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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 Response regarding four items objected to in the Defence Bar Table Motion”, 29 May 2024, ICC-02/05-01/20-1137-Conf

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I. INTRODUCTION

1. The Prosecution objects to the formal submission of three screening notes listed in the Annex to the Defence Bar Table Motion¹ on the grounds that a party should not be permitted to tender documents for the purpose of impeachment, unless a witness has been confronted with the relevant document or specific allegation relied upon therein and given an opportunity to comment or clarify. The Trial Chamber previously refused Defence requests for submission of these same screening notes and there has been no change to merit this renewed request, now via a bar table motion.²

2. The Prosecution also objects to the formal submission of one investigation report³ because the prejudice to the fair evaluation of the evidence of the relevant witness occasioned by its introduction would outweigh its probative value, as required by article 69(4).

3. Alternatively, if recognised as formally submitted, no weight should be given to these items for the aforementioned reasons.

II. CLASSIFICATION

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is classified as confidential as it responds to confidential items annexed to the Defence Bar Table Motion.

III. SUBMISSIONS

5. The Defence Bar Table Motion seeks to introduce into the record four documents for the purposes of impeaching or challenging the credibility of four Prosecution witnesses, whose prior recorded testimony was introduced into evidence

¹ Requête de la Défense aux fins d'admission d'éléments de preuve par voie de procédure écrite («*Bar Table*»), [ICC-02/05-01/20-1134](#) ("Defence Bar Table Motion"); Annex to À la Requête de la Défense aux fins d'admission d'éléments de preuve par voie de procédure écrite («*Bar Table*»), [ICC-02/05-01/20-1134-Conf-Anx](#) ("Defence Bar Table Annex"): item 10 (screening note of witness P-0040, DAR-OTP-0194-0178), item 11 (screening note of witness P-0816, DAR-OTP-0214-0179) and item 12 (screening note of witness P-0096 DAR-OTP-0113-0473).

²Public redacted version of the Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-625-Red](#), paras. 99-101.

³ [Defence Bar Table Annex](#), item 14 (Investigation Report, DAR-OTP-0222-5176).

under rule 68(2)(b).⁴ These items fall into two categories: (i) screening notes that the Defence previously sought to have submitted as associated materials, but which the Chamber rejected;⁵ and (ii) an investigation note regarding a [REDACTED].⁶

6. The introduction of evidence from the bar table requires consideration of three standard evidentiary criteria: the evidence in question must be *prima facie* (i) relevant, (ii) probative to the issues at trial, and (iii) its potential prejudicial effect must be weighed against its probative value.⁷

Screening Notes of P-0040, P-0096 and P-0816

7. The prior recorded statements and relevant associated materials of witnesses P-0040, P-0096 and P-0816 were previously submitted by the Prosecution under rule 68(2)(b).⁸ In those applications, the Prosecution did not seek to include screening notes for these witnesses, as they did not form part of their prior recorded testimony.

8. As held by Trial Chamber V in *Yekatom & Ngaissona*, prior recorded testimony within the meaning of rule 68 includes any annex to witness statements, or item otherwise associated with it, as long as it is used or explained by the witness in their statement and thereby forms an integral part of the testimony itself.⁹ The Chamber in

⁴ See [Defence Bar Table Annex](#), column entitled “Relevance and probative value”.

⁵ Public redacted version of the Second Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-625-Red, paras. 99-101.

⁶ [Defence Bar Table Annex](#), item 14 (DAR-OTP-0222-5176).

⁷ *Lubanga*, Corrigendum to Decision on the admissibility of four documents, [ICC-01/04-01/06-1399-Corr](#), paras. 27-31; *Katanga*, Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 14; *Bemba*, Public redacted version of the First decision on the prosecution and defence request for the admission of evidence, dated 15 December 2011, [ICC-01/05-01/08-2012-Red](#), paras. 13-16; *Bemba*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, [ICC-01/05-01/08-2299-Red](#), para. 8; *Ruto & Sang*, Decision on the Prosecution’s Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), paras. 15-16; Al Hassan, Public redacted version of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, [ICC-01/12-01/18-1475-Red](#), para. 73.

⁸ 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](#); Public Redacted Version of “Prosecution’s fifth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0096, P-0120 and P-0558”, [ICC-02/05-01/20-579-Red](#); 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](#). See also Second Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-625-Red](#), paras. 39, 57, 80.

⁹ *Yekatom & Ngaissona*, First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to rule 68(2)(b) of the Rules, [ICC-01/14-01/18-1833-Red](#), para. 24. See also *Yekatom & Ngaissona*, Public redacted version of Decision on the Prosecution Requests for Formal Submission of Prior

this trial routinely agreed with the Prosecution's assessment to exclude screening notes from inclusion as "associated materials" in rule 68(2)(b) applications, despite Defence requests to do so, presumably because they fall outside of the scope of this principle.¹⁰

9. The introduction of associated material is supported by Trial Chamber VI's finding in *Ntaganda* that "exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."¹¹

10. The Defence previously attempted to persuade the Chamber to include these screening notes as "associated material" under rule 68(2)(b) and requested their inclusion for submission.¹² In its Decision, the Chamber found that the Prosecution did not fail to disclose any material pursuant to article 67(2) of the Statute or rule 77 of the Rules and, accordingly, no such order was necessary.¹³

11. The Defence now renews its request for the formal submission of P-0040, P-0096 and P-00816's screening notes - this time through a bar table motion, despite there being no material change since the Chamber's ruling on this matter. While the Prosecution acknowledges that the Chamber's previous rejection of these documents

Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-02193, P-2926, P-2927, P-1577 and P-0287, and the Ngaissona Defence Motion to Limit the Scope of P-2926's Evidence, [ICC-01/14-01/18-907-Red](#), para. 13.

¹⁰ Public redacted version of the First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-612-Red](#), paras. 71-73; Public redacted version of the Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-625-Red](#), paras. 99-101.

¹¹ *Ntaganda* Transcript of 20 June 2016, [ICC-01/04-02/06-T-105-Red2-ENG ET](#), p. 94, l. 2-7. See also *Ntaganda*, Decision on Prosecution Application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, [ICC-01/04-02/06-1205](#), para. 7; *Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, [ICC-01/04-02/06-1029](#), paras. 23, 35; *Ruto & Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33.

¹² 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-02/05-01/20-571 (ICC-02/05-01/20-595-Conf, 14 February 2022), [ICC-02/05-01/20-595-Red](#), para. 20;

Public Redacted Version of Defence response to Prosecution's fifth application under rule 68(2)(b) (witnesses P-0096, P-0120, and P-0558), ICC-02/05-01/20-579 (ICC-02/05-01/20-592-Conf, 11 February 2022), [ICC-02/05-01/20-592-Red](#), para. 16;

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-02/05-01/20-573", [ICC-02/05-01/20-589-Red](#), para. 16.

¹³ Public redacted version of the Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-625-Red](#), paras. 99-101.

is not in itself an impediment to their introduction from the bar table, the Prosecution submits it is fundamentally unfair to the witnesses and prejudicial to the fair evaluation of their evidence to now permit them to be impeached on documents that could not have been shown to them for comment.¹⁴ Because a screening note is not authored, read back or signed by a witness, it is unfair, prejudicial and of no probative value to later request formal submission, for the purpose of undermining or impeaching a witness's credibility.

12. The Defence purportedly seeks submission the screening notes to highlight the fact that the witnesses did not make reference to the nickname "*Ali Kushayb*" during their telephone call with investigators.¹⁵ Given that a screening note is authored by an OTP investigator and based on a set of questions put to a witness during a brief call, the absence of reference to the nickname "*Ali Kushayb*" cannot fairly be submitted into evidence to cast doubt on a witness's credibility. Furthermore, the statutory framework does not even distinguish between the purpose for which an item of evidence is submitted by a party; neither article 69 of the Statute nor Chapter 4, section 1 of the Rules make such a distinction.¹⁶

13. Regarding the single screening note disclosed after the rule 68(2)(b) application for witness P-0040,¹⁷ the Defence allege a "windfall benefit to the Prosecution" and impact on the fair trial rights of the Accused, should the document not be recognised as formally submitted in the Defence bar table motion.¹⁸ The Defence fail to demonstrate what prejudice they incurred by virtue of the late disclosure of this document. In addition, the Prosecution further observes that, in their summary of the relevance and probative value of this item, the Defence concede that the content of the

¹⁴ According to the long established and widely followed principle known as the "Rule in *Browne v. Dunn*", *Browne v. Dunn* (1894) 6, R 67 [H L]. At p. 70, per Lord Herschell, L.C "[...] it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination [...] if you intend to impeach a witness you are bound, whilst he is still in the box, to give him an opportunity of making any explanation which is open to him [...]."

¹⁵ [Defence Bar Table Annex](#), items 10-12.

¹⁶ *Gicheru*, Decision on the Defence Request to Introduce Evidence Other than through a Witness, [ICC-01/09-01/20-328](#), para. 13. See also Section entitled "Evidence", rules 63-75 of the Rules.

¹⁷ [Defence Bar Table Annex](#), item 10 (DAR-OTP-0194-0178).

¹⁸ [Defence Bar Table Motion](#), para 8(iii).

screening note is entirely consistent with P-0040's subsequent witness statement.¹⁹ As such, there is no additional information contained in the screening note that would be relevant to the Chamber's assessment of P-0040's credibility, much less undermine it.

Investigation note

14. The Defence requests the formal submission of an investigation report summarising a telephone call with witness P-0868, [REDACTED] rule 68(2)(b) witness, P-0917.²⁰ In that brief call, P-0868 [REDACTED].²¹

15. The Defence acknowledge that they do not know the contents of the asylum file referred to in the investigation note. Nor did they have an opportunity to cross examine [REDACTED].²² Nor are the reasons for P-0868's refusal known to the Parties. Nevertheless, the Defence seek formal submission of this document through the bar table and invite the Chamber to "draw an inference that it contains details that are inconsistent with her OTP witness statement".²³

16. The Chamber has no opportunity to receive any context or explanation from either P-0868 or P-0917 about this telephone call with OTP investigators, making it unfair to draw adverse inferences from the document in question. Furthermore, the prejudice to the fair evaluation of P-0917's evidence far exceeds the probative value of this investigation note and the Chamber should exercise its discretion not to recognise it as formally submitted to ensure the fairness of trial.

IV. RELIEF REQUESTED

17. For the foregoing reasons, the Prosecution requests the Chamber to exercise its discretion to reject the formal submission of items 10, 11, 12 and 14 listed in the Defence Bar Table Annex.

¹⁹ [Defence Bar Table Annex](#), item 10 (DAR-OTP-0194-0178).

²⁰ 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", ICC-02/05-01/20-776-Conf, with confidential Annex A, [ICC-02/05-01/20-776-Conf-AnxA](#). A public redacted version was filed on the same day, [ICC-02/05-01/20-776-Red](#).

²¹ [Defence Bar Table Annex](#), item 14 (DAR-OTP-0222-5176).

²² [Defence Bar Table Annex](#), item 14 (DAR-OTP-0222-5176).

²³ [Defence Bar Table Annex](#), item 14 (DAR-OTP-0222-5176).

18. Alternatively, if recognised as formally submitted, the Chamber should decline to take these documents into consideration for credibility or impeachment purposes, or accord them no weight, when deciding on the guilt or innocence of the Accused in its judgment pursuant to article 74.



Karim A. A. Khan KC
Prosecutor

Dated this 14th day of June 2024

At The Hague, The Netherlands