



Original: English

**No. ICC-02/05-01/20
Date: 26 August 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 redacted version of
Decision on the Prosecution's thirteenth application to introduce prior recorded
testimonies under Rule 68(3)**

To be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Procedural history

1. On 20 January 2022, Trial Chamber I ('the Chamber') issued its first decision on the Prosecution's application to introduce prior recorded testimonies under Rule 68(3) of the Rules of Procedure and Evidence (the 'Rules'), setting out the general framework for the introduction of prior testimonies pursuant to this provision.¹
2. On 16 August 2022, the Prosecution filed an application to introduce the prior recorded testimonies of P-0584, P-0671 and P-1018 pursuant to Rule 68(3) of the Rules (the 'Application').²
3. On 24 August 2022, the Defence responded by email that it did not oppose the Application with regard to P-1018.³ With regards to P-0671 and P-0584, the Defence indicated that, in principle, it did not object to the use of Rule 68(3) of the Rules, but reserves the right to object if/when the Prosecution is in a position to disclose the witnesses' immigration records.⁴

II. Analysis

4. The Chamber incorporates by reference the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.⁵

P-0584

5. P-0584 is a civilian who provides evidence on the alleged crimes committed in Deleig in March 2004. His evidence relates to alleged attacks on [REDACTED] by Government of Sudan Forces and Militia/*Janjaweed* in 2003,⁶ and his subsequent displacement to Deleig. P-0584 also provides evidence about house to house searches,

¹ First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-559-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-559-Red (hereinafter: 'First Rule 68(3) Decision').

² Prosecution's thirteenth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0584, P-0671 and P-1018, ICC-02/05-01/20-721-Conf. A public redacted version was notified on 19 August 2022, ICC-02/05-01/20-721-Red.

³ Email from the Defence, 24 August 2022, at 11:04.

⁴ Email from the Defence, 24 August 2022, at 11:04. *See also* Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-69-ENG RT, p. 4, lines 7-10.

⁵ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

⁶ DAR-OTP-0200-1540 at 1550-1554, paras 34-50.

[REDACTED],⁷ and the arrest, detention, mistreatment,⁸ and killing⁹ of men in Deleig in March 2004. P-0584 also gives evidence regarding Mr Abd-Al-Rahman's alleged presence, indicia of authority, and role during the Deleig incident, including his killing of *Sheikh Motor*.¹⁰

6. In addition to the witness statement, the Prosecution seeks to introduce the following items as associated material: (i) a map shown to P-0584 during the interview; (ii) sketches drawn by P-0584 of [REDACTED] and Deleig; (iii) a CD signed by P-0584 containing photographs of [REDACTED]; and (iv) an investigation report.¹¹

7. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).¹²

8. In principle, the Defence does not object to the use of Rule 68(3) of the Rules for P-0584, but reserves the right to object if/when the Prosecution is in a position to disclose the witness's immigration records.¹³

9. The Chamber notes the Prosecution's submission that P-0584's evidence is corroborative and/or cumulative to that of other witnesses that have testified or will testify entirely *viva voce* in respect of alleged crimes in Deleig.¹⁴ Noting that, in principle, the Defence does not oppose the Application, the Chamber is satisfied that the introduction of P-0584's prior recorded statement will not be prejudicial to the accused.

10. Further noting that the Defence in principle does not oppose the Application, the Prosecution may use one hour for the supplementary examination of the witness.

11. Accordingly, the Chamber authorises the introduction of the prior recorded testimony of P-0584 identified in the Application and its corresponding annex, pursuant

⁷ DAR-OTP-0200-1540 at 1564-1566, paras 90-95.

⁸ DAR-OTP-0200-1540 at 1566-1567, paras 96-102.

⁹ DAR-OTP-0200-1540 at 1570-1573, paras 111-126.

¹⁰ DAR-OTP-0200-1540 at 1568-1569, paras 103-110

¹¹ Application, ICC-02/05-01/20-721-Conf, para. 11.

¹² Application, ICC-02/05-01/20-721-Conf, paras 12-13.

¹³ Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-69-ENG RT, p. 4, lines 7-10. It is noted that the Prosecution has indicated that, to date it has not received such documents. *See* e-mail from the Prosecution, 24 August 2022, at 13:42. *See also* Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-069 RT, p. 4, lines 21-24.

¹⁴ Application, ICC-02/05-01/20-721-Conf, para. 39(a) to (c) and (e).

to Rule 68(3) of the Rules. The Chamber's ruling is without prejudice to any matter the Defence may wish to raise as a result of disclosure of the immigration records of the witness.¹⁵ The Chamber's preliminary ruling is also subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.

P-0671

12. P-0671 is a civilian who provides evidence on an alleged attack on [REDACTED] in November/December 2003¹⁶ and his displacement to Deleig as a result.¹⁷ P-0671 further provides evidence on the encircling of Deleig by the Militia/*Janjaweed* and GoS on or about 5 March 2004,¹⁸ and a search and arrest operation, during which [REDACTED] were arrested on the orders of Mr Abd-Al-Rahman.¹⁹ The witness provides direct evidence on the alleged mistreatment of detainees near the Deleig police station²⁰ and describes seeing Mr Abd-Al-Rahman at that police station beating prisoners and ordering soldiers to do the same.²¹

13. P-0671 further provides hearsay evidence about how the detainees were allegedly placed in vehicles and driven to a dried up riverbed near Tolda Mountain to be executed.²² A number of days later, P-0671 [REDACTED].²³ Subsequently, P-0671 saw Mr Abd-Al-Rahman three to four times in Deleig market in 2004.²⁴

14. In addition to the witness statement, the Prosecution seeks to introduce the following associated material: (i) illustrations shown to P-0671 for identification purposes; (ii) a sketches drawn by P-0671 of relevant locations in Deleig; and (iii) an investigation report.²⁵

¹⁵ Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-69-ENG RT, p. 4, lines 7-10.

¹⁶ DAR-OTP-0206-0105 at 0108-0110, paras 14-19, 21.

¹⁷ DAR-OTP-0206-0105 at 0110, para. 20.

¹⁸ DAR-OTP-0206-0105 at 0111, paras 24-25.

¹⁹ DAR-OTP-0206-0105 at 0112-0114, paras 26-34.

²⁰ DAR-OTP-0206-0105 at 0115-0116, paras 40-41, 43.

²¹ DAR-OTP-0206-0105 at 0116, para. 44.

²² DAR-OTP-0206-0105 at 0117, para. 48.

²³ DAR-OTP-0206-0118, paras 51-54.

²⁴ DAR-OTP-0206-0105 at 0119-0120, paras 59-60.

²⁵ Application, ICC-02/05-01/20-721-Conf, para. 16.

15. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).²⁶

16. In principle, the Defence does not object to the use of Rule 68(3) of the Rules for P-0671, but reserves the right to object if/when the Prosecution is in a position to disclose the witness's immigration records.²⁷

17. The Chamber notes the Prosecution's submission that P-0671's evidence is corroborative of and cumulative to that of other witnesses who have already testified or will testify entirely *viva voce* in respect of alleged crimes in Deleig.²⁸ Noting that, in principle, the Defence does not oppose the Application, the Chamber is satisfied that the introduction of P-0671's prior recorded statement will not be prejudicial to the accused.

18. Further noting that the Defence in principle does not oppose the Application, the Prosecution may use one hour for the supplementary examination of the witness.

19. Accordingly, the Chamber authorises the introduction of the prior recorded testimony of P-0671 identified in the Application and its corresponding annex, pursuant to Rule 68(3) of the Rules. The Chamber's ruling is without prejudice to any matter the Defence may wish to raise as a result of disclosure of the immigration records of the witness.²⁹ The Chamber's preliminary ruling is also subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.

P-1018

20. P-1018 is an [REDACTED]. He provides evidence on an alleged attack on [REDACTED] led by Mr Abd-Al-Rahman on 8 December 2003, and his displacement to Deleig as a result.³⁰ P-1018's evidence further relates to the search and detention of Jenif, the transport of detainees towards Koska area,³¹ the detention of *Umdah Jiddo*

²⁶ Application, ICC-02/05-01/20-721-Conf, paras 17-18.

²⁷ Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-69-ENG RT, p. 4, lines 7-10.

²⁸ Application, ICC-02/05-01/20-721-Conf, para. 39(a) to (d).

²⁹ Transcript of hearing, 25 August 2022, ICC-02/05-01/20-T-69-ENG RT, p. 5, line 6-8.

³⁰ DAR-OTP-0220-2946 at 2949, l. 41-48.

³¹ DAR-OTP-0220-2946 at 2950, l. 97-101.

Khamis and *Umdah* Adam Adam Deguis at the Deleig police station,³² as well as the destruction of mass graves with the alleged involvement of Mr Abd-Al-Rahman.³³ The witness also [REDACTED] during the Deleig incident.³⁴

21. In addition to the witness statement, which is comprised of four interview transcripts (with English translations), the Prosecution seeks to introduce the following associated material: (i) a photograph of P-1018 holding a signed written declaration attesting to having given a statement to the Prosecution; (ii) a photograph of the signed written declaration; and (iii) [REDACTED] during the Deleig incident provided by P-1018.³⁵

22. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).³⁶

23. The Chamber notes the Prosecution's submission that P-1018's evidence is corroborative of and cumulative to that of other witnesses who have already testified or will testify entirely *viva voce* in respect of alleged crimes in Deleig.³⁷ Noting that the Defence does not object the Application, the Chamber is satisfied that the introduction of P-1018's prior recorded statement will not be prejudicial to the accused.

24. Further noting that the Defence does not oppose the Application, the Prosecution may use one hour for the supplementary examination of the witness.

25. Accordingly, the Chamber authorises the introduction of the prior recorded testimony of P-1018 identified in the Application and its corresponding annex, pursuant to Rule 68(3) of the Rules. The Chamber's preliminary ruling is subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.

³² DAR-OTP-0220-2946 at 2950-2951, l. 128-156, and DAR-OTP-0220-2956 at 2960-2962, l. 91-164.

³³ DAR-OTP-0220-2946 at 2952-2954, l. 187-192, 208-284.

³⁴ DAR-OTP-0220-2956 at 2958-2959, l. 13-39 and 2963-2966, l. 197-238, 263-328 and 2968-2970, l. 429-502, and DAR-OTP-0220-2972 at 2974-2981, l. 18-284 and 2984-2985, l. 394-428; DAR-OTP-0219-9003 (Translation at DAR-OTP-0219-3043); DAR-OTP-0219-9004 (Translation at DAR-OTP-0220-3045); DAR-OTP-0219-9005 (Translation at DAR-OTP-0220-3047); DAR-OTP-0219-9002 (Translation at DAR-OTP-0220-3041).

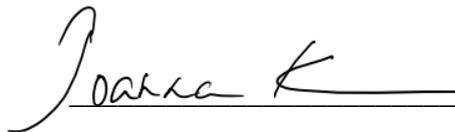
³⁵ Application, ICC-02/05-01/20-721-Conf, para. 24.

³⁶ Application, ICC-02/05-01/20-721-Conf, paras 25-26.

³⁷ Application, ICC-02/05-01/20-721-Conf, para. 39(a) to (d), (f) to (h).

26. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the Chamber considers that the Prosecution must focus its examination in order to complete the formalities under this provision and conduct any supplementary questioning of each witness within the estimated time.

27. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber authorises the introduction of the prior recorded testimony of P-1018 identified in the Application and its corresponding annex, pursuant to Rule 68(3) of the Rules. The Chamber equally authorises the introduction of the prior recorded testimonies of P-0584 and P-0671, unless the Defence indicates that it wants to raise matters arising from their immigration records. The Chamber's preliminary ruling is subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.

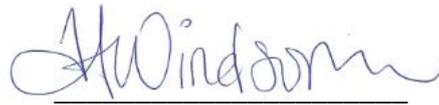


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 26 August 2022

At The Hague, the Netherlands