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No.: **ICC-02/05-01/20**
Date: **7 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 application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witnesses P-0026, P-0083, P-0085, P-0087 and P-0116” 3 February 2022, ICC-02/05-01/20-578-Conf

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I. INTRODUCTION

1. Pursuant to articles 69(2) and 69(4) of the Rome Statute (“Statute”), and rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)¹ of witnesses P-0026, P-0083, P-0085, P-0087 and P-0116 (“Five Witnesses”).

2. The Prior Recorded Testimonies of the Five Witnesses are admissible under rule 68(2)(c) of the Rules because: (i) the witnesses have become unavailable to testify; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute for any of the Five Witnesses; (iii) the Prior Recorded Testimonies are relevant, reliable and probative and therefore have sufficient indicia of reliability; and (iv) the introduction of the Prior Recorded Testimonies into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.

3. Upon *inter partes* consultation on the Five Witnesses, the Defence agreed to the introduction into evidence of the Prior Recorded Testimonies of P-0026 and P-0083 pursuant to rule 68(2)(c) of the Rules,² and opposed that for the remaining three witnesses.³

II. CLASSIFICATION

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

III. APPLICABLE LAW

5. Under Rule 68(2)(c) of the Rules, the Chamber may allow the introduction into evidence of the prior recorded testimony of a witness provided that: (i) the witness has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (ii) the necessity of measures under article 56 of the Statute could not have been anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.

¹ Annex A (A1 to A5) lists the prior recorded testimonies of the Five Witnesses which comprise their witness statements (at I) and associated material (at III). The material related to the witness’s prior recorded testimony which the Prosecution does not seek to introduce into evidence, is also included (at IV). Material related to the proof of unavailability of each witness is listed at item II. Hyperlinks to this material are also included, following the Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 47.

² Email from the Defence, [REDACTED].

³ Email from the Defence, [REDACTED] (regarding P-0085 and P-0116). Email from the Defence, [REDACTED] (regarding P-0087).

6. The unavailability of a witness to testify must be interpreted broadly in order to encompass all situations where there is an obstacle to the witness's ability to cooperate with the Court, or an obstacle to the Court in securing his/her oral testimony which cannot be overcome with reasonable diligence.⁴ As such, a person that remains untraceable, despite the Prosecution's best efforts to locate him/her, can be considered unavailable pursuant to rule 68(2)(c) of the Rules.⁵

7. The jurisprudence of the Court further establishes that proof of death can be obtained from different sources other than an official death certificate,⁶ such as a report from the group or locality's chief,⁷ the statements of people who knew the witness,⁸ or even an investigator's note reporting information corroborating the witness's death provided by different individuals contacted by telephone.⁹

8. However, should the Chamber not be satisfied with the proof of death or evidence of unavailability provided by the Prosecution to substantiate its request pursuant to rule 68(2)(c) of the Rules, prior practice indicates that the Chamber may afford the Prosecution more time to further substantiate its submissions.¹⁰

9. Furthermore, when assessing whether measures under article 56 of the Statute could have been anticipated by the Prosecution, Chambers have considered whether those measures would have been capable of ameliorating the situation¹¹ and whether the witness's death or unavailability could have been reasonably expected.¹²

10. In assessing the indicia of reliability, the Chamber may consider whether a witness statement "was signed by the witness and the investigators conducting the interview, was given

⁴ *Bemba et al*, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence' ("Decision pursuant rule 68(2)(c)"), [ICC-01/05-01/13-1481-Red-Corr](#), 12 November 2015, paras. 16-18.

⁵ *Ruto & Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony ("Decision on admission of prior testimony"), 19 August 2015, [ICC-01/09-01/11-1938-Corr-Red2](#), paras. 137-138.

⁶ In *Ruto & Sang*, Trial Chamber V(A) established that the standard of proof of the fulfilment of rule 68 of the Rules requirements should not be elevated ([Decision on admission of prior testimony](#), paras. 36-67).

⁷ *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0027, 25 November 2016, [ICC-01/04-02/06-1653](#), paras. 9-11. *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103 ("Decision under rule 68(2)(c)"), [ICC-01/04-02/06-1029](#), 20 November 2016, paras. 17, 19.

⁸ *Ntaganda*, [Decision under rule 68\(2\)\(c\)](#), paras. 17, 19.

⁹ *Al Hasan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules ("Decision pursuant to rule 68(2)(c)"), 14 April 2021, [ICC-01/12-01/18-1413](#), para. 10.

¹⁰ *Ntaganda*, [Decision under rule 68\(2\)\(c\)](#), para. 43.

¹¹ *Bemba et al*, [Decision pursuant rule 68\(2\)\(c\)](#), para. 19.

¹² *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, [ICC-01/04-02/06-1205](#), para. 12.

voluntarily, obtained in the presence of a qualified interpreter, and was declared to be accurate”, as well as if the statement is overall believable and internally coherent.¹³

11. Moreover, rule 68(2)(c) of the Rules expressly provides that the fact that the testimony goes to proof of acts and conducts of the Accused does not prohibit its admission into evidence, but is merely one factor that may be considered by the Chamber in its evaluation.¹⁴ The Chamber found in *Ntaganda* that it may balance the potential prejudice to the Defence with the probative value of the information provided by the witness.¹⁵

IV. SUBMISSIONS

12. As the Prosecution will demonstrate below, each of the Five Witnesses has provided relevant and probative prior recorded testimony and is unavailable to testify in Court for reasons the Prosecution could not have reasonably anticipated. Therefore, the introduction into evidence of the Prior Recorded Testimonies does not prejudice the Defence.

13. The Prior Recorded Testimonies of all Five Witnesses are also reliable. All Five Witnesses have signed their Prior Recorded Testimonies, attesting to the fact that they were voluntarily given and record their best recollection of events.¹⁶ The Prior Recorded Testimonies of the witnesses who were not interviewed exclusively in English also bear the interpreters’ signature and certification that each witness appeared to have heard and understood the translation, and an indication that the prior recorded testimony was read to each witness who affixed his/her signature attesting to the truth of its contents.¹⁷ Accordingly, the Prior Recorded Testimonies have the necessary indicia of reliability for introduction into evidence.¹⁸

14. In addition to the statements of the Five Witnesses, the Prosecution seeks to introduce into evidence the associated material for each of the Five Witnesses,¹⁹ which forms an integral part of their Prior Recorded Testimonies. These items are also necessary to fully comprehend the accounts of the Five Witnesses, as they discuss and clarify the items in their statements.

A. P-0026

¹³ *Al Hasan* [Decision pursuant to rule 68\(2\)\(c\)](#), para. 15. See also *Ntaganda* Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016 (“Second Decision under rule 68(2)(c)”), 24 February 2017, [ICC-01/04-02/06-1802-Red](#), paras. 22-23. *Bemba et al*, [Decision pursuant rule 68\(2\)\(c\)](#), para. 20.

¹⁴ *Al Hasan* [Decision pursuant to rule 68\(2\)\(c\)](#), para. 21. *Ntaganda* [Second Decision under rule 68\(2\)\(c\)](#), para. 26.

¹⁵ *Ntaganda* [Second Decision under rule 68\(2\)\(c\)](#), paras. 27-30.

¹⁶ [REDACTED]. See *Ongwen* Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, 19 June 2018, [ICC-02/04-01/15-1288](#), paras. 8, 10. *Ntaganda* [Second Decision under rule 68\(2\)\(c\)](#), para. 24. *Ruto & Sang* [Decision on admission of prior testimony](#), para. 32.

¹⁷ [REDACTED].

¹⁸ *Ntaganda* Preliminary decision on rule 68(3), [ICC-01/04-02/06-1640-Red](#), para. 9.

¹⁹ See Annex A (Part II of A1 to A5). Where applicable, the Prosecution includes in the Annex, the English translations of items referred to in the Associated Material.

15. The Prosecution seeks to submit into evidence P-0026's prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0026's prior recorded testimony consists of one witness statement, and nine associated items that relate to information and events discussed in the statement.

(i) P-0026 is deceased

16. P-0026 died unexpectedly [REDACTED], as confirmed by a copy of his death certificate.²⁰ The death certificate was obtained by the Prosecution with the cooperation of the [REDACTED] authorities,²¹ which also contacted the [REDACTED] who confirmed his death.²²

(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute

17. P-0026's last contact with the Prosecution was in September 2020 when he confirmed his willingness to cooperate with the Court and to testify at trial and reported no security or health concerns.²³ [REDACTED], the Prosecution could not reasonably have foreseen that P-0026 would die [REDACTED] only two months after his last contact with the Prosecution.

(iii) P-0026's Prior Recorded Testimony is relevant and probative

18. P-0026 was a [REDACTED].²⁴ P-0026 provided information on the background to the armed conflict in Darfur,²⁵ including information on rebel groups²⁶ and the rebel attack on Al Fasher airport in April 2003.²⁷ The witness also described the Government of Sudan ("GoS") efforts to marginalise, persecute and target members of the Fur tribe.²⁸ P-0026 further explained that high-ranking GoS Officials, including Omar Hassan Ahmad Al Bashir, Ali Uthman Muhammad Taha ("Taha"), Abdel Raheem Muhammad Hussein ("Hussein") and Ahmad Muhammad Harun ("Harun"), were aware of the GoS State policy to commit an attack on

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

civilian population.²⁹ P-0026's prior recorded statement is relevant to, *inter alia*, the contextual elements of war crimes³⁰ and crimes against humanity.³¹

19. P-0026's associated material consists of (i) a memorandum from an Arab Congress meeting calling for Arab rule of Darfur;³² (ii) [REDACTED];³³ (iii) an Islamic Movement policy document against the Fur and a report listing chronological attacks in Fur villages by the Militia/*Janjaweed*;³⁴ (iv) [REDACTED];³⁵ (v) recommendations made to the GoS by members of the Fur tribe during the Nertete Congress in August 2002;³⁶ (vi) recommendations made during a conference organised by the GoS in Kass in September 2002 in order to discuss with tribe leaders the situation in Darfur, but which Fur people prevented to attend ;³⁷ (vii) [REDACTED];³⁸ (viii) [REDACTED];³⁹ (ix) a list of crimes and deaths that occurred in Korma, North Darfur, in March 2004.⁴⁰

(iv) The introduction of P-0026's Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused

20. As demonstrated above, P-0026's statement does not go to the acts and conduct of the Accused. Evidence provided by P-0026 regarding the contextual elements of war crimes will also be elicited by *viva voce* witnesses, including in particular [REDACTED].⁴¹ P-0026 testimony is also corroborated by the facts agreed upon between the Prosecution and the Defence.⁴² Evidence provided by P-0026 regarding the contextual elements of crimes against humanity will also be elicited by *viva voce* witnesses, including in particular [REDACTED].⁴³ The Defence has also agreed to the introduction of this witness's prior recorded testimony pursuant to rule 68(2)(c) of the Rules.⁴⁴ As such, the introduction into evidence of witness P-0026's prior recorded testimony causes no prejudice to the Defence.

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² Agreed Facts 6, 14 and 17, Annex A to First Joint Submission on Agreed Facts, 5 March 2021, [ICC-02/05-01/20-291-AnxA](#). Agreed Facts 1-12, Annex B to the Third Joint Prosecution and Defence Submission on Agreed facts, 2 November 2021, [ICC-02/05-01/20-504-AnxB](#).

⁴³ [REDACTED].

⁴⁴ Email from the Defence, [REDACTED].

B. P-0083

21. The Prosecution seeks to submit into evidence P-0083's prior recorded testimony, including the associated material listed in Annex A (A2) to this Application. P-0083's prior recorded testimony consists of one witness statement, and nine associated items that were used and explained by the witness in his interview and relate to information and events discussed in the statement.

(i) P-0083 is deceased

22. P-0083 died on [REDACTED].⁴⁵ The Prosecution was able to verify this information with [REDACTED]. In particular, [REDACTED] confirmed that its enquires in response to the Prosecution's Request for Assistance ("RFA") confirm P-0083's death.⁴⁶ The Prosecution is currently waiting to receive an official record of P-0083's death certificate in implementation of its RFA and - with the Chamber's leave- will disclose it shortly as soon as it receives it.⁴⁷

(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute

23. The Prosecution had no reason to anticipate the need to resort to article 56 measures for P-0083 whose death was sudden and unexpected. Prior to his death, P-0083 did not report any security or health concerns.

(iii) P-0083's Prior Recorded Testimony is relevant and probative

24. P-0083 was the [REDACTED].⁴⁸ P-0083 provided reliable [REDACTED] information regarding the background of the armed conflict in Darfur.⁴⁹ His statement also explained the structure and functions of the National Security Committee and the Security Committee of West Darfur⁵⁰ and the Arab political and military structures in the region.⁵¹ P-0083 also discussed the composition, leadership and mobilisation of Militia/*Janjaweed*⁵² and its coordination with the GoS, including the distribution of weapons.⁵³ Furthermore, P-0083's statement explains the

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ See para. 8 above. Articles 64(2), 64(6)(d) and (d) and 69(3) of the Statute also grant the Chamber the ability to grant an extension of time in the interest of justice (*Al Hassan*, Public redacted version of the Decision on the Prosecution requests pursuant to Regulation 35 regarding P-0660 and P-0661 and to add 12 items to its Final List of Evidence, 21 October 2020, [ICC-01/12-01/18-988-Red](#), para. 6).

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

role of key components of the GoS Forces, such as the Popular Defence Forces (“PDF”),⁵⁴ the Popular Police Forces (“PPF”),⁵⁵ the Central Reserve Forces (“CRF”),⁵⁶ the Intelligence Forces⁵⁷ and the secret service.⁵⁸ P-0803 further described the role of GoS Officials such as Harun⁵⁹ and Hussein⁶⁰ in the Darfur conflict.

25. P-0083’s associated material consists of (i) a document [REDACTED] which relates to GoS actions against the Masalit tribe in West Darfur between 1996-2001;⁶¹ (ii) a document [REDACTED] listing the material and human losses of the Masalit tribe between 1997-1999;⁶² (iii) two documents [REDACTED] the attack in Habila by GoS Forces in August 2003;⁶³ (iv) a document [REDACTED];⁶⁴ (v) a publication from the Arab Gathering internally distributed and leaked to the Sudanese media in 1988 or 1989, and a document containing background objectives which P-0083 obtained in 1989;⁶⁵ (vi) a publication by the Arab Gathering on the return of displaced people to Darfur after 1999;⁶⁶ (vii) an undated report by the Regional Arab Alliance Committee, Administration and Military Operators containing instructions for the conscription of Arabs and target attacks against the Fur;⁶⁷ and (viii) a document dated 15 November 2003 relating to the creation of the Coordinating Council of Political Committee in South Darfur by Arab leaders.⁶⁸ P-0083’s prior recorded testimony is relevant to, *inter alia*, background information on the Darfur conflict⁶⁹ and the contextual elements of war crimes.⁷⁰

(iv) The introduction of P-0083’s Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused

26. P-0083’s statement does not go to the acts and conducts of the Accused. Evidence provided by P-0083 regarding the background to the conflict and the contextual elements of

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].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

war crimes will also be elicited by *viva voce* witnesses, including in particular [REDACTED],⁷¹ and [REDACTED] and [REDACTED],⁷² respectively. The Defence has also agreed to the introduction of this witness' prior recorded testimony pursuant to rule 68(2)(c) of the Rules.⁷³ As such, there is no prejudice to the Defence by the introduction into evidence of witness-0083's prior recorded testimony.

C. P-0085

27. The Prosecution seeks to submit into evidence P-0085's prior recorded testimony, including the associated material listed in Annex A (A3) to this Application. P-0085's prior recorded testimony consists of one witness statement and one associated item that was used and explained by the witness in his interview and relates to information and events discussed in the statement.

(i) P-0085 is unavailable to testify

28. The Prosecution is unable to contact P-0085 or identify his whereabouts.⁷⁴ P-0085's last contact with the Prosecution was in February 2009 when he did not report any security or major health concerns.⁷⁵

29. [REDACTED].⁷⁶ [REDACTED].⁷⁷

30. [REDACTED].⁷⁸ [REDACTED].⁷⁹

31. [REDACTED].⁸⁰

(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute

32. P-0085 is only [REDACTED] with no reported health or security concerns. The Prosecution had no reason to anticipate the sudden disappearance of the witness and therefore could not reasonably have anticipated the necessity of article 56 measures.

(iii) P-0085's Prior Recorded Testimony is relevant and probative

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ Email from the Defence, [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

33. P-0085 is a Fur [REDACTED]⁸¹ who provided evidence on the attack on Bindisi and surrounding villages on 15 and 16 August 2003.⁸² P-0085 describes the organisation and composition of the Militia/*Janjaweed*⁸³ and GoS distribution of weapons to the Militia/*Janjaweed* prior to the attack,⁸⁴ including by Mr Abd-Al-Rahman and Ja'afar Abd-Al-Hakam ("Abd-Al-Hakam").⁸⁵ P-0085 describes how Abd-Al-Hakam also allegedly authorised GoS Forces and Militia/*Janjaweed* to collect millet from the *Zakat* Office in Bindisi, according to information P-0085 received from P-0921.⁸⁶

34. P-0085 is a direct eyewitness to the Bindisi attack, placing Mr Abd-Al-Rahman on the ground and issuing instructions during the charged event.⁸⁷ P-0085 also provides evidence on murders,⁸⁸ rapes,⁸⁹ pillaging and the destruction of property⁹⁰ that occurred during the attack. P-0085 further comments on the structure, composition and cooperation between elements of the GoS Forces, including the PDF, the PPF, the Sudanese Armed Forces ("SAF"), the police and the Militia/*Janjaweed*.⁹¹ Lastly, P-0085 provides information on Abd-Al-Hakam's involvement with the implementation of the GoS State policy in Darfur⁹² and on Mr Abd-Al-Rahman's background and identity, including his military service and the ownership of a veterinary pharmacy in Garsila.⁹³

35. P-0085's prior recorded statement is, therefore, relevant, *inter alia*, to prove the contextual elements of crimes against humanity, Mr Abd-Al-Rahman's individual criminal responsibility and the charged crimes of murder (count 2), pillage (count 4), destruction of property (count 5), rape (counts 8 and 9), forcible displacement (count 10) and persecution (count 11) committed in Kodoom, Bindisi and surrounding areas on 15 and 16 August 2003, as well as the charged crimes of torture (counts 12-13) committed in Mukjar between late February and early March 2004.

36. P-0085's associated material consists of one sketch map of Bindisi and surrounding villages drawn by the witness.⁹⁴

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

(iv) *The introduction of P-0085's Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused*

37. P-0085's evidence on the contextual elements of crimes against humanity will also be elicited by *viva voce* witnesses [REDACTED].⁹⁵

38. P-0085's evidence on the crime of persecution (count 11) in Kodoom, Bindisi and surrounding areas⁹⁶ is also supported by witnesses [REDACTED], who will testify *viva voce*.⁹⁷

39. The evidence provided by P-0085 on the charged crimes of murder (counts 2-3) committed in Kodoom, Bindisi and surrounding areas⁹⁸ is also supported by a number of other witnesses who will testify *viva voce*, including [REDACTED].⁹⁹

40. The evidence provided by the witness on the crime of pillaging (count 4) committed in Kodoom, Bindisi and surrounding areas,¹⁰⁰ which is limited to corroborating that a Militia/*Janjaweed* commander by the name of Abdullah RABAK took part in the attack, is also supported by witnesses [REDACTED], who will testify *viva voce*.¹⁰¹

41. The evidence provided by P-0085 on the charged crime of destruction of property (count 5) committed in Kodoom, Bindisi and surrounding areas¹⁰² will be elicited by, *inter alia*, *viva voce* witnesses [REDACTED].¹⁰³ The hearsay evidence provided by the witness on the crimes of rape (counts 8-9) committed in Kodoom, Bindisi and surrounding areas,¹⁰⁴ is corroborated by direct witnesses [REDACTED] who are due to appear in Court to testify.¹⁰⁵

42. The evidence provided by P-0085 on the charged crime of forcible displacement (count 10) committed in Kodoom, Bindisi and surrounding areas¹⁰⁶ will also be elicited by, *inter alia*, *viva voce* witnesses [REDACTED].¹⁰⁷

43. P-0085's statement also refers to the identity and background information on Mr Abd-Al-Rahman, stating that he was a retired warrant officer in Garsila in the 1990s and had a veterinary pharmacy.¹⁰⁸ This information, however, is consistent with the facts agreed upon

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

with the Defence.¹⁰⁹ Moreover, P-0085's assertion that Mr Abd-Al-Rahman was the "top commander of the Janjaweed" in his area¹¹⁰ is also corroborative of, and cumulative, to evidence provided by *viva voce* witnesses.¹¹¹

44. While P-0085's prior recorded testimony is also relevant to establishing Mr Abd-Al-Rahman's individual criminal responsibility,¹¹² evidence in this regard will also be elicited by *viva voce* witnesses [REDACTED], whom the Defence will be able to cross examine in full.¹¹³ In evaluating the overall evidence on the same issues, the Chamber will therefore be able to attribute the proper weight to the parts of P-0085's evidence that go to proof of Mr Abd-Al-Rahman's criminal responsibility.

45. As described above, P-0085's prior recorded testimony does go to the acts and conducts of Mr Abd-Al-Rahman. As set out above, however, this is solely a factor to be considered by the Chamber, but does not prevent the statement being admitted into the case record.¹¹⁴ In the present case, P-0085's evidence is internally coherent,¹¹⁵ and is cumulative or corroborative of facts agreed upon between the parties and of other witnesses who will be present in Court and available for questioning by the Defence.

46. As such, there is no prejudice to the Defence by the introduction into evidence of the witness's prior recorded testimony notwithstanding Defence's opposition to the introduction of his evidence under the Application.¹¹⁶

D. P-0087

47. The Prosecution seeks to submit into evidence P-0087's prior recorded testimony, including the associated material listed in Annex A (A4) to this Application. P-0087's prior recorded testimony consists of two witness statements, and 173 associated items that were used and explained by the witness in his interview and relate to information and events discussed in the statement.

(i) P-0087 is deceased

¹⁰⁹ Annex A to the Third Joint Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#), facts 10, 15 and 11.

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ *Al Hasan* [Decision pursuant to rule 68\(2\)\(c\)](#), para. 21; *Ntaganda*, [Second Decision under rule 68\(2\)\(c\)](#), para. 26.

¹¹⁵ *Ntaganda*, [Second Decision under rule 68\(2\)\(c\)](#), paras. 27-30.

¹¹⁶ Email from the Defence, [REDACTED].

48. P-0087 died on [REDACTED] as confirmed by a copy of his death certificate.¹¹⁷ The Prosecution obtained P-0087's death certificate from the witness's family, who also confirms his death.¹¹⁸

(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute

49. P-0087 was [REDACTED]. At the time, the Prosecution considered article 56 measures in light of the age and health condition of the witness.¹¹⁹

50. However the Prosecution concluded that article 56 was not a viable option, having taken the following factors into consideration: (i) P-0087 stated that he did not wish to be contacted by the Prosecution unless Al Bashir was in the custody of the Court; (ii) [REDACTED], there was no indication that P-0087 was facing an imminent threat to life that may affect his availability for the trial scheduled to commence in a few months; and (iii) P-0085's evidence was intended to be submitted under rule 68(2)(b) of the Rules¹²⁰ by 5 January 2022,¹²¹ [REDACTED].

51. In light of the above considerations, the Prosecution determined that article 56 measures were not necessary or rather feasible especially considering P-0087's refusal to have any further contact with the Prosecution before the arrest or surrender of Al Bashir.

(iii) P-0087's Prior Recorded Testimony is relevant and probative

52. P-0087 was [REDACTED].¹²² He provided testimony on the background of the armed conflict in Darfur,¹²³ including rebel armed groups operating in Darfur,¹²⁴ the political developments before and during the attacks in 2003-2004,¹²⁵ and the peace process that followed.¹²⁶ The witness provided testimony on the composition of GoS Forces¹²⁷ and the Militia/*Janjaweed*,¹²⁸ and the relationship between the GoS and the Militia/*Janjaweed*,¹²⁹

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ Conduct of proceedings, [ICC-02/05-01/20-478](#), para. 47; deadline extended at the second Status Conference ([ICC-02/05-01/20-T-017-CONF-ENG ET 12-11-2021 1-53 NB T](#), p. 28, l. 21-25, and p. 29, l. 1-11).

¹²² [REDACTED].

¹²³ [REDACTED]

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

including the selective arming of Arab tribes¹³⁰ and attacks carried out throughout Darfur.¹³¹ P-0087 also provided evidence on the structure and role of the National Security Council (“NSC”), as well as the Security Committees.¹³²

53. P-0087 also provided evidence regarding Abd-Al-Hakam’s role in the conflict,¹³³ Hussein and Harun’s authority and their role in implementing the GoS State policy in Darfur¹³⁴ and the awareness of Al Bashir and other GoS Officials of the crimes committed by the Militia/*Janjaweed* in Darfur.¹³⁵ P-0087 also provided testimony regarding the GoS destruction of evidence related to mass graves in Darfur.¹³⁶

54. P-0087’s prior recorded statement relates to, *inter alia*, the contextual elements of crimes against humanity. He provided a list of Fur victims of the attack on Kodoom, Bindisi and surrounding areas in August 2003.¹³⁷

55. P-0087’s associated material consists of 173 items which are listed and described in Annex A (A4), including, *inter alia*, [REDACTED], news articles, maps of Darfur, [REDACTED] and reports on peace talks and conferences held between the GoS and rebel armed groups.

(iv) The introduction of P-0087’s Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused

56. P-0087 provided information on Mr Abd-Al-Rahman being a low ranking member of the police who executed the GoS State policy in Darfur.¹³⁸ However, P-0087 expressly stated that he never heard of Ali Kushyab before his surrender to the Court¹³⁹ and that he did not have any information on Mr Abd-Al-Rahman’s connection to GoS Officials.¹⁴⁰

57. Consistent with Prosecution’s initial assessment to submit P-0087’s evidence under rule 68(2)(b) of the Rules, the Prosecution does not intend to rely on the very limited passages of his witness statement that may go to the acts and conducts of the Accused.¹⁴¹

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

58. Furthermore, [REDACTED]¹⁴² and offered clarifications,¹⁴³ consistent with the certification process within the meaning of rule 68(2)(b) of the Rules.

59. In addition, evidence provided by P-0087 regarding the contextual elements of crimes against humanity will also be elicited by *viva voce* witnesses, including in particular [REDACTED],¹⁴⁴ [REDACTED],¹⁴⁵ [REDACTED],¹⁴⁶ [REDACTED],¹⁴⁷ [REDACTED],¹⁴⁸ [REDACTED],¹⁴⁹ [REDACTED],¹⁵⁰ [REDACTED],¹⁵¹ [REDACTED],¹⁵² [REDACTED],¹⁵³ [REDACTED],¹⁵⁴ [REDACTED],¹⁵⁵ [REDACTED]¹⁵⁶ and [REDACTED].¹⁵⁷ Moreover, the evidence provided by the witness on the NSC is also corroborated by the facts agreed upon between the Prosecution and the Defence.¹⁵⁸

60. As such, there would be no prejudice to the Defence by the introduction into evidence of the witness's prior recorded testimony.

E. P-0116

61. The Prosecution seeks to submit into evidence P-0116's prior recorded testimony, including the associated material listed in Annex A (A5) to this Application. P-0116's prior recorded testimony consists of two witness statements and one associated item, which is used and explained by the witness in his interview and relate to information and events discussed in the statement.

(i) P-0116 is deceased

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ [REDACTED].

¹⁵² [REDACTED].

¹⁵³ [REDACTED].

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ Agreed Facts 1, 5-7, Annex A to Second Joint Submission on Agreed Facts, 15 April 2015, [ICC-02/05-01/20-343-AnxA](#).

62. P-0116 died unexpectedly on [REDACTED].¹⁵⁹ [REDACTED], the Prosecution was able to contact the witness's son, who confirmed P-0116's death¹⁶⁰ and also provided copies of [REDACTED] confirmed P-0116's death.¹⁶¹

(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute

63. P-0116 passed away unexpectedly at a young age, shortly after providing his testimony to the Prosecution without any reported health or security concerns. Therefore, the Prosecution could not reasonably have anticipated the need for measures under article 56 of the Statute.

(iii) P-0116's Prior Recorded Testimony is relevant and probative

64. P-0116 was a [REDACTED]¹⁶² who provided testimony on the background of the armed conflict in Darfur,¹⁶³ several attacks orchestrated by GoS Forces and Militia/*Janjaweed* in Darfur,¹⁶⁴ a rebel attack on Al Fasher airport and how this attack influenced the GoS State Policy toward the Fur, Zaghawa and Masalit tribes.¹⁶⁵ P-0116 also provides testimony on the role of the Security Committees in West Darfur¹⁶⁶ and the general involvement of the GoS in the conflict,¹⁶⁷ including the use of public resources to recruit, train and fund the Militia/*Janjaweed*¹⁶⁸ at the same time the GoS denied resources to members of non-Arab tribes.¹⁶⁹ The witness also provided information on [REDACTED].¹⁷⁰ P-0116's testimony is relevant to the deliberate failure by the GoS to investigate and prosecute crimes committed by GoS Forces and Militia/*Janjaweed* in Darfur¹⁷¹ and its efforts to shield the perpetrators of crimes and destroy evidence.¹⁷²

65. P-0116's prior recorded statement is relevant, *inter alia*, to the contextual elements of crimes against humanity.¹⁷³

¹⁵⁹ [REDACTED].

¹⁶⁰ [REDACTED].

¹⁶¹ [REDACTED]. Due to the recent receipt of this document, its English translation is currently being prepared and with the Chamber's leave will be disclosed shortly.

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

66. P-0116's associated material consists of [REDACTED].¹⁷⁴

(iv) The introduction of P-0116's Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused

67. P-0116 mentioned that Mr Abd-Al-Rahman was a Militia/*Janjaweed* leader in the Wadi Salih area and was responsible for killing Fur leaders and intellectuals in Mukjar. However, P-0116 clarified that he did not personally know of Mr Abd-Al-Rahman's activities.¹⁷⁵ P-0116 also mentioned that he did not know whether Mr Abd-Al-Rahman was involved in the destruction of mass graves in Wadi Salih.¹⁷⁶

68. Evidence provided by P-0116 regarding this topic, while limited, will also be elicited, *inter alia*, by *viva voce* witnesses [REDACTED],¹⁷⁷ [REDACTED],¹⁷⁸ [REDACTED],¹⁷⁹ [REDACTED],¹⁸⁰ [REDACTED],¹⁸¹ [REDACTED],¹⁸² [REDACTED],¹⁸³ [REDACTED],¹⁸⁴ [REDACTED],¹⁸⁵ [REDACTED],¹⁸⁶ [REDACTED],¹⁸⁷ [REDACTED],¹⁸⁸ [REDACTED],¹⁸⁹ [REDACTED]¹⁹⁰ and [REDACTED].¹⁹¹

69. P-0116 also explains that sometime after the Deleig incident, mass graves and execution sites in the areas surrounding Deleig were intentionally destroyed to remove evidence of the crimes.¹⁹² This is corroborated by witnesses [REDACTED],¹⁹³ [REDACTED]¹⁹⁴ and [REDACTED],¹⁹⁵ who will testify *viva voce*.

70. As such, there is no prejudice to the Defence by the introduction into evidence of the witness's prior recorded testimony, and, therefore, the Defence's opposition¹⁹⁶ should not

¹⁷⁴ [REDACTED].

¹⁷⁵ [REDACTED].

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED]

¹⁸³ [REDACTED];

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED];

¹⁸⁷ [REDACTED].

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

¹⁹⁴ [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ Email from the Defence, [REDACTED].

preclude the introduction of this witness' prior recorded testimony pursuant to rule 68(2)(c) of the Rules.

V. RELIEF REQUESTED

71. 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)(c) of the Rules.



Karim A. A. Khan QC
Prosecutor

Dated this 7th day of February 2022

At The Hague, The Netherlands