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

Date: **13 January 2023**

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 Witness P-0973”, 13 January 2023, ICC-02/05-01/20-847-Conf

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I. INTRODUCTION

1. Pursuant to articles 69(2) and 69(4) of the Rome Statute, and rule 68(2)(c) of the Rules of Procedure and Evidence, the Prosecution requests that Trial Chamber I (“Chamber”) introduce into evidence the statement and associated material (“Prior Recorded Testimony”)¹ of Witness P-0973 (“Application”).

2. The Prior Recorded Testimony of P-0973 is admissible under rule 68(2)(c) of the Rules because: (i) the witness is 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 and 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 Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”).

3. Although only a factor for the Chamber to consider and not a requirement of rule 68(2)(c), in this instance the Prosecution does not seek to rely on the passages of the Prior Recorded Testimony that concern the acts and conduct of Mr Abd-Al-Rahman, or that otherwise go to his background and identity, which is an issue materially in dispute in this case. The Prosecution has consulted with the Defence, which has indicated that, on this basis, it does not object to P-0973’s evidence being introduced pursuant to rule 68(2)(c) of the Rules.

II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Application and its Annexes A and B are filed as confidential, since they contain information that may identify P-0973, as well as the content of confidential documents. A public redacted version of the Application will be filed as soon as practicable.

¹ Annex A lists the Prior Recorded Testimony of P-0973, comprising his witness statement (at Part I) and associated material (at Part II). The material necessary to understand the Prior Recorded Testimony, but which the Prosecution does not seek to introduce into evidence, is also included (at Part III). Hyperlinks to this material are also included. *See* Directions on the Conduct of Proceedings, [ICC-02/05-01/20-478](#), para. 47.

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)(c) of the Rules, as set out in its first application under rule 68(2)(c).²

(i) *P-0973 is unavailable to testify*

6. P-0973 is unavailable to testify because [REDACTED].

7. The information obtained by the Prosecution in relation to [REDACTED] is detailed in the following section. On the basis of this information, there is no reasonable prospect that P-0973 [REDACTED] to testify prior to the conclusion of the Prosecution's case.

8. [REDACTED].³ [REDACTED].⁴

9. [REDACTED].⁵ [REDACTED].⁶

10. [REDACTED].⁷

11. [REDACTED].⁸ [REDACTED].⁹

12. [REDACTED].¹⁰ [REDACTED].¹¹

13. [REDACTED].¹² [REDACTED].¹³

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.

³ Investigation report, DAR-OTP-00000841 at 000001.

⁴ Investigation report, DAR-OTP-00000841 at 000001.

⁵ Investigation report, DAR-OTP-0220-2371 at 2372.

⁶ Investigation report, DAR-OTP-0220-2371 at 2371-2372.

⁷ Investigation report, DAR-OTP-0220-5159 at 5159.

⁸ Investigation report, DAR-OTP-0220-5159 at 5159.

⁹ Investigation report, DAR-OTP-0220-5159 at 5159.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² Investigation report, DAR-OTP-00000841 at 000001.

¹³ Investigation report, DAR-OTP-00000841 at 000001.

14. [REDACTED].¹⁴ [REDACTED].¹⁵

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

15. The Prosecution was not aware that [REDACTED].¹⁶ The Prosecution could not reasonably have anticipated that [REDACTED], rendering him unavailable to testify in the trial proceedings.

(iii) *P-0973's Prior Recorded Testimony is relevant and probative, and has sufficient indicia of reliability*

16. P-0973 is a Fur civilian from [REDACTED].¹⁷ P-0973 fled to Deleig due to the attack on his village in [REDACTED].¹⁸ He provides direct evidence that on or about 5 March 2004, Militia/Janjaweed surrounded Deleig.¹⁹ That morning, P-0973 [REDACTED] arrested by the Janjaweed in their family shelter.²⁰ [REDACTED], they were brought outside the Deleig Police station and ordered to lay face down next to hundreds of other prisoners.²¹ P-0973 further saw detainees loaded onto a vehicle multiple times.²² Later that day, P-0973 was [REDACTED].²³

17. P-0973 further provides evidence on the [REDACTED].²⁴ [REDACTED].²⁵ P-0973 later heard that these five men had been executed in a location near Fere.²⁶

18. As indicated above, the Prosecution does not seek to rely on the passages of the Prior Recorded Testimony that concern the acts and conduct of Mr Abd-Al-Rahman

¹⁴ DAR-OTP-00000814 (Translation at DAR-OTP-00000839 at 000002). [REDACTED].

¹⁵ DAR-OTP-00000814 at 0000001 (Translation at DAR-OTP-00000839 at 000002).

¹⁶ *See above*, para. 11.

¹⁷ P-0973, DAR-OTP-0220-0736 at 0739, para. 11. [REDACTED].

¹⁸ P-0973, DAR-OTP-0220-0736 at 0740-0741, paras. 17-23.

¹⁹ P-0973, DAR-OTP-0220-0736 at 0741, para. 25.

²⁰ P-0973, DAR-OTP-0220-0736 at 0742, para. 26.

²¹ P-0973, DAR-OTP-0220-0736 at 0742, paras. 27-30.

²² P-0973, DAR-OTP-0220-0736 at 0743-0744, paras. 33, 37.

²³ P-0973, DAR-OTP-0220-0736 at 0744, paras. 36-39.

²⁴ P-0973, DAR-OTP-0220-0736 at 0744-0745, paras. 38, 40-41.

²⁵ P-0973, DAR-OTP-0220-0736 at 0745, paras. 40-43.

²⁶ P-0973, DAR-OTP-0220-0736 at 0745, para. 42.

or that otherwise go to his background and identity. These passages are identified in Annex A and, for ease of reference, are also marked directly on P-0973's statement in Annex B.

19. P-0973's Prior Recorded Testimony²⁷ comprises one statement,²⁸ and associated material consisting of: (i) a sketch drawn by P-0973 showing the location of his and other villages in relation to Deleig;²⁹ (ii) a headdress board used by P-0973 to indicate the types of turban worn by the *Janjaweed*;³⁰ (iii) four photographs showing [REDACTED];³¹ (iv) a witness colour chart used by P-0973 to indicate the colour of a vehicle he saw in Deleig;³² (v) a sketch drawn by P-0973 of Deleig police station and surrounds;³³ and (vi) an investigation report containing relevant measurements.³⁴

20. P-0973's Prior Recorded Testimony is relevant to proving the charged crimes of torture as a crime against humanity and a war crime (Counts 22-23), other inhumane acts as a crime against humanity (Count 24), cruel treatment as a war crime (Count 25), outrages upon personal dignity as a war crime (Count 26), murder as a crime against humanity and a war crime (Counts 27-28), and persecution as a crime against humanity (Count 31), committed in Deleig and surrounding areas between about 5 and about 7 March 2004.

21. P-0973's Prior Recorded Testimony has sufficient indicia of reliability. P-0973's statement was obtained by the Prosecution in the ordinary course of its investigations. It contains an acknowledgment signed by the witness indicating that the statement (i) was read back to the witness in his language, (ii) is true to the best of his knowledge and recollection, and (iii) was given voluntarily with the awareness that it may be

²⁷ See Annex A.

²⁸ DAR-OTP-0220-0736.

²⁹ DAR-OTP-0220-0753 (Translation at DAR-OTP-0219-5223).

³⁰ DAR-OTP-0220-0755.

³¹ DAR-OTP-0220-0761; DAR-OTP-0220-0762; DAR-OTP-0220-0763; DAR-OTP-0220-0764.

³² DAR-OTP-0220-0765.

³³ DAR-OTP-0220-0769 (Translation at DAR-OTP-0219-5226).

³⁴ DAR-OTP-0219-5866.

used in legal proceedings before the Court.³⁵ The statement also contains a certification signed by the interpreter who participated in the interview indicating that (i) the interpreter orally translated the statement to the witness into a language the witness speaks and understands, (ii) the witness appeared to have heard and understood the translation, and (iii) the witness signed the statement attesting to the truth of its contents.³⁶

(iv) The introduction of P-0973's Prior Recorded Testimony into evidence would not be prejudicial to or inconsistent with the rights of the Accused

22. The introduction of P-0973's Prior Recorded Testimony would not be prejudicial to or inconsistent with the rights of the Accused. As indicated above,³⁷ the Prosecution does not seek to rely on the passages of the Prior Recorded Testimony that concern the acts and conduct of Mr Abd-Al-Rahman or that otherwise go to his background and identity, which is an issue materially in dispute in this case. On this basis, the Defence does not object to P-0973's Prior Recorded Testimony being introduced into evidence pursuant to rule 68(2)(c) of the Rules.

23. Furthermore, P-0973's Prior Recorded Testimony is internally coherent, is not unique, and is corroborated by the testimony of witnesses who have testified and were cross-examined by the Defence:

- a. the search of Deleig and arrest of Fur males displaced to Deleig from the surrounding areas, between about 5 and about 7 March 2004;³⁸

³⁵ P-0973, DAR-OTP-0220-0736 at 0751.

³⁶ P-0973, DAR-OTP-0220-0736 at 0752.

³⁷ *See above*, para. 18.

³⁸ The evidence is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0060 (yet to testify), P-0584, P-0651, P-0671, P-0697, P-0712, P-0718, P-0850, P-0955 and P-0994, and *viva voce* witness P-0907.

- b. the detention and mistreatment of male Fur civilians in the open area near the Deleig police station on or about 5 March 2004;³⁹
- c. the loading of detainees onto vehicles, which drove out of Deleig and returned empty, and the repeating of this process multiple times on or about 5 March 2004;⁴⁰
- d. [REDACTED],⁴¹ [REDACTED];⁴² and
- e. the killing of a group of detainees, including several community leaders, in an area outside of Deleig near Fere on or about 7 March 2004.⁴³

IV. CONCLUSION

24. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application and introduce into evidence the Prior Recorded Testimony of P-0973.



Karim A. A. Khan KC
Prosecutor

Dated this 13th day of January 2023

At The Hague, The Netherlands

³⁹ The evidence is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0060 (yet to testify), P-0584, P-0651, P-0671, P-0718, P-0736, P-0955 and P-0994, and *viva voce* witnesses P-0585, P-0905, P-0907, and P-0931.

⁴⁰ The evidence is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0060 (yet to testify), P-0584, P-0651, P-0736, P-0955 and P-0994, and *viva voce* witnesses P-0905 (one transport only) and P-0907.

⁴¹ The evidence is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0955 and P-0994.

⁴² The evidence of is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0060 (yet to testify) and P-0994, and *viva voce* witnesses P-0585 and P-0907.

⁴³ The evidence is corroborative of, and cumulative to, the evidence of rule 68(3) witnesses P-0651, P-0671, P-0712, P-0726, P-0850, P-0955 and P-0994, and *viva voce* witnesses P-0643, P-0883, P-0907 and P-0935.