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**No. ICC-02/05-01/20
Date: 20 January 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
First Decision on the Prosecution's request 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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Other

I. Procedural history

1. On 8 September 2021, Trial Chamber I (the ‘Chamber’) set the commencement of trial and corresponding deadlines thereto.¹
2. On 4 October 2021, the Chamber adopted the ‘Directions on the conduct of proceedings’, setting out, *inter alia*, the procedure to submit applications pursuant to Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’) and establishing the deadlines for such applications on 5 January 2022.²
3. On 12 November 2021, noting the agreement among the parties, the Chamber granted the Prosecution’s request for an extension of time limit to submit applications pursuant to Rule 68 of the Rules until 3 February 2022.³
4. On 24 December 2021, the Prosecution filed its first application to introduce the prior recorded testimonies of five direct eyewitnesses relating to alleged incidents in Kodoom, Bindisi and Mukjar and surrounding areas (P-0717, P-0757, P-0834, P-0868 and P-0882), pursuant to Rule 68(3) of the Rules (the ‘Request’).⁴ The Prosecution also requested time for a supplementary examination of each witness.⁵
5. On 5 January 2022, the Defence filed its response (the ‘Response’), opposing the Request, and more generally, the submission of any evidence, including any witness statement pursuant to Rule 68 of the Rules, on the basis of the violation of rules governing the protection of confidential information.⁶ In the alternative, the Defence submitted that if the Chamber were to grant the Request, the portions of the witness statements relating to topics to be covered during the Prosecution’s supplementary

¹ Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

² Directions on the conduct of proceedings, ICC-02/05-01/20-478, paras 46-48 (hereinafter: ‘Directions on the conduct of proceedings’).

³ Transcript of hearing on 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, p. 28, line 21 to p. 29, line 14.

⁴ Prosecution’s first application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0717, P-0757, P-0834, P-0868 and P-0882, ICC-02/05-01/20-547-Conf with confidential annex A (hereinafter: ‘Request’). A public redacted version was filed on 6 January 2022, ICC-02/05-01/20-547-Red.

⁵ Request, ICC-02/05-01/20-547-Red, paras 1-4, 11-12.

⁶ Réponse à la Requête ICC-02/05-01/20-547-Conf, ICC-02/05-01/20-549-Conf. A public redacted version was filed on 10 January 2022, ICC-02/05-01/20-549-Red, paras 14-15 (hereinafter: ‘Response’).

examination should be excluded.⁷ The Defence also submits that regardless of the Chamber's determination on the Request, the time available to the Defence for cross-examination of witnesses must remain unchanged.⁸

II. Analysis

A. Public redacted version of the Request

6. The Chamber notes that the public redacted version of the Request is heavily redacted. Although the Chamber appreciates that protective measures may be pending for these witnesses, the redactions applied are extensive and the expunged information not necessarily identifiable. Accordingly, the Chamber has applied more limited redactions to the public redacted version of the present decision. It instructs the Prosecution to use the public redacted version of this decision as guidance for the preparation of public redacted versions of any future request.

B. General framework

7. Rule 68(1) and (3) of the Rules, together with Articles 64(2), 67(1)(c) and 69(2) of the Rome Statute (the 'Statute'), provide the legal framework for the determination of the Request.

8. The Chamber recalls that in its Directions on the conduct of proceedings, it determined the following as regards the use of Rule 68 of the Rules:

46. The Chamber recalls that the Prosecution has been ordered to file its final list of witnesses it intends to call by 5 January 2022 and to indicate whether it seeks leave to introduce any prior recorded testimony of a witness under Rule 68(2) and (3) of the Rules.

47. The Prosecution shall file applications pursuant to Rule 68(2) and (3) of the Rules as soon as possible and latest by the deadline set for the final list of witnesses. The applications shall be filed together with:

i) copies of the previously recorded testimony or hyperlink to same;

⁷ Response, ICC-02/05-01/20-549-Red, para. 16, referring to Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362, para. 27.

⁸ Response, ICC-02/05-01/20-549-Red, para. 17.

ii) other material referred to in the previously recorded testimony, without which the testimony would not be understandable, if this material is available to the Prosecution; and

iii) a specification as to whether the Prosecution seeks to ask further questions to the witness and the specific time sought for such examination, and an indication of the topics to be addressed orally with the witness.

48. Concerning applications pursuant to Rule 68(3) of the Rules, the Chamber will issue preliminary rulings ahead of the relevant in-court testimony. The final determination will be made at the time of the appearance of the witness before the Chamber and when all conditions of Rule 68(3) have been fulfilled. The Chamber expects the calling party to streamline its questioning considerably when the introduction of the previously recorded testimony is allowed.

9. During the status conference on 12 November 2021, the Chamber further instructed the Prosecution to indicate in its applications under Rule 68 of the Rules any agreement among the parties on the use of this provision.⁹

10. Rule 68 of the Rules is one exception to the general rule set out in Article 69(2) of the Statute, which mandates that the testimony of a witness shall be given in person.¹⁰

11. Rule 68(1) of the Rules requires that the introduction of a prior recorded testimony is not prejudicial to or inconsistent with the rights of the accused or the

⁹ Transcript of hearing on 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, p. 29, lines 12-14.

¹⁰ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, 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 Ngaïssona Defence Motion to Limit the Scope of P-2926's Evidence, 10 March 2021, ICC-01/14-01/18-907-Red, para. 8 (hereinafter: '*Yekatom and Ngaïssona* Rule 68(3) Decision'); Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, 5 August 2020, ICC-01/12-01/18-987-Red, para. 7 (hereinafter: '*Al Hassan* Rule 68(3) Decision'); Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 OA5 OA6, para. 77 (hereinafter: '*Bemba* Appeals Judgment'). See also Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 OA10, para. 84. As determined by the Appeals Chamber, a testimony submitted under this provision cannot be considered to be exclusively written as it complements and does not replace oral testimony. See Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 OA8, para. 79 (hereinafter: '*Gbagbo and Blé Goudé* Appeals Judgment').

fairness of trial. A Chamber's determination to allow the introduction of a prior recorded testimony under Rule 68 of the Rules is discretionary and requires a case-by-case assessment.¹¹ Greater discretion is afforded to trial chambers when applying Rule 68(3) of the Rules, since this provision typically carries a lower risk of interference with the fair trial rights of the accused than Rule 68(2)(b) of the Rules.¹²

12. A prior recorded statement is submitted under Rule 68(3) of the Rules *in lieu* of an examination in chief, or part thereof. The witness still appears in court for a limited examination by the calling party. Moreover, parties and participants, as well as the Chamber, have the opportunity to examine the witness.¹³ In particular, the Defence's right to question the witnesses concerned, including to address any issues of credibility or probative value and matters of an exculpatory nature, remains unchanged.¹⁴ Rule 68(3) of the Rules is thus not intended to replace oral testimony but, rather, complements it.¹⁵

13. Pursuant to Rule 68(3) of the Rules, introduction of a prior recorded testimony is allowed if the following requirements are met: (i) the witness is present before the Chamber; (ii) the witness does not object to the introduction of his or her prior recorded testimony; and (iii) both parties and the Chamber have the opportunity to examine the witness.

14. Accordingly, as stated in the Directions on the conduct of proceedings,¹⁶ the Chamber will issue preliminary rulings ahead of the relevant in-court testimony, while the final determination will only be made when the witness is present in court. It should be added at this point that introduction of prior recorded testimony under Rule 68(3) of the Rules can in principle be considered an option on the spot for every witness

¹¹ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 9; *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 10. *See also* *Gbagbo and Blé Goudé* Appeals Judgment, ICC-02/11-01/15-744 OA8, paras 69-72.

¹² *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14, *referring to* Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Red, para. 24.

¹³ *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 9.

¹⁴ *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 18.

¹⁵ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14.

¹⁶ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 48.

appearing before the Chamber, even if a request under Rule 68 of the Rules had previously not been made.

15. Factors that may be considered, bearing in mind the Chamber's discretion, include, *inter alia*, whether: (i) the evidence relates to issues that are not materially in dispute; (ii) the evidence is not central to core issues in the case, but instead provides relevant background information; (iii) the evidence is corroborative of other evidence; (iv) introduction serves good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings; and (v) introduction may prevent potential re-traumatisation of a vulnerable witness.¹⁷

16. Accordingly, the aforesaid factors do not necessarily impede the application of Rule 68(3) of the Rules. Prior recorded testimony may be introduced under Rule 68(3) of the Rules even if it relates to issues that are materially in dispute, central to core issues of the case or are uncorroborated, insofar as its introduction is not prejudicial to or inconsistent with the rights of the accused and the fairness of trial generally.¹⁸

17. The Chamber notes that the Prosecution requests the introduction of materials referred to or used by the witnesses during their interviews.¹⁹ Although the Chamber will analyse the prior recorded testimonies and related material on a case-by-case basis, it considers that, in principle, such associated material must also be introduced in order to ensure full understanding of the submitted testimony.²⁰

¹⁷ *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, footnote 16, referring to *Gbagbo and Blé Goudé* Appeals Judgment, ICC-02/11-01/15-744 OA8, paras 1, 2, 59, 61, 71; *Bemba* Appeals Judgment, ICC-01/05-01/08-1386 OA5 OA6, para. 78; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of 'Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P-0761', 18 November 2016, ICC-01/04-02/06-1640-Conf, 27 February 2017, ICC-01/04-02/06-1640-Red, para. 9; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-00100, 6 November 2015, ICC-01/04-02/06-988, para. 13.

¹⁸ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14; *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 10, referring to *Gbagbo and Blé Goudé* Appeals Judgment, ICC-02/11-01/15-744 OA8, paras 2, 67, 69. See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, ICC-02/04-01/15-621, para. 7 (hereinafter: '*Ongwen* Rule 68(3) Decision').

¹⁹ Request, ICC-02/05-01/20-547-Conf, para. 10.

²⁰ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 13; *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 17.

C. The Defence's general objection on the inadmissibility of witness statements

18. The Defence has repeatedly made submissions on what it asserts is the inadmissibility of witnesses statements that are not compliant with the Court's Information Protection Policy.²¹ The Chamber will not rehearse arguments discussed at length in previous written and oral submissions and on which a ruling has been made.²² The Chamber wishes to emphasise that once a ruling has been made on a particular issue, it is incumbent upon the parties to accept such a ruling, unless and until an appeal on the issue comes to a different conclusion. Parties should not waste the Court's limited resources by re-raising issues.

19. Accordingly, the Chamber will disregard this aspect of the Defence's submissions.

D. Acts and conduct of the accused

20. In the Request, the Prosecution notes that, after the stipulated *inter partes* consultation,²³ the Defence submits that the use of Rule 68(3) for any of the five witnesses is inappropriate, on the basis that their evidence relates to the identity of the accused and his acts and conduct.²⁴

21. As noted above, the question of whether a prior recorded statement goes to the acts and conduct of the accused, (unlike the rules applicable in other international criminal tribunals), is not a requirement for its submission pursuant to Rule 68(3) of the Rules. In fact, the Statute and Rule 68(3) of the Rules clearly conceive of the introduction of prior recorded testimony for fact witnesses and on issues concerning the acts and conducts of the accused.²⁵

²¹ ICC Information Protection Policy, Administrative Instruction ICC/AI/2007/001, 19 June 2007.

²² Decision on the Defence's requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims' participation, 2 December 2021, ICC-02/05-01/20-525; Transcript of hearing on 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, p. 36, line 12 to p. 42, line 10; p. 47, line 9 to p. 48, line 21; Requête en vertu de la Règle 64-1 du Règlement de Procédure et de Preuve, 2 November 2021, ICC-02/05-01/20-505.

²³ See para. 9 above.

²⁴ Request, ICC-02/05-01/20-547-Conf, para. 52.

²⁵ Al Hassan Rule 68(3) Decision, ICC-01/12-01/18-987-Red, para. 24; Ongwen Rule 68(3) Decision, ICC-02/04-01/15-621, para. 10; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé*

22. Moreover, the Chamber notes that as regards the identity of the accused, the evidence provided by the witnesses in the Request is corroborative of other witnesses' evidence to be presented orally during trial.²⁶ The Chamber also notes the Prosecution's submission that the parties have so far agreed on three biographical facts related to the accused, which are supported by the statements of P-0717, P-0868 and P-0882.²⁷

23. Although three of the witnesses (analysed below) refer to the alleged role and authority of the accused as the leader of the Janjaweed,²⁸ their evidence is corroborative of other witnesses' evidence to be presented orally during trial.²⁹ Thus, the anticipated subject-matter of the testimony of each of the witnesses in question is not of such a unique character or importance that the Chamber would consider necessary to hear the entirety of their evidence *viva voce*.

24. Lastly, the introduction of these witnesses' testimonies serves good trial management, particularly the streamlining of the presentation of evidence and the expeditiousness of proceedings, thereby reducing by a fourth the estimated time for the questioning by the calling party.³⁰

25. Accordingly, the Chamber rejects this general objection from the Defence.

Goudé, Decision on the "Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)", 7 April 2017, ICC-02/11-01/15-870, para. 14.

²⁶ See for example P-0589, P-0643, P-0769, P-0874, P-0878, P-0879, P-0883, P-0903, P-0905, P-0907, P-0924, P-0932, P-0935, P-0955, P-0973, P-0986, P-0994, according to Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Exp-Anx2 (confidential redacted version filed on the same date, ICC-02/05-01/20-551-Conf-Anx2-Red).

²⁷ Request, ICC-02/05-01/20-547-Conf, para. 53.

²⁸ P-0757, P-0834, P-0882.

²⁹ See for example P-0012, P-0029, P-0092, P-0129, P-0131, P-0643, P-0874, P-0878, P-0883, P-0903, P-0907, P-0987, according to Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Exp-Anx2 (confidential redacted version filed on the same date, ICC-02/05-01/20-551-Conf-Anx2-Red).

³⁰ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 15; *Gbagbo and Blé Goudé* Appeals Judgment, ICC-02/11-01/15-744 OA8, para. 61.

E. The prior recorded testimonies to be submitted pursuant to Rule 68(3) of the Rules

26. The Chamber notes that the Defence made no submissions as to the specific content of individual prior recorded testimonies or associated material for any of the five witnesses in the Request. In light of the absence of such detail the Chamber has borne in mind the criteria for submission, (as set out in Section B *supra*) and has derived some assistance from previous decisions of other chambers of the Court and in particular as to whether the introduction of these statements under Rule 68(3) of the Rules is consistent with the Statutory framework and thus not prejudicial or inconsistent with the rights of the accused.

P-0717

27. P-0717, a Fur civilian, is a direct eyewitness of alleged incidents in Kodoom, Bindisi, Mukjar and surrounding areas, particularly in relation to the charges of murder, destruction of property, forcible transfer, torture, cruel treatment and outrages upon personal dignity. The Chamber notes the Prosecution's submission that P-0717's evidence on the above charges is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses. P-0717's statement also relates to the identity of the accused, namely his name and profession at the time of the charges, but as noted above, this evidence too is corroborative and/or cumulative.³¹ Together with the witness statement, the Prosecution seeks the submission of associated material, namely [REDACTED], as well as two satellite images shown to the witness during the interview. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* examination).³²

³¹ See Section D. above.

³² Request, ICC-02/05-01/20-547-Conf, paras 14-20, 47-49, 51-52 and Annex A to the Prosecution's first application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0717, P-0757, P-0834, P-0868 and P-0882, ICC-02/05-01/20-547-Conf-AnxA (hereinafter: 'Annex to the Request').

P-0757

28. P-0757, a Fur civilian, is a direct eyewitness of alleged incidents in Kodoom, Bindisi, Mukjar and surrounding areas, particularly in relation to charges of destruction of property, torture, cruel treatment, outrages upon personal dignity and persecution. The Chamber notes the Prosecution's submission that some of P-0757's evidence on the above charges is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses. P-0757's statement also relates to the identity and individual criminal responsibility of the accused, but as noted above, this evidence too is corroborative and/or cumulative.³³ Together with the witness statement, the Prosecution seeks the submission of associated material, namely hand-drawn material by the witness and other images and charts shown to the witness during the interview. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* testimony).³⁴

P-0834

29. P-0834, a Fur civilian, is a direct eyewitness of alleged incidents in Kodoom, Bindisi and surrounding areas, particularly in relation to charges of murder, pillage, rape and forcible transfer. The Chamber notes the Prosecution's submission that P-0834's evidence on the above charges of pillage and forcible transfer of the civilian population is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses. P-0834's statement also relates to the individual criminal responsibility of the accused, but as noted above, this evidence too is corroborative and/or cumulative.³⁵ Together with the witness statement, the Prosecution seeks the submission of associated material, namely hand-drawn material by the witness and other images and charts shown to the witness during the interview. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* testimony).³⁶

P-0868

30. P-0868, a Fur civilian, is a direct eyewitness of alleged incidents in Kodoom, Bindisi and surrounding areas, particularly in relation to charges of murder and forcible

³³ See Section D. above.

³⁴ Request, ICC-02/05-01/20-547-Conf, paras 21-27, 49 and Annex to the Request.

³⁵ See Section D. above.

³⁶ Request, ICC-02/05-01/20-547-Conf, paras 28-33, 50-51 and Annex to the Request.

transfer of the civilian population. The Chamber notes the Prosecution's submission that P-0834's evidence on the above charges of forcible transfer of the civilian population is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses. P-0868's statement also relates to the identity of the accused, but as noted above, this evidence too is corroborative and/or cumulative.³⁷ Together with the witness statement, the Prosecution seeks the submission of associated material, namely one table with images shown to the witness during the interview. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* testimony).³⁸

P-0882

31. P-0882, a Fur civilian, is a direct eyewitness of alleged incidents in Kodoom, Bindisi and surrounding areas, particularly in relation to charges of murder, rape and forcible transfer of the civilian population. The Chamber notes the Prosecution's submission that P-0882's evidence on the above charges of forcible transfer of the civilian population is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses. P-0882's statement also relates to the identity and individual criminal responsibility of the accused, but as noted above, this evidence too is corroborative and/or cumulative.³⁹ Together with the witness statement, the Prosecution seeks the submission of associated material, namely one photograph shown to the witness during the interview. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* testimony).⁴⁰

F. Timing and scope of supplementary examination and cross-examination

32. In respect of the Defence's objection to the scope of the supplementary examination, the Chamber notes that the Defence refers to one example of introduction of a prior recorded statement, in the context of an earlier case, prior to the amendment of Rule 68 of the Rules and therefore the entry into force of Rule 68(3) of the Rules. In that previous case, and thus applying an entirely different provision as was Rule 68

³⁷ See Section D. above.

³⁸ Request, ICC-02/05-01/20-547-Conf, paras 34-39, 51 and Annex to the Request.

³⁹ See Section D. above.

⁴⁰ Request, ICC-02/05-01/20-547-Conf, paras 40-45, 51 and Annex to the Request.

prior to its amendment, the trial chamber considered it appropriate to introduce parts of a witness statement, while excluding the parts that were touched upon during in-court examination.⁴¹

33. The Chamber notes that thereafter, the practice of the Court has emphasised that admission under Rule 68 of the Rules should not be piecemeal, but that prior recorded testimonies should be admitted as a whole, including not only the statement, but also associated material shown to the witness during the interview that are necessary to understand the statement.⁴² The Chamber therefore rejects the Defence's submission seeking the exclusion of parts of the prior recorded testimonies referred to in the supplementary examination.

34. 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 hour requested.

35. Lastly, the Chamber concludes that introduction of evidence pursuant to Rule 68(3) of the Rules will not occasion any prejudice to the accused. As noted above, Rule 68(3) of the Rules does not replace oral testimony but, rather, complements it.⁴³ Therefore, the Defence will have full opportunity to question the witnesses in order to address any issue relating to their statements and associated material.

36. As anticipated in the Directions on the conduct of proceedings,⁴⁴ the Chamber will issue, in due course, a decision on the overall length and timing of the presentation of evidence by the Prosecution, and consequently the overall length and timing for the Defence's cross-examination of witnesses to be called by the Prosecution.

37. 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

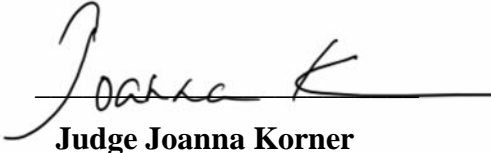
⁴¹ Response, ICC-02/05-01/20-549-Red, para. 16, *referring to* Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362, para. 27.

⁴² Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules, 15 November 2021, ICC-01/12-01/18-1924, para. 14; *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 16; *Al Hassan* Rule 68(3) Decision, ICC-01/12-01/18-987-Red, paras 24, 48.

⁴³ *Yekatom and Ngaïssona* Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14.


⁴⁴ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 22.

testimonies of P-0717, P-0757, P-0834, P-0868 and P-0882 identified in the Request 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.



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Judge Joanna Korner

Presiding Judge


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Judge Reine Alapini-Gansou


A handwritten signature in blue ink, appearing to read 'Althea Windsor', written over a horizontal line.

Judge Althea Violet Alexis-Windsor

Dated this 20 January 2021

At The Hague, The Netherlands