

Original: **English**No.: **ICC-02/05-01/20**Date: **27 June 2023****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 to ‘Defence submissions in response to Registry’s transmission of the declarations made by five witnesses pursuant to Rule 68(2)(b)’”, 26 June 2023, ICC-02/05-01/20-981-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. The Prosecution does not oppose the Defence's request to the Chamber to exclude certain information contained in the declarations transmitted to the Chamber by the Registry, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence, in relation to five witnesses ("Request"),¹ subject to three exceptions.

2. As detailed below,² the Prosecution and Defence have discussed the Request and agree that: (i) three excerpts identified in the Request be retained on the case record; and (ii) a fourth excerpt be excluded from the case record on the basis that the relevant information forms part of a newly agreed fact.³ The Prosecution does not object to the remaining information identified in the Request being excluded from the case record.

II. CLASSIFICATION

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("Regulations"), this filing is classified as confidential since it responds to a request with the same classification.

III. PROCEDURAL HISTORY

4. The Chamber provisionally authorised the introduction of the prior recorded testimonies of P-0028, P-0040, P-0041, P-0816 and P-0927, pursuant to rule 68(2)(b) of the Rules, on 11 March 2022⁴ and 7 November 2022,⁵ respectively.

¹ Defence submissions in response to Registry's transmission of the declarations made by five witnesses pursuant to Rule 68(2)(b), [ICC-02/05-01/20-974-Conf](#).

² See below, paras. 7-11.

³ See Emails from the Defence on 20 June 2023 at 16:25 and on 26 June 2023 at 11:21.

⁴ 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. 33-39, 50-57, 67-74, 102-102 (P-0040, P-0816 and P-0927).

⁵ Decision on the Prosecution's sixth, seventh and eighth applications to introduce prior recorded testimonies under Rule 68(2)(b), [ICC-02/05-01/20-808-Red](#) (P-0028 and P-0041).

5. The Registry transmitted to the Chamber the declarations relating to these witnesses on 15 November 2022,⁶ and 13 February 2023,⁷ respectively.

6. On 16 June 2023, the Defence requested the Chamber to exclude certain information from the declarations in relation to witnesses P-0028, P-0040, P-0041, P-0816 and P-0927.⁸ The Defence submits that the relevant excerpts amount to “new information”, which is precluded by rule 68(2)(b)(ii) of the Rules, and/or relate to paragraphs of the witnesses’ statements upon which the Prosecution has undertaken not to rely.⁹

IV. SUBMISSIONS

7. The Prosecution and the Defence have discussed the information identified in the Request and agree that the following three excerpts from the declaration of P-0028 be retained on the case record:

- a. “At page 0427, para. 13, second bullet point: [REDACTED]¹⁰
- b. “At pages 0434-0435, para. 47: [REDACTED]¹¹
- c. “At page 0439, para. 64: [REDACTED]¹²

8. These excerpts are not “new information” under rule 68(2)(b)(ii) of the Rules, but rather corrections to information contained in the witness’ statement that should form part of the prior recorded testimony to prevent the Chamber from erroneously relying on incorrect information.¹³

⁶ Registry Transmission of the Declarations made by Witnesses P-0756, P-0816 and P-0927 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, [ICC-02/05-01/20-812-Conf](#) (P-0816 and P-0927).

⁷ Registry’s Transmission of the Declarations made by Witnesses P-0008, P-0607, P-0041, P-0028, P-0016, P-0725, P-0096, P-0757, P-0013, P-0617, P-0917, P-0040, P-0675, and P-0039 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, [ICC-02/05-01/20-872-Conf](#) (P-0028, P-0040 and P-0041).

⁸ [Request](#), para. 34.

⁹ [Request](#), paras. 21-33.

¹⁰ [Request](#), para. 21(i); Declaration of P-0028, [ICC-02/05-01/20-872-Conf-Exp-AnxIV](#), p. 4, 9.

¹¹ [Request](#), para. 21(v); Declaration of P-0028, [ICC-02/05-01/20-872-Conf-Exp-AnxIV](#), p. 5, 10.

¹² [Request](#), para. 21(viii); Declaration of P-0028, [ICC-02/05-01/20-872-Conf-Exp-AnxIV](#), p. 5, 10.

¹³ See e.g. *Bemba et al.* Rule 68(2) and (3) Decision, [ICC-01/05-01/13-1478-Red-Corr](#), paras. 99-100 (“These clarifications do not contain new information but are merely provided to rectify inadvertencies and explanations with regard to non-substantive matters. The Chamber is of this view that in the present circumstances this sort of information is not to be considered ‘new information’ within the meaning of Rule 68(2)(b)(ii), but rather

9. In relation to an excerpt from the declaration of P-0041,¹⁴ the Prosecution and Defence agree, pursuant to rule 69 of the Rules, on the following agreed fact in lieu of this excerpt remaining on the case record:

- a. The Prosecution and Defence stipulate that Witness P-0041 states that [REDACTED].

10. This agreement was reached in order to correct [REDACTED], while excluding from the case record new information contained in the relevant paragraph of the declaration.

11. Subject to the above, the Prosecution does not object to the remaining information identified in the Request being excluded from the case record.¹⁵

12. Finally, the Prosecution notes that the Request is not timely, given that it was submitted seven and four months, respectively, since the Registry transmitted the relevant declarations to the Chamber.¹⁶ The Request was also submitted after the Prosecution had already concluded the presentation of its evidence.¹⁷ According to rule 64(1) of the Rules, as reflected in the Chamber's Directions on the conduct of proceedings,¹⁸ objections to the admissibility of evidence "must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known."¹⁹ In addition, regulation 34(b) of the Regulations provides a deadline of 10 days for any response to a document filed in the case. Despite its lateness, the Prosecution has nonetheless responded to the substance of the Request.

constitutes part of the prior recorded testimony itself. To conclude otherwise reduces the reliability of Rule 68(2)(b) prior recorded testimony for no good reason, precluding witnesses from correcting or clarifying details which – if not corrected or clarified – might be erroneously relied upon." (citation omitted). *See also Ongwen* Rule 68(2)(b) Decision, [ICC-02/04-01/15-1294](#), para. 25; *Ntaganda* Rule 68(2)(b) Decision, [ICC-01/04-02/06-2141-Red](#), para. 20.

¹⁴ [Request](#), para. 26(i); Declaration of P-0041, [ICC-02/05-01/20-872-Conf-Exp-AnxIII](#), p. 4, 7 [REDACTED].

¹⁵ [Request](#), P-0028: paras. 21(ii), (iii), (iv), (vi), (vii), (ix) and 23(i), (ii), (iii), (iv); P-0040: paras. 24(i), (ii), (iii); P-0816: paras. 28(i), (ii) and 30(i); P-0927: paras. 31(i) and 33(i).

¹⁶ *See above*, para. 6.

¹⁷ Notice of the conclusion of the Prosecution's presentation of evidence, [ICC-02/05-01/20-887](#) (28 February 2023).

¹⁸ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 27.

¹⁹ Rule 64(1) of the Rules.

V. CONCLUSION

13. The Prosecution respectfully requests the Chamber to grant the Request, but for the exceptions set out at paragraph 7 above, and to note the agreed fact identified in paragraph 9.



Karim A. A. Khan KC
Prosecutor

Dated this 27th day of June 2023

At The Hague, The Netherlands