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

Date: **22 June 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 “Defence submissions in response to Registry’s transmission of the declarations made by five witnesses pursuant to Rule 68(2)(b)”, 15 June 2023, ICC-02/05-01/20-974-Conf**

**Source:** Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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## I. INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) requests that the Trial Chamber find that certain corrections and changes made by witnesses P-0028, P-0040, P-0041, P-0816 and P-0927 (“Five Witnesses”) to their prior recorded testimony in their declarations of truth, prepared pursuant to Rule 68(2)(b)(ii) of the Rules of Procedure and Evidence (“Rules”), are so substantial that they amount to new information (“New Information”). This is specifically precluded by Rule 68(2)(b)(ii).

2. Consequently, is submitted that the Trial Chamber must exclude the New Information contained in the Five Witnesses’ declarations of truth.

## II. CLASSIFICATION AND PAGE LIMIT

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this request is classified as confidential since it is responsive to two confidential filings by which the Registry transmitted the declarations of truth made by *inter alia* the Five Witnesses under 68(2)(b)(ii).<sup>1</sup> A public redacted version will be submitted shortly after.

4. The request is submitted within the extended page limit authorized by the Trial Chamber.<sup>2</sup>

## III. PROCEDURAL HISTORY

5. On 2 February 2022, the Prosecution filed its third application under Rule 68(2)(b) to introduce into evidence the prior recorded testimony of four witnesses, one of whom was P-0040.<sup>3</sup> On the same day, the Prosecution filed its fourth application under Rule 68(2)(b) to introduce into evidence the prior recorded testimony of another

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<sup>1</sup> Registry Transmission of the Declarations made by Witnesses P-0756, P-0816 and P-0927 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-02/05-01/20-812-Conf, 15 November 2022 (“First Registry Transmission”); Registry’s Transmission of the Declarations made by Witnesses P-0008, P-0607, P-0041, P-0028, P-0016, P-0725, P-0096, P-0757, P-0013, P-0617, P-0917, P-0040, P-0675, and P-0039 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-02/05-01/20-872-Conf, 13 February 2023 (“Second Registry Transmission”; collectively, “Registry Transmissions”).

<sup>2</sup> E-mail from Trial Chamber, 15 June 2023, 17h12.

<sup>3</sup> Prosecution’s third application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0010, P-0016, P-0039 and P-0040, ICC-02/05-01/20-571-Conf, 2 February 2022; public redacted version of “Prosecution’s third application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0010, P-0016, P-0039 and P-0040”, [ICC-02/05-01/20-571-Red](#), 7 February 2022 (“Third Application”).

four witnesses, two of whom were P-0816 and P-0927.<sup>4</sup> The Prosecution made it clear that it did not seek to introduce into evidence paragraph 27 of P-0816's prior recorded testimony,<sup>5</sup> or paragraphs 45-48 of P-0927's prior recorded testimony.<sup>6</sup>

6. The Defence opposed the Prosecution's submissions inasmuch as they related to P-0040, P-0816 and P-0927, arguing *inter alia* that a number of aspects of these witnesses' evidence related to core issues materially in dispute in the trial.<sup>7</sup>

7. On 11 March 2022, the Chamber admitted, on a preliminary basis, the written testimony of P-0040, P-0816 and P-0927 into evidence under Rule 68(2)(b) of the Rules.<sup>8</sup>

8. On 18 October 2022, the Prosecution filed its sixth application under Rule 68(2)(b) to introduce into evidence the prior recorded testimony of an additional four witnesses, two of whom were P-0028 and P-0041.<sup>9</sup> Discussions between the Parties took place which resulted in agreement about certain paragraphs in the witness statements of P-0028 and P-0041 upon which the Prosecution would not seek to rely, namely:

- (i) **P-0028:** DAR-OTP-0094-0423, paragraphs 33, 35-37, 40, 42, 51, 59, 62, 66-68,<sup>10</sup> and

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<sup>4</sup> Prosecution's fourth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0756, P-0816, P-0867 and P-0927, ICC-02/05-01/20-573-Conf, 2 February 2022; public redacted version of "Prosecution's fourth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0756, P-0816, P-0867 and P-0927", [ICC-02/05-01/20-573-Red](#), 2 February 2022 ("Fourth Application").

<sup>5</sup> Fourth Application, para. 20.

<sup>6</sup> Fourth Application, para. 29.

<sup>7</sup> Defence response to Prosecution's third application under rule 68(2)(b) (witnesses P-0010, P-0016, P-0039 and P-0040), ICC-02/05-01/20-595-Conf, 14 February 2022; public redacted version of "Defence response to Prosecution's third application under rule 68(2)(b) (witnesses P-0010, P-0016, P-0039 and P-0040)", [ICC-02/05-01/20-595-Red](#), 16 February 2022 ("Third Response"), *see* paras 18-20; Defence response to Prosecution's fourth application under rule 68(2)(b) (witnesses P-0756, P-0816, P-0867 and P-0927), ICC-02/05-01/20-589-Conf, 9 February 2022; public redacted version of "Defence response to Prosecution's fourth application under rule 68(2)(b) (witnesses P-0756, P-0816, P-0867 and P-0927)", [ICC-02/05-01/20-589-Red](#), 9 February 2022 ("Fourth Response"), *see* paras 17-19 and 24-27.

<sup>8</sup> Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-625-Conf, 11 March 2022; public redacted version of "Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b)", [ICC-02/05-01/20-625-Red](#), 11 March 2022 ("Decision of 11 March"), *see* paras 39, 56-57 and 72-74.

<sup>9</sup> Prosecution's sixth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0008, P-0028, P-0041 and P-0675, [ICC-02/05-01/20-771](#), 18 October 2022 ("Sixth Application").

<sup>10</sup> Sixth Application, para. 12.

(ii) **P-0041:** DAR-OTP-0096-0002, paragraph 13; DAR-OTP-0206-0033, paragraphs 23-24, 26, 52 and 79.<sup>11</sup>

9. Consequently, the Defence indicated that, subject to those agreements it did not oppose the requests,<sup>12</sup> and on 7 November 2022 the Trial Chamber ruled accordingly, albeit on a preliminary basis.<sup>13</sup>

10. In both the Decision of 11 March and Decision of 7 November, the Chamber noted that its “preliminary ruling is subject to the receipt of the declarations [of truth]” as discussed in an earlier Decision.<sup>14</sup>

11. On 15 November 2022, the First Registry Transmission was filed, including confidential Annexes I-III. On 13 February 2023, the Second Registry Transmission was filed, including confidential Annexes I-XIV.

12. On 28 February 2023, the Prosecution filed its notice that it had concluded the presentation of its evidence.<sup>15</sup>

#### IV. APPLICABLE LAW

13. Rule 68(2)(ii) of the Rules provides:

Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief. *Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.*<sup>16</sup>

14. No definition of “new information” appears in the Rules. What amounts to “new information” has been considered in a number of decisions of different Trial

<sup>11</sup> Sixth Application, para. 14; *see also* email from trial lawyer to Trial Chamber I, 26 October 2022, 12:57.

<sup>12</sup> Defence consolidated response to Prosecution’s sixth, seventh and eighth applications under rule 68(2)(b), ICC-02/05-01/20-792-Conf, 27 October 2022 (“Consolidated Response”).

<sup>13</sup> Decision on the Prosecution’s sixth, seventh and eighth applications to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-808-Conf, 7 November 2022; public redacted version of “Decision on the Prosecution’s sixth, seventh and eighth applications to introduce prior recorded testimonies under Rule 68(2)(b)”, [ICC-02/05-01/20-808-Red](#), 7 November 2022 (“Decision of 7 November”), *see paras* 11 and 20.

<sup>14</sup> Decision of 7 November, para. 20; Decision of 11 March, para. 102(b) (referring to Decision [ICC-02/05-01/20-612-Red](#), *see paras* 14(ii) and 17-19 : “Accordingly, any decision of the Chamber authorising the introduction of a prior recorded testimony under Rule 68(2)(b) is a preliminary ruling, subject to the filing on the case record of the aforesaid signed declarations accompanying the statements.”)

<sup>15</sup> Notice of the conclusion of the Prosecution’s presentation of evidence, [ICC-02/05-01/20-887](#), 28 February 2023.

<sup>16</sup> Emphasis added.

Chambers, and will be determined on a case-by-case basis, taking into account the particular context. However, it is submitted that it is instructive to have regard to the approach of previous Trial Chambers in determining what is and what is not “new information” within the meaning of Rule 68(2)(b)(ii). In *Bemba et al.*,<sup>17</sup> the Chamber held that certain clarifications provided by one witness,<sup>18</sup> “do not contain new information but are merely provided to rectify inadvertencies and explanations with regard to non-substantive matters.”<sup>19</sup>

15. The Chamber went on to hold that:

...in the present circumstances this sort of information is not to be considered ‘new information’ within the meaning of Rule 68(2)(b)(ii), but rather constitutes part of the prior recorded testimony itself. To conclude otherwise reduces the reliability of Rule 68(2)(b) prior recorded testimony for no good reason, precluding witnesses from correcting or clarifying details which – if not corrected or clarified – might be erroneously relied upon.<sup>20</sup>

16. Conversely, when assessing more substantive new facts contained in the Rule 68(2)(b)(ii) declaration of another witness (P-264),<sup>21</sup> the Trial Chamber found that:

this fact provided by P-264 goes beyond corrections or clarifications. It constitutes ‘new information’ which goes against the purpose of Rule 68(2)(b)(ii) of the Rules. Accordingly, the Chamber will not consider this fact in its judgment.<sup>22</sup>

17. Two years later, the Trial Chamber in *Ntaganda* discussed *proprio motu* other examples of minor changes to witnesses’ prior recorded testimony contained in their Rule 68(2)(b) declarations that amounted to “merely rectifying information with regard to non-substantive matters” which should not be considered “new

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<sup>17</sup> *Prosecutor v. Bemba et al.*, Corrigendum of public redacted version of “Decision on Prosecution Rule 68(2) and (3) Requests”, [ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015 (“*Bemba et al.* Decision”).

<sup>18</sup> ie. the witness stated that he was represented by two counsel and indicated which counsel spoke at specific instances in the interview, and corrected a year, and made one other comment of a clarifying nature: *Bemba et al.* Decision, fn. 118.

<sup>19</sup> *Bemba et al.* Decision, para. 99.

<sup>20</sup> *Bemba et al.* Decision, para. 100.

<sup>21</sup> “Specifically, when signing the Rule 68(2)(b) declaration, P-264 added ‘the new information that D-6 had been in contact with [P-264] before [P-264’s] first meeting with the Prosecution and that he had advised [P-264] not to meet with the Prosecution, and that [P-264] had heard the Defence witnesses often discussing Me. Kilolo’”: *Bemba et al.* Decision, para. 107.

<sup>22</sup> *Bemba et al.* Decision, para. 108.

information”.<sup>23</sup> Such examples included where clarifications were provided regarding the order of a witness’s names as appearing in his statement,<sup>24</sup> the spelling of a witness’s name as appearing in her statement,<sup>25</sup> a witness’s place of birth and residence,<sup>26</sup> and a witness’s telephone number.<sup>27</sup>

18. In light of the above, the Defence submits that the proper test to be applied is the following: does the new information in the declaration of truth go beyond mere rectification, correction or clarification of a non-substantive matter? If it does not, but simply “constitutes part of the prior recorded testimony itself”, it is not new information within the meaning of Rule 68(2)(b)(ii). If it does, it reaches the level of new information and consequently offends the purpose of Rule 68(2)(b)(ii).

19. The Trial Chamber in *Gicheru* examined the consequences of new information being contained in a witness’s Rule 68(2)(b)(ii) declaration of truth:

33. The Chamber is mindful of the fact that Rule 68(2)(b)(ii) of the Rules does not allow the addition of new information. Accordingly, if the witness expresses the wish to make substantial changes to their prior recorded testimony, then the Chamber’s authorisation to introduce the testimony pursuant to Rule 68(2)(b) of the Rules automatically lapses. In such a case, the prior recorded testimony may still be introduced pursuant to Rule 68(3) of the Rules.

34. However, if a witness wishes to make minor corrections that do not change the substance of their testimony, this must be clearly reflected in the witness’ declaration, attested to by the certifying officer, and brought to the Chamber’s attention. The Chamber will then review the amendments and may decide to rescind its provisional authorisation to introduce the testimony pursuant to Rule 68(2)(b) of the Rules.<sup>28</sup>

20. It would be open to the Trial Chamber to follow the *Gicheru* Decision and find that its preliminary rulings authorising the introduction of the Five Witnesses’ prior recorded testimony under Rule 68(2)(b) automatically lapses. It would alternatively be

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<sup>23</sup> *Prosecutor v. Ntaganda*, Public redacted version of “Decision on Defence request for admission of prior recorded testimony of Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 pursuant to Rule 68(2)(b)”, [ICC-01/04-02/06-2141-Red](#), 4 December 2017 (“*Ntaganda* Decision”), para. 20.

<sup>24</sup> *Ntaganda* Decision, para. 34.

<sup>25</sup> *Ntaganda* Decision, para. 40.

<sup>26</sup> *Ntaganda* Decision, para. 40.

<sup>27</sup> *Ntaganda* Decision, para. 54.

<sup>28</sup> *Prosecutor v. Gicheru*, Public redacted version of “Decision on the Prosecution’s Request to Admit Prior Recorded Testimony under Rule 68(2)(b)”, [ICC-01/09-01/20-250-Red](#), 15 December 2021 (“*Gicheru* Decision”), paras. 33-34.

open to the Trial Chamber to rule that it will not consider the New Information in the Five Witnesses' declarations in its deliberations, *per* the *Bemba et al.* Decision, paragraph 108.

## V. SUBMISSIONS

### A. P-0028

21. Witness P-0028's Rule 68(2)(b)(ii) declaration of truth and corrections are found in Annex IV to the Second Registry Transmission. Some of the corrections and clarifications are of non-substantive matters and do not amount to new information within the meaning of Rule 68(2)(b)(ii). The Defence takes no issue with such minor corrections and clarifications. However, the declaration contains other, inadmissible, New Information that offends the purpose of Rule 68(2)(b)(ii):

- (i) "At page 0427, para. 13, second bullet point: [REDACTED]";
- (ii) "At page 0430-0431, paras. 25-26: [REDACTED]";
- (iii) "At page 0431, para. 27: [REDACTED]";
- (iv) "At page 0434, para. 43: [REDACTED]";
- (v) "At pages 0434-0435, para. 47: [REDACTED]";
- (vi) "At page 0436-0437, paras. 57-58: [REDACTED]";
- (vii) "At page 0437, para. 58: [REDACTED]";
- (viii) "At page 0439, para. 64: [REDACTED]";
- (ix) "At page 0441, para. 74: [REDACTED]."

22. The New Information in (i)-(ix) above does not simply constitute part of the prior recorded testimony itself. It goes beyond mere rectification, correction or clarification of a non-substantive matter. The New Information at (vi) and (vii) is particularly substantive and particularly prejudicial to the Defence.

23. Most egregiously, there is New Information relating to material in paragraphs of P-0028's prior recorded testimony upon which the Prosecution has specifically undertaken not to rely,<sup>29</sup> and which must therefore be excluded:

- (i) "At page 0432, para. 33: [REDACTED]";

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<sup>29</sup> See para. 7(i) above.



- (ii) “At page 0432, para. 35: [REDACTED]”;
- (iii) “At page 0433, para. 37: [REDACTED]”;
- (iv) “At page 0438, para. 62: [REDACTED].”

B. P-0040

24. Witness P-0040’s Rule 68(2)(b)(ii) declaration of truth and corrections are found in Annex XII to the Second Registry Transmission. As with P-0028, some of the corrections and clarifications are of non-substantive matters and do not amount to new information. However, the declaration contains other, inadmissible, New Information that offends the purpose of Rule 68(2)(b)(ii):

- (i) “At para. 55: [REDACTED]”;
- (ii) “At para. 64: [REDACTED]”;
- (iii) “At para. 124: [REDACTED].”

25. The New Information in (i)-(iii) above does not simply constitute part of the prior recorded testimony itself. It goes beyond mere rectification, correction or clarification of a non-substantive matter. The New Information contains apparent new material about *Ali Kushayb* whereas the prior recorded testimony of P-0040 never once mentioned him. This New Information exemplifies what could be describes as substantive evidence, and is highly prejudicial to the Defence. Moreover, the references to [REDACTED] cannot reasonably be characterised as constituting part of the prior recorded testimony itself. The references directly contradict the witness’s prior recorded testimony in which he states in terms that he does not know the name of [REDACTED].<sup>30</sup>

C. P-0041

26. Witness P-0041’s Rule 68(2)(b)(ii) declaration of truth and corrections are found in Annex III to the Second Registry Transmission. As with P-0028, some of the corrections and clarifications are of non-substantive matters and do not amount to new information. However, the declaration contains other, inadmissible, New Information that offends the purpose of Rule 68(2)(b)(ii):

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<sup>30</sup> See DAR-OTP-0094-0165, para. 55

- (i) “At DAR-OTP-0096-0002 at 0004, para. 7 and at DAR-OTP-0206-0033 at 0044, para. 43: [REDACTED].”

27. This New Information goes beyond mere rectification, correction or clarification of a non-substantive matter. It makes reference for the first time to a second and wholly different [REDACTED] discussed in the witness’s prior recorded testimony. The information is substantive evidence, thereby reaching the level of what is properly described as New Information, and consequently offends the purpose of Rule 68(2)(b)(ii).

D. P-0816

28. Witness P-0816’s Rule 68(2)(b)(ii) declaration of truth and corrections are found in Annex II to the First Registry Transmission. As with P-0028, some of the corrections and clarifications are of non-substantive matters and do not amount to new information. However, the declaration contains other, inadmissible, New Information that offends the purpose of Rule 68(2)(b)(ii):

- (i) “At DAR-OTP-0214-0726, paragraph 25, line 6; [REDACTED]”;  
(ii) “At DAR-OTP-0214-0729, paragraph 36, line 6; [REDACTED].”

29. This information is substantive evidence, thereby reaching the level of what is properly described as New Information, and consequently offends the purpose of Rule 68(2)(b)(ii).

30. Of greatest seriousness is the fact that there is New Information relating to material in paragraph 27 of P-0816’s prior recorded testimony, a paragraph that the Prosecution has specifically undertaken not to rely on,<sup>31</sup> and which must therefore be excluded:

- (i) “At DAR-OTP-0214-0727, paragraph 27, line 5; [REDACTED].”

E. P-0927

31. Witness P-0927’s Rule 68(2)(b)(ii) declaration of truth and corrections are found in Annex III to the First Registry Transmission. As with P-0028, some of the corrections and clarifications are of non-substantive matters and do not amount to new

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<sup>31</sup> See para. 4 above.

information. However, the declaration contains other, inadmissible, New Information that offends the purpose of Rule 68(2)(b)(ii):

- (i) “At DAR-OTP-0221-0530, paragraph 32, tenth line, I wish to add [REDACTED].”


32. In the witness’s own comment, he notes that the new information is an addition. It goes beyond a simple rectification, correction or clarification of a non-substantive matter. It is substantive evidence, thereby reaching the level of what is properly described as New Information, and consequently offends the purpose of Rule 68(2)(b)(ii).

33. Moreover, and once again, there is New Information in P-0927’s declaration of truth relating to material in paragraph 47 of his prior recorded testimony, one of the four paragraphs that the Prosecution has specifically undertaken not to rely on,<sup>32</sup> and which must therefore be excluded:

- (i) “At DAR-OTP-0221-0533, paragraph 47, I wish to add that [REDACTED].”

## VI. RELIEF

34. For the aforementioned reasons, the Defence respectfully requests that the Trial Chamber exclude the New Information contained in the Five Witnesses’ declarations of truth and identified in paragraphs 20-32 above.



Dr Cyril Laucci,  
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 22<sup>nd</sup> day of June 2023 at The Hague, The Netherlands

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<sup>32</sup> See para. 4 above.