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No.: ICC-02/05-01/20
Date: 26 October 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 eighth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0757 and P-0917”, 24 October 2022, ICC-02/05-01/20-776-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)(b) 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”)¹ of P-0757 and P-0917 (“Two Witnesses”); (ii) designate the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations required pursuant to rule 68(2)(b)(ii) and 68(2)(b)(iii); and (iii) authorise remote certifications.²

2. Granting the application would serve the interests of justice by enhancing the expeditiousness of the proceedings, obviating the unnecessary appearance of witnesses and saving valuable court time and resources.

3. As submitted below, the Prosecution will not seek to rely on the passages of the Prior Recorded Testimonies that concern either the acts and conduct of Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”)³ or that otherwise go to his background and identity, since these are issues materially in dispute in the present case.⁴ As such, their introduction into evidence is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, since the Prior Recorded Testimonies are of a cumulative or corroborative nature and bear sufficient indicia of reliability.⁵

¹ Annex A (A1 to A2) lists the prior recorded testimonies of the Two Witnesses which comprise their witness statements (at Part I) and associated material (at Part II). The material related to each witness’s prior recorded testimony which the Prosecution does not seek to introduce into evidence is also included (at Part III), where applicable. Hyperlinks to this material are also included. *See* Directions on the Conduct of Proceedings, [ICC-02/05-01/20-478](#), para. 47.

² First Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), 2 March 2022, [ICC-02/05-01/20-612-Red](#), para. 18.

³ *Ongwen* Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, TC IX, [ICC-02/04-01/15-1294](#), paras. 4-5, 9 and 20, 2 July 2018. *Ntaganda* Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’, 2 December 2016, ICC-01/04-02/06-1667-Conf, [ICC-01/04-02/06-1667-Red](#), TC VI, 27 February 2017, para. 11.

⁴ Information that simply confirms the facts agreed upon between the Parties has not been excluded from introduction into evidence. Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#).

⁵ Rule 68(2)(b)(i) of the Rules.

II. CLASSIFICATION

4. Pursuant to regulation 23bis(1) of the Regulations of the Court, this Application and its Annex A are filed as confidential, since they contain information that may identify the Two Witnesses. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

5. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(b) of the Rules, as set out in the first application under rule 68(2)(b).⁶

6. The Prosecution also submits that the Chamber's previous decisions authorising the introduction of the Two Witnesses' Prior Recorded Testimony into evidence pursuant to rule 68(3) of the Rules⁷ do not bar the present request, since the Prosecution will not seek to rely on the parts of the witnesses' statements that go to the issues identified by the Defence as core to their case.

A. Overview of the Prior Recorded Testimonies of P-0757 and P-0917

7. The Prior Recorded Testimonies of the Two Witnesses relate to the crimes committed in Kodoom, Bindisi and surrounding areas on or about 15 and 16 August 2003 (Counts 1 to 11).⁸

⁶ First Rule 68(2)(b) Application, [ICC-02/05-01/20-565-Red](#), paras. 6-8.

⁷ First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), 20 January 2022, [ICC-02/05-01/20-559-Conf](#), paras. 22, 28, 30-31, 37. Decision on the Prosecution's fourth and fifth request to introduce prior recorded testimonies under Rule 68(3), 21 February 2022, [ICC-02/05-01/20-602-Conf](#), paras. 37-43.

⁸ Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 23 November 2021, [ICC-02/05-01/20-433-Corr](#), p. 38-41, 54-58.

8. Moreover, the Prior Recorded Testimony of P-0757 relates also to the crimes committed in Mukjar and surrounding areas on or about February and March 2004 (Counts 12 to 21).⁹

9. In addition to the statements of the Two Witnesses, the Prosecution seeks to introduce into evidence the associated material which forms an integral part of their Prior Recorded Testimonies, as listed in Annex A to the application.¹⁰

(i) *Prior Recorded Testimony of P-0757*

10. The Prosecution refers to the previously provided summary of P-0757's evidence and annexes.¹¹

11. Should the Chamber admit P-0757's prior testimony into evidence, the Prosecution will not rely on: (i) paragraphs 66-69, in which the witness presents information on Ali Kushayb; (ii) a passage of paragraph 70 which identifies Al-Dayf Samih as a subordinate of Ali Kushayb;¹² (iii) passages from paragraphs 71 and 79, in which P-0757 places Mr Abd-Al-Rahman in Mukjar on 28 February 2004;¹³ (iv) paragraphs 73 and 74, in which the witness implicates Mr Abd-Al-Rahman in the Sindu operation; (v) passages from paragraph 75, in which the witness provides hearsay evidence on Mr Abd-Al-Rahman hitting and killing *Umdah* Yahya Zarruq while he was in detention.¹⁴

⁹ Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 23 November 2021, [ICC-02/05-01/20-433-Corr](#), p. 42-45, 58-63.

¹⁰ See Annex A (Part II of A1 to A6). Where applicable, the Prosecution includes in the Annex the English translations of items referred to in the Associated Material.

¹¹ 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, 24 December 2021, [ICC-02/05-01/20-547-Conf](#), paras. 21-24.

¹² The Prosecution will not rely on the passage "He was well-known as a subordinate of Ali KUSHAYB" at P-0757, DAR-OTP-0211-0003 at 0021, para. 70, l. 2.

¹³ The Prosecution will not rely on the passage "I remember, prior to Ahmad HARUN's visit to Mukjar (possibly a few days earlier) Ali KUSHAYB and his forces moved from Garsila to Mukjar and positioned near a big dried-up river called Wadi Saleh, located in the southwest of Mukjar town. We were worried by his presence there" at P-0757, DAR-OTP-0211-0003 at 0021, para. 71, l. 3-6.

The Prosecution will also not rely on passage "Ali KUSHAYB and his forces" at P-0757, DAR-OTP-0211-0003 at 0023, para. 79, l. 5.

¹⁴ The Prosecution will not rely on the following passages from P-0757, DAR-OTP-0211-0003 at 0022, para.75: "I heard from general talk amongst people there that Ali KUSHAYB and his forces destroyed villages in and

(ii) Prior Recorded Testimony of P-0917

12. The Prosecution refers to the previously provided summary of P-0917's evidence and annexes.¹⁵ In addition to the information already provided therein, it should be noted that P-0917 also provides testimony on hearing about Militia/*Janjaweed* preparing for an attack on Darfur in 2002 and receiving support from the GoS.¹⁶ P-0917 also describes the attacks on Nankuseh and Gausir Dulufuro in 2002 and early 2003,¹⁷ which resulted in the withdrawal of GoS Forces from the region, which P-0917 heard from [REDACTED].¹⁸

13. Moreover, the witness describes how upon her arrival in Mukjar on 18 August 2003, she was stopped by Militia/*Janjaweed* who were searching for and arresting displaced Fur men and boys over 15 years old.¹⁹ After returning to Bindisi [REDACTED], the witness describes finding houses burned and people being harassed by Militia/*Janjaweed*, especially women and girls who were raped.²⁰ P-0917 also provides evidence on Militia/*Janjaweed* [REDACTED], torturing two men while questioning if they were "*toroboro*" and executing them.²¹

14. Lastly, P-0917 provides information about Militia/*Janjaweed* launching an attack on Sindu in December 2003 and later coming to Bindisi to look for rebels.²²

15. Should the Chamber admit P-0917's prior testimony into evidence, the Prosecution will not rely on: (i) paragraphs 51 and 59, in which the witness asserts that Ali Kushayb was a Militia/*Janjaweed* commander; (ii) paragraphs 55-57, in which the

around the Sindu area, and villagers had fled towards Mukjar." (l. 1-3) and "and I heard later that Ali KUSHAYB had hit Umdah Yahia OMER AHMAD ZAROUK with an axe on his chest. Umdah Yahia OMER AHMAD ZAROUK apparently died immediately." (l. 11-13).

¹⁵ 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, [ICC-02/05-01/20-564-Conf](#), paras. 29-30.

¹⁶ P-0917, DAR-OTP-0217-0071 at 0074, paras. 14-15 and at 0084, para. 62.

¹⁷ P-0917, DAR-OTP-0217-0071 at 0074-0076, paras. 16-21.

¹⁸ P-0917, DAR-OTP-0217-0071 at 0075-0076, paras. 21-24.

¹⁹ P-0917, DAR-OTP-0217-0071 at 0077-0078, para. 28.

²⁰ P-0917, DAR-OTP-0217-0071 at 0078-0082, paras. 30-33, 42-50.

²¹ P-0917, DAR-OTP-0217-0071 at 0079-0080, paras. 34-38.

²² P-0917, DAR-OTP-0217-0071 at 0082-0083, paras. 52-54.

witness recounts [REDACTED]; (iii) paragraph 60, in which the witness provides hearsay evidence about one of Mr Abd-al-Rahman's known associates; (iv) paragraph 61, in which the witness provides hearsay evidence about Mr Abd-Al-Rahman's identity and background; and (v) paragraph 63, where the witness provides lead information about crimes committed by Ali Kushayb.

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

16. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(2)(b) of the Rules, are relevant, reliable and probative.²³

17. The Two Witnesses have given their statements voluntarily and acknowledged that the statements record their best recollections of events.²⁴ The Prior Recorded Testimonies were also collected with the assistance of interpreters when needed.²⁵ The Prior Recorded Testimonies are internally consistent²⁶ and, accordingly, have the necessary indicia of reliability for introduction into evidence.

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

18. The evidence provided by the Two Witnesses with respect to several central aspects relevant to the attack on Kodoom, Bindisi and surrounding areas is corroborative of, and cumulative to, evidence provided or to yet be provided by *viva voce* witnesses, such as:

- a. The intentional targeting and murder of civilians, in particular in Bindisi: P-0011, P-0029, P-0874 and P-0878;
- b. Rape: P-0011, P-0878 and P-0921;

²³ *Gbagbo & Blé Goudé* Prosecution's Rule 68(2)(b) Application, [ICC-02/11-01/15-950-Red](#), para. 22.

²⁴ P-0757, DAR-OTP-0211-0003 at 0027; P-0917, DAR-OTP-0217-0071 at 0085.

²⁵ P-0757, DAR-OTP-0211-0003 at 0028; P-0917, DAR-OTP-0217-0071 at 0084.

²⁶ *Ntaganda* Prosecution Rule 68(2)(b) Application, [ICC-01/04-02/06-1730-Red](#), para. 13; *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), paras. 17-19; *Gbagbo & Blé Goudé* Appeals Judgment on Rule 68(2)(b) Decision, [ICC-02/11-01/15-744 OA 8](#), para. 3.

- c. The pillaging of goods: P-0029, P-0874, P-0878 and P-1021;
- d. The destruction and burning of civilian property: P-0029, P-0874, P-0878 and P-1021;
- e. The forcible transfer of civilians: P-0011, P-0029, P-0874, P-0878 and P-1021.

19. P-0917 also provides evidence in relation to the persecution of men and boys in Mukjar in August 2003. This evidence is corroborative of, and cumulative to, evidence provided or to be provided by *viva voce* witnesses, including P-0188 , P-0878 and P-0984, and rule 68(3) witnesses, including P-0913, P-0918 and P-0922.

20. The evidence provided by P-0757 with respect to several central aspects relevant to the Mukjar and surrounding areas incident on February/March 2004, is corroborative of, and cumulative to, evidence provided or to be provided by *viva voce* witnesses, such as:

- a. The preparation to and participation in the Sindu operation: P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0990;
- b. The subsequent displacement of people to Mukjar: P-0877, P-0885, P-0903, P-0905, P-0919, P-0990;
- c. The arrest of Fur males in Mukjar in checkpoints and house-to-house searches and their detention at the Mukjar police station: P-0029, P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0984, P-0990; and
- d. The execution of detainees: P-0877, P-0885, P-0903, P-0905, P-0919, P-0931, P-0984, P-0990.

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

21. The introduction of the Prior Recorded Testimonies of the Two Witnesses into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, as they are reliable and the Prosecution has indicated it does not intend to rely on the passages that go to the acts and conducts of the Accused²⁷ or to the issue of the identity of the Accused, which is materially in dispute between the parties.²⁸

22. Furthermore, the Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the Prior Recorded Testimonies of these witnesses, lead contradictory evidence during the Defence case or advance arguments regarding the weight to be attributed to the Prior Recorded Testimonies to the extent that discrepancies with any other evidence exist.

IV. CONCLUSION

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



Karim A. A. Khan KC
Prosecutor

Dated this 26th day of October 2022

At The Hague, The Netherlands

²⁷ *Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-596-Red](#), para. 12; *Gbagbo & Blé Goudé* Rule 68(2)(b) Decision, [ICC-02/11-01/15-950-Red](#), paras. 19-20, 29, 36-37; *Ntaganda* Rule 68(2)(b) Decision, [ICC-01/04-02/06-1715-Red](#), paras. 13-14.

²⁸ *Ongwen* Rule 68(2)(b) Decision on Prosecution Witnesses, [ICC-02/04-01/15-596-Red](#), para. 15.