

Original: **English**No.: **ICC-02/05-01/20**Date: **4 July 2024****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 ‘Deuxième requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite (« Bar Table »)”, 3 July 2024, ICC-02/05-01/20-1160-Conf

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I. INTRODUCTION

1. The Prosecution objects to the submission into evidence of one item (“Item”) included in the Defence’s second request to submit evidence through the bar table.¹ The Item is an information report containing notes of a witness interview carried out by the United Nations Commission of Inquiry in Darfur (“UNCOI”).² For the reasons set out below, since the Item is testimonial in nature, it cannot be submitted through a bar table motion. The Prosecution does not object to the submission into evidence of the remaining six items requested by the Defence.

II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this filing is classified as confidential since it contains information subject to certain conditions on disclosure, as well as information that could identify a Prosecution witness.

III. SUBMISSIONS

3. The Item consists of a four-page information report, containing detailed notes of an interview conducted by members of the UNCOI on 8 December 2004, and a three-page addendum, containing additional detailed notes of a further interview conducted by the UNCOI with the same witness on 9 December 2004.³ In summary, the witness provides evidence in relation to attacks on villages in the Nyala region, as well as information regarding tribal structures and hierarchies.⁴

4. The legal framework of the Court provides that prior recorded testimony can only be submitted through rule 68 of the Rules of Procedure and Evidence or, where measures have been taken under article 56, through article 69 of the Rome Statute.⁵ In this respect, the Appeals Chamber has held:

¹ Deuxième requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite (« Bar Table »), [ICC-02/05-01/20-1158](#) (“Second Bar Table Motion”).

² Item [DAR-OTP-0011-0111](#). See [Second Bar Table Motion](#), para. 9; Annex 1 to Second Bar Table Motion, [ICC-02/05-01/20-1158-Conf-Anx1](#), item 2.

³ [DAR-OTP-0011-0111](#) at 0111-0114 and 0115-0117. Although the date on page 0115 is 7 December 2004, this appears to be a typographical error in light of the 9 December 2004 date referenced on page 0112.

⁴ [DAR-OTP-0011-0111](#).

⁵ *Bemba et al.* Appeals Judgment, [ICC-01/05-01/13-2275-Red](#), para. 581.

Evidence which is testimonial in nature is thus inadmissible – irrespective of the “purpose” for which it would be relied upon by a party – when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court’s applicable law are not met.⁶

5. A statement can be considered prior recorded testimony “if the person when providing the statement understands that they are ‘providing information which may be relied upon in the context of legal proceedings’, namely when they are questioned in the capacity of a witness in the context of or in anticipation of legal proceedings.”⁷ There is no need for the witness to know “against whom an investigation is initiated or the precise contours and the alleged crimes for which the investigations are conducted.”⁸

6. Evidence regarding the mandate and methodology of the UNCOI demonstrates that witness statements obtained by the UNCOI, including the Item, fit within the definition of prior recorded testimony and should therefore not be recognised as submitted through the bar table.

7. The mandate of the UNCOI clearly envisaged that the evidence it gathered, including statements taken from witnesses, would be used in future legal proceedings. The UNCOI was established by the United Nations Security Council (“UNSC”) on 18 September 2004 by resolution 1564, which requested the Secretary-General to:

rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and

⁶ *Bemba et al.* Appeals Judgment, [ICC-01/05-01/13-2275-Red](#), para. 581.

⁷ *Yekatom & Ngaiissona* Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), para. 16. *See also* *Yekatom & Ngaiissona* Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaiissona Defence Motion to Limit the Scope of P-2926’s Evidence, [ICC-01/14-01/18-907-Red](#), para. 11; *Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, [ICC-02/04-01/15-596-Red](#), para. 9; *Ongwen* Decision on Prosecution’s Request to Submit 1006 Items of Evidence, [ICC-02/04-01/15-795](#), paras. 19-20; *Katanga & Ngudjolo* Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 49; *Bemba et al.* Decision on Prosecution Rule 68(2) and (3) Requests, [ICC-01/05-01/13-1478-Red-Corr](#), para. 32.

⁸ *Bemba et al.* Decision on Prosecution Rule 68(2) and (3) Requests, [ICC-01/05-01/13-1478-Red-Corr](#), para. 32; *Katanga & Ngudjolo* Decision on the Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 49.

human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.⁹

8. To discharge its mandate, the UNCOI acted as a “fact-finding body”¹⁰ and aimed to “collect a reliable body of material that indicate [sic] which individuals may be responsible for violations committed in Darfur and who should therefore be brought to trial with a view to determining their liability.”¹¹ To identify the perpetrators, the UNCOI interviewed a range of witnesses, examined documents and visited places.¹²

9. Consistent with its mandate, the UNCOI’s tasks included “to suggest means of ensuring that those responsible for [international humanitarian law and human rights law] violations are held accountable.”¹³ In this respect, the principal recommendation of the UNCOI was that the UNSC immediately refer the situation in Darfur to the ICC.¹⁴ The UNCOI also recommended that the evidentiary material it had collected be handed over to the Prosecutor of the ICC,¹⁵ which ultimately occurred.

10. In relation to its working methods, the UNCOI noted that: “Although clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body.”¹⁶

11. [REDACTED].¹⁷

⁹ UNCOI Report, [DAR-OTP-0209-0593](#) at 0594 and 0601, paras. 1-2.

¹⁰ UNCOI Report, [DAR-OTP-0209-0593](#) at 0601, para. 3. In contrast, in *Yekatom & Ngaïssona*, the Trial Chamber found that individual victim accounts compiled in a report by civil society organisations with a view to documenting alleged crimes against humanity did not qualify as prior recorded testimony given that, *inter alia*, the report did not show “the purpose or mandate of the civil society organisations compiling the report, in particular whether they had a specific fact-finding mandate”. See *Yekatom & Ngaïssona* Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), paras. 18-19.

¹¹ UNCOI Report, [DAR-OTP-0209-0593](#) at 0602-0604, paras. 6, 15.

¹² UNCOI Report, [DAR-OTP-0209-0593](#) at 0604-0605, paras. 16, 20-25.

¹³ UNCOI Report, [DAR-OTP-0209-0593](#) at 0594 and 0603, para. 10.

¹⁴ UNCOI Report, [DAR-OTP-0209-0593](#) at 0597 and 0737-0738, paras. 569, 571-573 and 0740-0741, paras. 583-589.

¹⁵ UNCOI Report, [DAR-OTP-0209-0593](#) at 0753-0754, paras. 644-645.

¹⁶ UNCOI Report, [DAR-OTP-0209-0593](#) at 0603, para. 14.

¹⁷ [REDACTED].

12. [REDACTED] that potential witnesses were screened before a formal statement was taken, with an average witness interview lasting between one to two hours.¹⁸ Witnesses were asked to distinguish between what they had seen with their own eyes and hearsay.¹⁹ At the end of each interview, [REDACTED] informed the witnesses that “the information would only be used for the investigation and would be provided to the Commission in Geneva and maybe used for further investigative procedures.”²⁰ In addition, [REDACTED]: “Sometimes [REDACTED] expressly stated that the information might be used by the International Criminal Court.”²¹

13. Contemporaneous notes were taken during interviews on a standardised form, either directly on a computer or in handwriting and later typed up,²² although there was insufficient time to read statements back to witnesses.²³

14. The Court’s jurisprudence supports that witness statements taken in the above circumstances should be considered prior recorded testimony. In *Ongwen*, the Trial Chamber found that files from the Uganda Human Rights Commission containing statements made by witnesses to alleged crimes, which were made in order to further the claim of a complainant, constituted prior recorded testimony and therefore could only be introduced pursuant to rule 68 of the Rules.²⁴

15. In *Ruto & Sang*, the Trial Chamber found that transcripts of testimony of witnesses questioned by the Commission of Inquiry into the Post-Election Violence (“CIPEV”) were testimonial in nature and therefore should not be submitted through the bar table.²⁵

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ *Ongwen* Decision on Defence Request to Submit 470 Items of Evidence, [ICC-02/04-01/15-1670](#), paras. 9-10. Some of the statements included some sort of affirmation that the information provided was given to the best of the person’s knowledge.

²⁵ *Ruto & Sang* Decision on the Prosecution’s Request for Admission of Documentary Evidence, [ICC-01/09-01/11-1353](#), paras. 17, 86-88. *See also* *Ruto & Sang* Decision on the Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness 13, [ICC-01/09-01/11-1804](#), para. 27. Each witness made a declaration at the beginning of their testimony stating that they would provide truthful evidence.

16. By contrast, in *Yekatom & Ngaïssona*, the Trial Chamber found that the “Final Report of the United Nations Commission of Inquiry on the Central African Republic” was not testimonial in nature since, although the report’s findings were informed by witness statements, the statements as such were not included in the report.²⁶

17. Given the testimonial nature of the interviews conducted by the UNCOI, the Prosecution did not seek to submit these statements into evidence through the bar table in the presentation of its case. The Prosecution notes that one information report (in the same format as the Item) containing a statement taken from [REDACTED] by the UNCOI was shown to [REDACTED] during re-examination, commented on by him, and thereafter recognised as formally submitted into evidence.²⁷

IV. RELIEF REQUESTED

18. For the above reasons, the Prosecution respectfully requests the Chamber to reject the submission of the Item into evidence.



Karim A. A. Khan KC
Prosecutor

Dated this 4th day of July 2024

At The Hague, The Netherlands

²⁶ *Yekatom & Ngaïssona* Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), para. 17.

²⁷ [REDACTED].