



Original: English

**No. ICC-02/05-01/20
Date: 31 January 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 redacted version of the
Third Rule 68(2)(c) Decision**

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

The Office of the Prosecutor

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Counsel for the Defence

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Legal Representatives of Victims

Natalie von Wistinghausen
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 8 February 2022, Trial Chamber I (the ‘Chamber’) issued a decision rejecting the Prosecution’s application to introduce P-0954’s prior recorded testimony pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’).¹
2. On 2 May 2022, the Chamber rejected the Prosecution’s application to introduce the prior recorded testimony of P-0954 pursuant to Rule 68(2)(c) of the Rules (‘P-0954’s Rule 68(2)(c) Decision’).²
3. On 13 January 2023, the Prosecution filed an application to introduce P-0973’s testimony pursuant to Rule 68(2)(c) of the Rules (the ‘P-0973 Application’).³ The Prosecution notes that the Defence, agrees with the P-0973 Application, insofar as the Prosecution does not rely on paragraphs that go to the acts and conduct of the accused.⁴
4. On 19 January 2023, the Prosecution filed a request for reconsideration of P-0954’s Rule 68(2)(c) Decision (the ‘P-0954 Application’).⁵ The Prosecution notes that the Defence, agrees with the P-0954 Application, insofar as the Prosecution does not rely on paragraphs that go to the acts and conduct of the accused.⁶
5. On 20 January 2023, the Defence filed its response to the P-0954 Application, confirming it does not oppose it, as agreed with the Prosecution (the ‘P-0954

¹ Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-588-Conf (hereinafter: ‘P-0954 Rule 68(3) Decision’). A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red.

² Decision on the Prosecution’s second application to introduce a prior recorded testimony under Rule 68(2)(c), ICC-02/05-01/20-680-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-680-Red. *See also* Prosecution’s second application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0954, ICC-02/05-01/20-656-Conf. A public redacted version was notified on 31 March 2022, ICC-02/05-01/20-656-Red; and Réponse à la Requête ICC-02/05-01/20-656-Conf, ICC-02/05-01/20-669-Conf (notified on 12 April 2022). A public redacted version was notified on the same day, ICC-02/05-01/20-669-Red.

³ Prosecution’s application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of Witness P-0973, ICC-02/05-01/20-847-Conf. A public redacted version as notified on the same day, ICC-02/05-01/20-847-Red.

⁴ P-0973 Application, ICC-02/05-01/20-847-Conf, para. 22.

⁵ Prosecution’s request for reconsideration of the “Decision on the Prosecution’s second application to introduce a prior recorded testimony under Rule 68(2)(c)”, 2 May 2022, ICC-02/05-01/20-680, ICC-02/05-01/20-851-Conf. A public redacted version was notified on 20 January 2023, ICC-02/05-01/20-851-Red.

⁶ P-0954 Application, ICC-02/05-01/20-851-Conf, para. 16.

Response’). The Defence, however, states that its agreement does not amount to an admission of the truth of all or part of P-0954’s prior recorded testimony.⁷

6. The Defence did not file a response to the P-0973 Application.

ANALYSIS

7. The Chamber refers to the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(2)(c) of the Rules.⁸

P-0954

8. The Chamber recalls that in P-0954’s Rule 68(2)(c) Decision it already established: that there is sufficient evidence on P-0954’s death, that measures under Article 56 of the Rome Statute (the ‘Statute’) could not have been anticipated, and that the prior recorded testimony has sufficient indicia of reliability.⁹

9. Although the Chamber noted in P-0954’s Rule 68(2)(c) Decision that the introduction of his prior recorded testimony would be prejudicial to the accused,¹⁰ the parties have now agreed to the introduction of the prior recorded testimony, insofar as paragraphs relating to the acts and conduct of the accused are excluded.¹¹ In particular, the parties have agreed to exclude the following excerpts:

- Paragraphs 34, 35, and 49 to 60 in their entirety;
- Paragraph 24, the bullet point: “- Emir Ali KUSHAYB, who operated in the following areas Arawala, Bindisi, Kodoom, Garsila, Mukjar, Deleig, Sindu. In fact, it is in all Wadi Salih. [REDACTED]. Ali KUSHAYB and his men were supported by Arms, Ammunitions and other equipment from the People's Defence Force of Nyala. This is during the period from 2003.
- Paragraph 41, the bullet point: “a. Emir Ali KUSHAYB; Wadi Salih (Garsila and Deleig) His visits were during the period from 2003 to 2004 or 2005 to Nyala”.

⁷ Defence response to “Prosecution’s request for reconsideration of the ‘Decision on the Prosecution’s second application to introduce a prior recorded testimony under Rule 68(2)(c)’”, ICC-02/05-01/20-852-Conf, paras 1-2.

⁸ Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c), ICC-02/05-01/20-603-Conf, paras 6-7.

⁹ P-0954’s Rule 68(2)(c) Decision, ICC-02/05-01/20-680-Conf, para. 12.

¹⁰ P-0954’s Rule 68(2)(c) Decision, ICC-02/05-01/20-680-Conf, paras 14-15.

¹¹ P-0954 Application, ICC-02/05-01/20-851-Conf, para. 16.

- At page 0581, the title “Ali KUSHAYB”.

10. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises, pursuant to Rule 68(2)(c) of the Rules, the introduction of P-0954’s prior recorded testimony, as well as the associated material submitted.¹²

P-0973

11. The Chamber notes that P-0973 is unavailable to testify, [REDACTED]. The Chamber in particular notes the Prosecution’s submission that [REDACTED], any action to bring P-0973 to testify would expose him as a Prosecution witness and thus put him at risk.¹³ The Chamber further notes that measures under Article 56 of the Statute could not have been anticipated, particularly that the Prosecution could not reasonably have anticipated that P-0973 [REDACTED].¹⁴ The Chamber also notes that P-0973’s prior recorded testimony has sufficient indicia of reliability, in that the statement is signed by the witness, attesting that it was given voluntarily, and the interpreter certified that the interview was translated into a language that the witness speaks and understands.¹⁵

12. The Chamber notes that, in agreement with the Defence, the Prosecution does not seek to rely on the passages of the statement that concern the acts and conduct of the accused.¹⁶ In particular, the parties have agreed to exclude the following excerpts:

- at 0739, para. 14: Heading and whole paragraph.
- at 0739-0740, para. 15: Whole paragraph, except [REDACTED].
- at 0740, para. 16: Whole paragraph.
- at 0742, para. 29: Whole paragraph.
- at 0742, para. 30: “Ali KUSHAYB started walking on our backs as we were laying [sic] face down. He would say things like God creates and I kill and flies are worth more than you. He remained [REDACTED] for period of time before I heard the vehicle leave.”

¹² This includes the statement and associate material in ICC-02/05-01/20-851-Conf-AnxA.

¹³ P-0973 Application, ICC-02/05-01/20-847-Conf, paras 6-7. See also paras 8-14, providing more detail about P-0973’s detention.

¹⁴ P-0973 Application, ICC-02/05-01/20-847-Conf, para. 15.

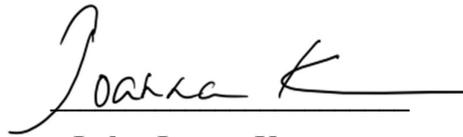
¹⁵ DAR-OTP-0220-0736-R01 at 0738, 0751 and 0752.

¹⁶ P-0973 Application, ICC-02/05-01/20-847-Conf, para. 18 and Annexes A and B.

- at 0743, para. 31: “They set up some chairs and came and joined Ali KUSHAYB who was seated under a tree.”
- at 0743, para. 32: Whole paragraph.
- at 0743, para. 33: “by Ali KUSHAYB”, “by him”, “As they entered he would poke them with his axe. I saw Ali KUSHAYB enter the passenger seat of this vehicle and”, “However, on this occasion I was unable to see if Ali KUSHAYB left in the vehicle” and “I did not see Ali KUSHAYB leave with the prisoners on this occasion”.
- at 0743, para. 34: “by Ali KUSHAYB” and from “As we walked towards the Police Station” until the end of the paragraph.
- at 0744, para. 37: “Ali KUSHAYB was about 3 to 4 metres from the cell door” and “Ali KUSHAYB enter”.
- at 0744, para. 39: “I did not see Ali KUSHAYB or see any Janjaweed on Saturday”.
- at 0745, para. 40: Whole paragraph, except “On Sunday, a few hours after sunrise, possibly around 8am, I saw through the prison cell door” and “a vehicle which appeared to be the same vehicle I had described on Friday”.
- at 0745, para. 42: “Ali KUSHAYB entered the front passenger side of the vehicle”.
- at 0745, para. 43: Whole paragraph, except “About four hours later, possibly around 11:30 am or 12:00” and “the same vehicle which appeared to be the one the five others had been placed in, however they were no longer in the rear. The vehicle stopped”.
- at 0745-0746, para. 44: Whole paragraph, except “ordered [REDACTED].”
- at 0746, paras. 45-46: Whole paragraphs.
- at 0746, para. 47: Whole paragraph, except “The vehicle left and we were driven to the area where [REDACTED]held prisoner by the Janjaweed, just outside Deleig.”
- at 0747, para. 53: “[REDACTED] Janjaweed say to Mr ISMAIL that he had been instructed by Ali KUSHAYB and he had to follow orders. Juma told the Janjaweed member I will stay at Mr ISMAIL house so Ali KUSHAYB can find me there if he needs.”
- at 0748, para. 54: “[REDACTED].”
- at 0748, para. 58: Heading and whole paragraph.
- at 0749: “Annexure E: Hand-drawn illustration of axe”.

13. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises, pursuant to Rule 68(2)(c) of the Rules, the introduction of P-0973's prior recorded testimony, as well as the associated material submitted.¹⁷

14. The Chamber orders the Registry to reflect in the e-Court metadata the introduction of the prior recorded testimonies as identified in the present decision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 31 January 2023

At The Hague, The Netherlands

¹⁷ This includes the witness statement and associated material in ICC-02/05-01/20-851-Conf-AnxA.