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

Date: **28 March 2022**

**TRIAL CHAMBER I**

**Before:** Judge Joanna Korner, Presiding Judge  
Judge Reine Alapini-Gansou  
Judge Althea Violet Alexis-Windsor

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR v.  
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

**Public**

**Public redacted version of “Prosecution’s tenth application under rule 68(3) to introduce into evidence the prior recorded testimony of witnesses P-0103, P-0112 and P-0117”, 23 March 2022, ICC-02/05-01/20-642**

**Source:** Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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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 Procedure and Evidence (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”): (i) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)<sup>1</sup> of witnesses P-0103, P-0112 and P-0117 (“Three Witnesses”); and (ii) grant the time requested in the paragraphs below for supplementary *viva voce* questioning of each witness.<sup>2</sup>

2. Granting this application (“Application”) will enhance the expeditiousness of the proceedings by reducing the length of the witnesses’ in-court testimony from 21 hours to 5.5 hours, thus saving approximately 15.5 hours of court time.<sup>3</sup>

3. As set out below, the Prior Recorded Testimonies of the Three Witnesses are relevant, reliable and probative. The Prior Recorded Testimonies of the Three Witnesses relate primarily to the contextual elements of war crimes and crimes against humanity, and Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”)’s individual criminal responsibility.<sup>4</sup>

4. Should the request to conduct a supplementary examination be granted, the Prosecution would elicit further focussed *viva voce* evidence of certain issues that require clarification or elaboration as set out below. The Prosecution will ensure that the Three Witnesses are not asked merely to repeat information already provided in their Prior Recorded Testimonies.

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<sup>1</sup> Annex A (A1 to A3) lists the prior recorded testimonies of the Expert Witness and the Three Witnesses which comprise their witness statements or expert report (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 Conduct of Proceedings Directions, [ICC-02/05-01/20-478](#), para. 47.

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

<sup>3</sup> 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 Against the Decision on Unlawful Detention and Stay of Proceedings, [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* Decision on Prosecution application under Rule 68(3), [ICC-01/04-02/06-961](#), para 13. *Gbagbo & Blé Goudé* Decision on Prosecutor’s application under Rules 68(2)(b) and 68(3), [ICC-02/11-01/15-573](#), paras. 25, 42.

<sup>4</sup> Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), p. 67-71, paras. 61-67, 69-73.

5. The introduction into evidence of the Prior Recorded Testimonies is not prejudicial to or inconsistent with the rights of the Accused, as the Three 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, since they contain information that identifies the Three Witnesses. A public redacted version of the Application will be filed.

## 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 at paragraphs 7 to 10 of the its first application under rule 68(3).<sup>5</sup>

8. The associated material which the Prosecution seeks to introduce into evidence for each of the Three Witnesses<sup>6</sup> forms an integral part of their prior recorded testimonies.<sup>7</sup> These items are also necessary to fully comprehend the accounts of the Three Witnesses, as they discuss the items and when required, clarify them in their statements. 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 the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."<sup>8</sup> Further, Trial Chamber I found in an earlier ruling that "in principle, such material must also be introduced in order to ensure full understanding of the submitted testimony".<sup>9</sup>

<sup>5</sup> Prosecution's first application under Rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0717, P-0757, P-0834, P-0868 and P-0882, [ICC-02/05-01/20-547-Red](#), paras. 7-9.

<sup>6</sup> 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.

<sup>7</sup> See *Yekatom & Ngaissona* Decision on the Prosecution Requests under Rule 68(3), [ICC-01/14-01/18-907-Red](#), para. 26.

<sup>8</sup> *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.

<sup>9</sup> First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), [ICC-02/05-01/20-559-Red](#), para. 17.

A. Overview of the Prior Recorded Testimonies of the Three Witnesses

(i) *Prior Recorded Testimony of P-0103*

9. The Prosecution seeks to submit into evidence P-0103's prior recorded testimony, inclusive of the associated material listed in Annex A (A1) to this Application. P-0103's prior recorded testimony consists of seven transcripts and four associated items that relate to information and events discussed therein.

10. P-0103, [REDACTED], provides testimony on the contextual elements of war crimes, including in relation to the existence of a non-international armed conflict ("NIAC"). P-0103 also provides evidence on, *inter alia*: (i) [REDACTED];<sup>10</sup> (ii) [REDACTED]<sup>11</sup> [REDACTED];<sup>12</sup> (iii) the prior practice of conscripting<sup>13</sup> and assimilating militia fighters into GoS Forces;<sup>14</sup> (iv) the coordination between the Popular Defence Forces ("PDF") and the Border Intelligence with the SAF;<sup>15</sup> (v) the role of Security Committees;<sup>16</sup> (vi) the ability of rebel groups to move, recruit and train members, organise attacks, and gather equipment;<sup>17</sup> (vii) the perceived tribal support offered to rebel groups;<sup>18</sup> (viii) the rebel attack on Al Fasher airport;<sup>19</sup> (ix) the intensity of the armed conflict and the support provided by Mr Abd-al-Rahman to GoS Forces, including following a rebel attack on Mukjar's police station in August 2003, [REDACTED];<sup>20</sup> and (x) ceasefire negotiations and agreements between the GoS and

<sup>10</sup> P-0103, DAR-OTP-0120-0141 at 0150, l. 349-366 and at 0155, l. 534-567; DAR-OTP-0120-0161 at 0164-0165, l. 105-158; DAR-OTP-0120-0167 at 0168, l. 13-31; DAR-OTP-0120-0186 at 0195-0196, l. 400-410; DAR-OTP-0120-0203 at 0210, l. 270-271, 284-289 and at 0218, l. 583-585, 591-596; DAR-OTP-0120-0244 at 0253-0254, l. 359-390.

<sup>11</sup> As explained in the Trial Brief, 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].

<sup>12</sup> P-0103, DAR-OTP-0120-0167 at 0170, l. 105-110 and 0176, l. 381-388 and 0181, l. 611-614; P-0103, DAR-OTP-0120-0244 at 0253-0254, l. 359-390.

<sup>13</sup> P-0103, DAR-OTP-0120-0186 at 0187, l. 27-45; DAR-OTP-0120-0244 at 0253, l. 330-334.

<sup>14</sup> P-0103, DAR-OTP-0120-0141 at 0153-0154, l. 464-516.

<sup>15</sup> P-0103, DAR-OTP-0120-0186 at 0188-0190, l. 60-70, 86-90, 128-156, 165-167 and 0192-0194, l. 237-267, 286-289, 335-357 and 0198-0199, l. 516-547, 566-570; P-0103, DAR-OTP-0120-0167 at 0177-0182, l. 439-470, 518-582, 632-639, 642-650; P-0103, DAR-OTP-0120-0203 at 0207, l. 155-158 and at 0213-0214, l. 387-401, 420-423 and 0221-0224, l. 696-710, 720-729, 757-769, 812-829.

<sup>16</sup> P-0103, DAR-OTP-0120-0186 at 0189, l. 92-119.

<sup>17</sup> P-0103, DAR-OTP-0120-0161 at 0163, l. 63-77; P-0103, DAR-OTP-0120-0167 at 0172, l. 190-203; P-0103, DAR-OTP-0120-0226 at 0228-0231, l. 45-85, 101-168, 184-189.

<sup>18</sup> P-0103, DAR-OTP-0120-0186 at 0197, l. 452-490.

<sup>19</sup> P-0103, DAR-OTP-0120-0161 at 0162, l. 43-47.

<sup>20</sup> P-0103, DAR-OTP-0120-0203 at 0217-0219, l. 603-615; P-0103, DAR-OTP-0120-0167 at 0174-0175, l. 321-324, 03301-333; P-0103, DAR-OTP-0120-0244 at 0246, l. 43-75; P-0103, DAR-OTP-0120-0186 at 0194-0195, l. 338-341, 368.

rebel armed groups.<sup>21</sup> P-0103 also briefly discusses the detention and execution of people in Deleig.<sup>22</sup>

11. P-0103 also provides evidence on the contextual elements of crimes against humanity, including in relation to the distribution of weapons, equipment, and uniforms to the PDF by the GoS,<sup>23</sup> and the commission of crimes by members of the GoS Forces and the Militia/*Janjaweed*.<sup>24</sup>

12. P-0103's account is also relevant to establishing that Mr Abd-Al-Rahman is Ali Kushayb,<sup>25</sup> and Mr Abd-Al-Rahman's individual criminal responsibility, as he provides evidence on: (i) the Accused's position of authority as senior Militia/*Janjaweed* leader;<sup>26</sup> (ii) the Accused's cooperation with senior GoS officials;<sup>27</sup> and as set out above, his support to GoS Forces and (iii) the Accused's role as a member of the PDF and responsibility for the recruitment of PDF members.<sup>28</sup>

13. P-0103's associated material consists of: (i) an atlas showing the administrative units in Wadi Salih and Habillah in West Darfur, in September 2005;<sup>29</sup> (ii) [REDACTED];<sup>30</sup> (iii) [REDACTED];<sup>31</sup> and (iv) [REDACTED].<sup>32</sup>

*The Prosecution requests two hours for its limited supplementary examination of P-0103*

14. The Prosecution seeks two hours to conduct a streamlined supplementary examination of P-0103, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court,<sup>33</sup> on topics including: (i) the structure of the SAF and their coordination with the PDF; (ii) the GoS's support to Militia/*Janjaweed*; (iii) the organisation of the SLM/A; (iv) Mr Abd-Al-Rahman's

<sup>21</sup> P-0103, DAR-OTP-0120-0167 at 0173-0174, l. 241-285.

<sup>22</sup> P-0103, DAR-OTP-0120-0224 at 0247-0248, l. 116-146.

<sup>23</sup> P-0103, DAR-OTP-0120-0203 at 0214-0215, l. 438-484; P-0103, DAR-OTP-0120-0244 at 0253-0254, l. 359-390.

<sup>24</sup> P-0103, DAR-OTP-0120-0186 at 0190-0191, l. 167-182, 188-189, 197-204; P-0103, DAR-OTP-0120-0203 at 0210-0211, l. 277-281, 296-298; P-0103, DAR-OTP-0120-0226 at 0232, l. 227-228

<sup>25</sup> P-0103, DAR-OTP-0120-0203 at 0217, l. 536-542.

<sup>26</sup> P-0103, DAR-OTP-0120-0203 at 0217-0219, l. 570-615.

<sup>27</sup> P-0103, DAR-OTP-0120-0203 at 0218, l. 600-611.

<sup>28</sup> P-0103, DAR-OTP-0120-0203 at 0217, l. 570-574; P-0103, DAR-OTP-0120-0244, l. 46-49.

<sup>29</sup> DAR-OTP-0107-0618 at 0618-0621; P-0103, DAR-OTP-0120-0244 at 0245-0246, l. 4-42.

<sup>30</sup> DAR-OTP-0107-0622 at 0622-0626; P-0103, DAR-OTP-0120-0161 at 0162-0165, l. 26-162; P-0103, DAR-OTP-0120-0167 at 0168-0176, l. 5-409.

<sup>31</sup> DAR-OTP-0107-0627 at 0627-0637; P-0103, DAR-OTP-0120-0167 at 0176-0184, l. 410-748.

<sup>32</sup> DAR-OTP-0107-0638 at 0638-0741 (English translation at DAR-OTP-0153-0959); P-0103, DAR-OTP-0120-0167 at 0176, l. 381-389.

<sup>33</sup> *Lubanga* Decision on the admission of the prior recorded statements, [ICC-01/04-01/06-1603](#), para. 25; *Lubanga* Transcript of 7 July 2009, [ICC-01/04-01/06-T-205-Red3-ENG](#), p. 19, l. 11 *et seq*; *Katanga* Decision on Request to admit prior recorded testimony, ICC-01/04-01/07-2233-Corr, paras.16-17; *Ntaganda* Transcript of hearing, [ICC-01/04-02/06-T-110-Red2-ENG](#), p. 34, l. 8-13; *Gbagbo & Blé Goudé* Annex A to Decision on amended and supplemented directions on the conduct of the proceedings, [ICC-02/11-01/15-498-AnxA](#), para. 40.

position of authority, including his relationship with members of the GoS and GoS Forces and his role in response to the rebel attack on Mukjar and the recruitment of PDF members; (v) the link between Mr Abd-Al-Rahman and Ali Kushayb; and (vi) [REDACTED].

15. If his prior recorded testimony is not introduced under rule 68(3), the Prosecution estimates it would require nine hours for the direct examination of P-0103.<sup>34</sup> The introduction of P-0103 prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by seven hours.

(ii) *Prior Recorded Testimony of P-0112*

16. The Prosecution seeks to submit into evidence P-0112's prior recorded testimony, inclusive of the associated material listed in Annex A (A2) to this Application. P-0112's prior recorded testimony comprises two witness statements and 10 transcripts. It also includes 21 associated items that were used and explained by the witness in his statements and transcripts, and relate to information and events discussed therein.

17. P-0112, [REDACTED], provides evidence on the contextual elements of war crimes, in particular in relation to the existence of a NIAC, including: (i) [REDACTED];<sup>35</sup> (ii) the integration of Militia/*Janjaweed* into the GoS Forces;<sup>36</sup> (iii) the attack on Al Fasher airport by the SLM/A, in April 2003;<sup>37</sup> and (iv) the consequential increase in hostilities between the GoS and the rebel armed groups.<sup>38</sup>

18. P-0112's account is also relevant to the contextual elements of crimes against humanity, including in relation to the deliberate failure to investigate and prosecute the Militia/*Janjaweed* for crimes committed in West Darfur.<sup>39</sup>

19. P-0112's account is also relevant to establishing the individual criminal responsibility of the Accused, as it provides evidence on: (i) Mr Abd-Al-Rahman's position of authority as a Militia/*Janjaweed* leader;<sup>40</sup> (ii) Mr Abd-Al-Rahman's role in the recruitment of

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<sup>34</sup> [REDACTED].

<sup>35</sup> P-0112, DAR-OTP-0125-0002 at 0014-0015, para. 64.

<sup>36</sup> P-0112, DAR-OTP-0125-0002-R02 at 0016-0017, paras. 70-75 and 0022, para. 107; P-0112, DAR-OTP-0214-0582-R02 at 0596, para. 44.

<sup>37</sup> P-0112, DAR-OTP-0125-0002-R02 at 0012, paras. 51-52.

<sup>38</sup> P-0112, DAR-OTP-0214-0582-R02 at 0591, para. 27.

<sup>39</sup> P-0112, DAR-OTP-0215-4903-R02 at 4915-4916, l. 383-429.

<sup>40</sup> P-0112, DAR-OTP-0125-0002 at 0004-0005, paras. 10-13.

Militia/*Janjaweed*;<sup>41</sup> and (iii) Mr Abd-Al-Rahman's work together with, and as coordinator of, the PDF.<sup>42</sup>

20. P-0112 also refers to [REDACTED] State Minister for the Ministry of the Interior Ahmed Harun, among others.<sup>43</sup> He further provides evidence about [REDACTED] Mukjar Commissioner, Abdullah Torshein and observed various GoS Forces in Mukjar.<sup>44</sup>

21. P-0112's associated material consists of: (i) [REDACTED];<sup>45</sup> (ii) a map of Darfur [REDACTED];<sup>46</sup> (iii) [REDACTED];<sup>47</sup> (iv) [REDACTED];<sup>48</sup> (v) [REDACTED];<sup>49</sup> (vi) [REDACTED];<sup>50</sup> (vii) [REDACTED];<sup>51</sup> (viii) [REDACTED];<sup>52</sup> (ix) a list of documents to be copied by investigators;<sup>53</sup> (x) [REDACTED];<sup>54</sup> (xi) [REDACTED];<sup>55</sup> (xii) [REDACTED];<sup>56</sup> (xiii) [REDACTED];<sup>57</sup> (xiv) [REDACTED];<sup>58</sup> (xv) [REDACTED];<sup>59</sup> (xvi) three certificates of completed training;<sup>60</sup> (xvii) a certificate of participation in a Red Cross training on Law of Armed Conflicts;<sup>61</sup> (xviii) a certification of completion of compulsory national services; and (xix) the agreement on statement of limited use, pursuant to article 55(2) of the Rome Statute.<sup>62</sup>

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<sup>41</sup> *Ibid.*

<sup>42</sup> P-0112, DAR-OTP-0125-0002 at 0024, paras. 120-121.

<sup>43</sup> P-0112, DAR-OTP-0125-0002 at 0014-0015, paras. 64-68.

<sup>44</sup> P-0112, DAR-OTP-0125-0002 at 0017-0018, paras. 79-83.

<sup>45</sup> DAR-OTP-0120-0878 at 0878; P-0112, DAR-OTP-0215-4767 at 4773-4774, l. 215-249.

<sup>46</sup> DAR-OTP-0120-0879 at 0879; P-0112, DAR-OTP-0215-4793 at 4794-4799, l. 13-176.

<sup>47</sup> DAR-OTP-0120-0880 at 0880; P-0112, DAR-OTP-0215-4876 at 4877-4878, l. 13-51; P-0112, DAR-OTP-0215-4927 at 4932, l. 162-167.

<sup>48</sup> DAR-OTP-0125-0031 at 0031; P-0112, DAR-OTP-0125-0002 at 0025, paras. 122-123; P-0112, DAR-OTP-0215-4767 at 4773-4774, l. 209-249; P-0112, DAR-OTP-0215-4927 at 4932, l. 152-153.

<sup>49</sup> DAR-OTP-0125-0032 at 0032 (English translation at DAR-OTP-0219-9067); P-0112, DAR-OTP-0125-0002 at 0025, paras. 122, 124; P-0112, DAR-OTP-0215-4793 at 4794-4799, l. 13-181; DAR-OTP-0215-4927 at 4932, l. 157-160.

<sup>50</sup> DAR-OTP-0125-0033 at 0033 (English translation at DAR-OTP-0219-9069); P-0112, DAR-OTP-0125-0002 at 0025-0026, paras. 122, 125; P-0112, DAR-OTP-0215-4876 at 4877-4878, l. 18-51; P-0112, DAR-OTP-0215-4927 at 4932, l. 162-164.

<sup>51</sup> DAR-OTP-0125-0034 at 0034 (English translation at DAR-OTP-0219-9071); P-0112, DAR-OTP-0125-0002 at 0025-0026, paras. 122, 126.

<sup>52</sup> DAR-OTP-0125-0035 at 0035 (English translation at DAR-OTP-0219-9073); P-0112, DAR-OTP-0125-0002 at 0025-0026, paras. 122, 126.

<sup>53</sup> DAR-OTP-0125-0036 at 0036-0038; P-0112, DAR-OTP-0125-0002 at 0028, para. 136.

<sup>54</sup> DAR-OTP-0125-0043 at 0043-0080; P-0112, DAR-OTP-0125-0002 at 0010, para. 40 and 0012-0013, paras. 49, 57 and 0015, para. 67 and 0017, paras. 77-78 and 0028, paras. 135-136; P-0112, DAR-OTP-0214-0582 at 0585-0590, paras. 11-23 and 0592, para. 32; P-0112, DAR-OTP-0215-4744 at 4750, l. 185-190 and 202-204; P-0112, DAR-OTP-0215-4903 at 4909, l. 175-183.

<sup>55</sup> DAR-OTP-0125-0124 at 0124; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>56</sup> DAR-OTP-0125-0125 at 0125; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>57</sup> DAR-OTP-0125-0127 at 0127; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>58</sup> DAR-OTP-0125-0128 at 0129; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>59</sup> DAR-OTP-0125-0129 at 0129-0130. P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>60</sup> DAR-OTP-0125-0256 at 0256; DAR-OTP-0125-0257 at 0257; DAR-OTP-0125-0258 at 0258; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>61</sup> DAR-OTP-0125-0259 at 0259; P-0112, DAR-OTP-0125-0002 at 0025, para. 136.

<sup>62</sup> DAR-OTP-0120-0875; P-0112, DAR-OTP-0215-4688 at 4704-4709, l. 560-732; DAR-OTP-0215-4927 at 4932, l. 139-143.

*The Prosecution requests two hours for its limited supplementary examination of P-0112*

22. The Prosecution seeks two hours to conduct a streamlined supplementary examination of P-0112, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court,<sup>63</sup> on topics including: (i) the integration of Militia/*Janjaweed* into GoS Forces; (ii) the intensity of armed violence in the context of the NIAC; (iii) the deliberate failure to investigate Militia/*Janjaweed*; (iv) Mr Abd-Al-Rahman's position of authority and co-ordination with the GoS; (v) P-0112's interactions with senior members of the GoS and GoS Forces.

23. If his prior recorded testimony is not introduced under rule 68(3), the Prosecution estimates it would require six hours for the direct examination of P-0112. The introduction of P-0112 prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by four hours.

*(iii) Prior Recorded Testimony of P-0117*

24. The Prosecution seeks to submit into evidence P-0117's prior recorded testimony, inclusive of the associated material listed in Annex A (A3) to this Application. P-0117's prior recorded testimony comprises two witness statements. It also includes 163 associated items that were used and explained by the witness in his statements and transcripts, and relate to information and events discussed therein.<sup>64</sup>

25. P-0117, [REDACTED], provides evidence on the contextual elements of war crimes, in particular in relation to: (i) the structure and functions of GoS Forces;<sup>65</sup> (ii) the co-operation between GoS Forces and the Militia/*Janjaweed*;<sup>66</sup> and (iii) the attack on Al Fasher airport by SLM/A in April 2003 and the GoS response to such attack.<sup>67</sup> P-0117 also provides evidence on the contextual elements of crimes against humanity, including *inter alia*: (i) the GoS recruitment, arming, supplying and funding of the Militia/*Janjaweed*, including with the support of Ahmad Harun;<sup>68</sup> and (ii) the exclusion of members of the Fur, Zaghawa, and Masalit from participation in operations conducted in Darfur.<sup>69</sup> [REDACTED], P-0117 provides a

<sup>63</sup> See fn. 33.

<sup>64</sup> In his witness statement, P-0117 is asked to comment on items: DAR-OTP-0118-0412, DAR-OTP-0118-0810, DAR-OTP-0118-0862, DAR-OTP-0118-0967, and DAR-OTP-0118-1514. [REDACTED]. Despite being duplicates, for completeness, the Prosecution has included the abovementioned items in subsection III of Annex (A3).

<sup>65</sup> P-0117, DAR-OTP-0128-0042 at 0057-0066, paras. 87-150.

<sup>66</sup> P-0117, DAR-OTP-0128-0042 at 0051, paras. 49-51 and 0059, para. 102.

<sup>67</sup> P-0117, DAR-OTP-0128-0042 at 0048, para. 29 and 0050, paras. 40-41.

<sup>68</sup> P-0117, DAR-OTP-0128-0042 at 0051, paras. 50-51 and 0054-0055, paras. 68, 70 and 0074-0075, paras. 207, 214 and 0084-0085, para. 302.

<sup>69</sup> P-0117, DAR-OTP-0128-0042 at 0061, para. 111.

description on the roles of, and relationship among, key figures, such as then President Omar Hassan Ahmad Al-Bashir, Vice-President Ali Uthman Muhammad Taha, Minister of the Interior Abdel Raheem Muhammad Hussein and Ahmad Harun.<sup>70</sup>

26. P-0117's account is also relevant to establishing that Mr Abd-Al-Rahman is Ali Kushayb;<sup>71</sup> and the Accused's position of authority.<sup>72</sup>

27. P-0117's associated material consists of: (i) 79 documents shown to the witness by OTP investigators and described by the witness, as listed in Annex A (A3), items DAR-OTP-0118-0372 to DAR-OTP-0118-1544;<sup>73</sup> (ii) one documentary titled "Meet the Janjaweed";<sup>74</sup> (iii) one presentation concerning the JEM attack in Omdurman;<sup>75</sup> and (iv) 83 photographs relating to attacks on Silea, Suruj, and Sirba.<sup>76</sup>

<sup>70</sup> P-0117, DAR-OTP-0150-0651 at 0653-0657, paras. 6-29 and 0662-0664, paras. 69-72, 80-82.

<sup>71</sup> P-0117, DAR-OTP-0128-0042 at 0071, para. 189.

<sup>72</sup> P-0117, DAR-OTP-0128-0042 at 0071, paras. 192-193.

<sup>73</sup> DAR-OTP-0118-0372 (English translation at DAR-OTP-0219-8307); DAR-OTP-0118-0376; DAR-OTP-0118-0377 (English translation at DAR-OTP-0219-8310); DAR-OTP-0118-0379; DAR-OTP-0118-0396 (English translation at DAR-OTP-0219-3331); DAR-OTP-0118-0410; DAR-OTP-0118-0427; DAR-OTP-0118-0428; DAR-OTP-0118-0443; DAR-OTP-0118-0456; DAR-OTP-0118-0462; DAR-OTP-0118-0476; DAR-OTP-0118-0479; DAR-OTP-0118-0480; DAR-OTP-0118-0481; DAR-OTP-0118-0482 (English translation at DAR-OTP-0219-3338); DAR-OTP-0118-0483; DAR-OTP-0118-0487; DAR-OTP-0118-0491; DAR-OTP-0118-0504; DAR-OTP-0118-0522; DAR-OTP-0118-0525; DAR-OTP-0118-0739; DAR-OTP-0118-0740 (English translation at DAR-OTP-0219-3286); DAR-OTP-0118-0742; DAR-OTP-0118-0743 (English translation at DAR-OTP-0219-3288); DAR-OTP-0118-0744 (English translation at DAR-OTP-0219-3290); DAR-OTP-0118-0745 (English translation at DAR-OTP-0219-3292); DAR-OTP-0118-0761 (English translation at DAR-OTP-0219-3454); DAR-OTP-0118-0762; DAR-OTP-0118-0767; DAR-OTP-0118-0768 (English translation at DAR-OTP-0219-3465); DAR-OTP-0118-0769; DAR-OTP-0118-0770; DAR-OTP-0118-0771; DAR-OTP-0118-0772; DAR-OTP-0118-0775; DAR-OTP-0118-0779; DAR-OTP-0118-0792; DAR-OTP-0118-0793; DAR-OTP-0118-0794 (English translation at DAR-OTP-0219-3376); DAR-OTP-0118-0797; DAR-OTP-0118-0800 (English translation at DAR-OTP-0219-3381); DAR-OTP-0118-0806 (English translation at DAR-OTP-0219-3467); DAR-OTP-0118-0808 (English translation at DAR-OTP-0153-1070); DAR-OTP-0118-0812; DAR-OTP-0118-0841; DAR-OTP-0118-0842; DAR-OTP-0118-0854; DAR-OTP-0118-0856; DAR-OTP-0118-0858; DAR-OTP-0118-0859; DAR-OTP-0118-0867 (English translation at DAR-OTP-0219-3388); DAR-OTP-0118-0880 (English translation at DAR-OTP-0153-1086); DAR-OTP-0118-0886; DAR-OTP-0118-0933; DAR-OTP-0118-0957 (English translation at DAR-OTP-0219-3415); DAR-OTP-0118-0957; DAR-OTP-0118-0961; DAR-OTP-0118-0964 (English translation at DAR-OTP-0153-1093); DAR-OTP-0118-0970 (English translation at DAR-OTP-0153-1097); DAR-OTP-0118-1011; DAR-OTP-0118-1115; DAR-OTP-0118-1125; DAR-OTP-0118-1212 (English translation at DAR-OTP-0153-0634); DAR-OTP-0118-1255 (English translation at DAR-OTP-0219-3341); DAR-OTP-0118-1275; DAR-OTP-0118-1393 (English Translation at DAR-OTP-0219-8314); DAR-OTP-0118-1395 (English translation at DAR-OTP-0219-3420); DAR-OTP-0118-1481; DAR-OTP-0118-1503; DAR-OTP-0118-1505 (English translation at DAR-OTP-0219-9322); DAR-OTP-0118-1508; DAR-OTP-0118-1511; DAR-OTP-0118-1519; DAR-OTP-0118-1521 (English translation at DAR-OTP-0219-8317); DAR-OTP-0118-1522; DAR-OTP-0118-1524; DAR-OTP-0118-1526; DAR-OTP-0118-1527 (English translation at DAR-OTP-0221-1802); DAR-OTP-0118-1544. P-0117, DAR-OTP-0128-0042 at 0080-0089, paras. 250-335.

<sup>74</sup> DAR-OTP-0136-0100. P-0117, DAR-OTP-0150-0651 at 0665, paras. 86, 91.

<sup>75</sup> DAR-OTP-0150-0675. P-0117, DAR-OTP-0150-0651 at 0666, para. 92.

<sup>76</sup> DAR-OTP-0150-0758; DAR-OTP-0150-0759; DAR-OTP-0150-0760; DAR-OTP-0150-0761; DAR-OTP-0150-0762; DAR-OTP-0150-0763; DAR-OTP-0150-0774; DAR-OTP-0150-0775; DAR-OTP-0150-0776; DAR-OTP-0150-0777; DAR-OTP-0150-0778; DAR-OTP-0150-0779; DAR-OTP-0150-0780; DAR-OTP-0150-0781; DAR-OTP-0150-0782; DAR-OTP-0150-0783; DAR-OTP-0150-0787; DAR-OTP-0150-0788; DAR-OTP-0150-0789; DAR-OTP-0150-0790; DAR-OTP-0150-0791; DAR-OTP-0150-0792; DAR-OTP-0150-0793; DAR-OTP-0150-0794; DAR-OTP-0150-0795; DAR-OTP-0150-0796; DAR-OTP-0150-0797; DAR-OTP-0150-0798; DAR-

*The Prosecution requests one hour and a half for its limited supplementary examination of P-0117*

28. The Prosecution seeks one hour and a half to conduct a streamlined supplementary examination of P-0117, pursuant to rule 68(3) of the Rules and the prior jurisprudence of this Court,<sup>77</sup> on topics including: (i) the identity of Mr Abd-Al-Rahman; (ii) the structure of the GoS Forces; (iii) the SLM/A attack on Al Fasher airport in April 2003 and the GoS response; (iv) the legitimisation of Militia/*Janjaweed* by the GoS; and (v) the exclusion of Fur, Zaghawa and Masalit from participation in operations in Darfur.

29. If his prior recorded testimony is not introduced under rule 68(3), the Prosecution estimates it would require six hours for the direct examination of P-0117.<sup>78</sup> The introduction of P-0117 prior recorded testimony under rule 68(3) would thus shorten his in-court testimony by four hours and a half.

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

30. The Prior Recorded Testimonies of the Three Witnesses on the contextual elements of war crimes and crimes against humanity are cumulative in nature and corroborative of the evidence to be provided by *viva voce* witnesses,<sup>79</sup> as described in the paragraphs below.

31. P-0103, P-0112, and P-0117's evidence on the contextual elements of war crimes is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0012, P-0029, P-0131, P-0547, P-0643, P-0769, P-0883, P-0905, P-0976, P-0992, and P-0994.<sup>80</sup>

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OTP-0150-0799; DAR-OTP-0150-0800; DAR-OTP-0150-0801; DAR-OTP-0150-0802; DAR-OTP-0150-0803; DAR-OTP-0150-0804; DAR-OTP-0150-0805; DAR-OTP-0150-0806; DAR-OTP-0180-0808; DAR-OTP-0150-0809; DAR-OTP-0150-0810; DAR-OTP-0150-0811; DAR-OTP-0150-0812; DAR-OTP-0150-0813; DAR-OTP-0150-0814; DAR-OTP-0150-0815; DAR-OTP-0150-0816; DAR-OTP-0150-0817; DAR-OTP-0150-0818; DAR-OTP-0150-0819; DAR-OTP-0150-0820; DAR-OTP-0150-0821; DAR-OTP-0150-0822; DAR-OTP-0150-0823; DAR-OTP-0150-0824; DAR-OTP-0150-0825; DAR-OTP-0150-0826; DAR-OTP-0150-0827; DAR-OTP-0150-0828; DAR-OTP-0150-0829; DAR-OTP-0150-0830; DAR-OTP-0150-0831; DAR-OTP-0150-0832; DAR-OTP-0150-0833; DAR-OTP-0150-0834; DAR-OTP-0150-0835; DAR-OTP-0150-0836; DAR-OTP-0150-0837; DAR-OTP-0150-0838; DAR-OTP-0150-0839; DAR-OTP-0150-0840; DAR-OTP-0150-0841; DAR-OTP-0150-0842; DAR-OTP-0150-0843; DAR-OTP-0150-0844; DAR-OTP-0150-0845; DAR-OTP-0150-0846; DAR-OTP-0150-0847; DAR-OTP-0150-0848; DAR-OTP-0150-0849; DAR-OTP-0150-0850; DAR-OTP-0150-0851; DAR-OTP-0150-0858; DAR-OTP-0150-0859; DAR-OTP-0150-0861; DAR-OTP-0150-0869. P-0117, DAR-OTP-0150-0651 at 0666 para. 93.

<sup>77</sup> See fn. 33.

<sup>78</sup> [REDACTED].

<sup>79</sup> See *Bemba* Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

<sup>80</sup> P-0012, DAR-OTP-0119-0503 at 0514, para. 46 and 0517, para. 49; P-0029, DAR-OTP-0094-0119 at 0131, para. 49 and 1344-1355, l. 1579-1981; P-0131, DAR-OTP-0158-0879 at 0918-0920, l. 1303-1401; P-0131, DAR-

32. P-0103, P-0112, and P-0117's evidence on the contextual elements of crimes against humanity is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0769, P-0874, P-0883, P-0921, P-0976, and P-1021.<sup>81</sup>

33. P-0103 and P-0117's evidence related to the Accused's nickname of Ali Kushayb is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0012, P-0643, P-0769, P-0874, P-0879, P-0885, P-0903, P-0905, P-0921, P-0932, P-0990, P-0994, and P-1021.<sup>82</sup>

34. P-0103 and P-0112's evidence on Mr Abd-Al-Rahman's position of authority will be elicited, *inter alia*, by *viva voce* witnesses P-0131, P-0547, P-0643, P-0874, P-0883, P-0885, P-0905, and P-0932.<sup>83</sup>

35. On the issue of the Accused's identity, the Defence and the Prosecution have agreed on at least one biographical fact related to the Accused,<sup>84</sup> which is that Mr Abd-Al-Rahman was a member of the SAF and part of the Medical Corps. This agreed fact is supported by P-0103 and P-0117, thus narrowing the scope of the contested issue of the Accused's identity.

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OTP-0158-1300 at 1341, l. 1463-1474; P-0547, DAR-OTP-0200-0017, para. 86; P-0547, DAR-OTP-0204-0003 at 0026, para. 61; P-0547, DAR-OTP-0212-0296 at 0318, para. 174; P-0643, DAR-OTP-0218-0638 at 0641-0643, paras. 20, 31-39 and 0648, para. 69; P-0769, DAR-OTP-0212-0018 at 0027, para. 78; P-0769, DAR-OTP-0212-0296 at 0318, para. 174; P-0883, DAR-OTP-0218-0059 at 0062, para. 18 and 0100-0103, paras. 220-222, 224, 227-228, 238-239; P-0905, DAR-OTP-0219-6704 at 6730-6731, l. 884-913; P-0976, DAR-OTP-0222-0526 at 0543-0535, paras. 52-55; P-0992, DAR-OTP-0221-0668 at 0675, paras. 36-38; P-0994, DAR-OTP-0222-0055 at 0061-0062, paras. 31-39.

<sup>81</sup> P-0769, DAR-OTP-0212-0018 at 0027, para. 79 and 0031-0032, paras. 118-119; P-0874, DAR-OTP-0219-7164 at 7176-7177, l. 399-407 and 7183-7184, l. 624-651; P-0874, DAR-OTP-0219-7207 at 7219-7221, l. 412-430, 465-480; P-0883, DAR-OTP-0218-0059 at 0064, paras. 25-28 and 0087-0088, paras. 154-161 and 0107, para. 168; P-0921, DAR-OTP-0219-8253 at 8256-8257, l. 44-97; P-0976, DAR-OTP-0222-0526 at 0534, para. 50; P-1021, DAR-OTP-0221-1247 at 1268-1269, l. 629-755.

<sup>82</sup> P-0012, DAR-OTP-0119-0503 at 0511, para. 33; P-0643, DAR-OTP-0218-0638 at 0640-0642, paras. 15-20, 26-27; P-0769, DAR-OTP-0212-0018 at 0047-0048, paras. 248-249 and 0086, para. 585; P-0874, DAR-OTP-0219-7129 at 7148-7149, l. 648-654; P-0874, DAR-OTP-0221-1326 at 1337-1338, l. 373-387; P-0879, DAR-OTP-0217-0033 at 0039, paras. 30-32; P-0885, DAR-OTP-0222-1088 at 1099-1100, l. 364-387; P-0903, DAR-OTP-0221-0436 at 0448, para. 61; P-0905, DAR-OTP-0219-6770 at 6792, l. 740-748; P-0921, DAR-OTP-0219-3146 at 3152, l. 182-187; P-0932, DAR-OTP-0222-0602 at 0606-0607, paras. 22-23; P-0990, DAR-OTP-0223-0217 at 0219, para. 15; P-0994, DAR-OTP-0222-0055 at 0060, para. 24; P-1021, DAR-OTP-0221-1134 at 1149-1150, l. 499-521; P-1021, DAR-OTP-0221-1326 at 1337-1338, l. 373-387.

<sup>83</sup> P-0131, DAR-OTP-0158-0964 at 0988, l. 866-871; P-0547, DAR-OTP-0196-0146 at 0184, paras. 129-130; P-0643, DAR-OTP-0215-0440 at 0443-0445, l. 99-109, 174-175 and 0452, l. 398-402; P-0643, DAR-OTP-0215-0492 at 0511-0512, l. 665-691; P-0874, DAR-OTP-0219-7129 at 7151, l. 728-733; P-0885, DAR-OTP-0222-0749 at 0774-0775, l. 824-867; P-0883, DAR-OTP-0218-0059 at 0078, paras. 97-98 and 0103, para. 237; P-0885, DAR-OTP-0222-1066 at 1080, l. 478-484; P-0885, DAR-OTP-0222-0784 at 0803-0804, l. 632-642 and 0814-0816, l. 1014-1068; P-0905, DAR-OTP-0219-6214 at 6229-6230, l. 532-536, 541-545 and 6233, l. 677-679, 691-693; P-0932, DAR-OTP-0222-0602 at 0610, para. 39.

<sup>84</sup> Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, [ICC-02/05-01/20-504-AnxA](#), facts 10 and 15.

C. The introduction of the Prior Recorded Testimonies of the Three Witnesses is not prejudicial to or inconsistent with the rights of the Accused

36. The introduction of the Prior Recorded Testimonies of the Three Witnesses into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, since, pursuant to rule 68(3) of the Rules, the Three Witnesses will appear before the Chamber, their evidence will only be introduced upon their consent, and the Parties, the Common Legal Representative of Victims and the Chamber will have an opportunity to examine them during the proceedings.

37. The Defence has been consulted on the Prosecution's application for the admission into evidence of the Prior Recorded Testimonies of the Three Witnesses, pursuant to rule 68(3), but opposed it.<sup>85</sup> This, however, does not militate against the admission into evidence of the Prior Recorded Testimonies, nor does it indicate this would be prejudicial to, or inconsistent with, the rights of the Accused.<sup>86</sup>

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

38. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(3) of the Rules are relevant, reliable and probative.<sup>87</sup> In addition to being mainly corroborative in nature and internally consistent, the Prior Recorded Testimonies of the Three Witnesses bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.<sup>88</sup> The Three Witnesses have given their testimonies voluntarily and acknowledged that they record their best recollection of events.<sup>89</sup> P-0103 and P-0112, who were interviewed pursuant to article 55(2) of the Rome Statute, and were properly informed of their rights. The Prior Recorded Testimonies of the Three Witnesses were also collected with the assistance of interpreters and each witness appeared to have heard and understood the translation.<sup>90</sup>

<sup>85</sup> See Email from the Defence, "Latest batch of R. 68(3) witnesses," 23 February 2022 13:57.

<sup>86</sup> *Ongwen*, Public Redacted Version of Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 16 August 2018, [ICC-02/04-01/15-1322-Red](#), paras. 7, 9, 10.

<sup>87</sup> See paras. 3, 9, 17-19, 24-26, 31-32.

<sup>88</sup> *Ntaganda* Preliminary decision on rule 68(3), [ICC-01/04-02/06-1640-Red](#), para. 9.

<sup>89</sup> P-0103, DAR-OTP-0120-0141 at 0143, l. 49-52; P-0112, DAR-OTP-0125-0002 at 0029; P-0112, DAR-OTP-0214-0582 at 0597; P-0112, DAR-OTP-0215-4688 at 4694, l. 194-197; P-0117, DAR-OTP-0128-0042 at 0090; P-0117, DAR-OTP-0150-0651 at 0667.

<sup>90</sup> P-0103, DAR-OTP-0120-0141 at 0142-0143, l. 29-47; P-0112, DAR-OTP-0125-0002 at 0029-0030; P-0112, DAR-OTP-0214-0582 at 0598; P-0112, DAR-OTP-0215-4688 at 4694-4695, l. 203-220; P-0117, DAR-OTP-0128-0042 at 0090; P-0117, DAR-OTP-0150-0651 at 0667.

#### IV. CONCLUSION

39. 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.



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**Karim A. A. Khan QC**  
**Prosecutor**

Dated this 28<sup>th</sup> day of March 2022

At The Hague, The Netherlands