



Original: **English**

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

Date: **4 March 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 seventh application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0015 and P-0918”,
3 March 2022, ICC-02/05-01/20-614-Conf**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pursuant to article 69(2) and (4) of the Rome Statute, and rule 68(3) 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”)¹ of witnesses P-0015 and P-0918 (“Two Witnesses”); and (ii) grant the time requested in the paragraphs below for supplementary *viva voce* questioning of each witness.²

2. Granting the Application will enhance the expeditiousness of the proceedings by reducing the length of the Two Witness’s in-court testimony from nine hours to two, thus saving approximately seven hours of court time.³

3. As set out below, the Prior Recorded Testimonies of the Two Witnesses are relevant, reliable and probative. The Prior Recorded Testimonies of the Two Witnesses relate primarily to the charged crimes in Kodoom, Bindisi and surrounding areas on or around 15 and 16 August 2003.⁴ In particular, they provide evidence on, *inter alia*, specific events relating to charged crimes, such as intentionally directing attacks against the civilian population (Count 1), murder (Counts 2-3), pillaging (Count 4), destruction of property (Count 5), other inhumane acts and outrages upon personal dignity (Counts 6-7), forcible displacement (Count 10) and persecution (Count 11).

¹ Annex A (A1 and A2) lists the prior recorded testimonies of the Two Witnesses which comprise their witness statements (at I) and associated material (at 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 III). Hyperlinks to this material are also included. See Conduct of Proceedings Directions, [ICC-02/05-01/20-478](#), para. 47.

² This Application is submitted in accordance with [Directions on the Conduct of Proceedings](#), paras. 46-48.

³ Article 64 (3)(a), the Chamber shall, “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings.” See also; Chambers Practice Manual (2019), p. i (“The overall question of the expeditiousness of proceedings is one of considerable complexity and the conduct and readiness of all parties and participants to Court proceedings play a crucial role—the commitment to expediency must, in this regard, be a collective one.”); *Katanga* Judgment on the Appeal Against the Decision on Unlawful Detention and Stay of Proceedings, [ICC-01/04-01/07-2259](#), para. 43 (“The Appeals Chamber observes that expeditiousness is a recurrent theme in the Court’s legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants.[...]”). See also, *Ntaganda* Decision on Prosecution application under Rule 68(3) , [ICC-01/04-02/06-961](#), para 13. *Gbagbo & Blé Goudé* Decision on Prosecutor’s application under Rules 68(2)(b) and 68(3), [ICC-02/11-01/15-573](#), paras. 25, 42.

⁴ Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), paras. 94, 117.

4. Should the request to conduct a supplementary examination be granted, the Prosecution would elicit further focussed *viva voce* evidence of certain issues that require clarification or elaboration as set out below. The Prosecution will ensure that the Two Witnesses are not asked merely to repeat information already provided in their Prior Recorded Testimonies.

5. The introduction into evidence of the Prior Recorded Testimonies is not prejudicial to or inconsistent with the rights of the Accused, as the Two Witnesses will be available, *inter alia*, for cross examination by the Defence and any further questioning by the Chamber.

II. CLASSIFICATION

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

III. SUBMISSIONS

7. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(3) of the Rules, as set out at paragraphs seven to 10 of its first application under rule 68(3).⁵

8. The associated material which the Prosecution seeks to introduce into evidence for each of the Two Witnesses⁶ forms an integral part of their prior recorded testimonies.⁷ These items are also necessary to fully comprehend the accounts of the Two Witnesses, as they discuss the items and when required, clarify them in their statements. The introduction of this material is supported by Trial Chamber VI's finding in *Ntaganda* that "exhibits associated with a previously recorded testimony

⁵ Prosecution's first application under Rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0717, P-0757, P-0834, P-0868 and P-0882, [ICC-02/05-01/20-547-Red](#), paras. 7-9.

⁶ See Annex A (Part II of A1 and A2). Where applicable, the Prosecution includes in the Annex, the English translations of items referred to in the Associated Material.

⁷ See *Yekatom & Ngaissona* Decision on the Prosecution Requests under Rule 68(3), [ICC-01/14-01/18-907-Red](#), para. 26.

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.”⁸

A. Overview of the Prior Recorded Testimonies of Witnesses P-0015 and P-0918

(i) *Prior Recorded Testimony of Witness of P-0015*

9. The Prosecution seeks to submit into evidence P-0015’s prior recorded testimony, inclusive of the associated material listed in Annex A (A1) to this Application. P-0015’s prior recorded testimony comprises a single witness statement, which refers to seven associated items that were used and explained by the witness in her interview and relate to information and events discussed in the statement.

10. P-0015, a [REDACTED], provides testimony on the attack on Bindisi town on or around 15 and 16 August 2003, conducted by forces from the Government of Sudan (“GoS forces”) and Militia/*Janjaweed*,⁹ including a description of the attackers,¹⁰ the killing of [REDACTED] during the attack,¹¹ the looting and destruction of property,¹² [REDACTED],¹³ and the rape of women.¹⁴ P-0015 also provides evidence on the attackers using derogatory terms to refer to civilians¹⁵ and the displacement of civilians during and after the attack.¹⁶ P-0015 further provides testimony on the detention of males in Mukjar in August 2003, [REDACTED],¹⁷ [REDACTED],¹⁸ with the participation of Mr Ali Muhammad Ali Abd-Al-Rahman (“Abd-Al-Rahman”),¹⁹

⁸ *Ntaganda* Transcript of 20 June 2016, [ICC-01/04-02/06-T-105-Red-ENG](#) ET, p. 94, l. 2-7. *See also*, *Ntaganda* Decision on Prosecution application under Rule 68, [ICC-01/04-02/06-1205](#), para.7; *Ntaganda* Decision on Rule 68, [ICC-01/04-02/06-1029](#), para. 23, 35; *Ruto & Sang* Decision on the Admission of Prior Recorded Testimony, [ICC-01/09-01/11-1938-Corr-Red2](#), para. 33.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

identified by the witness as a leader in the Militia/*Janjaweed*.²⁰ P-0015 also provides evidence on a meeting held in Mukjar in December 2003, attended by Mr Abd-Al-Rahman and Ahmad Harun, among others.²¹

11. P-0015's prior recorded testimony relates, *inter alia*, to the charges of intentionally directing attacks against the civilian population,²² murder,²³ pillaging,²⁴ destruction of property,²⁵ other inhumane acts and outrages upon personal dignity,²⁶ rape,²⁷ forcible displacement²⁸ and persecution;²⁹ as well as to the contextual elements of crimes against humanity³⁰ and Mr Abd-Al-Rahman's individual criminal responsibility.³¹

12. P-0015's associated material comprises (i) a hand drawn sketch of Bindisi town provided by the witness during the interview and which was referred to multiple times during the interview;³² (ii) a hand drawn sketch of Mukjar town provided by the witness during the interview and referred to multiple times during the interview;³³ (iii) a hand drawn sketch provided by the witness during the interview, which outlines the positions of prisoners kept at the Mukjar police station;³⁴ (iv) a hand drawn sketch of a "rashash" weapon drawn by the witness during the interview, which was carried by Militia/*Janjaweed* and/or GoS Forces;³⁵ (v) a photocopy of a page from a book depicting the male and female body, which was used by the witness to explain how women were raped in Bindisi and surrounding areas;³⁶ (vi) a list of codes used in annexes 1 and 2 for explanatory purposes, relating to the witness's hand drawn sketches of Bindisi and

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

Mukjar towns;³⁷ and (vii) an investigator note prepared by investigators of the Office of the Prosecutor following a meeting with P-0015,³⁸ which contains clarifications to information contained in paragraphs 66 to 68 of the prior recorded statement. Even though this note is not used or explained by the witness in the statement, it is complementary to it, as the note provides clarifications to the information contained therein and, as such, is necessary to understand the contents and context of the prior recorded testimony.

The Prosecution requests one hour for its limited supplementary examination of P-0015

13. Should P-0015's prior testimony be introduced into evidence, the Prosecution requires approximately one hour to conduct a streamlined supplementary examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court.³⁹

14. The Prosecution would explore and clarify aspects of P-0015's evidence during the limited supplementary examination, including, in particular: (a) P-0015's basis of knowledge relating to the deceased victims listed at paragraph 105 of the statement; (b) details relating to the rape of women and girls during the attack on Bindisi and surrounding areas; and (c) P-0015's basis of knowledge for identifying Mr Abd-Al-Rahman as Ali Kushayb.

15. The Prosecution estimates that it would require 4.5 hours for direct examination of P-0015, if her prior recorded testimony is not introduced through rule 68(3).⁴⁰ The Prosecution assesses that it would require one hour for its limited supplementary examination, which would significantly shorten the in-court testimony of this witness by 3.5 hours, should this Application be granted.

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ *Lubanga* Decision on the admission of the prior recorded statements, [ICC-01/04-01/06-1603](#), para. 25; *Lubanga* Transcript of 7 July 2009, [ICC-01/04-01/06-T-205-Red3-ENG](#), p. 19, l. 11 *et seq*; *Katanga* Decision on Request to admit prior recorded testimony, ICC-01/04-01/07-2233-Corr, paras.16-17; *Ntaganda* Transcript of hearing, [ICC-01/04-02/06-T-110-Red2-ENG](#), p. 34, l. 8-13; *Gbagbo & Blé Goude* Annex A to Decision on amended and supplemented directions on the conduct of the proceedings, [ICC-02/11-01/15-498-AnxA](#), para. 40.

⁴⁰ [REDACTED].

(ii) *Prior Recorded Testimony of Witness of P-0918*

16. The Prosecution seeks to submit into evidence P-0918's prior recorded testimony, inclusive of the associated material listed in Annex A (A2) to this Application. P-0918's prior recorded testimony comprises a single witness statement, which refers to seven associated items that were used and explained by the witness in his interview and relate to information and events discussed in the statement.

17. P-0918, a [REDACTED], provides testimony on the attack on Kodoom and surrounding areas on or around 15 and 16 August 2003, conducted by GoS Forces and Militia/*Janjaweed*, including Al-Dayf Samih,⁴¹ where they murdered civilians,⁴² pillaged⁴³ and caused the destruction of property.⁴⁴ P-0918 further provides evidence on events that took place prior to the attacks in Kodoom and surrounding areas, such as GoS Forces and Militia/*Janjaweed* amassing in Mukjar,⁴⁵ including the presence of Mr Abd-Al-Rahman at the Mukjar market.⁴⁶ P-0918 also provides testimony on the identity of the Accused, who he knows by the name Ali Kushayb, stating that he was the owner of a veterinary pharmacy situated near the Garsila market.⁴⁷

18. P-0918's prior recorded testimony is relevant to, *inter alia*, the charges of murder,⁴⁸ pillaging,⁴⁹ destruction of property⁵⁰ and persecution,⁵¹ as well as to Mr Abd-Al-Rahman's individual criminal responsibility.⁵²

19. P-0918's associated material comprises (i) a hand drawn sketch of Kodoom provided by the witness during the interview and referred to in the statement;⁵³ (ii) a headdress board referenced by the witness, which P-0918 used to identify the

⁴¹ [REDACTED].

⁴² [REDACTED]

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

headdress worn by Militia/*Janjaweed*;⁵⁴ (iii) a colour chart used by the witness to identify the colour of a vehicle used by Mr Abd-Al-Rahman in Mukjar in August 2003;⁵⁵ (iv) an aircraft chart used by P-0918 to identify aircrafts seen in Mukjar in 2003;⁵⁶ (v) P-0918's handwritten notes referring to the attacks in Kodoom and surrounding areas in August 2003;⁵⁷ (vi) a list of people killed during the attacks in Kodoom and surrounding areas, compiled by the witness;⁵⁸ and (vii) a list of persons raped during the attacks in Kodoom and surrounding areas, compiled by the witness.⁵⁹

The Prosecution requests one hour for its limited supplementary examination of P-0918

20. Should P-0918's prior testimony be introduced into evidence, the Prosecution requires approximately one hour to conduct a streamlined supplementary examination, in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court.⁶⁰

21. The Prosecution would explore and clarify aspects of P-0918's evidence during the limited supplementary examination, in particular: (a) P-0918's basis of knowledge of the list of rape victims; and (b) P-0918's basis of knowledge for identifying Mr Abd-Al-Rahman as Ali Kushayb.

22. The Prosecution estimates that it would require 4.5 hours for direct examination of P-0918, if his prior recorded testimony is not introduced through rule 68(3).⁶¹ The one hour required for the limited supplementary examination, would shorten the in-court testimony of this witness by 3.5 hours, should this Application be granted.

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ See fn. 39.

⁶¹ [REDACTED].

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

23. The Prior Recorded Testimonies of the Two Witnesses on the charged crimes are cumulative in nature and corroborative of the evidence,⁶² as described in the paragraphs below.

24. The evidence provided by P-0015 on the charge of intentionally directing attacks against the civilian population, notably on the fact that there was no rebel presence in Kodoom or Bindisi at the time of the attack, is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0874, P-0878 and P-0986,⁶³ as well as by other witness submitted under rule 68(3), including P-0868.⁶⁴ P-0918 also provides evidence relating to the presence of witnesses P-0921 and P-0878,⁶⁵ who will testify *viva voce*.

25. The evidence provided by the Two Witnesses on the charged crime of murder is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0007, P-0012, P-0874, P-0878 and P-0921.⁶⁶

26. The evidence provided by the Two Witnesses on the charged crime of pillaging is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.⁶⁷

27. The evidence provided by the Two Witnesses on the charged crime of destruction of property is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0007, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.⁶⁸

⁶² See Bemba Rule 68 Appeals Decision, [ICC-01/05-01/08-1386](#), para. 78.

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

28. The evidence provided by P-0015 on the charge of other inhumane acts and outrages upon personal dignity is cumulative to the evidence to be provided by, among others, *viva voce* witnesses P-0011 and P-0589.⁶⁹

29. The evidence provided by P-0015 on the charge of rape is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0007, P-0011 and P-0878.⁷⁰

30. The evidence provided by P-0015 on the charge of forcible transfer is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0011, P-0012, P-0874, P-0913, P-0932 and P-1021.⁷¹

31. The evidence provided by the Two Witnesses on the charged crime of persecution is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0913, P-0932 and P-0986.⁷²

32. The evidence provided by P-0015 on the contextual elements of crimes against humanity, notably on violence directed against the civilian population and preparatory meetings and public speeches promoting and encouraging attacks against the civilian population, is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0011, P-0012, P-0029, P-0188 and P-0878.⁷³

33. The evidence provided by P-0918 on Mr Abd-Al-Rahman's individual criminal responsibility, is corroborative of, and cumulative to, the evidence to be provided by, among others, *viva voce* witnesses P-0012, P-0029, P-0874, P-0921 and P-1021.⁷⁴

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

34. Furthermore, the information provided by P-0918 in relation to the Accused's identity corroborates two facts that were already agreed between the Defence and the Prosecution,⁷⁵ which is, that upon his retirement from the Sudanese Armed Forces, Mr Abd-Al-Rahman lived in Garsila, where he also opened a shop, from which he sold medication.

35. In addition to the agreed facts relating to biographical details of the Accused, the Two Witnesses also provide evidence that the Accused was a leader of the *Militia*/Janjaweed.⁷⁶ However, this evidence is corroborative of and cumulative to the evidence to be provided by *viva voce* witnesses,⁷⁷ and the Defence will be able to fully examine these witnesses. Moreover, rule 68(3) does not preclude the admission of evidence which goes to the acts and conduct of the Accused for charged crimes.⁷⁸

C. The introduction of the Prior Recorded Testimonies of the Two Witnesses is not prejudicial to or inconsistent with the rights of the Accused

36. The introduction of the Prior Recorded Testimonies of the Two Witnesses into evidence would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, since, pursuant to rule 68(3) of the Rules, the Two Witnesses will appear before the Chamber, their evidence will only be introduced upon their consent, and the Parties, the Common Legal Representative of Victims and the Chamber will have an opportunity to examine them during the proceedings.

37. The Defence has been consulted on the Prosecution's application for the admission into evidence of the Prior Recorded Testimonies of the Two Witnesses, pursuant to rule 68(3), but opposed it.⁷⁹ This, however, does not militate against the

⁷⁵ Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, [ICC-02/05-01/20-504-AnxA](#), facts 11 and 15, respectively.

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ *Gbagbo & Blé Goudé* Rule 68 Appeals Decision, [ICC-02/11-01/15-744](#), para. 69.

⁷⁹ [REDACTED].

admission into evidence of the Prior Recorded Testimonies, nor does it indicate this would be prejudicial to, or inconsistent with, the rights of the Accused.⁸⁰

D. The Prior Recorded Testimonies of the Two Witnesses are relevant, reliable and probative to the case

38. The Prior Recorded Testimonies that the Prosecution seeks to introduce into evidence, pursuant to rule 68(3) of the Rules are relevant, reliable and probative.⁸¹ In addition to being mainly corroborative in nature and internally consistent, the Prior Recorded Testimonies of the Two Witnesses bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.⁸² The Two Witnesses have signed their Prior Recorded Testimonies, attesting to the fact that they were voluntarily given and are true to their best knowledge and recollection of events.⁸³ The Prior Recorded Testimonies also bear the interpreters' signature and certification that the interviews were orally translated into a language that the witnesses speak and understand.⁸⁴

IV. CONCLUSION

39. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application subject to the fulfilment of the further conditions of rule 68(3) of the Rules.



Karim A. A. Khan QC
Prosecutor

Dated this 4th day of March 2022

At The Hague, The Netherlands

⁸⁰ *Ongwen*, Public Redacted Version of Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 16 August 2018, [ICC-02/04-01/15-1322-Red](#), paras. 7, 9, 10.

⁸¹ See paras. 3, 12-13, 19-20, 25-35.

⁸² *Ntaganda* Preliminary decision on rule 68(3), [ICC-01/04-02/06-1640-Red](#), para. 9.

⁸³ [REDACTED].

⁸⁴ [REDACTED].