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TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

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

Public

Public redacted version of “Prosecution’s second application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0954”, 30 March 2022, ICC-02/05-01/20-656

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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 statement and associated material (“Prior Recorded Testimony”)¹ of witness P-0954.

2. The Prior Recorded Testimony of P-0954 is admissible under rule 68(2)(c) of the Rules because: (i) the witness has become unavailable to testify; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute; (iii) the Prior Recorded Testimony is relevant, reliable, probative and has sufficient indicia of reliability; and (iv) the introduction of the Prior Recorded Testimony into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.

II. CLASSIFICATION

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Application and Annex A are filed as confidential, because they contain sensitive information regarding the identity of P-0954. A public redacted version of the Application will be filed as soon as practicable.

III. SUBMISSIONS

4. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(c) of the Rules, as set out at paragraphs 5 to 11 of its first application under rule 68(2)(c).²

¹ Annex A lists the prior recorded testimony of P-0954 which comprises the witness’ statements (at I) and associated material (at III). Material related to the proof of unavailability of P-0954 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 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, [ICC-02/05-01/20-578-Red](#), paras. 5-11.

5. The Prosecution seeks to submit into evidence P-0954's prior recorded testimony, including the associated material listed in Annex A to this Application. P-0954's prior recorded testimony consists of one witness statement and one associated material that is referred to in the witness statement and relates to information and events discussed therein.

(i) P-0954 is deceased

6. P-0954 died unexpectedly on [REDACTED], at the approximate age of 60, as confirmed by a [REDACTED].³ The [REDACTED] was obtained by the Prosecution through an intermediary, who was also able to contact the witness's family members to confirm his death,⁴ [REDACTED].⁵

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

7. P-0954's last contact with the Prosecution was in [REDACTED], during his interview, when he affirmed his willingness to cooperate with the Court and to testify at trial and reported no security or health concerns. The Prosecution could not reasonably have foreseen that P-0954 would die unexpectedly only five months later and shortly before the beginning of trial.

³ DAR-OTP-0220-3013 (English translation at DAR-OTP- DAR-OTP-0220-3143).

⁴ DAR-OTP-0220-3271.

⁵ DAR-OTP-0220-3271 at 3272.

(iii) P-0954's Prior Recorded Testimony is relevant and probative

8. P-0954, [REDACTED], provided testimony regarding Mr Abd-Al-Rahman's background,⁶ their direct interactions,⁷ Mr Abd-Al-Rahman's position of authority in the Militia/*Janjaweed*⁸ and his areas of operation including Bindisi, Kodoom, Garsila, Mukjar and Deleig.⁹ P-0954 also provided testimony on the support of the GoS for the Militia/*Janjaweed* with weapons, ammunition and clothing,¹⁰ including the PDF arming and funding of Militia/*Janjaweed* under Mr Abd-Al-Rahman's command.¹¹

9. In addition, P-0954 provided information [REDACTED].¹² [REDACTED].¹³ P-0954's associated material consists of a handwritten sketch of [REDACTED].¹⁴

10. P-0954's prior recorded testimony is relevant to, *inter alia*, establishing Mr Abd-Al-Rahman's identity,¹⁵ the contextual elements of war crimes¹⁶ and crimes against humanity¹⁷ and modes of individual criminal responsibility for Mr Abd-Al-Rahman.¹⁸

11. In addition to being internally consistent, the Prior Recorded Testimony of P-0954 bears other formal *indicia* of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.¹⁹ The witness signed his witness statement attesting to the fact that it was given voluntarily and is true to his best knowledge and recollection.²⁰ Moreover, the statement also contains the interpreter's

⁶ P-0954, DAR-OTP-0221-0571 at 0581, para. 49.

⁷ P-0954, DAR-OTP-0221-0571 at 0581-0583, paras. 50-60.

⁸ P-0954, DAR-OTP-0221-0571 at 0573, paras. 14-15, 0575-0576, paras. 24-25, 27, 0581, para. 50.

⁹ P-0954, DAR-OTP-0221-0571 at 0575-0576, para. 24.

¹⁰ P-0954, DAR-OTP-0221-0571 at 0574, para. 20, 0575-0576, para. 24, 27, 0578, paras. 34-37, 0579-0580, paras. 40, 42, 0580, para. 43, 0581-0584, paras. 50-56.

¹¹ P-0954, DAR-OTP-0221-0571 at 0573, paras. 14-15, 0575, para. 23, 0581-0582, paras. 50-51.

¹² P-0954, DAR-OTP-0221-0571 at 0575, para. 23, 0578, para. 33, 0580, para. 46, 0581, paras. 47-48.

¹³ P-0954, DAR-OTP-0221-0571 at 0575-0576, paras. 24, 26-27, 0578, para. 33, 0579-0580, paras. 40-46, 0581-0584, paras. 50-56.

¹⁴ DAR-OTP-0221-0587. *See also*: P-0954, DAR-OTP-0221-0571 at 0578, paras. 31-32, 0583.

¹⁵ P-0954, DAR-OTP-0221-0571 at 0581, para. 49.

¹⁶ P-0954, DAR-OTP-0221-0571 at 0575-0576, paras. 24, 26-27, 0578, para. 33, 0579-0780, paras. 40, 42, 0580, para. 46, 0581-0584, paras. 50-56.

¹⁷ P-0954, DAR-OTP-0221-0571 at 0575-0576, para. 24, 0579-0580, paras. 40, 42, 0581-0584, paras. 50-56.

¹⁸ P-0954, DAR-OTP-0221-0571 at 0573, paras. 14, 15, 0575-0576, paras. 23-25, 27, 0581, paras. 50-51.

¹⁹ *Ntaganda*, Rule 68(3) Preliminary Ruling, [ICC-01/04-02/06-1640-Red](#), para. 9.

²⁰ P-0954, DAR-OTP-0221-0571 at 0685.

signature and certification that the interview was orally translated into a language that P-0954 speaks and understands.²¹

12. The Chamber has previously found P-0954's Prior Recorded Testimony to be relevant in its decision²² on the Prosecution's earlier request to introduce his Prior recorded Testimony under rule 68(3) of the Rules, as it determined that P-0954's account was "unique and different to that of other witnesses".

(iv) The introduction of P-0954's Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused

13. The evidence provided by P-0954 regarding the contextual elements of war crimes and crimes against humanity is cumulative to, and corroborated by, in particular, P-0011, P-0012, P-0028, P-0029, P-0131, P-0140, P-0547, P-0643, P-0769, P-0843, P-0874, P-0883, P-0884, P-0885, P-0905, P-0907, P-0921, P-0976, P-0984, P-0992, P-0994 and P-1021²³ who will provide *viva voce* testimony.

²¹ P-0954, DAR-OTP-0221-0571 at 0686.

²² Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, [ICC-02/05-01/20-588-Conf](#), para. 78.

²³ P-0011, DAR-OTP-0088-0219 at 0222, para. 15 and at 0235, para. 91; P-0012, DAR-OTP-0119-0503 at 0513, para. 45; P-0028, DAR-OTP-0094-0423 at 0437-0438, para. 60; P-0029, DAR-OTP-0094-0119 at 0129, paras. 40-42 and 0145-0147, paras. 115-119; P-0131, DAR-OTP-0158-0879 at 0920-0923, l. 1397-1449 and 1505-1507; P-0131, DAR-OTP-0158-1229 at 1234, l. 148-151; P-0140, DAR-OTP-0215-5888 at 5911-5912, l. 776-806, and DAR-OTP-0215-6268 at 6294, l. 886-894; P-0547, DAR-OTP-0212-0296 at 0318, para. 174; P-0547, DAR-OTP-0196-0146 at 0180-0181, para. 114 and 0185-0186, paras. 136-137; P-0643, DAR-OTP-0215-0440 at 0441, l. 34-35; P-0643, DAR-OTP-0218-0638 at 0642-0644, paras. 31-39, 41; P-0769, DAR-OTP-0214-0534 at 0546, para. 47, and DAR-OTP-0212-0018 at 0027, para. 79 and 0031-0032, paras. 118-119; P-0843, DAR-OTP-0216-0600 at 0613, para. 64 and 0615, paras. 71-73; P-0874, DAR-OTP-0219-7129 at 7141, l. 392-404 and at 7146-7148, l. 582-628, and DAR-OTP-0219-7155 at 7162-7163, l. 224-254, and DAR-OTP-0219-7164 at 7167-7171, l. 94-206 and at 7176-7177, l. 399-407 and 7183-7184, l. 624-651, and DAR-OTP-0219-7207 at 7219-7220, l. 412-430 and 7221, l. 465-480; P-0883, DAR-OTP-0218-0059 at 0064, paras. 25-28 and at 0067, para. 41 and at 0070-0071, paras. 58-62 and at 0087-0088, paras. 154-161 and at 0091-0092, para. 177 and at 0100-0102, paras. 220, 227-228, and at 0107, para. 268; P-0884, DAR-OTP-0216-0503 at 0514-0516, paras. 54, 57-60; P-0885, DAR-OTP-0222-0832 at 0839-0843, l. 228-356 and 0849, l. 562-572, and DAR-OTP-0222-0943 at 0954, l. 376-383, and DAR-OTP-0222-0975 at 0981-0983, l. 179-190, 239-262, and DAR-OTP-0222-1019 at 1038, l. 553-577; P-0905, DAR-OTP-0219-6704 at 6728-6729, l. 833-859; P-0907, DAR-OTP-0220-0668 at 0682, para. 77; P-0921, DAR-OTP-0219-8253 at 8273, l. 693-694; P-0976, DAR-OTP-0222-0526 at 0534, para. 50; P-0984, DAR-OTP-0222-0084 at 0090-0091, paras. 38-40; P-0992, DAR-OTP-0221-0668 at 0675, paras. 36-38; P-0994, DAR-OTP-0222-0055 at 0061-0062, paras. 30-31; P-1021, DAR-OTP-0221-1134 at 1141-1142, l. 231-262 and at 1144-1145, l. 302-339 and at 1152-1153, l. 596-604 and at 1155-1156, l. 668-677, 685-705 and at 1162, l. 920-924, and DAR-OTP-0221-1247 at 1268-1269, l. 692-755.

14. P-0954's statement also refers to the identity and background information on Mr Abd-Al-Rahman, stating that he was a retired officer from the Sudanese Armed Forces.²⁴ This information, however, is consistent with the facts agreed upon with the Defence²⁵ and is also corroborated by a number of *viva voce* witnesses.²⁶

15. While P-0954's prior recorded testimony is also relevant to establishing Mr Abd-Al-Rahman's individual criminal responsibility.²⁷ Evidence in this regard will also be elicited by *viva voce* witnesses P-0027, P-0029, P-0131, P-0584, P-0643, P-0671, P-0718, P-0874, P-0883, P-0885, P-0903, P-0905, P-0907, P-0926, P-0973 and P-1021²⁸ whom the Defence will be able to cross examine in full.

16. As described above, P-0954's Prior Recorded Testimony does go to proof of acts and conducts of Mr Abd-Al-Rahman. This, however, is solely a factor to be considered by the Chamber and does not prevent it from being admitted into the case record.²⁹

17. In the present case, P-0954's evidence is internally coherent,³⁰ and, as noted previously by the Chamber, 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.³¹

18. Likewise, the fact that the Chamber has previously determined that P-0954 was "an insider who could provide unique evidence not only as regards the identity of the accused, but also on matters of individual criminal responsibility" does not bar the

²⁴ P-0954, DAR-OTP-0221-0571-R01 at 0581, para. 49.

²⁵ Annex A to the Third Joint Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#), fact 10.

²⁶ P-0769, DAR-OTP-0212-0018 at 0086, para. 588; P-0883, DAR-OTP-0218-0059 at 0098, para. 213; P-0885, DAR-OTP-0222-0749 at 0770-0771, l. 716-745; P-0921, DAR-OTP-0219-3171 at 3179, l. 276-282.

²⁷ P-0954, DAR-OTP-0221-0571 at 0573, paras. 14, 15 and at 0575-0576, paras. 24, 27 and at 0581, para. 50.

²⁸ P-0027, DAR-OTP-0216-0738 at 0743-0744, para. 28; P-0029, DAR-OTP-0094-0119 at 0131, para. 52; P-0131, DAR-OTP-0158-0820 at 0860, l. 1360-1363, and DAR-OTP-0158-1091 at 1094, l. 79-81, and DAR-OTP-0215-0279 at 0286-0287; P-0584, DAR-OTP-0200-1540 at 1570, para. 110; P-0643, DAR-OTP-0218-0638 at 0646, para. 58; P-0671, DAR-OTP-0206-0105 at 0116, paras. 43-45; P-0718, DAR-OTP-0209-2004 at 2016, para. 78; P-0874, DAR-OTP-0219-7207 at 7218-7219, l. 369-407; P-0883, DAR-OTP-0218-0059 at 0068-0070, paras. 48-55; P-0885, DAR-OTP-0222-0784 at 0800-0801, l. 523-554, and at 0803-0804, l. 632-641; P-0903, DAR-OTP-0221-0436 at 0441, para. 27; P-0905, DAR-OTP-0219-6648 at 6669-6670, l. 724-738; P-0907, DAR-OTP-0220-0668 at 0672, para. 19; P-0926, DAR-OTP-0218-0738 at 0744-0745, paras. 26, 31; P-0973, DAR-OTP-0220-0736 at 0743, para. 32; P-1021, DAR-OTP-0221-1164 at 1186, l. 731-733.

²⁹ *Al Hasan* [Decision pursuant to rule 68\(2\)\(c\)](#), para. 21; *Ntaganda*, [Second Decision under rule 68\(2\)\(c\)](#), para. 26.

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

³¹ Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, [ICC-02/05-01/20-588-Conf](#), para. 77.

introduction of his Prior Recorded Testimony into evidence under rule 68(2)(c) due to his sudden death. In balancing the importance of this witness's evidence with any potential prejudice to the Defence, the Chamber will be able to attribute the proper weight to the parts pertaining to the identity and criminal responsibility of the Accused contained in this witness's prior recorded testimony in light of the totality of the evidence in the case, and the Defence's ability to cross examine live witnesses on similar matters.³²

IV. RELIEF REQUESTED

19. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application.



Karim A. A. Khan QC
Prosecutor

Dated this 31st day of March 2022

At The Hague, The Netherlands

³² *Ntaganda* Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, [ICC-01/04-02/06-1802-Red](#), paras. 28-30.