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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
With Confidential Annex A**

**Joint Prosecution and Defence application under rule 68(3) to introduce into
evidence the expert report provided by P-1042 and associated material**

Source: Office of the Prosecutor

Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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 article 69(2) and 69(4) of the Rome Statute, and rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and in accordance with the Chamber’s instruction dated 7 February 2022,¹ the Office of the Prosecutor (“Prosecution”) and the Defence (“Parties”) jointly request that Trial Chamber I (“Chamber”): (i) introduce into evidence the expert report provided by P-1042 (“Expert Report”)² and associated material;³ and (ii) grant the time requested in the paragraphs below for supplementary *viva voce* questioning of the witness (“Application”).⁴

2. P-1042 is an expert witness jointly instructed by the Parties⁵ in accordance with the Chamber’s suggestion to appoint someone to address the background to the armed conflict.⁶ Due to the joint appointment and instruction of P-1042, the introduction into evidence of the Expert Report and associated material is not prejudicial to or inconsistent with the rights of Mr Abd-Al-Rahman.

3. Should the Chamber grant this Application, the Parties would elicit further focused *viva voce* evidence from P-1042 regarding certain issues that require clarification or elaboration, including as set out below. The Parties will ensure that P-1042 is not asked merely to repeat information already provided in the Expert Report.

II. LEGAL BASIS

4. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where

¹ Fourth Status Conference, [ICC-02/05-01/20-T-020-CONF-ENG](#), p. 49, lines 16-19, 23-25 and p. 50, lines 1-9.

² DAR-OTP-0220-1623 (“Expert Report”).

³ DAR-OTP-0220-1686; DAR-OTP-0220-1689; DAR-OTP-0220-1693; DAR-OTP-0220-1696; DAR-OTP-0220-1712.

⁴ This Application is submitted in accordance with Directions on the Conduct of Proceedings, [ICC-02/05-01/20-478](#), para. 51.

⁵ Joint Submission of Expert Report, [ICC-02/05-01/20-582](#).

⁶ First Status Conference, [ICC-02/05-01/20-T-13-ENG](#), p. 23, l. 20-25 and p. 24, l. 1-8; Second Status Conference, [ICC-02/05-01/20-T-017-CONF-ENG](#), p. 27, l. 1-6.

the individual does not object, and the Parties and the legal representatives of the victims have the opportunity to examine the witness.⁷

5. Rule 68(3) allows for more economical proceedings while fully respecting the rights of the Accused to a fair trial, as the witnesses whose prior recorded testimonies are tendered into evidence are asked to confirm their accuracy, and the Defence has the opportunity to examine them in Court. In these circumstances, the Appeals Chamber has ruled that such testimony “cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it.”⁸

6. The main purpose of rule 68(3) is to streamline the presentation of evidence and conduct the proceedings in a more effective and expeditious way.⁹ Trial Chamber VII noted in the *Bemba* case that the central motivation for introducing witness testimony under rule 68(3) is to save time,¹⁰ and concluded that the fact that in-court testimony can be considerably shortened by admitting prior recorded testimony is in itself a sufficient reason for granting a rule 68(3) request, as long as its other mandatory requirements are met.¹¹ Likewise, the Appeals Chamber has further acknowledged that Trial Chambers can take good trial management into account in making decisions under rule 68(3).¹² Accordingly, other Chambers have encouraged the use of rule 68(3) to enhance the expeditiousness of the proceedings.¹³

⁷ *Bemba* Appeals Decision on Admission of Evidence, [ICC-01/05-01/08-1386](#), para. 78. See also *Gbabgo & Blé Goudé* Rule 68(3) Decision, [ICC-02/11-01/15-870](#), para. 7; *Ntaganda* PRV of Preliminary Ruling on Rule 68(3), [ICC-01/04-02/06-1640-Red](#), para. 7; *Ongwen* Rule 68(3) Decision, [ICC-02/04-01/15-621](#), para. 6.

⁸ *Gbabgo & Blé Goudé* Rule 68(2)(b) and 68(3) Appeals Decision, [ICC-02/11-01/15-744](#), para. 79.

⁹ See *Gbabgo & Blé Goudé* Rule 68(2)(b) and 68(3) Appeals Decision, para. 60; *Bemba* Rule 68(2) and 68(3) Decision, [ICC-01/05-01/13-1478-Red-Corr](#), para. 51.

¹⁰ *Bemba* Rule 68(2) and 68(3) Decision, para. 51.

¹¹ *Bemba* Rule 68(2) and 68(3) Decision, para. 48.

¹² *Gbabgo & Blé Goudé* Rule 68(2)(b) and 68(3) Appeals Decision, para. 62.

¹³ *Ntaganda* Rule 68(3) Decision, [ICC-01/04-02/06-961](#), para. 13. *Gbabgo & Blé Goudé* Rule 68(2)(b) and 68(3) Decision, [ICC-02/11-01/15-573-Red](#), paras. 25, 42.

7. Reports of expert witnesses and their associated material have previously been admitted into evidence pursuant to rule 68(3) in *Ntaganda*,¹⁴ *Ongwen*¹⁵ and *Al Hassan*.¹⁶ The use of rule 68(3) allows the introduction of the Expert Report into the case record and avoids repetition of its content during in-court proceedings, contributing to the overall efficiency of trial.¹⁷

8. The associated material which the Parties seek to introduce into evidence for P-1042 forms an integral part of the Expert Report.¹⁸ Some of these items are directly referred to in the Expert Report, and others are necessary to fully comprehend P-1042's qualifications as an expert witness.¹⁹ The introduction of associated material is supported by Trial Chamber VI's finding in *Ntaganda* that "exhibits associated with a previously recorded testimony 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."²⁰ Furthermore, the Chamber found in an earlier ruling that "in principle, such material must also be introduced in order to ensure full understanding of the submitted testimony".²¹

III. SUBMISSIONS

9. The Parties seek to submit into evidence P-1042's Expert Report and five associated items listed in Annex A to this Application.

¹⁴ *Ntaganda* Preliminary Ruling on Rule 68(3), [ICC-01/04-02/06-845](#).

¹⁵ *Ongwen* Decision on Mental Health Expert Evidence, [ICC-02/04-01/15-1073](#), para. 14 ("As for the modalities of examining these experts, the Single Judge considers it unnecessary for the Prosecution Experts to describe each and every aspect of their reports through oral testimony. The Single Judge considers that the fair and expeditious conduct of the proceedings is best served by hearing these witnesses pursuant to Rule 68(3) of the Rules, and permits the Prosecution to do so on condition of satisfying the criteria under this rule.").

¹⁶ *Al Hassan* Decision on Proposed Expert Witnesses, [ICC-01/12-01/18-989-Red](#).

¹⁷ *Gbabgo & Blé Goudé* Rule 68(2)(b) and 68(3) Appeals Decision, para. 79.

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

¹⁹ Due to the large number of sources cited by P-1042 in the Expert Report, the Parties will, following P-1042's testimony, identify additional sources to submit into evidence that are most necessary to understanding his testimony. The probative value of these sources is largely contingent on the topics and questions that will be raised by the Parties and the Chamber during P-1042's *viva voce* testimony. As such, the Parties will not at this stage specify the exact sources on which they intend to rely until the conclusion of P-1042's *viva voce* testimony. Following P-1042's testimony, if it becomes necessary to submit any additional items cited in the Expert Report, the Parties will consult and submit an application to the Chamber.

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

²¹ First Decision on the Prosecution's Rule 68(3) Request, [ICC-02/05-01/20-559-Red](#), para. 17.

10. P-1042 is Executive Director of The World Peace Foundation and Professor in the Fletcher School of Law and Diplomacy at Tufts University. P-1042 was jointly instructed by the Parties and provided the Expert Report which covers topics relevant to the case, including (i) aspects of the sociology and political history of Darfur;²² (iii) the ethnic, social, political, tribal and administrative structures and conflict resolution in Darfur;²³ (iv) the root causes of the armed conflict in Darfur in 2003-2004;²⁴ (v) the parties to the conflict, including the Government of Sudan (“GoS”) forces,²⁵ irregular forces and rebel forces;²⁶ (vi) a description of individuals and/or groups known as the Militia/*Janjaweed*, including its origins, composition, structure, key leaders, and relationship with the GoS;²⁷ (vii) the response of the GoS to the attacks by the rebel forces during the armed conflict, in particular the attack on Al Fasher airport in April 2003;²⁸ and (viii) the impact of the armed conflict on the civilian population in Darfur.²⁹

11. The material associated with P-1042’s Expert Report which the Parties seek to introduce into evidence consists of (i) two annexes to the Expert Report, including a map of Sudan in 2003-2004, a satellite image of Darfur showing vegetation, a map depicting tribal *dars* in the colonial era,³⁰ a map depicting camel herding migration routes in Darfur, a map of Darfur states in 2004, a map depicting conflict-affected areas and IDP locations in March 2005, and a map of damaged and destroyed villages in Darfur from February 2003 to December 2009;³¹ (ii) the letter of joint instructions from the Parties to P-1042 for the preparation of the Expert Report;³² (iii) P-1042’s resume;³³

²² Expert Report, 1627-1642, paras. 5-52.

²³ Expert Report, 1643-1651, paras. 53-74.

²⁴ Expert Report, 1661-1670, paras. 95-117.

²⁵ The GoS Forces included the Sudanese Armed Forces, also known as the Sudanese People’s Armed Forces, the Popular Defence Forces, the Central Reserve Forces, the Popular Police Forces, and the Sudanese Police (together, the “GoS Forces”). See Prosecution’s Trial Brief, [ICC-02/05-01/20-550-Corr-Red2](#), para. 32.

²⁶ Expert Report, 1668-1676, paras. 114-139.

²⁷ Expert Report, 1660-1663, paras. 93-94, 99 and 1672-1674, paras. 126-130.

²⁸ Expert Report, 1670-1676, paras. 118-139.

²⁹ Expert Report, 1677-1683, paras. 143-159.

³⁰ DAR-OTP-0220-1686.

³¹ DAR-OTP-0220-1689.

³² DAR-OTP-0220-1693.

³³ DAR-OTP-0220-1696.

and (iv) P-1042's personal statement regarding his qualifications to provide expert testimony on Darfur, Sudan.³⁴

12. Pursuant to the Chamber's instructions,³⁵ the Parties intend for P-1042 to adopt the Expert Report and then will ask supplementary questions regarding the background to the armed conflict in Darfur. Therefore, as the Chamber has already suggested in relation to P-1042, introduction of the Expert Report under rule 68(3) of the Rules will expedite proceedings by obviating the need for P-1042 to address each issue covered in the Expert Report while still retaining the opportunity for the Parties and the Chamber to explore the most relevant topics in greater detail. These topics will form the basis on which to understand the evidence provided by other *viva voce* witnesses in the case.

The Prosecution requests up to 3 hours for its limited supplementary examination of P-1042

13. The Prosecution requests up to 3 hours to conduct a supplementary examination of P-1042 pursuant to rule 68(3) of the Rules. The Prosecution will seek to clarify some aspects of the Expert Report, including but not limited to:

- a. The historical tensions between Arab and non-Arab tribes and how the perceived differences between members of tribes contributed to the behaviours of belligerents during the armed conflict;
- b. The roles of tribal and native administration structures in Darfur and their relationship with the central government in Khartoum;
- c. The significance of tribal leaders in Darfur, including *sheikhs*, *umdahs*, *sheikhs* and *shartays*, their role in conflict resolution and governance and how communities would respond to their arrest and execution;
- d. The significance of the titles of *agid* and *emir*, how these titles were bestowed and the authority they signify among armed groups; and

³⁴ DAR-OTP-0220-1712.

³⁵ See fn. 1 above.

- e. The underlying reasons and objectives of the GoS for using paramilitary and irregular forces, including the Militia/*Janjaweed*, in successive armed conflicts, in particular in Darfur in 2003-2004.

The Defence requests up to 3 hours for its limited supplementary examination of P-1042

14. The Defence requests up to 3 hours to conduct a supplementary examination of P-1042 pursuant to rule 68(3) of the Rules. The Defence will seek to clarify some aspects of the Expert Report, including but not limited to:

- a. Those mentioned by the Prosecution in paragraph 13 above;
- b. Tribal administration and authority and their articulation with official administration and authority of the Government of Sudan;
- c. Rebel belligerence in 2003-2004;
- d. Involvement of the various Arab Tribes in the counter-insurrection;
- e. The place and authority of the Judiciary in Sudan; and
- f. Human rights in Sudan.

The introduction of the Expert Report and associated material from P-1042 is not prejudicial to or inconsistent with the rights of the Accused

15. The Expert Report and associated material that the Parties seek to introduce into evidence pursuant to rule 68(3) of the Rules are relevant, reliable and probative. In addition to being mainly corroborative in nature and internally consistent, the Expert Report and associated material bear other formal indicia of reliability for introduction into evidence in accordance with prior jurisprudence of the Court.³⁶ P-1042 has provided his testimony voluntarily and signed and dated the Expert Report.³⁷ In addition, the Defence has agreed to jointly appoint and instruct P-1042 and will have ample opportunity to ask additional questions during its examination.

³⁶ [Ntaganda PRV of Preliminary Ruling on Rule 68\(3\)](#), para. 9.

³⁷ Expert Report, 1683.

IV. CONCLUSION

16. For the foregoing reasons, the Parties respectfully request 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



Cyril Laucci
Lead Counsel for the Defence of Mr Ali
Muhammad Ali Abd-Al-Rahman

Dated this 24th day of March 2022

At The Hague, The Netherlands