

Original: **English**No.: ICC-02/05-01/20  
Date: 5 December 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 re-application under rule 68(2)(c) to  
introduce into evidence the prior recorded testimony of witness P-0085”, 28  
November 2022, ICC-02/05-01/20-821-Conf****Source:** Office of the Prosecutor

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 articles 69(2) and 69(4) of the Rome Statute (“Statute”), and rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests that Trial Chamber I (“Chamber”) introduce into evidence the statement and associated material (“Prior Recorded Testimony”)<sup>1</sup> of witness P-0085.

2. The Prior Recorded Testimony of P-0085 is admissible under rule 68(2)(c) of the Rules because: (i) the witness has become unavailable to testify; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute; (iii) the Prior Recorded Testimony is relevant, reliable, probative and has sufficient indicia of reliability; and (iv) the introduction of the Prior Recorded Testimony into evidence would not be prejudicial to or inconsistent with the rights of Ali Muhammad Ali Abd-Al-Rahman (“Mr Abd-Al-Rahman”).

## II. CLASSIFICATION

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Application and its Annex A are filed as confidential, as they contain sensitive information regarding the identity of P-0085. A public redacted version of the Application will be filed as soon as practicable.

## III. SUBMISSIONS

4. The Prosecution relies on its previous submissions on the legal framework for the introduction into evidence of prior recorded testimony under rule 68(2)(c) of the Rules, as set out at paragraphs 5 to 11 of its first application under rule 68(2)(c).<sup>2</sup>

5. The Prosecution seeks to submit into evidence P-0085’s prior recorded testimony, including the associated material listed in Annex A to this Application. P-0085’s prior recorded testimony consists of one witness statement and one associated

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<sup>1</sup> Annex A lists the prior recorded testimony of P-0085 (at I) and its associated item (at III), as well as material related to the proof of unavailability of the witness (at II). Hyperlinks to this material are also included, following the Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 47.

<sup>2</sup> Prosecution’s application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witnesses P-0026, P-0083, P-0085, P-0087 and P-0116, [ICC-02/05-01/20-578-Red](#), paras. 5-11.

item, a sketch of Bindisi and surrounding villages, that is referred to in the witness statement and relates to information and events discussed therein.<sup>3</sup>

6. As instructed by the Chamber in its previous decision relating to the introduction of P-0085's Prior Recorded Testimony into evidence,<sup>4</sup> the Prosecution has taken additional steps to locate the witness in Sudan. Regrettably these steps have not been successful and the Prosecution seeks to renew this application, now that the end of its case is approaching.

(i) *P-0085 is unavailable to testify*

7. The Prosecution is unable to contact P-0085 or identify his whereabouts.<sup>5</sup> P-0085's last contact with the Prosecution was in February 2009 when he did not report any security or major health concerns.<sup>6</sup>

8. In June 2020, [REDACTED] was unable to locate P-0085 in Chad and informed the Prosecution, in December 2020, that according to P-0085's former neighbours the witness had returned to Sudan in 2015.<sup>7</sup> In August 2021, [REDACTED] a neighbour of P-0085's mother in Sudan, who was then contacted by the Prosecution and who confirmed that P-0085 had not been to [REDACTED] in a long time.<sup>8</sup>

9. P-0085's brother, [REDACTED], confirmed that he and his family have not heard from the witness since he left Chad in 2015. To date, P-0085's actual location is unknown to the family, except that they have heard that he is [REDACTED]. The Office of Prosecutor (the "OTP") in a further effort to obtain information on P-0085's whereabouts, [REDACTED].<sup>9</sup> To date, P-0085's family have never reported any contact with P-0085.<sup>10</sup>

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<sup>3</sup> P-0085, DAR-OTP-0110-0054 at 0057-0058, paras. 11-12; at 0061-0062, paras. 25-27, 31; at 0064, para. 38; at 0066, para. 48 and at 0068, para. 56. DAR-OTP-0110-0071 (Translation at DAR-OTP-0153-1577).

<sup>4</sup> Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(2)(c), 21 February 2022, [ICC-02/05-01/20-603-Conf](#), para. 31.

<sup>5</sup> DAR-OTP-0219-6148; DAR-OTP-0219-7929; DAR-OTP-0220-1617.

<sup>6</sup> DAR-OTP-0219-6148; DAR-OTP-0220-1617 at 1617.

<sup>7</sup> DAR-OTP-0220-1617 at 1617-1618.

<sup>8</sup> DAR-OTP-0219-6148; DAR-OTP-0219-7929; DAR-OTP-0220-1617.

<sup>9</sup> DAR-OTP-0219-6148; DAR-OTP-0220-1617 at 1617-1619.

<sup>10</sup> DAR-OTP-0220-1617 at 1619.

10. Following the Chamber's instructions on 21 February 2022,<sup>11</sup> the Prosecution renewed its efforts to locate P-0085, without success. The following avenues were unsuccessfully pursued:<sup>12</sup>

- a. Deployment of an intermediary in Sudan: in March 2022, an intermediary was tasked with locating P-0085 and one of his sisters in Sudan. In April 2022, the intermediary reported that he had received news that P-0085 was alive and based in the region of [REDACTED], Darfur but that, due to conflicts in the area P-0085 had relocated to an unknown location, in an area with no phone signal. The intermediary was also unable to locate P-0085's sister. In addition, the intermediary independently contacted P-0085's brother and his neighbour (unaware of their previous contact with the OTP) and they again confirmed not having seen or heard from P-0085 since 2015.
- b. Further calls to P-0085's brother and neighbour [REDACTED]: between March and November 2022, the OTP tried to contact P-0085's brother, without success. The OTP was able, however, to contact this brother's neighbour in July 2022, who informed the OTP that he had received information that P-0085 was living in [REDACTED], in an area without a phone signal. The neighbour further informed that he heard that P-0085 [REDACTED] Chad in 2015 and that P-0085 has not been in contact with them since. Asked about the source of such information, the neighbour pointed to an acquaintance that would have more information on the whereabouts of P-0085. [REDACTED].
- c. Calls to [REDACTED]: between August and November 2022, the OTP was in contact with [REDACTED], who claimed to have known P-0085

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<sup>11</sup> Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(2)(c), 21 February 2022, [ICC-02/05-01/20-603-Conf](#), para. 31.

<sup>12</sup> These attempts are all registered in two investigation reports registered as DAR-OTP-00000036 and DAR-OTP-00000449.

for at least a year and to have information on P-0085 and his ex-wives' whereabouts. [REDACTED].

d. Efforts to contact [REDACTED] in Chad: [REDACTED].

11. The Prosecution has exhausted different avenues to try and locate P-0085, without success. The information on P-0085's location differs, as provided by the deployed intermediary, P-0085 brother's neighbour and [REDACTED]. [REDACTED], mentioned by the brother's neighbour as the possible location of P-0085, covers a relatively wide area on the border between Sudan and the [REDACTED]. In contrast, information provided by the intermediary indicates that P-0085 has been displaced from [REDACTED] to an unknown location early in the year. As such, no further efforts can be taken to try and locate the witness without more precise and concrete information on his whereabouts.

12. Furthermore, deploying an intermediary to such a wide area in [REDACTED] to ask general questions about P-0085 was deemed a security risk, as it would highly increase the witness' profile and risks disclosing his association with the Prosecution.

13. Moreover, [REDACTED] has also not proven to be a reliable source of information on P-0085's whereabouts. [REDACTED] contradicted himself over the course of the OTP's interactions with him, was emphatic that he would only provide further assistance if provided with money in advance and, ultimately, provided no actionable information on P-0085's whereabouts to justify his further engagement. In addition, the Prosecution was unable to locate any new relative of P-0085, either in Chad or Sudan. As such, no new possibility to locate P-0085 has presented itself in the past months, despite the Prosecution's concerted efforts.

*(ii) The Prosecution could not have reasonably anticipated the need to take measures under article 56 of the Statute*

14. P-0085 is currently [REDACTED] years old. At the time he was last contacted by the Prosecution, the witness was [REDACTED] years old and hadn't reported any

health or security concerns or issues with availability and therefore the Prosecution could not reasonably have anticipated the necessity of article 56 measures.

*(iii) P-0085's Prior Recorded Testimony is relevant and probative*

15. P-0085 is a Fur [REDACTED]<sup>13</sup> who provided evidence on the attack on Bindisi and surrounding villages on or about 15 and 16 August 2003.<sup>14</sup> P-0085 describes the organisation and composition of the Militia/*Janjaweed*<sup>15</sup> and GoS distribution of weapons to the Militia/*Janjaweed* prior to the attack,<sup>16</sup> including by Mr Abd-Al-Rahman and Ja'afar Abd-Al-Hakam ("Abd-Al-Hakam").<sup>17</sup> P-0085 describes how Abd-Al-Hakam also allegedly authorised GoS Forces and Militia/*Janjaweed* to collect millet from the *Zakat* Office in Bindisi, according to information P-0085 received from P-0921.<sup>18</sup>

16. P-0085 is a direct eyewitness to the Bindisi attack, placing Mr Abd-Al-Rahman on the ground and issuing instructions during the charged event.<sup>19</sup> P-0085 also provides evidence on murders,<sup>20</sup> rapes,<sup>21</sup> pillaging and the destruction of property<sup>22</sup> that occurred during the attack. P-0085 also provides evidence on the structure, composition and cooperation between elements of the GoS Forces, including the PDF, the PPF, the Sudanese Armed Forces, the police and the Militia/*Janjaweed*.<sup>23</sup> Lastly, P-0085 provides evidence on Abd-Al-Hakam's involvement with the implementation of the GoS State policy in Darfur<sup>24</sup> and on Mr Abd-Al-Rahman's background and identity, including his military service and ownership of a veterinary pharmacy in Garsila.<sup>25</sup>

<sup>13</sup> P-0085, DAR-OTP-0110-0054 at 0058, para. 15.

<sup>14</sup> P-0085, DAR-OTP-0110-0054 at 0056-0057, para. 8 and at 0061-0062, paras. 25, 27-28, 32.

<sup>15</sup> P-0085, DAR-OTP-0110-0054 at 0057-0058, paras. 10-11, 14 and at 0063, paras. 33-34.

<sup>16</sup> P-0085, DAR-OTP-0110-0054 at 0057-0060, paras. 12-13, 15-20, 22-23.

<sup>17</sup> P-0085, DAR-OTP-0110-0054 at 0059-0060, paras. 18-21, 23.

<sup>18</sup> P-0085, DAR-OTP-0110-0054 at 0060-0061, para. 24.

<sup>19</sup> P-0085, DAR-OTP-0110-0054 at 0061-0063, paras. 26, 29-30, 33-34.

<sup>20</sup> P-0085, DAR-OTP-0110-0054 at 0062, para. 31.

<sup>21</sup> P-0085, DAR-OTP-0110-0054 at 0062, para. 31.

<sup>22</sup> P-0085, DAR-OTP-0110-0054 at 0061-0063, paras. 27-29, 32.

<sup>23</sup> P-0085, DAR-OTP-0110-0054 at 0063-0066, paras. 36-41, 43.

<sup>24</sup> P-0085, DAR-OTP-0110-0054 at 0066-0067, paras. 46-51.

<sup>25</sup> P-0085, DAR-OTP-0110-0054 at 0065-0066, paras. 42-45.

17. P-0085's prior recorded statement is, therefore, relevant, *inter alia*, to prove the contextual elements of crimes against humanity, Mr Abd-Al-Rahman's individual criminal responsibility and the charged crimes of murder (count 2), pillaging (count 4), destruction of property (count 5), forcible displacement (count 10) and persecution (count 11) committed in Kodoom, Bindisi and surrounding areas, and rape (counts 8 and 9) committed in Bindisi and surrounding areas on or about 15 and 16 August 2003, as well as the charged crimes of torture (counts 12-13) committed in Mukjar between late February and early March 2004.

*(iv) The introduction of P-0085's Prior Recorded Testimony into evidence is not prejudicial to or inconsistent with the rights of the Accused*

18. P-0085, a crime-base witness, provides evidence which is internally coherent<sup>26</sup> and not unique, as cumulative to or corroborative of facts agreed upon between the parties and of evidence provided by other witnesses who were present in Court and questioned by the Defence.

19. P-0085's evidence on the contextual elements of crimes against humanity has been elicited from, *inter alia*, witnesses P-0007, P-0011, P-0029, P-0878 and P-1021.

20. P-0085's evidence on the charged crime of persecution (count 11) in Kodoom, Bindisi and surrounding areas<sup>27</sup> is also supported by, *inter alia*, witnesses P-0007, P-0011 and P-0878, who have testified.

21. The evidence provided by P-0085 on the charged crime of murder (count 2) committed in Kodoom, Bindisi and surrounding areas<sup>28</sup> is also supported by other witnesses who appeared in Court, including P-0007, P-0011, P-0012, P-0015, P-0029, P-0874, P-0878, P-0913, P-0918, P-0932 and P-0986.

22. The evidence provided by P-0085 on the charged crime of pillaging (count 4) committed in Kodoom, Bindisi and surrounding areas,<sup>29</sup> which is limited to

<sup>26</sup> Ntaganda, [Second Decision under rule 68\(2\)\(c\)](#), paras. 27-30.

<sup>27</sup> P-0085, DAR-OTP-0110-0054 at 0065, para. 43.

<sup>28</sup> P-0085, DAR-OTP-0110-0054 at 0062, para. 31.

<sup>29</sup> P-0085, DAR-OTP-0110-0054 at 0063, paras. 33-34.



[REDACTED], is also supported by witnesses P-0012 and P-0874, who already testified before the Chamber.

23. The evidence provided by P-0085 on the charged crime of destruction of property (count 5) committed in Kodoom, Bindisi and surrounding areas<sup>30</sup> has been elicited from, *inter alia*, witnesses P-0007, P-0012, P-0015, P-0029, P-0874 and P-0878.

24. The hearsay evidence provided by P-0085 on the charged crimes of rape (counts 8-9) committed in Bindisi and surrounding areas,<sup>31</sup> is corroborated by direct witnesses P-0007, P-0011, P-0015, P-1073 and P-1074, who have already testified.

25. The evidence provided by P-0085 on the charged crime of forcible displacement (count 10) committed in Kodoom, Bindisi and surrounding areas<sup>32</sup> has also been elicited from, *inter alia*, witnesses P-0012, P-0015, P-0029, P-0874, P-0878, P-0913, P-0922, P-0932 and P-1021.

26. P-0085's statement also refers to the identity and background information on Mr Abd-Al-Rahman, stating that he was a retired warrant officer in Garsila in the 1990s and had a veterinary pharmacy.<sup>33</sup> This information, however, is consistent with the facts agreed upon with the Defence.<sup>34</sup> Moreover, P-0085's assertion that Mr Abd-Al-Rahman was the "top commander of the Janjaweed" in his area<sup>35</sup> is also corroborative of, and cumulative to, evidence provided by, *inter alia*, witnesses P-0012, P-0129, P-0878, P-0903, P-0905, P-0907, among others.

27. While P-0085's prior recorded testimony is also relevant to establishing Mr Abd-Al-Rahman's individual criminal responsibility,<sup>36</sup> evidence in this regard has already been elicited from witnesses such as, among others, P-0012, P-0029, P-0643, P-0874, P-0878 and P-1021, whom the Defence had the opportunity to cross-examine. In evaluating the overall evidence on the same issues, the Chamber will therefore be able

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<sup>30</sup> P-0085, DAR-OTP-0110-0054 at 0062, paras. 28-29, 33.

<sup>31</sup> P-0085, DAR-OTP-0110-0054 at 0062, para. 31.

<sup>32</sup> P-0085, DAR-OTP-0110-0054 at 0063, para. 35.

<sup>33</sup> P-0085, DAR-OTP-0110-0054 at 0065, para. 42.

<sup>34</sup> Annex A to the Third Joint Submission on Agreed facts, [ICC-02/05-01/20-504-AnxA](#), facts 10, 15 and 11.

<sup>35</sup> P-0085, DAR-OTP-0110-0054 at 0065-0066, paras. 43-45.

<sup>36</sup> P-0085, DAR-OTP-0110-0054 at 0060, para. 23; at 0062-0063, paras. 30, 33 and at 0066, para. 44.

to attribute the proper weight to the parts of P-0085's evidence that go to proof of Mr Abd-Al-Rahman's criminal responsibility.

28. As described above, despite P-0085's prior recorded testimony going to the acts and conduct of Mr Abd-Al-Rahman, this is solely a factor to be considered by the Chamber and does not prevent the statement being admitted into the case record.<sup>37</sup> In addition, the evidence provided by the crime-base witness is not unique, but rather corroborative of and cumulative to evidence provided by many other witnesses who appeared before the Chamber, thus minimising any prejudice to the Defence due to its inability to cross-examine P-0085.

#### IV. RELIEF REQUESTED

29. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application and introduce P-0085's Prior Recorded Testimony into evidence, pursuant to rule 68(2)(c) of the Rules.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 5<sup>th</sup> day of December 2022

At The Hague, The Netherlands

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<sup>37</sup> *Al Hasan* [Decision pursuant to rule 68\(2\)\(c\)](#), para. 21; *Ntaganda*, [Second Decision under rule 68\(2\)\(c\)](#), para. 26.