



Original: English

No. ICC-02/05-01/20

Date: 31 May 2023

Date of original: 7 October 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 the
Decision on the Prosecution's application to introduce prior recorded testimonies
of P-0907 and P-0973 under Rule 68(3)**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

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**

Philipp Ambach

Other

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 Since then, the Chamber has issued twelve decisions dealing with subsequent Rule 68(3) applications.²
2. On 16 September 2022, following an instruction of the Chamber,³ the Prosecution made an application to introduce the prior recorded testimonies of P-0907 and P-0973 pursuant to Rule 68(3) of the Rules (the 'Application').⁴

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 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. A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red; Decision on the Prosecution's fourth and fifth request to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-602-Conf. A public redacted version was notified on that same date, 21 February 2022, ICC-02/05-01/20-602-Red (hereinafter: 'Third Rule 68(3) Decision'); Decision on the Prosecution's sixth request to introduce prior recorded testimonies under Rule 68(3), 16 March 2022, ICC-02/05-01/20-630-Conf. A public redacted version was notified the same day, ICC-02/05-01/20-630-Red; Decision on the Prosecution's seventh application to introduce prior recorded testimonies under Rule 68(3), 18 March 2022, ICC-02/05-01/20-635-Conf. A public redacted version was notified the same day, ICC-02/05-01/20-635-Red (hereinafter: 'Fifth Rule 68(3) Decision'); Decision on the Prosecution's eighth application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-649-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-649-Red; Seventh Decision on Prosecution's applications to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-651-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-651-Red; Decision on the Prosecution's tenth application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-660-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-660-Red; Decision on the Prosecution's eleventh application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-699-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-699-Red; Decision on the Prosecution's twelfth application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-711-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-711-Red; Decision on the Prosecution's application to introduce prior recorded testimony of P-0129 under Rule 68(3), ICC-02/05-01/20-726-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-726-Red; Decision on the Prosecution's thirteenth application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-729-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-729-Red; Decision on the Prosecution's fifteenth application to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-731-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-731-Red.

³ The Chamber informed the parties of the potential use of Rule 68(3) of the Rules in respect of P-0979, P-0907, and P-0973 and that the Prosecution may file such an application by 16 September 2022 (responses to be filed by 23 September 2022). *See* e-mail from the Chamber, 12 September 2022, at 11:15.

⁴ E-mail from the Prosecution, 16 September 2022, at 15:30.

3. On 23 September 2022, the Defence responded to the Application, opposing it (the 'Response').⁵

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.⁶

P-0907

5. P-0907, a civilian from [REDACTED] village, provides evidence on the alleged attack on Forgo in October 2003, and his [REDACTED] displacement to Deleig. [REDACTED] by Ali Kushayb, [REDACTED]. [REDACTED]. His evidence also relates to the accused's identity and background.⁷

6. In addition to P-0907's statement, the Prosecution seeks to introduce as associated material, a sketch and a table used during his interview.⁸

7. The Prosecution requests one hour to conduct a supplementary examination (instead of the nine hours estimated for *viva voce* examination).⁹

8. The Prosecution submits that granting the Rule 68(3) application for P-0907 will reduce the length of the witness' in-court testimony. The Prosecution also contends that P-0907's evidence is cumulative and corroborative of evidence provided by *viva voce* witnesses.¹⁰ The Prosecution further submits that P-0907's evidence is relevant to the contextual elements of crimes against humanity. Finally, the Prosecution submits that the introduction into evidence of P-0907's prior recorded testimony would not be prejudicial or inconsistent with the rights of the accused, since the witness will be present before the Chamber and the Defence will have the opportunity to fully examine the witness during the proceedings.¹¹

⁵ E-mail from the Defence, 23 September 2022, at 12:24.

⁶ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

⁷ E-mail Application.

⁸ E-mail Application.

⁹ E-mail Application.

¹⁰ P-0905, P-0987, P-0879, P-0585, P-0092 and P-0027.

¹¹ E-mail Application.

9. The Defence submits that it is essential that P-0907 testifies *viva voce* and objects to the introduction of his prior recorded testimony under Rule 68(3) of the Rules. The Defence contends that there are features of P-0907's evidence that make it unique, namely that the witness states: [REDACTED]. The Defence also submits that, if believed, P-0907's testimony would be powerfully incriminating and 'as such go[es] to issues which are vehemently contested by the Defence'. The Defence avers that 'the interests of justice demand that these features should not simply be admitted (in chief) in writing'.¹²

10. The Chamber notes the Prosecution's submission that P-0907's evidence is cumulative and corroborative of evidence to be given by *viva voce* witnesses and that admitting his prior recorded testimony would save in-court time.¹³ However, given the nature of P-0907's evidence, and the objections raised by the Defence,¹⁴ it is more appropriate to hear P-0907 *viva voce*. The Chamber notes in particular that so far, it has not yet heard any other witness [REDACTED].¹⁵

P-0973

11. P-0973, a civilian from [REDACTED], provides evidence [REDACTED]. [REDACTED]. P-0973 also provides evidence on Mr Abd-Al-Rahman's identity and background.¹⁶

12. In addition to P-0973's statement, the Prosecution seeks to introduce as associated material, three sketches, two tables used during P-0973's interview, four photographs and an investigation report.¹⁷

13. The Prosecution requests one hour to conduct a supplementary examination (instead of the nine hours estimated for *viva voce* examination).¹⁸

14. The Prosecution avers that P-0907's evidence is cumulative and corroborative of evidence to be given by *viva voce* witnesses.¹⁹ The Prosecution also submits that the

¹² E-mail Response.

¹³ E-mail Application *referring to* P-0905, P-0987, P-0879, P-0585, P-0092 and P-0027.

¹⁴ E-mail Response.

¹⁵ The Chamber notes that [REDACTED].

¹⁶ E-mail Application.

¹⁷ E-mail Application.

¹⁸ E-mail Application.

¹⁹ P-0905, P-0987, P-0879, P-0585, P-0092 and P-0027.

introduction into evidence of the prior recorded testimony would not be prejudicial to or inconsistent with the rights of the accused since the witness will be present before the Chamber and the Defence will have an opportunity to fully examine the witness during the proceedings.²⁰

15. The Defence objects to the introduction evidence of the prior recorded testimony under Rule 68(3) of the Rules. The Defence requests that the entirety of the witness' testimony be given *viva voce*. The Defence contends that [REDACTED]. In particular, the Defence refers to the witness testifying to: (i) seeing Ali Kushayb [REDACTED]; (ii) seeing Ali Kushayb [REDACTED]; and (iii) seeing Ali Kushayb [REDACTED]. The Defence avers that this evidence relates to fundamental issues in dispute.²¹

16. The Chamber recalls that, while uniqueness has been previously considered by the Chamber in the exercise of its discretion, it 'is not, *per se*, an obstacle to authorise the introduction of evidence under Rule 68(3) of the Rules'. Indeed this is not a requirement appearing in the Rule. The Chamber recalls the factors which militate in favour of the use of Rule 68(3) include 'good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings.'²² In many respects P-0973's evidence is corroborative and cumulative of evidence expected to be given by *viva voce* witnesses, [REDACTED].²³ His account is also cumulative and corroborated by other *viva voce* witnesses already heard by this Chamber, [REDACTED]. Accordingly, the Chamber is unpersuaded by the Defence's contention that 'the nature of the evidence that P-0973 purports to provide against Mr Abd-Al-Rahman as "*Ali Kushayb*" fulfil the uniqueness criterion'.

17. Therefore, the Chamber is of the view that admitting P-0973's prior recorded statement into evidence will not occasion any prejudice to the accused. The Chamber reiterates that Rule 68(3) of the Rules does not replace oral testimony but, rather,

²⁰ E-mail Application.

²¹ E-mail Response.

²² Decision on the Prosecution's eleventh application to introduce prior recorded testimonies under Rule 68(3), 3 June 2022, ICC-02/05-01/20-699-Conf, para. 24

²³ See Prosecution's Trial Brief, 5 January 2022, ICC-02/05-01/20-550-Conf-Exp, paras. 450, 527, 528 and 545. A confidential redacted and public redacted version were filed on 21 January 2022 and 4 February 2022 respectively, ICC-02/05-01/20-550-Conf-Red-Corr and ICC-02/05-01/20-550-Corr-Red2.

complements it.’²⁴ Thus, the Defence will have full opportunity to cross-examine the witness on the ‘fundamental issues in dispute’ referred to in its Response.²⁵

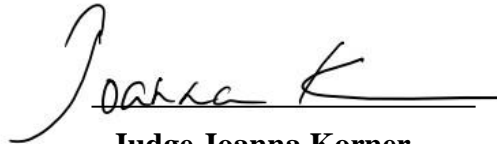
18. The Chamber concludes that granting the Prosecution’s Rule 68(3) application in respect of P-0973 will streamline the presentation of evidence and expedite the proceedings. The Prosecution has requested one hour for its examination in-chief (instead of the nine hours estimated for *viva voce* examination), thus saving at least eight hours of in-court time.

19. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the Prosecution must streamline its examination in order to complete the formalities under this provision and conduct any supplementary questioning of P-0973 within the requested time.

²⁴ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 35.

²⁵ E-mail Response.

20. In view of the foregoing, and given the nature of the objections raised by the Defence, the Chamber rejects the Application in respect of P-0907, and authorises the introduction of the prior recorded testimony of P-0973 identified in the Application and its corresponding annex, pursuant to Rule 68(3) of the Rules. The Chamber's preliminary ruling is subject to the witness' appearance before the Chamber and his consent to the introduction of his testimony pursuant to this provision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 7 October 2022

At The Hague, the Netherlands