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No.: ICC-02/05-01/20
Date: 25 October 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(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0607, P-0617 and P-0725”, 21 October 2022, ICC-02/05-01/20-773-Conf

Source: Office of the Prosecutor

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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 requests¹ that Trial Chamber I (“Chamber”): (i) introduce into evidence the statements and associated material (“Prior Recorded Testimonies”)² of P-0607, P-0617 and P-0725 (“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.³
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 below, the Prosecution will not seek to rely on the passages of the Prior Recorded Testimonies that concern either the acts and conduct of Mr Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”)⁴ or that otherwise go to his background and identity, since these are issues materially in dispute in the present case.⁵ As such, their introduction into evidence is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, since the Prior Recorded Testimonies are of a cumulative or corroborative nature and bear sufficient indicia of reliability.⁶

¹ This Application is submitted in accordance with [Directions on the Conduct of Proceedings](#), paras. 46-48.

² 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.

³ *See* First Rule 68(2)(b) Decision, [ICC-02/05-01/20-612-Red](#), para. 18.

⁴ *Ongwen* Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, [ICC-02/04-01/15-1294](#), paras. 4-5, 9 and 20; *Ntaganda* Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’ ICC-01/04-02/06-1667-Conf, [ICC-01/04-02/06-1667-Red](#), para. 11.

⁵ Information that simply confirms the facts agreed upon between the Parties have not been excluded from introduction into evidence. Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#).

⁶ Rule 68(2)(b)(i) of the Rules.

II. CLASSIFICATION

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

III. SUBMISSIONS

5. 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).⁷

6. The Chamber previously authorised the introduction of the evidence of the Three Witnesses under rule 68(3).⁸ The Prosecution now seeks their introduction under rule 68(2)(b), since it no longer relies on the parts of their Prior Recorded Testimonies that go to the acts and conduct of Mr Abd-Al-Rahman, or his background and identity.

A. *Overview of the Prior Recorded Testimonies of P0607, P-0617 and P-0725*

7. The Prior Recorded Testimonies of P-0607, P-0617 and P-0725 relate primarily to the crimes committed in Deleig and surrounding areas in March 2004 (Counts 22 to 31).⁹

8. In addition to the statements of the Three Witnesses, the Prosecution seeks to introduce into evidence the associated material which forms an integral part of their Prior Recorded Testimonies, as listed in Annex A to the Application.¹⁰

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

⁸ Decision on the Prosecution's sixth request to introduce prior recorded testimonies under Rule 68(3), [ICC-02/05-01/20-630-Conf](#), paras. 89-104, 127-132.

⁹ See Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), paras. 106-114 and p. 63-67, 69-70.

¹⁰ 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.

(i) *Prior Recorded Testimony of P-0607*

9. The Prosecution seeks to submit into evidence P-0607's prior recorded testimony, including the associated material listed in Annex A (A1) to this Application. P-0607's prior recorded testimony comprises one witness statement and associated material consisting of: (i) a sketch drawn by P-0607 [REDACTED];¹¹ (ii) a sketch drawn by P-0607 of the village of [REDACTED];¹² and (iii) a sketch drawn by P-0607 of Deleig.¹³

10. P-0607, a Fur civilian from [REDACTED], provides evidence on attacks on [REDACTED] by Government of Sudan ("GoS") Forces and Militia/*Janjaweed* in around November 2003,¹⁴ [REDACTED].¹⁵ P-0607 describes GoS Forces and Militia/*Janjaweed* surrounding and entering Deleig in March 2004, searching from house to house and arresting displaced males, [REDACTED].¹⁶ P-0607 recounts how Mr Abd-Al-Rahman inspected new batches of detainees arriving at the open area near the police station¹⁷ and walked on the backs of detainees who were made to lie face down on the ground.¹⁸ P-0607 provides evidence about the questioning of detainees,¹⁹ and their loading onto vehicles, which then drove away, on three occasions.²⁰ Finally, P-0607 was told that Mr Abd-Al-Rahman was the head of the Militia/*Janjaweed*²¹ and observed that he appeared to be in charge during the Deleig operation.²²

11. Should the Chamber admit P-0607's prior recorded testimony into evidence, the Prosecution will not rely on the parts of his testimony that relate to Mr Abd-Al-

¹¹ DAR-OTP-0203-0187 (Translation at DAR-OTP-0219-8150).

¹² DAR-OTP-0203-0188 (Translation at DAR-OTP-0219-8152).

¹³ DAR-OTP-0203-0189 (Translation at DAR-OTP-0219-1682).

¹⁴ P-0607, DAR-OTP-0203-0164 at 0168-0174, paras. 16-35.

¹⁵ P-0607, DAR-OTP-0203-0164 at 0175-0176, paras. 39-41.

¹⁶ P-0607, DAR-OTP-0203-0164 at 0176-0177, paras. 42-46.

¹⁷ P-0607, DAR-OTP-0203-0164 at 0178, para. 50.

¹⁸ P-0607, DAR-OTP-0203-0164 at 0178-0179, paras. 48, 51.

¹⁹ P-0607, DAR-OTP-0203-0164 at 0179, para. 52.

²⁰ P-0607, DAR-OTP-0203-0164 at 0179-0180, paras. 53-55.

²¹ P-0607, DAR-OTP-0203-0164 at 0181, para. 60.

²² P-0607, DAR-OTP-0203-0164 at 0178, para. 49.

Rahman's presence and conduct during the Deleig incident, or his position as leader of the Militia/*Janjaweed*, as detailed in Annex A (A1).

(ii) *Prior Recorded Testimony of P-0617*

12. The Prosecution seeks to submit into evidence P-0617's prior recorded testimony, including the associated material listed in Annex A (A2) to this Application. P-0617's prior recorded testimony comprises one witness statement and associated material consisting of: (i) a sketch of villages surrounding [REDACTED]²³ and annotated versions of the same document on which the witness included details of attacks;²⁴ (ii) a sketch of the [REDACTED] area annotated with details of the February 2004 attack;²⁵ and (iii) a sketch of Deleig showing locations relevant to the incident.²⁶

13. P-0617, a Fur civilian, provides evidence about the tribal administration structure of his area,²⁷ and attacks by GoS Forces and Militia/*Janjaweed* on [REDACTED] from July 2003 to February 2004,²⁸ which displaced civilians, [REDACTED].²⁹ P-0617 also provides information on the arrest, detention and mistreatment of males in Deleig in March 2004, and their loading onto vehicles, which drove out of Deleig and returned empty.³⁰ P-0617 also refers to the identity of Mr Abd-Al-Rahman and his position as a senior Militia/*Janjaweed* leader,³¹ in addition to his presence and role during the Deleig incident.³²

²³ DAR-OTP-0202-1537 (Translation at DAR-OTP-0219-8142).

²⁴ DAR-OTP-0202-1538 (Translation at DAR-OTP-0219-8144); DAR-OTP-0202-1539 (Translation at DAR-OTP-0219-8146).

²⁵ DAR-OTP-0202-1540 (Translation at DAR-OTP-0219-8148).

²⁶ DAR-OTP-0202-1541 (Translation at DAR-OTP-0219-1680).

²⁷ P-0617, DAR-OTP-0202-1496 at 1502, paras. 21-23.

²⁸ P-0617, DAR-OTP-0202-1496 at 1505-1509, paras. 28, 30-40 and 1512-1516, paras. 50-60 and 1520-1523, paras. 71-78.

²⁹ P-0617, DAR-OTP-0202-1496 at 1512-1513, paras. 50-51 and 1518-1519, para. 66 and 1522, para. 76.

³⁰ P-0617, DAR-OTP-0202-1496 at 1523-1526, paras. 79-85.

³¹ P-0617, DAR-OTP-0202-1496 at 1524, para. 81 and 1531-1532, paras. 96-98.

³² P-0617, DAR-OTP-0202-1496 at 1524-1526, paras. 82-85.

14. Should the Chamber admit P-0617's prior recorded testimony into evidence, the Prosecution will not rely on the parts of his testimony that relate to Mr Abd-Al-Rahman's role in the attack on [REDACTED], his presence and conduct during the Deleig incident, his position as leader of the Militia/*Janjaweed*, and his identity and personal background, as detailed in Annex A (A2).

(iii) *Prior Recorded Testimony of P-0725*

15. The Prosecution seeks to submit into evidence P-0725's prior recorded testimony, including the associated material listed in Annex A (A3) to this Application. P-0725's prior recorded testimony comprises one witness statement and associated material consisting of: (i) a headdress board used by the witness to identify headgear worn by the Arab tribes and Militia/*Janjaweed*;³³ (ii) a colour chart used to identify the colour of certain clothing and vehicles;³⁴ (iii) a sketch of the area surrounding [REDACTED];³⁵ and (iv) a sketch of Deleig showing relevant locations.³⁶

16. P-0725, a Fur civilian, provides evidence about the attacks on [REDACTED] by GoS Forces and the Militia/*Janjaweed* in September 2003 and around January 2004,³⁷ [REDACTED].³⁸ P-0725 provides evidence about the arrest and detention of males in Deleig, and their loading onto vehicles which drove out of Deleig, returned empty and were reloaded.³⁹ P-0725 [REDACTED] Abdallah Mussa, who returned to Deleig injured and died later that night, and gives information about a number of survivors of the executions.⁴⁰ P-0725 also describes seeing a convoy of vehicles containing

³³ DAR-OTP-0210-0138.

³⁴ DAR-OTP-0210-0139.

³⁵ DAR-OTP-0210-0140 (Translation at DAR-OTP-0219-8162).

³⁶ DAR-OTP-0210-0141 (Translation at DAR-OTP-0219-1701).

³⁷ P-0725, DAR-OTP-0210-0122 at 0124-0130, paras. 15-29, 32-38, 48-59.

³⁸ P-0725, DAR-OTP-0210-0122 at 0130, para. 63.

³⁹ P-0725, DAR-OTP-0210-0122 at 0131-0134, paras. 71-76, 78-80, 86-91.

⁴⁰ P-0725, DAR-OTP-0210-0122 at 0132-0134, paras. 78-91.

detained community leaders in Deleig two days later.⁴¹ Finally, he refers to Mr Abd-Al-Rahman's position of authority as a leader of the Militia/*Janjaweed*.⁴²

17. Should the Chamber admit P-0725's prior recorded testimony into evidence, the Prosecution will not rely on the part of his testimony in which he identifies Mr Abd-Al-Rahman as a leader of the Militia/*Janjaweed*, as detailed in Annex A (A3).

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

18. 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.⁴³

19. All Three Witnesses have given their statements voluntarily and acknowledged that they record their best recollections of events.⁴⁴ The Prior Recorded testimonies were also collected with the assistance of interpreters.⁴⁵ The Prior Recorded Testimonies of all Three Witnesses are internally consistent.⁴⁶ 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

20. The Three Witnesses provide evidence in relation to several central aspects of the Deleig incident, which is corroborative of, and cumulative to, evidence already provided or to be provided by *viva voce* witnesses:

⁴¹ P-0725, DAR-OTP-0210-0122 at 0134, paras. 94-96.

⁴² P-0725, DAR-OTP-0210-0122 at 0134, para. 97.

⁴³ *Gbagbo & Blé Goudé* Prosecution's Rule 68(2)(b) Application, [ICC-02/11-01/15-950-Red](#), para. 22.

⁴⁴ P-0607, DAR-OTP-0203-0164 at 0186; P-0617, DAR-OTP-0202-1496 at 1535; P-0725, DAR-OTP-0210-0122 at 0136.

⁴⁵ P-0607, DAR-OTP-0203-0164 at 0185-0186; P-0617, DAR-OTP-0202-1496 at 1536; P-0725, DAR-OTP-0210-0122 at 0137.

⁴⁶ *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.

- a. the search of Deleig and arrest of Fur males displaced to Deleig from the surrounding areas, between about 5 and about 7 March 2004;⁴⁷
- b. the detention and mistreatment of male Fur civilians in the open area near the Deleig police station on or about 5 March 2004;⁴⁸
- c. the loading of detainees onto vehicles, which drove out of Deleig and returned empty, and the repeating of this process multiple times on or about 5 March 2004;⁴⁹
- d. the survival of several persons who were taken to execution sites;⁵⁰ and
- e. the sighting of a group of community leaders in Deleig in a convoy in Deleig on or about 7 March 2004, and their subsequent killing.⁵¹

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

21. The introduction into evidence of the Prior Recorded Testimonies of the Three Witnesses would not be prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman, as they are reliable and the Prosecution does not intend to rely on the passages that go to the acts and conducts of the Accused,⁵² or to the identity of the Accused, which is materially in dispute between the Parties.⁵³

⁴⁷ The evidence of the Three Witnesses is corroborative of, and cumulative to, the evidence of *viva voce* witnesses, including P-0907, P-0973, P-0987 and P-0994.

⁴⁸ The evidence of the Three Witnesses is corroborative of, and cumulative to, the evidence of *viva voce* witnesses, including, P-0905, P-0907, P-0931, P-0973, P-0987 and P-0994.

⁴⁹ The evidence of the Three Witnesses is corroborative of, and cumulative to, the evidence of *viva voce* witnesses, including, P-0905, P-0907, P-0973, P-0987 and P-0994.

⁵⁰ The evidence of the P-0725 is corroborative of, and cumulative to, the evidence of *viva voce* witnesses, including P-0907 and P-0987.

⁵¹ The evidence of P-0725 is corroborative of, and cumulative to, the evidence of *viva voce* witnesses, including P-0643, P-0907, P-0973, P-0987 and P-0994.

⁵² *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.

⁵³ *Ongwen* Rule 68(2)(b) Decision on Prosecution Witnesses, [ICC-02/04-01/15-596-Red](#), para. 15.

22. 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.

IV. CONCLUSION

23. 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.



Karim A. A. Khan QC
Prosecutor

Dated this 25th day of October 2022

At The Hague, The Netherlands