P-0884's prior recorded testimony, including the associated material listed in Annex A (A3) to this Application. P-0884's prior recorded testimony consists of one witness statement and 13 associated

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ See fn. 24 above.

items that relate to information and events discussed in the statement. P-0884's prior recorded testimony relates, *inter alia*, to the background of the armed conflict in Darfur,⁴⁴ establishing Mr Abd-Al-Rahman's identity,⁴⁵ the contextual elements of crimes against humanity⁴⁶ and the attack by GoS Forces and the Militia/*Janjaweed* on Mukjar in February/March 2004.⁴⁷

22. P-0884, a [REDACTED],⁴⁸ provides background information regarding local administrative structures⁴⁹ and the Militia/*Janjaweed*⁵⁰ in Mukjar, and the rebel attacks on Al Fasher in early 2003 and Mukjar in August 2003.⁵¹ P-0884 witnessed two of Harun's visits to Mukjar, in August 2003⁵² and February 2004.⁵³ During his second visit, Harun met with GoS Officials and delivered a speech blaming members of the Fur tribe for the rebellion.⁵⁴ P-0884 explains how members of GoS Forces, including Al-Dayf Samih, Torshein and P-1021, distributed salaries, weapons and ammunition to the Militia/*Janjaweed* by helicopter and plane.⁵⁵

23. P-0884 further describes the attack on Mukjar by GoS Forces and the Militia/*Janjaweed* in August 2003,⁵⁶ in particular the arrest, detention and torture of males who were perceived to be associated with the rebel armed groups [REDACTED].⁵⁷ P-0884 witnessed members of GoS Forces and the Militia/*Janjaweed*, including Mr Abd-Al-Rahman, Himeidan, [REDACTED], gathering in Mukjar to attack and raid the *Zakat* Office in Bindisi in August 2003.⁵⁸

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

24. P-0884 also describes the attack by GoS Forces and the Militia/*Janjaweed* under the command of Mr Abd-Al-Rahman on Mukjar and surrounding villages in February/March 2004.⁵⁹ During this attack, [REDACTED] Mr Abd-Al-Rahman,⁶⁰ whom he later saw taking people to the police station in Mukjar to be executed in March 2004, including several *umdaahs*.⁶¹ P-0884 heard about mass graves near Mukjar⁶² and compiled a list of names of victims killed during the conflict in Darfur.⁶³ In addition, P-0884 describes his interactions with Mr Abd-Al-Rahman, including his physical appearance, military service, ownership of a pharmacy for veterinary medicine in Garsila and use of the nickname “Ali Kushayb”.⁶⁴

25. P-0884’s associated material consists of: (i) [REDACTED];⁶⁵ (ii) a chart used by P-0884 to identify the head coverings worn by the Militia/*Janjaweed*;⁶⁶ (iii) [REDACTED];⁶⁷ (iv) a list of people killed in the Darfur conflict compiled by P-0884;⁶⁸ and (v) [REDACTED].⁶⁹

The Prosecution requests one hour for its limited supplementary examination of P-0884

26. Should the Chamber grant the request to admit P-0884’s prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.⁷⁰

27. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0884’s testimony, including in particular: (a) additional details regarding P-0884’s personal knowledge of Mr Abd-Al-Rahman; (b) the content of Harun’s speeches in Mukjar in August 2003 and February 2004; (c) Mr Abd-Al-

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ See fn. 24 above.

Rahman's interactions with GoS Officials, GoS Forces and the Militia/*Janjaweed* in Mukjar before the Bindisi operation in August 2003; (d) arrests and subsequent executions conducted by GoS Forces and the Militia/*Janjaweed*, including Mr Abd-Al-Rahman, in Mukjar in February/March 2004, in particular circumstances of *Umdah* Yahya's death; (e) Mr Abd-Al-Rahman's position of authority over GoS Forces and the Militia/*Janjaweed* during the attacks on Mukjar; and (f) [REDACTED].

28. The Prosecution estimates that it would require four hours for direct examination of P-0884 if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for the limited supplementary *viva voce* examination of P-0884 would shorten the in-court testimony by three hours.

(iv) *Prior Recorded Testimony of Witness of P-0917*⁷¹

29. The Prosecution seeks to submit into evidence P-0917's prior recorded testimony, including the associated material listed in Annex A (A4) to this Application. P-0917's prior recorded testimony consists of one witness statement and does not refer to any associated material. P-0917's prior recorded testimony relates, *inter alia*, to establishing the discriminatory intent demonstrated by GoS Forces and Militia/*Janjaweed*, including Mr Abd-Al-Rahman, during other incidents in the charged period;⁷² the contextual elements of crimes against humanity;⁷³ as well as Mr Abd-Al-Rahman's knowledge and intend to committed the charged crimes in Kodoom, Bindisi and surrounding areas.⁷⁴

30. P-0917, a Fur civilian, provides testimony on the attack by the GoS Forces and Militia/*Janjaweed* on Kodoom, Bindisi and surrounding areas in August 2003,⁷⁵ including pillaging⁷⁶ and burning of homes.⁷⁷ Lastly, the witness provides information

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

on Mr Abd-Al-Rahman's identity⁷⁸ and position of authority⁷⁹ as a Militia/*Janjaweed* leader. P-0917 also provides an illustrative example of gender persecution in August 2003, by way of witnessing Militia/*Janjaweed* arrest males attempting to enter Mukjar and noting that some covered themselves up with female clothing to avoid detection so they could enter the town.⁸⁰

The Prosecution requests one hour for its limited supplementary examination of P-0917

31. Should the Chamber grant the request to admit P-0917's prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.⁸¹

32. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0917's testimony, including in particular: (a) P-0917's personal knowledge regarding Mr Abd-Al-Rahman's physical appearance; (c) P-0917's statement that he heard Mr Abd-Al-Rahman say "[REDACTED]".⁸²

33. The Prosecution estimates that it would require four hours for direct examination of P-0917 if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for the limited supplementary *viva voce* examination of P-0917 would shorten the in-court testimony of P-0581 by three hours.

(v) *Prior Recorded Testimony of Witness of P-0922*⁸³

34. The Prosecution seeks to submit into evidence of P-0922's prior recorded testimony, including the associated material listed in Annex A (A5) to this Application. P-0922's prior recorded testimony consists of one witness statement and 69 associated

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ See fn. 24 above.

⁸² [REDACTED].

⁸³ [REDACTED].

⁸³ [REDACTED].

items that relate to information and events discussed in the statement. P-0922's prior recorded testimony is relevant to, *inter alia*, establish the attack on Kodoom, Bindisi and surrounding areas,⁸⁴ and the occurrence of the crimes of destruction of property⁸⁵ and forcible displacement.⁸⁶

35. P-0922, a Fur civilian from Drangal, provides evidence about attacks by GoS Forces and Militia/*Janjaweed* on 15 August 2003 carried out on Kodoom, Bindisi and surrounding areas, including Drangal.⁸⁷ P-0922 was present in Bindisi prior to it being attacked and was present during the attack on Drangal. P-0922 provides evidence about the presence of [REDACTED] at Bindisi⁸⁸ and about being informed [REDACTED] that the Militia/*Janjaweed* were going to collect corn from the *Zakat* office in Bindisi.⁸⁹ P-0922 provides evidence about the use of discriminatory language by the attackers during the attack on Drangal.⁹⁰ P-0922 also explains that on the following day (16 August 2003) he saw that the south of Bindisi had been burnt down.⁹¹

36. P-0922 also provides evidence about events that occurred in Mukjar in 2004, including attacks on the town by GoS Forces and Militia/*Janjaweed* in February-March 2004;⁹² a visit by Ahmad Harun in order to distribute weapons and ammunitions to Militia/*Janjaweed*;⁹³ the presence of Mr Abd-Al-Rahman [REDACTED] in Mukjar in March 2004;⁹⁴ the detention of males at Mukjar police station and prisoners being loaded onto vehicles for execution;⁹⁵ and the murder of individuals.⁹⁶

37. P-0922's associated material comprises *inter alia*: (i) a sketch map of Drangal and surrounding villages (annex 1 to the statement);⁹⁷ (ii) two headdress boards used by

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

the witness to identify the head coverings worn by members of the Militia/Janjaweed and GoS Forces (annexes 2 and 3 to the statement);⁹⁸ (iii) a Sketch map of the market and the surrounding area in Mukjar (annex 4);⁹⁹ (iv) a Sketch of the girls' school in Mukjar (annex 5);¹⁰⁰ (v) a Sketch of the boys' school in Mukjar (annex 6);¹⁰¹ (vi) an Aircraft list (annex 7);¹⁰² a Sketch map of Mukjar (annex 8);¹⁰³ (vii) a colour chart used by P-0922 identified the colours of vehicles belonging to the Militia/Janjaweed and GoS Forces (annex 9 to the statement);¹⁰⁴ (viii) a sketch map of Bindisi (annex 10 to the statement);¹⁰⁵ (ix) [REDACTED];¹⁰⁶ and (x) [REDACTED].¹⁰⁷

The Prosecution requests one hour for its limited supplementary examination of P-0922

38. Should the Chamber grant the request to admit P-0922's prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.¹⁰⁸

39. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0922's testimony, including in particular: (a) [REDACTED]; (b) P-0922's knowledge of Mr Abd-Al-Rahman's presence in Bindisi during the charged attack; (c) P-0922's personal knowledge regarding Mr Abd-Al-Rahman physical appearance; (d) P-0922's statement that he saw a group of detainees outside the Mukjar police station, that he later heard gunshots and that he was told that the detainees had been executed at a location now known as Kushayb Canal (near the UNAMID

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ See fn. 27 above.

building);¹⁰⁹ and (e) P-0922's evidence in relation to individuals killed including the death of Umda Zarruq.¹¹⁰

40. The Prosecution estimates that it would require three hours for direct examination of P-0922 if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for the limited supplementary *viva voce* examination of P-0922 would shorten the in-court testimony by two hours.

(vi) *Prior Recorded Testimony of Witness of P-0991*

41. The Prosecution seeks to submit into evidence P-0991's prior recorded testimony, including the associated material listed in Annex A (A5) to this Application. P-0991's prior recorded testimony consists of one witness statement¹¹¹ and seven associated items that relate to information and events discussed in the statement. P-0991's prior recorded testimony relates, *inter alia*, to establishing Mr Abd-Al-Rahman's identity,¹¹² the contextual elements of war crimes and crimes against humanity,¹¹³ and the attack on Kodoom, Bindisi and surrounding areas in August 2003.¹¹⁴

42. P-0991 is a Fur civilian who at the time of events, resided in Seder which he describes as being part of Bindisi locality.¹¹⁵ P-0991 provides evidence regarding the link between Mr Abd-Al-Rahman and the nickname "Ali Kushayb" including the link between Mr Abd-Al-Rahman and a pharmacy in Garsila and physical features that demonstrate that Mr Abd-Al-Rahman and Ali Kushayb are the same person.¹¹⁶ P-0991, is a direct eyewitness of the attack on Seder and surrounding villages by GoS Forces and Militia/*Janjaweed* on 7 August 2003, during which he saw and recognised Mr Abd-Al-Rahman.¹¹⁷ He also provides information in relation to the attack on Kodoom,

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

Bindisi and surrounding villages on or about 15 and 16 August 2003, including in relation the charges of murder.¹¹⁸

43. P-0991's associated material consists of: (i) a colour chart used by P-0991 to identify the colours of uniforms and vehicles;¹¹⁹ (ii) a sketch map of Bindisi Locality;¹²⁰ (iii) a sketch map of Seder town;¹²¹ (iv) a Chart ("headdress board") used by P-0991 to identify head coverings worn by the Militia/*Janjaweed* and Mr Abd-Al-Rahman;¹²² (iv) a sketch map of Bindisi town;¹²³ (v) a list of people killed during three attacks (the 7th August 2003 and 14th August 2003 attacks on Bindisi and surrounding villages and the November 2003 attack on Kodoom) compiled by P-0991;¹²⁴ and (vi) a copy of P-0991's identity card.¹²⁵

The Prosecution requests one hour for its limited supplementary examination of P-0991

44. Should the Chamber grant the request to admit P-0991's prior recorded testimony into evidence, the Prosecution requires approximately one hour to conduct a supplementary *viva voce* examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of the Court.¹²⁶

45. In its limited *viva voce* examination, the Prosecution would seek to clarify important aspects of P-0991's testimony, including in particular: (a) the date and timeline of the attacks P-0991 describes in the statement; (b) an announcement given by military personnel that the Militia/*Janjaweed* would be coming to Bindisi to collect millet from the *Zakat* Office;¹²⁷ and (c) information to further confirm that Mr Abd-Al-Rahman is Ali Kushayb, such as the location of his veterinary pharmacy in Garsila.¹²⁸

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ See fn. 24 above.

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

46. The Prosecution estimates that it would require four hours for direct examination of P-0991 if his prior recorded testimony is not introduced through rule 68(3). If the Chamber grants this Application, the one hour required for its limited supplementary *viva voce* examination of P-0991 would shorten the in-court testimony by three hours.

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

47. The Prior Recorded Testimonies of the Six Witnesses on the charged crimes are cumulative in nature and are corroborative of the evidence provided by *viva voce* witnesses,¹²⁹ as described in the paragraphs below.

48. The evidence provided by P-0001 and P-0884 regarding the background to the armed conflict in Darfur is cumulative to, and corroborated by, in particular, [REDACTED]¹³⁰ who will provide *viva voce* testimony. The evidence provided by P-0001, P-0581, P-0884, P-0917 and P-0922 regarding the contextual elements of crimes against humanity is cumulative to, and corroborated by, in particular, [REDACTED],¹³¹ who will provide *viva voce* testimony.

49. The evidence provided by P-0917 on acts of persecution in Mukjar in August 2003 is cumulative to, and corroborated by, *inter alia*, *viva voce* witness [REDACTED].¹³² The evidence provided by P-0991 regarding the charged crime of murder in Kodoom, Bindisi and surrounding areas in August 2003 is cumulative to, and corroborated by, in particular, [REDACTED],¹³³ who will provide *viva voce* testimony.

50. The evidence provided by P-0922 regarding the charged crime of destruction of property in Kodoom, Bindisi and surrounding areas in August 2003 is cumulative to, and corroborated by, *inter alia*, [REDACTED],¹³⁴ who will provide *viva voce* testimony.

¹²⁹ See Bemba Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

¹³⁰ [REDACTED]

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

The evidence provided by P-0922 regarding the charged crime of forcible displacement in Kodoom, Bindisi and surrounding areas in August 2003 is cumulative to, and corroborated by, *inter alia*, [REDACTED],¹³⁵ who will provide *viva voce* testimony.

51. The evidence provided by P-0917 regarding Mr Abd-Al-Rahman's knowledge and intent in relation to crimes committed in Kodoom, Bindisi and surrounding areas is cumulative to, and corroborated by, in particular, [REDACTED],¹³⁶ [REDACTED],¹³⁷ and [REDACTED]¹³⁸ who will provide *viva voce* testimony. The evidence provided by P-0917 regarding gender persecution is cumulative to, and corroborated by, in particular, [REDACTED],¹³⁹ [REDACTED]¹⁴⁰ and [REDACTED].¹⁴¹

52. The evidence provided by P-0581, P-0884 and P-0991 regarding the physical description of Mr Abd-Al-Rahman is also cumulative to, and corroborated by, in particular, [REDACTED],¹⁴² [REDACTED],¹⁴³ [REDACTED],¹⁴⁴ [REDACTED],¹⁴⁵ [REDACTED],¹⁴⁶ [REDACTED]¹⁴⁷ and [REDACTED],¹⁴⁸ who will provide *viva voce* testimony. P-0581, P-0884 and P-0991 also provide evidence that Mr Abd-Al-Rahman was the leader of the *Militia*/Janjaweed.¹⁴⁹ This evidence is cumulative to, and corroborated by, other witnesses who will provide *viva voce* testimony, in particular, [REDACTED].¹⁵⁰

53. The evidence provided by the witnesses regarding the contextual elements of crimes against humanity supports facts already agreed upon with the Defence,¹⁵¹ such

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ Agreed Facts 1-2 and 5, Annex A to First Joint Submission on Agreed Facts, [ICC-02/05-01/20-291-AnxA](#); Agreed Fact 7, Annex A to Second Joint Submission on Agreed Facts, [ICC-02/05-01/20-343-AnxA](#).

as the existence of a protracted armed conflict not of an international character between GoS Forces and rebel armed groups,¹⁵² and Harun's role as the State Minister for the Ministry of the Interior between at least August 2003 and at least April 2004.¹⁵³

54. Moreover, on the issue of Mr Abd-Al-Rahman's identity, the Defence and the Prosecution have agreed on at least 19 biographical facts related to him, including the fact that he was from Rahad Al-Berdi, belongs to the Ta'aisha tribe, was a member of the SAF until the early to middle 1990s, and that upon his retirement he resided in Garsila where he opened a shop from which he sold medication.¹⁵⁴ P-0581, P-0884 and P-0991 provide further corroboration of these agreed facts.¹⁵⁵

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

55. The introduction into evidence of the Prior Recorded Testimonies of the Six Witnesses would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman. The Prosecution consulted the Defence regarding its application to admit the Prior Recorded Testimonies of the Six Witnesses into evidence pursuant to rule 68(3). The Defence has agreed to the use of rule 68(3) for P-0001.¹⁵⁶ However, it did not agree to the use of rule 68(3) for P-0581, P-0884, P-0917, P-0922 and P-0991.¹⁵⁷ The mere lack of agreement from the Defence does not prevent the introduction of the Prior Recorded Testimonies, nor does it necessarily follow that their introduction would be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.¹⁵⁸

56. Rule 68(3) does not preclude the admission of evidence which goes to the acts and conduct of Mr Abd-Al-Rahman for charged crimes.¹⁵⁹ As required by rule 68(3), each witness will be present before the Chamber, their evidence will only be

¹⁵² Agreed Facts 1-2, Annex A to First Joint Submission on Agreed Facts, [ICC-02/05-01/20-291-AnxA](#).

¹⁵³ Agreed Fact 7, Annex A to Second Joint Submission on Agreed Facts, [ICC-02/05-01/20-343-AnxA](#).

¹⁵⁴ Agreed Facts 7, 4, 10 and 11, Annex A to Third Joint Submission on Agreed Facts, ICC-02/05-01/20-504-AnxA.

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ *Ongeven* Rule 68(2)(b) Decision on Defence Witnesses, [ICC-02/04-01/15-1322-Red](#), paras. 6-7, 9-10.

¹⁵⁹ *Gbagbo and Blé Goudé* Rule 68 Appeals Decision, [ICC-02/11-01/15-744](#), para. 69.

introduced if he or she does not object and the Defence will have the opportunity to examine each witness during the proceedings.¹⁶⁰

D. The Prior Recorded Testimonies of the Six Witnesses are relevant, reliable and probative to the case

57. The Prior Recorded Testimonies of the Six Witnesses that the Prosecution seeks to introduce into evidence pursuant to rule 68(3) of the Rules are relevant, reliable and probative, as set out above. In addition to being mainly corroborative in nature and internally consistent, the Prior Recorded Testimonies of all Six Witnesses bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.¹⁶¹ All Six Witnesses have signed their witness statements attesting to the fact that they were given voluntarily and are true to their best knowledge and recollection.¹⁶² The Prior Recorded Testimonies of witnesses not interviewed in English also contain interpreters' signatures and certifications that the interviews were orally translated into a language that they speak and understand.¹⁶³

IV. CONCLUSION

58. 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, Q.C.
Prosecutor

Dated this 31st day of January 2022

At The Hague, The Netherlands

¹⁶⁰ Rule 68(3) of the Rules.

¹⁶¹ *Ntaganda* Rule 68(3) Preliminary Ruling, [ICC-01/04-02/06-1640-Red](#), para. 9.

¹⁶² [REDACTED].

¹⁶³ [REDACTED]. The witness statement for P-0001 does not include an interpreter's certification because he was interviewed in English.