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No. ICC-02/05-01/20
Date: **6 October 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 WITH CONFIDENTIAL ANNEX A

Public redacted version of “Defence request to submit the prior recorded testimony of Witness DAR-OTP-P-0017 / D-0017 under rule 68(2)(b)”

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. Pursuant to Article 69(2) and (4) of the Rome Statute (“Statute”) and Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), the Defence for Ali Muhammad Ali Abd-Al-Rahman (“Defence”) applies to submit into evidence the statements and associated material of Defence Witness D-0017, previously DAR-OTP-P-0017 (“Prior Recorded Testimony”, “D-0017”).¹ The Defence also requests that the Chamber designate an appropriate person to authorise the witness declaration required pursuant to rule 68(2)(b)(ii) and 68(2)(b)(iii) of the Rules.
2. The Prior Recorded Testimony of D-0017 does not concern the acts and conduct of Mr Abd-Al-Rahman and relates primarily to background information regarding the structural composition of the armed forces in Darfur, specifically the Popular Defence Forces (“PDF”) and the Popular Police Forces (“PPF”).
3. The Prior Recorded Testimony of D-0017 is relevant, reliable and probative. It is cumulative or corroborative in nature, including with the expected testimony of Defence Witness D-0016, and is limited to issues that are not materially in dispute. Its introduction into evidence will not prejudice the Prosecution. D-0017 is former Prosecution Witness DAR-OTP-P-0017. Had the Office of the Prosecutor (“OTP”) deem useful to call its Witness DAR-OTP-P-0017 to appear at trial, it had full opportunity to call him. It did not. The Defence is seeking the admission of all Prior Recorded Testimonies made by D-0017, i.e. to the OTP and Defence alike. Since the OTP did not find it useful to call its Witness DAR-OTP-P-0017 to appear, the admission of his statements under Rule 68(2)(b) of the Rules should not be an issue for the Prosecution, nor be considered prejudicial to its case.

¹ Annex A lists the Prior Recorded Testimony of D-0017 which comprises his witness statements and associated material.

II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this request and its Annex are filed as confidential, since they contain confidential information that identifies the witness. A public redacted version of the request will be filed as soon as practicable.

III. APPLICABLE LAW

5. Rule 68(1) and (2)(b) of the Rules, together with Article 69(2) of the Statute, provide the legal framework for the determination of the present request. The Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when it: (i) goes to proof of a matter other than the acts and conduct of the accused; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii).
6. The decision of whether to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules is a discretionary one. The entire purpose of this provision is to identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial.²
7. In the exercise of this discretion, the Appeals Chamber in *Bemba* articulated a non-exhaustive list of factors that the Chamber shall consider in determining whether to introduce into evidence prior recorded testimony falling under Rule 68(2)(b) of the Rules.³ These are *inter alia* whether the prior testimony: (i) relates to issues that are not materially in dispute; (ii) is of a corroborative nature; and (iii) relates to background information. In addition, the Trial Chamber will

² *Al Hassan*, Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules, 15 November 2021, [ICC-01/12-01/18-1924](#) (“*Al Hassan* Decision”), para. 11.

³ *Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, [ICC-01/05-01/08-1386](#) (“*Bemba* Decision”), para. 78.

consider whether the interests of justice are best served by its introduction and whether the evidence has sufficient indicia of reliability.⁴

8. The interests of justice are better served by the introduction in writing of prior recorded testimony when such introduction would safeguard the expeditiousness of the proceedings, streamline the presentation of evidence, focus live testimony on those topics of greatest relevance to the proceedings, minimise cumulative in-court testimony, save resources of the institution which may rather be utilised for other purposes, and/or avoid witnesses having to travel in order to appear in court.⁵

IV. SUBMISSIONS

A. Prior Recorded Testimony of D-0017

9. The Prior Recorded Testimony of D-0017 is found in his statement of [REDACTED] given to the Prosecution,⁶ and his more recent statement to the Defence of [REDACTED].⁷ The witness lived and worked in [REDACTED] Darfur remote from the areas covered by the geographic scope of the charges faced by Mr Abd-Al-Rahman. However, D-0017's position as [REDACTED],⁸ and involvement with the [REDACTED]⁹ placed him in a good position to gain an understanding of the structural composition, training, organisation and funding of certain paramilitary forces in Darfur, particularly the PDF and the PPF. This information is of relevance to this case.
10. The Second Statement complements and elaborates on his knowledge of the structural composition, training, organisation and funding of the PDF, the PPF and their relation with the so-called *Janjaweed*.

⁴ *Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, [ICC-02/04-01/15-596-Red](#), paras. 16-17.

⁵ *Al Hassan* Decision, para. 18.

⁶ DAR-OTP-0088-0262 ("First Statement").

⁷ DAR-D31-00000146 ("Second Statement").

⁸ First Statement, para. 33.

⁹ First Statement, para. 10.

11. The Defence seeks to submit into evidence D-0017's Prior Recorded Testimony along with the associated material listed in Annex A to this Application.¹⁰ There is one document, also included in Annex A, that the Defence does not seek to introduce into evidence.¹¹
12. D-0017 is of [REDACTED] ethnic origin. He was formerly employed by the Sudanese [REDACTED] and trained with the [REDACTED].¹² During the time of relevance to Mr Abd-Al-Rahman's case, he worked for [REDACTED].¹³ By virtue of that position, D-0017 is able to provide direct evidence of the structure and internal functioning of the PDF and PPF. He also directly witnessed their recruitment, training, financing and conditions of service.¹⁴ He explains that the local PDF coordinator would recruit men into the PDF.¹⁵ D-0017 also provides evidence of compensation for PDF members killed in operations, and distribution of land to them.¹⁶ Additionally, D-0017 provides evidence on the differences in allowances given to the PDF and PPF.¹⁷
13. D-0017 explains that the PPF and the Border Guards were indistinguishable and that a member of the *Janjaweed* would necessarily be either a member of the PDF or the PPF / Border Guards.¹⁸
14. It will be noted that nothing contained in the D-0017's Prior Recorded Testimony goes to the acts and conduct of Mr Abd-Al-Rahman.

¹⁰ DAR-OTP-0088-0262, DAR-D31-00000146, DAR-OTP-0088-0295, DAR-OTP-0088-0296, DAR-OTP-0088-0297, DAR-OTP-0088-0298, DAR-OTP-0088-0299, DAR-OTP-0088-0300, DAR-OTP-0088-0301, DAR-OTP-0088-0303, DAR-OTP-0088-0304, DAR-OTP-0153-1346, DAR-OTP-0215-7310, DAR-OTP-0219-7090 and DAR-D31-00000205

¹¹ DAR-OTP-00004306-R01

¹² Second Statement, para. 16.

¹³ Second Statement, para. 17.

¹⁴ Second Statement, paras. 21-32.

¹⁵ Second Statement, para. 23.

¹⁶ Second Statement, paras. 21-28.

¹⁷ Second Statement, paras. 29-32.

¹⁸ Second Statement, paras. 30-31.

B. The Prior Recorded Testimony is admissible under rule 68(2)(b)

15. The Prior Recorded Testimony is relevant, reliable and probative.¹⁹
16. The witness signed his witness statements, attesting that their contents were read back to him, were given voluntarily and were true to the best of his recollection of the events. The witness statements also bear the interpreters' signatures from the Registry's Language Services Section, certifying that the witness appeared to have heard and understood the interpretation of the interview and translation of the witness statement. The Prior Recorded Testimony is internally consistent. Accordingly, it is submitted that the Prior Recorded Testimony has the necessary indicia of reliability for introduction into evidence.

C. The Prior Recorded Testimony is cumulative and corroborative of evidence provided by other witnesses

17. The Prior Recorded Testimony on the structural composition of the PDF, PPF and *Janjaweed* in Darfur is corroborative of, and cumulative to, the evidence provided by, in particular, Prosecution witnesses [REDACTED].²⁰ These witnesses testified *inter alia* about the *Janjaweed*'s relationship with the PDF, the *Janjaweed*'s military training, the uniforms each unit was known for wearing, the relationship between the *Janjaweed* leadership and PDF coordinators, the recruitment of the PPF, and compensation to the *Janjaweed* in case of death. D-0017's Prior Recorded Testimony is also corroborative of the expected evidence of Witness D-0016.
18. Due to the cumulative or corroborative character of the Prior Recorded Testimony, its introduction through rule 68(2)(b) of the Rules would save the

¹⁹ *Gbagbo and Blé Goudé*, Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088", 6 June 2017, [ICC-02/11-01/15-950-Red](#), para. 22.

²⁰ See for example: [REDACTED].

Chamber time during hearings so it can focus live testimony on topics of most relevance, as well as Court resources in having the witness travel to testify. Its introduction would also avoid in-court repetition, serving the overall interests of justice.

D. The introduction of the Prior Recorded Testimony is not prejudicial to the Prosecution

19. The introduction of the Prior Recorded Testimony into evidence would not be prejudicial to the Prosecution, given the limited nature of D-0017's testimony and that fact that the issues are not materially in dispute between the Parties.²¹ Had the Prosecution wish to call that witness to appear, it had full opportunity to call him as Witness DAR-OTP-P-0017 and did not do so. The Prosecution's decision not to call its Witness DAR-OTP-P-0017 necessarily implies that the introduction of his Prior Recorded Testimonies, including those made to the Prosecution as DAR-OTP-P-0017, under Rule 68(2)(b) is not prejudicial to the Prosecution.

E. Request to designate an appropriate person to certify the witness declaration required under rule 68(2)(b) of the Rules

20. Prior recorded testimony may only be introduced under rule 68(2)(b) of the Rules if the testifying witness declares that it is true and correct through the formalities specified in sub-rules (ii) and (iii). In accordance with these sub-rules, the Defence requests that the declaration be witnessed by a person authorised by the Chamber for this purpose.²²

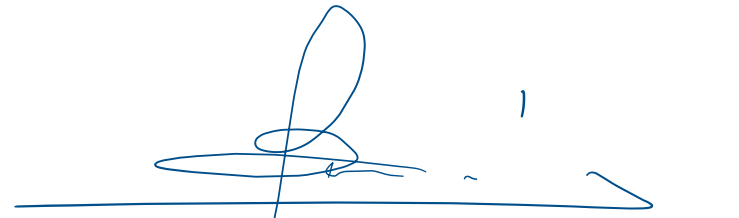
V. CONCLUSION

21. For the foregoing reasons, the Defence requests that the Chamber grant the request subject to the fulfilment of the further conditions of rule 68(2)(b) of the Rules.

²¹ *Bemba* Decision, para. 78.

²² *Al Hassan*, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, [ICC-01/12-01/18-1111-Red](#), para. 14.

Respectfully submitted,



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

Dated this 6 October 2023 at The Hague, The Netherlands