



Original: English

**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 request to introduce prior recorded testimonies
under Rule 68(2)(c)**

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 date of the 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 3 February 2022, the Prosecution filed an application to introduce the prior recorded testimonies of P-0026, P-0083, P-0085, P-0087 and P-0116 pursuant to Rule 68(2)(c) of the Rules (the ‘Request’).⁴
5. On 8 February 2022, during the fourth status conference, the Defence made oral submissions on the Request.⁵

II. Analysis

A. General Framework

6. Pursuant to Rule 68(2)(c) of the Rules, the Chamber may allow the introduction of a previously recorded testimony of a witness who is not present before the Chamber when the following three requirements are met:

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.

³ Transcript of hearing on 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG.

⁴ Prosecution’s application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witnesses P-0026, P-0083, P-0085, P-0087 and P-0116, ICC-02/05-01/20-578-Conf with Confidential Annex A. A public redacted version was notified on 7 February 2022, ICC-02/05-01/20-578-Red.

⁵ Transcript of hearing on 8 February 2022, ICC-02/05-01/20-T-022-CONF, p. 25, line 21 to p. 27, line 23.

- (i) the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally;
- (ii) the necessity of measures under Article 56 of the Rome Statute (the ‘Statute’) could not have been anticipated; and
- (iii) the prior recorded testimony has sufficient indicia of reliability.

7. Pursuant to Rule 68(1) of the Rules, the introduction must not be prejudicial to or inconsistent with the rights of the accused. Rule 68(2)(c)(ii) also provides that the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it.

B. The prior recorded testimonies

P-0026

8. P-0026 was a Fur [REDACTED] in North Darfur. P-0026’s testimony refers mainly to background and contextual elements of the crimes. The witness refers particularly to the state policy to persecute members of the Fur tribe and high ranking government official’s awareness of this.⁶

9. The Prosecution submits that P-0026 died [REDACTED]. The Prosecution submits that a death certificate and the [REDACTED] confirm the death. The Prosecution submits that the use of Article 56 of the Statute was not foreseeable, as investigators were in contact the witness, who had no particular health concerns.⁷

10. Together with the witness statement, the Prosecution seeks to introduce [REDACTED] provided by P-0026.⁸

11. The Defence does not oppose the Request in respect of P-0026.⁹

⁶ Request, ICC-02/05-01/20-578-Conf, para. 18, *referring to* [REDACTED].

⁷ Request, ICC-02/05-01/20-578-Conf, para. 17.

⁸ Request, ICC-02/05-01/20-578-Conf, paras 16, 19 and Annex A.

⁹ ICC-02/05-01/20-T-022-CONF-ENG, p. 25, lines 22-25.

12. The Chamber notes the Prosecution's submissions that P-0026's evidence does not go to the acts and conduct of the accused and is corroborated by other evidence to be elicited by *viva voce* witnesses.¹⁰ The Chamber also notes the Defence's agreement above.

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 the Prosecution to introduce P-0026's prior recorded testimony, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.

P-0083

14. P-0083 [REDACTED] the Justice and Equality Movement (JEM). P-0083's statement refers to the background of the armed conflict, the Militia/*Janjaweed* composition, leadership and mobilisation and its alleged link with the Government of Sudan.¹¹

15. The Prosecution submits that P-0083 died in [REDACTED]. The Prosecution was able to verify P-0083's death with [REDACTED]. The Prosecution states that it requested, and is awaiting, a death certificate [REDACTED]. The Prosecution submits it could not anticipate P-0083's death and therefore could not anticipate the need to resort to Article 56 measures for this witness.¹²

16. In addition to the witness statement, the Prosecution seeks to introduce associated material, including [REDACTED].¹³

17. The Defence does not oppose the Request in respect of P-0083.¹⁴

18. The Chamber notes the Prosecution's submissions that P-0083's evidence does not go to the acts and conduct of the accused and is corroborated by other evidence to

¹⁰ Request, ICC-02/05-01/20-578-Conf, para. 20, *referring to* P-0117, P-0131, P-0769, P-0874, P-0883, P-0885, P-0921, P-0935, P-0976, P-0992 and P-1021.

¹¹ Request, ICC-02/05-01/20-578-Conf, para. 24.

¹² Request, ICC-02/05-01/20-578-Conf, paras 22-23.

¹³ Request, ICC-02/05-01/20-578-Conf, para. 25 and Annex A.

¹⁴ ICC-02/05-01/20-T-022-CONF-ENG, p. 25, lines 22-25.

be elicited by *viva voce* witnesses.¹⁵ The Chamber also notes the Defence's agreement above.

19. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises the Prosecution to introduce P-0083's prior recorded testimony, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.

P-0087

20. P-0087 was a [REDACTED]. His evidence relates to the background of the armed conflict in Darfur, the attacks in 2003-2004 and the subsequent peace process. P-0087 refers to the composition of government forces and the Militia/*Janjaweed* and its relation with the Government of Sudan. The witness also [REDACTED] on Kodoom, Bindisi and surrounding areas in August 2003.¹⁶

21. The Prosecution submits that P-0087 died in [REDACTED]. The Prosecution submits a death certificate to prove this. The Prosecution had contact with P-0087 in [REDACTED], when the witness reported being [REDACTED]. After that, the Prosecution considered taking Article 56 measures, but refrained from doing so, as P-0087 was no longer willing to be contacted by the Prosecution. Instead, the Prosecution intended to introduce his testimony via Rule 68(2)(b) of the Rules.¹⁷

22. In addition to the witness statement, the Prosecution seeks to introduce [REDACTED] referred to during the interview.¹⁸

23. The Defence does not oppose the Request in respect of P-0087.¹⁹

24. The Chamber notes that P-0087's evidence on the accused is minimal. The Chamber further notes that the Prosecution does not intend to rely on the very limited passages referring to the acts and conduct of the accused.²⁰ The Prosecution notes that

¹⁵ Request, ICC-02/05-01/20-578-Conf, para. 26, referring to P-0092, P-0769 and P-0883.

¹⁶ Request, ICC-02/05-01/20-578-Conf, paras 52-54.

¹⁷ Request, ICC-02/05-01/20-578-Conf, paras 49-51.

¹⁸ Request, ICC-02/05-01/20-578-Conf, paras 47, 55 and Annex A.

¹⁹ ICC-02/05-01/20-T-022-CONF-ENG, p. 25, lines 22-25.

²⁰ Request, ICC-02/05-01/20-578-Conf, paras 56-57, referring to [REDACTED].

in the months prior to his death, P-0087 met with investigators and confirmed his previous statement and provided clarifications.²¹ The Prosecution also submits his evidence is corroborative of other evidence to be provided *viva voce* or by the facts agreed upon between the parties.²² The Chamber also notes the Defence's agreement above.

25. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises the Prosecution to introduce P-0087's prior recorded testimony, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.

P-0085

26. P-0085 is a Fur [REDACTED]. His evidence relates to the alleged attack in Bindisi in August 2003. He refers to the organisation, weapons, role of the Militia/*Janjaweed* in the attack, including the alleged involvement of the accused, who P-0085 recognised during the attack. His statement refers to the charges of murder, rape, pillaging and destruction of property. He also refers to the background and identity of the accused.²³

27. The Prosecution submits that it lost contact with P-0085 in [REDACTED]. In [REDACTED] the Prosecution requested the assistance of [REDACTED] to locate the witness, but P-0085 appeared to have returned to [REDACTED]. In [REDACTED], the Prosecution was able to contact [REDACTED], who confirmed the witness had not been [REDACTED] for a long time. P-0085's [REDACTED] also confirmed he had not heard of the witness since [REDACTED], when he was [REDACTED]. The Prosecution further states that it considered several options to locate the witness, but these were disregarded [REDACTED].²⁴

²¹ Request, ICC-02/05-01/20-578-Conf, para. 58.

²² Request, ICC-02/05-01/20-578-Conf, para. 59, *referring to* P-0029, P-0547, P-0589, P-0643, P-0769, P-0874, P-0878, P-0883, P-0885, P-0905, 0931, 0932, 0984 and P-1021.

²³ Request, ICC-02/05-01/20-578-Conf, paras 33-35.

²⁴ Request, ICC-02/05-01/20-578-Conf, paras 28-31.

28. In addition to the witness statement, the Prosecution seeks to introduce a sketch drawn by the witness.²⁵

29. In its oral submissions, the Defence stated it opposes the Request in respect of P-0085.²⁶ Moreover, the Defence argued that there is no evidence that this witness is dead, but instead he has gone missing. The Defence therefore submitted that the Request is premature and suggested that the Prosecution could renew its application at any time until the end of the Prosecution case.²⁷ As regards the prior recorded testimony of P-0085, the Defence identified paragraphs which in its view are highly incriminating and therefore prejudicial to the accused since the Defence would be unable to cross-examine the witness in this regard.²⁸

30. The Prosecution submits that most of P-0085's evidence is corroborated by other witnesses expected to testify *viva voce*, including the parts related to the accused's individual criminal responsibility.²⁹ The Prosecution submits that in evaluating the overall evidence on the same issues, the Chamber will be able to attribute the proper weight to the parts of P-0085's evidence that go to the accused's acts and conduct. The Prosecution emphasises this is a factor to consider but does not prevent the use of Rule 68(2)(c) of the Rules.³⁰

31. As noted above, in order to authorise the introduction of a testimony under Rule 68(2)(c) of the Rules, a witness must be dead, presumed dead or otherwise unavailable to testify due to obstacles that cannot be overcome. As submitted by the Defence, P-0085 is not dead or presumed dead. Instead, it appears that the Prosecution is unable to locate the witness. The trial is yet to start and, as noted by the Defence, the Prosecution may renew its application at any time until the end of its case. In particular, the Chamber notes that the Prosecution has information that P-0085 moved [REDACTED]. The Prosecution could thus take steps to locate the witness in that country.

²⁵ Request, ICC-02/05-01/20-578-Conf, para. 36 and Annex A.

²⁶ ICC-02/05-01/20-T-022-CONF-ENG, p. 26, lines 1-2.

²⁷ ICC-02/05-01/20-T-022-CONF-ENG, p. 26, line 7 to p. 27, line 10.

²⁸ ICC-02/05-01/20-T-022-CONF-ENG, p. 27, lines 12-13. The Defence referred to paragraphs 18-23, 26-30 and 36-41.

²⁹ Request, ICC-02/05-01/20-578-Conf, paras 37-43.

³⁰ Request, ICC-02/05-01/20-578-Conf, paras 44-45.

32. Accordingly, the Chamber rejects the Request in respect of P-0085. This is without prejudice to the Prosecution's ability to request the introduction of P-0085's prior recorded testimony at a later stage of the trial.

P-0116

33. P-0116 was a [REDACTED]. His prior recorded testimony (two witness statements and an identification document) refers to the background of the armed conflict, the attacks carried out by the Government of Sudan and the Militia/*Janjaweed*, and the rebels. P-0116 also refers to the role of the Security Committees and link between the Government of Sudan and the Militia/*Janjaweed*.³¹

34. The Prosecution submits that P-0116 died in [REDACTED]. The [REDACTED] confirmed his death and provided copies of a court order confirming the same. The Prosecution submits it could not foresee P-0116's death and could thus not anticipate Article 56 measures.³²

35. In its oral submissions, the Defence did not contest the proof of death. However, the Defence argued that the witness speaks of Ali Kushayb as a *Janjaweed* leader and describes his alleged responsibility for the killings of leaders and intellectuals in Mukjar. The Defence further submits that the evidence is hearsay.³³

36. The Chamber notes P-0116's death is uncontested. In light of the Prosecution's submissions, the Chamber finds that measures under Article 56 of the Statute could not have been anticipated. The Chamber further notes that the two witness statements and the identification card to be introduced have sufficient *indicia* of reliability. They are signed by the witness and the interpreter, who certified that the interview was given voluntarily.³⁴

37. P-0116's evidence on the accused is not unique and appears to be corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely

³¹ Request, ICC-02/05-01/20-578-Conf, paras 61, 64-66.

³² Request, ICC-02/05-01/20-578-Conf, paras 62-63.

³³ ICC-02/05-01/20-T-022-CONF-ENG, p. 27, lines 14-21.

³⁴ [REDACTED].

viva voce.³⁵ The Chamber further notes that the Prosecution intends to rely on P-0116's testimony mostly for issues related to the contextual elements of the crimes. Moreover, in all situations where the Prosecution is relying on P-0116 in its Trial Brief, the witness is never the only source of information.³⁶ Although P-0116 mentions the accused in his testimony, as noted by the Prosecution, P-0116 clarified he did not personally know of Mr Abd-Al-Rahman's activities.³⁷ As regards the specific reference on P-0116's testimony to the alleged mass graves in Deleig, the witness in fact indicated that he did not know 'if Koshib was involved'.³⁸

38. The Chamber notes the Defence's submissions as to the hearsay nature of some of P-0116's allegations. The Chamber recalls that indirect evidence is not barred from introduction pursuant to Rule 68 of the Rules. Furthermore, in line with the Chamber's Directions on the conduct of proceedings, full consideration of the standard evidentiary criteria for material introduced into evidence, in particular in terms of its relevance and probative value, is deferred to the Chamber's deliberation for its judgment pursuant to Article 74 of the Statute.³⁹

39. Accordingly, the Chamber finds that the introduction sought is neither prejudicial to nor inconsistent with the rights of the accused. Therefore, the Chamber authorises the Prosecution to introduce P-0116 prior recorded testimony in full, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules.

³⁵ Request, ICC-02/05-01/20-578-Conf, paras 67-69. The Prosecution refers to P-0011, P-0012, P-0092, P-0131, P-0547, P-0643, P-0671, P-0769, P-0874, P-0878, P-0883, P-0885, P-0905, P-0907, P-0955, P-0984 and P-1021. *See also* 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 notified on the same date, ICC-02/05-01/20-551-Conf-Anx2-Red), p.15.

³⁶ Prosecution's Trial Brief, 5 January 2022, ICC-02/05-01/20-550-Conf-Red, fns 257, 282, 289, 302, 307, 312, 322-323.

³⁷ Request, ICC-02/05-01/20-578-Conf, para. 67, *referring to* [REDACTED]. In fact, the Chamber notes the Prosecution does not intend to rely on this part of P-0116's testimony, pursuant to its Trial Brief.

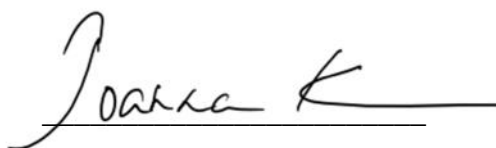
³⁸ Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fn. 1669, *referring to* [REDACTED].

³⁹ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 25.

C. Conclusion

40. For the foregoing reasons, the Chamber rejects the Request in respect of P-0085 and authorises the Prosecution to introduce the prior recorded testimonies of P-0026, P-0083, P-0087 and P-0116 and related material pursuant to Rule 68(2)(c) of the Rules.

41. The Chamber orders the Registry to reflect in the eCourt 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 21 February 2022

At The Hague, The Netherlands