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No. ICC-02/05-01/20

Date: 21 February 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 fourth and fifth 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:

The Office of the Prosecutor

Karim A.A. Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Nasser Mohamed Amin Abdalla
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**

Other

I. Procedural history

1. On 20 January 2022, the Trial Chamber I (the ‘Chamber’) issued its ‘First Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(3)’ (the ‘First Rule 68(3) Decision’), setting out the general framework for the introduction of prior testimonies pursuant to this provision.¹
2. On 26 January 2022, the Prosecution filed its fourth application to introduce the prior recorded testimonies of witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991 pursuant to Rule 68(3) of the Rules (the ‘Fourth Request’).² The Prosecution also requested time for a supplementary examination of each witness.
3. On 2 February 2022, the Prosecution filed its fifth application to introduce the prior recorded testimonies of witnesses P-0020, P-0601 and P-0606 pursuant to Rule 68(3) of the Rules (the ‘Fifth Request’).³ The Prosecution also requested time for a supplementary examination of each witness.
4. On 8 February 2022, during the fourth status conference, the Defence made oral submissions on the Fourth and Fifth Requests.⁴
5. On that same date, the Chamber issued its ‘Decision on the Prosecution’s second and third requests to introduce prior recorded testimonies under Rule 68(3)’ (the ‘Second Rule 68(3) Decision’).⁵

¹ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-559-Red.

² Prosecution’s fourth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0001, P-0581, P-0884, P-0917, P-0922 and P-0991, ICC-02/05-01/20-564-Conf with confidential annex A (hereinafter: ‘Fourth Request’). A public redacted version was notified on 31 January 2022, ICC-02/05-01/20-564-Red.

³ Prosecution’s fifth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0020, P-0601 and P-0606, ICC-02/05-01/20-574-Conf with confidential annex A (hereinafter: ‘Fifth Request’). A public redacted version was notified on 7 February 2022, ICC-02/05-01/20-574-Red.

⁴ Transcript of hearing on 8 February 2022, ICC-02/05-01/20-T-022-CONF.

⁵ Second Rules 68(3) Decision, ICC-02/05-01/20-588-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-588-Red.

II. Analysis

6. The Chamber incorporates by reference the general framework applicable to the assessment of requests for introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules.⁶

A. General objections of the Defence

Acts and conduct of the accused

7. In the Fourth and Fifth Requests, the Prosecution notes that, after an *inter partes* discussion, the Defence has agreed the use of Rule 68(3) in respect of witness P-0001, but otherwise objects to the use of this provision for all other witnesses. The basis of that objection is that their evidence relates to the identity and acts and conduct of the accused.⁷ As regards this general objection from the Defence, the Chamber reiterates its conclusion ‘that 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’.⁸ The Chamber will nevertheless analyse individually each of the prior recorded testimonies of the seven witnesses concerned, bearing in mind the rights of the accused.

Reliability of the prior recorded testimonies

8. During its oral submissions, the Defence alluded to four general issues related to the witness statement-taking process which produce in its view, unreliable statements and which, if introduced, via Rule 68(3) of the Rules, result in prejudice to the accused.

9. First, the Defence argued that the way evidence is elicited during the interview process cannot be controlled as it would be in the courtroom. The Defence submitted that interpretation issues are also better controlled in the courtroom when witnesses

⁶ Second Rule 68(3) Decision, ICC-02/05-01/20-588-Red, para. 8, *referring to* First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, paras 7-17.

⁷ Fourth Request, ICC-02/05-01/20-564-Conf, para. 55; Fifth Request, ICC-02/05-01/20-574-Conf, para. 41. This was confirmed during the fourth status conference, ICC-02/05-01/20-T-022-CONF.

⁸ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 21.

testify entirely *viva voce*. It further stated that the vulnerability of witnesses as well as their education level are factors to consider.⁹

10. Second, the Defence argued that when witness statements are introduced it is not possible to know what questions the investigators asked or what conversations took place between the witness and others at the time of the interview.¹⁰

11. Third, the Defence submitted that the use of Rule 68(3) will not necessarily expedite the proceedings as time to be saved is negligible.¹¹ As indicated during the fourth status conference,¹² the Chamber is unable to understand this submission, as it is obvious that there will be a saving of time, particularly when subsequent interpretation may be needed for some of the witnesses.

12. Fourth, the Defence argued that witnesses do not always give the account the calling party expects and that the solemnity of the courtroom ‘provokes in the witness a greater desire to tell the truth’.¹³

13. As noted already by the Chamber during the fourth status conference,¹⁴ and in its Second Rules 68(3) Decision,¹⁵ the issues raised by the Defence ‘are no more than pure speculation and are matters which may be dealt with in the normal course of cross-examination’,¹⁶ if and when the Defence would consider it necessary to explore such issues in cross-examination.¹⁷

14. Furthermore, as established by the Appeals Chamber, when considering the reliability of prior recorded testimonies, trial chambers have the discretion to consider, on a case-by-case basis, whether to take into account only formal requirements, or take into account other factors beyond formal criteria.¹⁸ Moreover, the Appeals Chamber

⁹ ICC-02/05-01/20-T-022-CONF, p.12, line 18 to p.17, line 5.

¹⁰ ICC-02/05-01/20-T-022-CONF, p. 17, line 6 to p. 18, line 21.

¹¹ ICC-02/05-01/20-T-022-CONF, p.18, line 22 to p. 20, line 12.

¹² ICC-02/05-01/20-T-022-CONF, p. 20, lines 3-9.

¹³ ICC-02/05-01/20-T-022-CONF, p 20, lines 13 to 25.

¹⁴ ICC-02/05-01/20-T-022-CONF, p. 17, line 21 to p. 18, line 3.

¹⁵ Second Rules 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 59.

¹⁶ Second Rules 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 59.

¹⁷ ICC-02/05-01/20-T-022-CONF, p. 14, lines 23 et seq.

¹⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 1 November 2016, 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

determined that in their assessment of reliability,¹⁹ ‘Trial Chambers are not obliged to consider factors beyond formal requirements’.²⁰ In the instant case, and bearing in mind that when Rule 68(3) is applied the witness still appears in Court, factors such as those raised by the Defence during its aforesaid oral submissions, may still be examined when the witness appears in Court. Moreover, these factors can also be considered by the Chamber when it assesses the probative value and weight to be given to these testimonies in the context of its judgment under Article 74 of the Statute.

15. Accordingly, the Chamber rejects the general objections made by the Defence. This is without prejudice to the Chamber’s case-by-case analysis below, particularly bearing in mind the rights of the accused.

B. The prior recorded testimonies

P-0001

16. P-0001 is the [REDACTED]. His testimony touches upon the background information and the contextual elements of the crimes.²¹ The witness also provides

testimony under Rules 68(2)(b) and 68(3)” (hereinafter: ‘Gbagbo and Blé Goudé Appeals Judgment’), ICC-02/11-01/15-744, paras 101-103. In its judgment, the Appeals Chamber refers to practice of the Court as well as ICTY, including: Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence’”, 12 November 2015, ICC-01/05-01/13-1481-Red, para. 20; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103”, 11 March 2016, ICC-01/04-02/06-1205, para. 16; Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103”, 20 November 2015, ICC-01/04-02/06-1029, paras 24, 34; Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr, paras 86, 117, 133; ICTY, *The Prosecutor v. Stanislav Gali*, “Decision on Interlocutory Appeal Concerning Rule 92bis(C)”, 7 June 2002, IT-98-29-AR73.2, paras 31, 36; *The Prosecutor v. Gotovina et al.*, Decision on Defendant Ante Gotovina’s Motion for Admission of Evidence of One Witness Pursuant to Rule 92 bis”, 16 September 2009, IT-06-90-T, para. 5; “Third Decision on Rule 92 Bis Witnesses”, 3 November 2008, IT-06-90-T, para. 15; *The Prosecutor v. Seselj*, Redacted Version of the Second Decision on the Prosecution’s Consolidated Motion Pursuant to Rules 89 (F), 92 Bis, 92 Ter and 92 Quater of the Rules of Procedure and Evidence filed confidentially on 27 February 2008”, 27 February 2008, IT-03-67-T, paras 19-20; *The Prosecutor v. Radovan Karadžić*, “Decision on Accused’s Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 bis”, 22 August 2012, IT-95-5/18-T, para. 9.

¹⁹ Although the Appeals Chamber was referring specifically to Rule 68(2)(b), the Chamber is guided by the Appeals Chamber’s jurisprudence since reliability is also a factor to consider under Rule 68(3) of the Rules.

²⁰ Gbagbo and Blé Goudé Appeals Judgment, ICC-02/11-01/15-744, para. 104.

²¹ Fourth Request, ICC-02/05-01/20-564-Conf, para. 8.

evidence on military operations and structure of the Sudanese forces, the Militia/*Janjaweed* and rebel forces.²²

17. In addition to the witness statement, the Prosecution seeks to introduce as associated material, the final report of the [REDACTED].²³

18. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).²⁴

19. The Chamber notes the Defence's agreement to introduce this prior recorded testimony pursuant to Rule 68(3) of the Rules.²⁵ It also notes the Prosecution's submissions as to the corroborative and cumulative evidence to be provided by other witnesses who will testify entirely *viva voce*.²⁶

20. The Chamber is satisfied that the introduction of P-0001's prior recorded testimony will not occasion any prejudice to the accused.

P-0581

21. P-0581, a [REDACTED], provides evidence on the contextual elements of the crimes, particularly as regards events in Mukjar, where male civilians were allegedly detained [REDACTED] and executed and women were allegedly raped.²⁷

22. As regards the accused, P-0581 refers to him as leading the Militia/*Janjaweed* at the time of the events.²⁸ The Prosecution intends to rely on the statement to establish the accused's identity, particularly his nickname 'Ali Kushayb', his physical description and background.²⁹

²² Fourth Request, ICC-02/05-01/20-564-Conf, para. 9.

²³ Fourth Request, ICC-02/05-01/20-564-Conf, para. 10 and Annex A.

²⁴ Fourth Request, ICC-02/05-01/20-564-Conf, paras 11-13.

²⁵ Fourth Request, ICC-02/05-01/20-564-Conf, para. 55; ICC-02/05-01/20-T-022-CONF, p. 22, lines 12-13.

²⁶ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48

²⁷ Fourth Request, ICC-02/05-01/20-564-Conf, paras 14-15.

²⁸ Fourth Request, ICC-02/05-01/20-564-Conf, para. 16.

²⁹ Fourth Request, ICC-02/05-01/20-564-Conf, paras 14, 16.

23. In addition to the witness statement, the Prosecution seeks to introduce associated material, namely photographs, charts and a video [REDACTED].³⁰

24. The Prosecution requests one hour to conduct a supplementary examination (instead of three hours estimated for *viva voce* examination).³¹

25. In its oral submissions, the Defence argued that P-0581 gives evidence about the role of the accused and the alleged alias ‘Ali Kushayb’. The Defence further submitted that P-0581 speaks at some length about the presence and role of Ali Kushayb and the *Janjaweed* in the charged events and his relationship with the government of Sudan. The Defence states that all this evidence goes to the heart of the Prosecution case. The Defence argued that the introduction of the prior recorded testimony pursuant to Rule 68(3) of the Rules is too prejudicial to the Defence.³²

26. The Chamber notes the agreed facts related to the contextual elements³³ of the crimes and the accused’s identity.³⁴ Further, the Chamber notes the Prosecution’s submission that the evidence of P-0581 on the contextual elements of the crimes is corroborative to, and corroborated by other witnesses who will testify entirely *viva voce*.³⁵ In this regard, for example, in paragraph 26 which was identified by the Defence, P-0581 refers very generally, as other witnesses mentioned above, to Harun, who he saw as a civilian when he allegedly came to Mukjar.³⁶

27. The Chamber further notes that the witness’s evidence related to the accused’s physical description and his leadership role in the Militia/*Janjaweed*, as submitted by the Prosecution, is cumulative to and corroborated by other witnesses who will testify

³⁰ Fourth Request, ICC-02/05-01/20-564-Conf, paras 14, 17 and Annex A.

³¹ Fourth Request, ICC-02/05-01/20-564-Conf, paras 18-20.

³² ICC-02/05-01/20-T-022-CONF, p. 22, lines 15-23. The Defence referred specifically to paragraphs 26-28 of the witness statement.

³³ Fourth Request, ICC-02/05-01/20-564-Conf, para 53, *referring to* agreed facts 1, 2 and 5 in First Joint Submission on Agreed Facts, ICC-02/05-01/20-291-AnxA; agreed fact 7 in Second Joint Submission on Agreed Facts, ICC-02/05-01/20-343-AnxA.

³⁴ Fourth Request, ICC-02/05-01/20-564-Conf, para. 54, *referring to* agreed facts 7, 4, 10 and 11 in Third Joint Submission on Agreed Facts, ICC-02/05-01/20-504-AnxA.

³⁵ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0007, P-0011, P-0012, P-0029, P-0129, P-0131, P-0547, P-0589, P-0643, P-0769, P-0874, P-0878, P-0883, P-0885, P-0984, P-0905, P-0921 and P-1021.

³⁶ [REDACTED].

entirely *viva voce*.³⁷ For example, the Chamber notes that paragraphs 26-28 identified by the Defence refer very generally to the accused's presence in Mukjar and P-0581 in fact accepted that he did not know Ali Kushayb from before, but had been told who he was.³⁸

28. The Chamber is satisfied that the introduction of P-0581's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and in relation to P-0581, the witness's basis of knowledge for the above assertions.

P-0884

29. P-0884, a [REDACTED], is a witness who provides background information and refers to alleged incidents in Al Fasher and Mukjar. The witness also provides evidence on the link between the Government of Sudan and the Militia/*Janjaweed* and Harun's alleged visits to Mukjar at the time of the charges.³⁹

30. As regards the accused, the witness's evidence refers to his identity and command during the alleged attack on Mukjar and [REDACTED].⁴⁰

31. In addition to the witness statement, the Prosecution seeks to introduce associated material, namely photographs, a chart, a certificate, a list, and a [REDACTED].⁴¹

32. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).⁴²

³⁷ Fourth Request, ICC-02/05-01/20-564-Conf, para. 52, referring to P-0012, P-0092, P-0103, P-0117, P-0129, P-0589, P-0643, P-0769, P-0878, P-0883, P-088, P-0907, P-0921 and P-0987.

³⁸ [REDACTED].

³⁹ Fourth Request, ICC-02/05-01/20-564-Conf, paras 21-23.

⁴⁰ Fourth Request, ICC-02/05-01/20-564-Conf, paras 23-24.

⁴¹ Fourth Request, ICC-02/05-01/20-564-Conf, para. 25 and Annex A.

⁴² Fourth Request, ICC-02/05-01/20-564-Conf, paras 26-28.

33. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of the witness statement it considered go to the acts and conduct of the accused.⁴³

34. The Chamber notes the Prosecution's submissions as to the corroborative and cumulative evidence to be provided by other witnesses who, as P-0884, will testify entirely *viva voce* on the background to the armed conflict in Darfur,⁴⁴ and on the contextual elements of the crimes.⁴⁵ The Chamber also notes the Prosecution's submissions as to agreed facts related to the contextual elements of the crimes.⁴⁶

35. The Chamber notes that P-0884 provides significant evidence on the accused. For example, in paragraphs 21, 33 and 64 of the witness statement identified by the Defence, P-0884 refers to 'Ali KUSHAYB's men', 'a group of Ali KUSHAYB' and 'Alik KUSHAYB and his men', in the context of alleged incidents in Mukjar, that include killing civilians, looting, and burning houses.⁴⁷ Moreover, in paragraphs 46-50 of the statement referred to by the Defence, P-0884 provides direct evidence of Ali Kushayb's arrival in Mukjar in 2003.⁴⁸ At paragraph 51, P-0884 also states he had met Ali Kushayb [REDACTED]. Paragraphs 94-100 which were also identified by the Defence, relate to [REDACTED] with Ali Kushayb in 2004. These paragraphs also refer to alleged killings carried out by Ali Kushayb in Mukjar in 2004.⁴⁹

36. Although these factors are not, *per se*, an obstacle to authorise the introduction of evidence under Rule 68(3) of the Rules, in the instant case, P-0884's evidence appears to be in this aspect unique and different to that of other witnesses expected to testify about the accused and his identity and his individual criminal responsibility.

⁴³ ICC-02/05-01/20-T-022-CONF, p. 23, line 13 to p. 24, line 14. The Defence referred specifically to paragraphs 21, 33, 46-50, 64, 94-100 of the witness statement.

⁴⁴ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0040, P-0041, P-0092, P-0129, P-0643, P-0874 and P-0905.

⁴⁵ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0007, P-0011, P-0012, P-0029, P-0129, P-0131, P-0547, P-0589, P-0643, P-0769, P-0874, P-0878, P-0883, P-0885, P-0984, P-0905, P-0921 and P-1021.

⁴⁶ Fourth Request, ICC-02/05-01/20-564-Conf, para 53, *referring to* agreed facts 1, 2 and 5 in First Joint Submission on Agreed Facts, ICC-02/05-01/20-291-AnxA; agreed fact 7 in Second Joint Submission on Agreed Facts, ICC-02/05-01/20-343-AnxA.

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

Accordingly, the Chamber, in the particular circumstances, determines that it is preferable that the entirety of P-0884 evidence is heard *viva voce*.

P-0917

37. P-0917, a Fur civilian, is a witness of alleged attacks on Kodoom, Bindisi and surrounding areas, particularly as regards alleged pillaging and burning of homes. The witness also provides evidence on the discriminatory intent of the attacks and the contextual elements of the crimes.⁵⁰

38. As regards the accused, the witness's evidence refers to his knowledge and intent to commit crimes, including his discriminatory intent. He also refers to the accused's identity and position of authority in the Militia/*Janjaweed*.⁵¹

39. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).⁵²

40. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of his statement that refer to the person identified as Ali Kushayb and his alleged role in the distribution of weapons.⁵³

41. The Chamber notes the Prosecution's submission that P-0917's evidence on the contextual elements of the crimes,⁵⁴ as well as alleged acts of persecution,⁵⁵ is corroborative to, and corroborated by other witnesses who will testify entirely *viva voce*. The Chamber further notes the Prosecution's submission that P-0917's evidence regarding the accused's knowledge and intent in relation to alleged crimes in Kodoom, Bindisi and surrounding areas is cumulative to, and corroborated by, other witnesses

⁵⁰ Fourth Request, ICC-02/05-01/20-564-Conf, paras 29-30.

⁵¹ Fourth Request, ICC-02/05-01/20-564-Conf, paras 29-30.

⁵² Fourth Request, ICC-02/05-01/20-564-Conf, paras 31-33.

⁵³ ICC-02/05-01/20-T-022-CONF, p. 24, lines 6-14. The Defence referred specifically to paragraphs 15, 51, 57, 59-62 of the witness statement.

⁵⁴ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0007, P-0011, P-0012, P-0029, P-0129, P-0131, P-0547, P-0589, P-0643, P-0769, P-0874, P-0878, P-0883, P-0885, P-0984, P-0905, P-0921 and P-1021.

⁵⁵ Fourth Request, ICC-02/05-01/20-564-Conf, paras 48, 51, *referring to* P-0188, P-0726, P-0905, P-0913, P-0918 and P-0984.

who will also testify entirely *viva voce*.⁵⁶ The Chamber also notes the Prosecution's submissions as to agreed facts related to the contextual elements⁵⁷ of the crimes and the accused's identity.⁵⁸

42. As regards the acts and conduct of the accused and his identity, and in addition to the conclusions set out above,⁵⁹ the Chamber notes in respect of the specific paragraphs identified by the Defence, that paragraphs 15, 51, 59-62 provide very general hearsay evidence on the alleged role of the accused as leader of the *Janjaweed* and in the distribution of weapons.⁶⁰ In paragraph 57, also identified by the Defence, P-0917 in fact accepted he could not assess Ali Kushayb's age.⁶¹ Bearing in mind the indirect nature of the evidence provided by P-0917, insofar as relevant, the evidentiary weight of any assertion will be considered by the Chamber in its assessment in the context of the judgment under Article 74 of the Statute.

43. The Chamber is satisfied that the introduction of P-0917's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and in relation to P-0884, the witness's evidence as regards the role of Ali Kushayb in the distribution of weapons.

P-0922

44. P-0922, a Fur civilian, is a witness of alleged attacks on Kodoom, Bindisi and surrounding areas, including Drangal, particularly as regards crimes of destruction of property and forcible displacement. He also refers to the alleged attack on Mukjar. The

⁵⁶ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0885, P-0878 and P-0921.

⁵⁷ Fourth Request, ICC-02/05-01/20-564-Conf, para 53, *referring to* agreed facts 1, 2 and 5 in First Joint Submission on Agreed Facts, ICC-02/05-01/20-291-AnxA; agreed fact 7 in Second Joint Submission on Agreed Facts, ICC-02/05-01/20-343-AnxA.

⁵⁸ Fourth Request, ICC-02/05-01/20-564-Conf, para. 54, *referring to* agreed facts 7, 4, 10 and 11 in Third Joint Submission on Agreed Facts, ICC-02/05-01/20-504-AnxA.

⁵⁹ See paragraph 7 above.

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

witness also provides evidence on the Militia/*Janjaweed*, including the use of discriminatory language and its link to the Government of Sudan.⁶²

45. As regards the accused, the witness's evidence refers to his presence in Mukjar at the time of the alleged attacks in 2004.⁶³

46. In addition to the witness statement, the Prosecution seeks to introduce 69 items associated material, including sketches, photographs and other images used during the interview.⁶⁴

47. The Prosecution requests one hour to conduct a supplementary examination (instead of three hours estimated for *viva voce* examination).⁶⁵

48. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of his statement that refer to the person identified as Ali Kushayb and refer to his alleged presence in Mukjar.⁶⁶

49. The Chamber notes the Prosecution's submission that the evidence of P-0922 on the contextual elements of the crimes,⁶⁷ as well as on the alleged charges of destruction of property,⁶⁸ and forcible transfer⁶⁹ in Kodoom, Bindisi and surrounding areas, is corroborative to, and corroborated by other witnesses who will testify entirely *viva voce*.

50. As regards the acts and conduct of the accused and his identity, and in addition to the conclusions set out above,⁷⁰ the Chamber notes that in paragraphs 17, 27-29 of the

⁶² Fourth Request, ICC-02/05-01/20-564-Conf, paras 34-36.

⁶³ Fourth Request, ICC-02/05-01/20-564-Conf, para. 36.

⁶⁴ Fourth Request, ICC-02/05-01/20-564-Conf, paras 34, 37 and Annex A.

⁶⁵ Fourth Request, ICC-02/05-01/20-564-Conf, paras 38-40.

⁶⁶ ICC-02/05-01/20-T-022-CONF, p. 24, lines 15-21. The Defence referred specifically to paragraphs 17, 27-29, 70, 76-77, 85-89 of the witness statement.

⁶⁷ Fourth Request, ICC-02/05-01/20-564-Conf, para. 48, *referring to* P-0007, P-0011, P-0012, P-0029, P-0129, P-0131, P-0547, P-0589, P-0643, P-0769, P-0874, P-0878, P-0883, P-0885, P-0984, P-0905, P-0921 and P1021.

⁶⁸ Fourth Request, ICC-02/05-01/20-564-Conf, para. 50, *referring to* P-0007, P-0012, P-0015, P-0029 and P-0589.

⁶⁹ Fourth Request, ICC-02/05-01/20-564-Conf, para. 50, *referring to* P-0011, P-0029, P-0874, P-0986 and P-1021.

⁷⁰ *See* paragraph 7 above.

statement identified by the Defence, P-0922 provides mostly general hearsay evidence on the alleged role of the accused, particularly in Bindisi.⁷¹ Paragraph 70 only refers very generally to followers of Ali Kushayb.⁷² Paragraphs 76-77 and 85-89 refer very generally to hearsay evidence on Ali Kushayb's alleged role in the attacks in Mukjar in 2004.⁷³ Although P-0922 allegedly saw the accused during the first attack in Mukjar in 2004, his testimony does not appear unique or otherwise particularly significant in the body of the expected evidence on the issue, as P-0922 had no direct interaction with the accused and he accepts that in fact it was someone else who told him that the person he was seeing was named Ali Kushayb.⁷⁴ Bearing in mind the indirect nature of the evidence provided by P-0922, insofar as relevant, the evidentiary weight of any assertion will be considered by the Chamber in its assessment in the context of the judgment under Article 74 of the Statute.

51. The Chamber is satisfied that the introduction of P-0922's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and in relation to P-0922, the witness's evidence as regards the role of Ali Kushayb in the alleged attacks in Mukjar in 2004.

P-0991

52. P-0991, a Fur civilian, provides evidence on alleged events in Seder (Bindisi) and Kodoom and surrounding areas in August 2003, particularly as regards the contextual elements of the crimes and the charges of murder.⁷⁵

53. As regards the accused, the witness's evidence refers to his identity, particularly his nickname, pharmacy and physical features. P-0991 is a direct witness of the events in Seder, in which he allegedly saw the accused.⁷⁶

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ Fourth Request, ICC-02/05-01/20-564-Conf, paras 41-42.

⁷⁶ Fourth Request, ICC-02/05-01/20-564-Conf, paras 41-42.

54. In addition to the witness statement, the Prosecution seeks to introduce seven items of associated material, namely charts, sketches and a list used during the interview as well as P-0991's identity card.⁷⁷

55. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).⁷⁸

56. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of his statement that link the accused with the alias 'Ali Kushayb'.⁷⁹

57. The Chamber notes the Prosecution's submission that evidence of P-0991 related to the alleged murders in Kodoom, Bindisi and surrounding areas is cumulative to, and corroborated by, other witnesses who will testify entirely *viva voce*.⁸⁰ The Chamber also notes the Prosecution's submissions as to agreed facts related to the contextual elements of the crimes⁸¹ and the accused's identity.⁸²

58. As regards the acts and conduct of the accused and his identity, and in addition to the conclusions set out above,⁸³ the Chamber notes paragraphs 71-74 identified by the Defence, P-0991 refers to the accused, [REDACTED], but his evidence is general, mostly hearsay, and does not appear to be unique or otherwise particularly significant in the body of the expected evidence on the issue.⁸⁴ Bearing in mind the indirect nature of some of the evidence provided by P-0991, insofar as relevant, the evidentiary weight of any assertion will be considered by the Chamber in its assessment in the context of the judgment under Article 74 of the Statute.

⁷⁷ Fourth Request, ICC-02/05-01/20-564-Conf, paras 41, 43 and Annex A.

⁷⁸ Fourth Request, ICC-02/05-01/20-564-Conf, paras 44-46.

⁷⁹ ICC-02/05-01/20-T-022-CONF, p. 24, lines 22-25. The Defence referred specifically to paragraphs 71-74 of the witness statement.

⁸⁰ Fourth Request, ICC-02/05-01/20-564-Conf, para. 49, *referring to* P-0007, P-0011, P-0012, P-0015, P-0029, P-0874, P0878, P-0913, P-0918, P-0921, P-0932 and P-0986.

⁸¹ Fourth Request, ICC-02/05-01/20-564-Conf, para 53, *referring to* agreed facts 1, 2 and 5 in First Joint Submission on Agreed Facts, ICC-02/05-01/20-291-AnxA; agreed fact 7 in Second Joint Submission on Agreed Facts, ICC-02/05-01/20-343-AnxA.

⁸² Fourth Request, ICC-02/05-01/20-564-Conf, para. 54, *referring to* agreed facts 7, 4, 10 and 11 in Third Joint Submission on Agreed Facts, ICC-02/05-01/20-504-AnxA.

⁸³ *See* paragraph 7 above.

⁸⁴ [REDACTED].

59. The Chamber is satisfied that the introduction of P-0991's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused.

P-0020

60. P-0020, a Fur [REDACTED], provides evidence mainly on the contextual elements of the crimes.⁸⁵ He also provides evidence on Harun's alleged role.⁸⁶

61. As regards the accused, P-0020's evidence refers to his identity and background.⁸⁷

62. In addition to the witness statement, the Prosecution seeks to introduce notes [REDACTED].⁸⁸

63. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).⁸⁹

64. In its oral submissions, the Defence objected to the introduction of P-0020's prior recorded testimony pursuant to Rule 68(3). It particularly noted the witness's [REDACTED] and referred to the parts of his statement that mention the person identified as Ali Kushayb and the meaning of that nickname.⁹⁰

65. The Chamber notes the Prosecution's submission that P-0020's testimony on the contextual elements of crimes against humanity,⁹¹ as well as war crimes,⁹² is cumulative and corroborative of evidence to be provided by other *viva voce* witnesses.

⁸⁵ Fifth Request, ICC-02/05-01/20-574-Conf, paras 10-11.

⁸⁶ Fifth Request, ICC-02/05-01/20-574-Conf, para. 11.

⁸⁷ Fifth Request, ICC-02/05-01/20-574-Conf, para. 12.

⁸⁸ Fifth Request, ICC-02/05-01/20-574-Conf, para. 13 and Annex A.

⁸⁹ Fifth Request, ICC-02/05-01/20-574-Conf, paras 14-16.

⁹⁰ ICC-02/05-01/20-T-022-CONF, p. 25, lines 2-7. The Defence referred specifically to paragraph 63 of the witness statement.

⁹¹ Fifth Request, ICC-02/05-01/20-574-Conf, para. 31, *referring to* P-0012, P-0131, P-0547, P-0675, P-0874, P-0878, P-0905, P-0921, P-0931 and P-1021.

⁹² Fifth Request, ICC-02/05-01/20-574-Conf, para. 32, *referring to* P-0103, P-0117, P-0131, P-0883 and P-0935.

Furthermore, as regards P-0020's evidence on the identity of the accused and his background, the Prosecution submits that in addition to the agreed facts which support P-0020's evidence,⁹³ other *viva voce* witnesses provide testimony that is cumulative to and corroborative of P-0020's evidence.⁹⁴

66. As regards the identity of the accused, and in addition to the conclusions set out above,⁹⁵ the Chamber notes that in the only paragraph mentioned by the Defence, paragraph 63, P-0020 refers very generally to a brief encounter in which he was [REDACTED]. However, the evidence is otherwise not particularly significant in the body of the expected evidence on the issue of the accused's identity.

67. The Chamber is satisfied that the introduction of P-0020's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and as regards P-0020's his testimony about the meaning of the word 'kushayb'.

P-0601

68. P-0601, a [REDACTED], provides evidence on the contextual elements of the crimes and the charges of persecution and destruction of property in Bindisi and Mukjar.⁹⁶

69. As regards the accused, P-0601's evidence refers to his identity as well as his alleged network of co-perpetrators, including Hamuda Hamdan, who is an alleged subordinate of the accused.⁹⁷

⁹³ Fifth Request, ICC-02/05-01/20-574-Conf, para. 35. The Prosecution refers specifically to agreed facts 10 and 15 contained in Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, ICC-02/05-01/20-504-AnxA.

⁹⁴ Fifth Request, ICC-02/05-01/20-574-Conf, para. 35, *referring to* P-0012, P-0117, P-0643, P-0769, P-0878, P-0903, P-0905, P-0921, P-0926, P-0879, P-0932, P-0935, P-0990 and P-0994.

⁹⁵ See paragraph 7 above.

⁹⁶ Fifth Request, ICC-02/05-01/20-574-Conf, paras 17-18.

⁹⁷ Fifth Request, ICC-02/05-01/20-574-Conf, para. 19.

70. In addition to P-0601's statement, the Prosecution seeks to introduce a sketch used during the interview.⁹⁸

71. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).⁹⁹

72. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of his statement that refer to the person identified as Ali Kushayb.¹⁰⁰

73. The Chamber notes the Prosecution's submission that P-0601's testimony on the contextual elements of crimes against humanity,¹⁰¹ as well as that of persecution,¹⁰² and destruction of property,¹⁰³ is cumulative and corroborative of evidence to be provided by other *viva voce* witnesses. As regards the accused's alleged position of authority and leadership,¹⁰⁴ and individual criminal responsibility of the accused,¹⁰⁵ the Prosecution submits that P-0601's evidence is also cumulative to and corroborative of evidence to be provided by other witnesses.

74. As regards the identity of the accused, and in addition to the conclusions set out above,¹⁰⁶ the Chamber notes that the single paragraph identified by the Defence, paragraph 75 of the statement, P-0601 refers to [REDACTED] said he was an officer of Ali Kushayb and [REDACTED] until Ali Kushayb ordered it to happen.¹⁰⁷ [REDACTED], it has little significance in the body of the expected evidence on the issue of the accused's leadership role.

⁹⁸ Fifth Request, ICC-02/05-01/20-574-Conf, para. 20 and Annex A.

⁹⁹ Fifth Request, ICC-02/05-01/20-574-Conf, paras 21-23.

¹⁰⁰ ICC-02/05-01/20-T-022-CONF, page 25, lines 8-9. The Defence referred specifically to paragraph 75 of the witness statement.

¹⁰¹ Fifth Request, ICC-02/05-01/20-574-Conf, para. 31, *referring to* P-0012, P-0131, P-0547, P-0675, P-0874, P-0878, P-0905, P-0921, P-0931 and P-1021.

¹⁰² Fifth Request, ICC-02/05-01/20-574-Conf, para. 33, *referring to* P-0012, P-0015, P-0905, P-0913, P-0976 and P-0992.

¹⁰³ Fifth Request, ICC-02/05-01/20-574-Conf, para. 34, *referring to* P-0007, P-0012, P-0015, P-0188, P-0589, P-0874 and P-0878.

¹⁰⁴ Fifth Request, ICC-02/05-01/20-574-Conf, paras 36, 38, *referring to* P-0012, P-0041, P-0092, P-0129, P-0874, P-0643, P-0877, P-0878, P-0903 and P-0921.

¹⁰⁵ Fifth Request, ICC-02/05-01/20-574-Conf, para. 37, *referring to* P-0012, P-0029, P-0041, P-0131, P-0547, P-0643 and P-0874.

¹⁰⁶ *See* paragraph 7 above.

¹⁰⁷ [REDACTED].

75. The Chamber is satisfied that the introduction of P-0601's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and as regards P-0601's testimony about [REDACTED].

P-0606

76. P-0606, a Fur civilian, provides evidence on the contextual elements of the crimes, particularly in the Mukjar locality. The witness also refers to charges of persecution and the alleged detention and torture of Fur and Masalit males, [REDACTED] and forced training in a Militia/*Janjaweed* training camp.¹⁰⁸

77. As regards the accused, P-0606 refers to his identity and his alleged individual criminal responsibility, [REDACTED] the accused was referred to as a leader of the Militia/*Janjaweed*.¹⁰⁹

78. In addition to the witness statement, the Prosecution seeks the introduction of associated material, mainly maps and sketches, photographs and other documents used during the interview.¹¹⁰

79. The Prosecution requests one hour to conduct a supplementary examination (instead of four hours estimated for *viva voce* examination).¹¹¹

80. In its oral submissions, the Defence objected to the introduction of this prior recorded testimony pursuant to Rule 68(3), particularly noting the parts of his statement that refer to the person identified as Ali Kushayb and his alleged role as *Janjaweed* commander.¹¹²

¹⁰⁸ Fifth Request, ICC-02/05-01/20-574-Conf, paras 24-25.

¹⁰⁹ Fifth Request, ICC-02/05-01/20-574-Conf, para. 26.

¹¹⁰ Fifth Request, ICC-02/05-01/20-574-Conf, para. 28 and Annex A.

¹¹¹ Fifth Request, ICC-02/05-01/20-574-Conf, paras 28-29.

¹¹² ICC-02/05-01/20-T-022-CONF, p. 25, lines 10-12. Although the Defence counsel could not recall the relevant paragraphs, the Chamber has identified paragraphs 113-115.

81. The Chamber notes the Prosecution's submission that P-0606's testimony on the contextual elements of crimes against humanity,¹¹³ as well as that of persecution,¹¹⁴ is cumulative and corroborative of evidence to be provided by other *viva voce* witnesses.

82. As regards the role of the accused, and in addition to the conclusions set out above,¹¹⁵ the Chamber notes that P-0606's evidence is limited and is mostly hearsay of what the witness allegedly heard from [REDACTED].¹¹⁶ Bearing in mind the indirect nature of the evidence provided by P-0606, insofar as relevant, the evidentiary weight of any assertion will be considered by the Chamber in its assessment in the context of the judgment under Article 74 of the Statute.

83. The Chamber is satisfied that the introduction of P-0606's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. The Defence will still have ample opportunity to question the witness on issues identified as core to its case, in particular as regards P-0601's testimony about [REDACTED].

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

84. 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 each witness within the estimated hour requested.

85. As anticipated in the Directions on the conduct of proceedings,¹¹⁷ 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.

86. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber rejects the request in respect of P-0884 and

¹¹³ Fifth Request, ICC-02/05-01/20-574-Conf, para. 31, *referring to* P-0012, P-0131, P-0547, P-0675, P-0874.

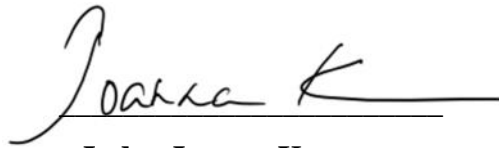
¹¹⁴ Fifth Request, ICC-02/05-01/20-574-Conf, para. 33, *referring to* P-0012, P-0015, P-0905, P-0913, P-0976 and P-0992.

¹¹⁵ See paragraph 7 above.

¹¹⁶ [REDACTED].

¹¹⁷ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 22.

authorises the introduction of the prior recorded testimonies of witnesses P-0001, P-0581, P-0917, P-0922, P-0991, P-0020, P-0601 and P-0606, identified in the Fourth and Fifth Requests and their corresponding annexes, 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.




Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 21 February 2022

At The Hague, The Netherlands