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No.: ICC-02/05-01/20  
Date: 7 February 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 fifth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0096, P-0120 and P-0558” 3 February 2022, ICC-02/05-01/20-579-Conf**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan QC

Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci

Mr Iain Edwards

**Legal Representatives of the Victims**

Ms Natalie von Wistinghausen

Mr Nasser Mohamed Amin Abdalla

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Section**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. INTRODUCTION

1. Pursuant to article 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”)<sup>1</sup> of P-0096, P-0120 and P-0558 (“Three 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 due to the current challenges imposed by the ongoing COVID-19 pandemic<sup>2</sup> (“Application”).<sup>3</sup>

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, the Prior Recorded Testimonies of the Three Witnesses do not concern the acts and conduct of Mr Abd-Al-Rahman.<sup>4</sup> They relate primarily to the contextual elements of crimes against humanity.<sup>5</sup>

4. As set out below, the Prior Recorded Testimonies of the Three Witnesses are relevant, reliable and probative. The introduction into evidence of these testimonies is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, as they do not concern the acts or conduct of Mr Abd-Al-Rahman, relate to issues that are not

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<sup>1</sup> Annex A (A1 to A3) lists the prior recorded testimonies of the Three Witnesses which comprise their witness statements (at Part I) and associated material (at Part II). The material related to the 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.

<sup>2</sup> *Al Hassan* Rule 68(2)(b) Decision, [ICC-01/12-01/18-1111-Red](#), para. 18.

<sup>3</sup> This Application is submitted in accordance with [Directions on the Conduct of Proceedings](#), paras. 46-48.

<sup>4</sup> The Prosecution excluded those portions in the Prior Recorded Testimonies that go to the acts and conduct of Mr Abd-Al-Rahman, as set out below.

<sup>5</sup> Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), p. 50-51.

materially in dispute, are of a cumulative or corroborative nature and have sufficient indicia of reliability.<sup>6</sup>

## II. CLASSIFICATION

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

## III. SUBMISSIONS

6. 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).<sup>7</sup>

### A. Overview of the Prior Recorded Testimonies of P-0096, P-0120 and P-0558

7. The Prior Recorded Testimonies of the Three Witnesses relate primarily to the contextual elements of crimes against humanity.<sup>8</sup>

8. In addition to the statements of the Three Witnesses, the Prosecution seeks to introduce into evidence the associated material for each of the Three Witnesses. This material, which forms an integral part of their Prior Recorded Testimonies, is listed in Annex A to the Application<sup>9</sup> and is also mentioned below.

#### (i) *Prior Recorded Testimony of P-0096*

9. The Prosecution seeks to submit into evidence P-0096's prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0096's prior recorded testimony consists of one witness statement and

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<sup>6</sup> Rule 68(2)(b)(i) of the Rules.

<sup>7</sup> First Rule 68(2)(b) Application, [ICC-02/05-01/20-565-Red](#), paras. 6-8.

<sup>8</sup> [REDACT].

<sup>9</sup> See Annex A (Part II of A1 to A3). Where applicable, the Prosecution includes in the Annex the English translations of items referred to in the Associated Material.

three associated items that relate to information and events discussed in the statement. P-0096's prior recorded testimony is relevant to, *inter alia*, the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population in Darfur,<sup>10</sup> and the use of public resources by the GoS to recruit and fund the Militia/*Janjaweed*.<sup>11</sup>

10. P-0096, a Masalit civilian, provides testimony on three attacks on Arara village by Government of Sudan ("GoS") forces ("GoS Forces")<sup>12</sup> and the Militia/*Janjaweed* in December 2003.<sup>13</sup> P-0096 also provides information about the general support provided by the GoS to the Militia/*Janjaweed*, including recruitment<sup>14</sup> and the distribution of weapons and uniforms.<sup>15</sup> In addition, P-0096 describes the coordination between GoS Forces and the Militia/*Janjaweed* in joint operations,<sup>16</sup> and GoS unwillingness to disarm the Militia/*Janjaweed* and limit civilian casualties.<sup>17</sup>

11. P-0096's associated material consists of: (i) a map of the village of Arara drawn by P-0096 during his interview;<sup>18</sup> (ii) a list of locations in Arara town indicated on the map drawn by P-0096;<sup>19</sup> and (iii) a sketch of Arara's police station also drawn by P-0096 during his interview.<sup>20</sup>

(ii) *Prior Recorded Testimony of P-0120*

12. The Prosecution seeks to submit into evidence P-0120's prior recorded testimony, including the associated material listed in Annex A (A2) to this Application. P-0120's prior recorded testimony consists of one witness statement and

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<sup>10</sup> [REDACT].

<sup>11</sup> [REDACT].

<sup>12</sup> [REDACT].

<sup>13</sup> [REDACT].

<sup>14</sup> [REDACT].

<sup>15</sup> [REDACT].

<sup>16</sup> [REDACT].

<sup>17</sup> [REDACT].

<sup>18</sup> [REDACT]

<sup>19</sup> [REDACT].

<sup>20</sup> [REDACT].

two associated items that relate to information and events discussed in the statement. P-0120's prior recorded testimony is relevant to, *inter alia*, the contextual elements of crimes against humanity, in particular the involvement of senior GoS Officials, including Harun and Hussein, in the counter-insurgency campaign.<sup>21</sup>

13. P-0120, a [REDACTED], provides testimony on the background of the armed conflict in Darfur<sup>22</sup> and the GoS arming, mobilising and providing other support to the Militia/*Janjaweed*.<sup>23</sup> P-0120 also provides information on the visit of Ahmad Muhammad Harun ("Harun") and Abdel Raheem Muhammad Hussein ("Hussein") to Al Geneina in May 2003<sup>24</sup> and on the structure and function of Security Committees in Sudan.<sup>25</sup>

14. P-0120's associated material consists of a [REDACTED].<sup>26</sup>

(iii) *Prior Recorded Testimony of P-0558*

15. The Prosecution seeks to submit into evidence P-0558's prior recorded testimony, including the associated material listed in Annex A (A3) to this Application. P-0558's prior recorded testimony consists of 18 transcribed statements and seven associated items that relate to information and events discussed in the statement. P-0558's prior recorded testimony is relevant to, *inter alia*, the structure and activities of [REDACTED],<sup>27</sup> including after the attack by rebel armed groups on Al Fasher airport in 2003,<sup>28</sup> and the role of Security Committees in Sudan.<sup>29</sup>

16. P-0558, [REDACTED], provides testimony regarding the contextual elements of crimes against humanity, including (i) the use of public resources to recruit, fund

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<sup>21</sup> [REDACT].

<sup>22</sup> [REDACT].

<sup>23</sup> [REDACT].

<sup>24</sup> [REDACT].

<sup>25</sup> [REDACT].

<sup>26</sup> [REDACT].

<sup>27</sup> [REDACT].

<sup>28</sup> [REDACT].

<sup>29</sup> [REDACT].

and arm the Militia/*Janjaweed*,<sup>30</sup> including the involvement of Harun;<sup>31</sup> (ii) the integration of the Militia/*Janjaweed* into the GoS Forces;<sup>32</sup> (iii) the deliberate failure of the GoS to investigate and prosecute crimes committed by the Militia/*Janjaweed* in Darfur;<sup>33</sup> and (iv) the deliberate exclusion of members of the Fur, Zaghawa and Masalit tribes from sensitive positions in the GoS.<sup>34</sup>

17. P-0558's associated material consists of: (i) [REDACTED];<sup>35</sup> (ii) a map of Al Fasher and three surrounding camps for IDPs drawn by P-0558 during his interview;<sup>36</sup> (iii) a sketch depicting [REDACTED] drawn by P-0558 during his interview;<sup>37</sup> (iv) [REDACTED];<sup>38</sup> (v) a [REDACTED];<sup>39</sup> (vi) [REDACTED];<sup>40</sup> (vii) [REDACTED].<sup>41</sup>

*The Prosecution does not request the introduction into evidence of the portions identified below in the prior recorded testimony of P-0558*

18. Should the Chamber admit P-0558's prior testimony into evidence, the Prosecution will not rely on lines 48 to 95 of one of his transcripts, in which the witness provides information that Mr Abd-Al-Rahman was a leader of the Militia/*Janjaweed* in West Darfur and carried out operations on the behalf of the GoS, including Harun.<sup>42</sup> The Prosecution will also not rely on lines 166 to 233 of the same transcript which refer to the leadership role of Mr Abd-Al-Rahman in the Mukjar Locality in 2003-2004.<sup>43</sup>

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

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<sup>30</sup> [REDACT].

<sup>31</sup> [REDACT]

<sup>32</sup> [REDACT].

<sup>33</sup> [REDACT].

<sup>34</sup> [REDACT].

<sup>35</sup> [REDACT].

<sup>36</sup> [REDACT].

<sup>37</sup> [REDACT].

<sup>38</sup> [REDACT].

<sup>39</sup> [REDACT].

<sup>40</sup> [REDACT].

<sup>41</sup> [REDACT].

<sup>42</sup> [REDACT].

<sup>43</sup> [REDACT].

19. 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.<sup>44</sup>

20. All Three Witnesses have given their statements voluntarily and acknowledged that they record their best recollections of events.<sup>45</sup> The Prior Recorded testimonies were also collected with the assistance of interpreters, and each witness appeared to have heard and understood the translation.<sup>46</sup> The Prior Recorded Testimonies of all Three Witnesses are internally consistent.<sup>47</sup> Accordingly, the Prior Recorded Testimonies have the necessary indicia of reliability for introduction into evidence.

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

21. The Prior Recorded Testimonies of the Three Witnesses regarding the contextual elements of crimes against humanity are cumulative in nature and corroborative of the evidence<sup>48</sup> that will be provided by *viva voce* witnesses, including in particular [REDACTED].<sup>49</sup>

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

22. The introduction of the Prior Recorded Testimonies of the Three Witnesses into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman. The Prior Recorded Testimonies of the Three Witnesses are limited to the contextual elements of crimes against humanity, which is an issue not materially in

<sup>44</sup> *Gbagbo & Blé Goudé* Prosecution's Rule 68(2)(b) Application, [ICC-02/11-01/15-950-Red](#), para. 22.

<sup>45</sup> [REDACT].

<sup>46</sup> P[REDACT].

<sup>47</sup> *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.

<sup>48</sup> See *Bemba* Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

<sup>49</sup> [REDACT].



dispute<sup>50</sup> between the Prosecution and the Defence.<sup>51</sup> The Prior Recorded Testimonies also do not relate to the acts and conduct of Mr Abd-Al-Rahman, as set out in the consolidated jurisprudence of the Court.<sup>52</sup> The evidence regarding Mr Abd-Al-Rahman in the Three Witnesses' statements is limited to establishing his network of co-perpetrators and does not link him to any of the charged attacks, which the Prosecution has excluded from the Application.<sup>53</sup>

23. 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.

24. The Prosecution consulted the Defence regarding its Application to admit the Prior Recorded Testimonies of the Three Witnesses into evidence pursuant to rule 68(2)(b). The Defence did not agree to the use of rule 68 (2)(b) for these witnesses.<sup>54</sup> The mere lack of agreement from the Defence does not prevent the introduction of the Prior Recorded Testimonies, nor does it necessarily follow that their introduction would be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.<sup>55</sup>

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<sup>50</sup> *Ongwen* Rule 68(2)(b) Decision on Prosecution Witnesses, [ICC-02/04-01/15-596-Red](#), para. 15.

<sup>51</sup> Agreed Facts 1-6, 11 and 14, Annex A to First Joint Submission on Agreed Facts, [ICC-02/05-01/20-291-AnxA](#); Agreed Facts 6 and 7, Annex A to Second Joint Submission on Agreed Facts, [ICC-02/05-01/20-343-AnxA](#).

<sup>52</sup> *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.

<sup>53</sup> See para. 18 above.

<sup>54</sup> See Email from the Defence to the Prosecution, [REDACT] (regarding P-0120); Email from the Defence to the Prosecution, [REDACT] (regarding P-0096 and P-0558).

<sup>55</sup> *Ongwen* Rule 68(2)(b) Decision on Defence Witnesses, [ICC-02/04-01/15-1322-Red](#), paras. 6-7, 9-10.

#### IV. CONCLUSION

25. 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.



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**Karim A. A. Khan QC**  
**Prosecutor**

Dated this 7<sup>th</sup> day of February 2022

At The Hague, The Netherlands