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No. ICC-02/05-01/20

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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 requests to introduce prior recorded
testimonies under Rule 68(2)(b)**

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

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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 20 January 2022, 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.⁴
5. On 26 January 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its first application to introduce prior recorded testimonies of witnesses P-0013, P-0034, P-0043, and P-0065, pursuant to Rule 68(2)(b) of the Rules (the ‘First Rule 68(2)(b) Request’).⁵

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

⁵ Prosecution’s first application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0013, P-0034, P-0043, and P-0065, ICC-02/05-01/20-565-Conf with confidential Annex A. A public redacted version was filed on 31 January 2022, ICC-02/05-01/20-565-Red.

6. On 28 January 2022, the Prosecution filed its second application to introduce prior recorded testimonies of other two witnesses, P-0118 and P-0290, pursuant to Rule 68(2)(b) of the Rules (the ‘Second Rule 68(2)(b) Request’).⁶
7. On 6 February 2022, the Defence filed its response to the First Rule 68(2)(b) Request, opposing it in its entirety (the ‘First Response’).⁷
8. On 7 February 2022, the Defence filed its response to the Second Rule 68(2)(b) Request, opposing it in its entirety (the ‘Second Response’).⁸
9. On 8 February 2022, 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’).⁹
10. On 21 February 2022, the Chamber issued its ‘Decision on the Prosecution’s fourth and fifth requests to introduce prior recorded testimonies under Rule 68(3)’ (the ‘Third Rule 68(3) Decision’).¹⁰

II. Analysis

A. General framework

11. Rule 68(1) and (2) 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 present requests.
12. The Chamber refers to the general framework, as established in its First Rule 68(3) Decision, which is applicable to the assessment of requests for introduction of

⁶ Prosecution’s second application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0118 and P-0290, ICC-02/05-01/20-567-Conf with confidential Annex A. A public redacted version was filed on 31 January 2022, ICC-02/05-01/20-567-Red.

⁷ Defence response to Prosecution’s first application under rule 68(2)(b) (witnesses P-0013, P-0034, P-0043 and P-0065), ICC-02/05-01/20-565, ICC-02/05-01/20-585-Conf. A public redacted version was filed on 7 February 2022, ICC-02/05-01/20-585-Red.

⁸ Defence response to Prosecution’s second application under rule 68(2)(b) (witnesses P-0118 and P-0290), ICC-02/05-01/20-567, ICC-02/05-01/20-586-Conf. A public redacted version was filed on 9 February 2022, ICC-02/05-01/20-586-Red.

⁹ Second Rules 68(3) Decision, ICC-02/05-01/20-588-Conf. A public redacted version was filed on that same date, ICC-02/05-01/20-588-Red.

¹⁰ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf. A public redacted version was filed on that same date, ICC-02/05-01/20-602-Red.

prior recorded statements pursuant to Rule 68 of the Rules.¹¹ The Chamber notes, nevertheless, that the conditions for introduction of the prior recorded testimony will vary, depending on whether the witness is present before the Chamber or not (namely whether introduction is sought under Rule 68(3) or Rule 68(2) of the Rules).¹²

13. The purpose of Rule 68(2)(b) of the Rules is to streamline the presentation of evidence and thus expedite the proceedings, in accordance with the criterion of good trial management.¹³ As noted by the Appeals Chamber, the expeditious conduct of proceedings in one form or another constitutes an attribute of a fair trial.¹⁴ In line with the Directions on the conduct of proceedings,¹⁵ the Chamber will consider the relevance and probative value of introduced prior recorded testimonies fully at the time of deliberation for judgment.

14. Pursuant to Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when it:

- (i) goes to proof of ‘a matter other than the acts and conduct of the accused’; and
- (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules.

¹¹ First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, paras 7-11, 15.

¹² 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, ICC-01/12-01/18-987-Red, para. 13.

¹³ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, 16 October 2020, ICC-01/12-01/18-1111-Red, para. 7 (hereinafter: ‘*Al Hassan Rule 68(2)(b) Decision*’), referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 5 (hereinafter: ‘*Ongwen Rule 68(2)(b) Decision*’). See also 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)”, ICC-02/11-01/15-744 OA8, para. 59 (hereinafter: ‘*Gbagbo and Blé Goudé Appeals Judgment*’).

¹⁴ *Gbagbo and Blé Goudé Appeals Judgment*, ICC-02/11-01/15-744 OA8, para. 59, referring to Appeals Chamber, *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, para. 11.

¹⁵ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 25.

15. As regards the scope of ‘acts and conduct of the accused’, which is not further defined in the legal texts, the Chamber has considered the jurisprudence of other chambers of the Court, and, (for the purposes of guidance), that of Appeal Chambers of the *ad hoc* tribunals on the on the interpretation of the words, ‘acts and conduct of the accused’. In the *Al-Hassan case*, within the meaning of Rule 68(2)(b) of the Rules, the ‘acts and conduct of the accused’ has been interpreted as including ‘the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged’.¹⁶ In the *Ongwen case*, it was held that the concept does not include evidence with respect to the acts and conduct of other persons, such as alleged co-perpetrators or subordinates, which are attributed to the accused in the charges by reason of the mode of liability alleged.¹⁷ The concept may however encompass evidence which, even if the accused is not specifically named, the Prosecution intends to rely on primarily for the purpose of establishing acts and conduct of the accused.¹⁸

16. However, in particular cases, to be considered on a case-by-case basis, the presence of limited references to the acts and conduct of the accused does not bar *per se* its introduction under this provision. This is the case in particular when the calling party indicates it does not intend to rely on that reference and the reference is not of significance to the case or is of limited importance.¹⁹ In such cases of peripheral and discrete references to the acts and conduct of the accused, the Chamber will not consider

¹⁶ 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 (the ‘*Al Hassan P-0113 Decision*’), para. 12, referring to Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Red, para. 9; *Ongwen Rule 68(2)(b) Decision*, ICC-02/04-01/15-596-Red, paras 11-12; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of ‘Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68’, 2 December 2016, ICC-01/04-02/06-1667-Red, para. 11. See also ICTY, *The Prosecutor v. Stanislav Galić*, Decision on Interlocutory Appeals concerning Rule 92 bis (C), Case No. IT-98-29-AR73.2, 7 June 2002, paras 9-11.

¹⁷ *Ongwen Rule 68(2)(b) Decision*, ICC-02/04-01/15-596-Red, para. 12.

¹⁸ *Al Hassan P-0113 Decision*, ICC-01/12-01/18-1924, para. 12, referring to Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430, para. 8 and *Ongwen Rule 68(2)(b) Decision*, ICC-02/04-01/15-596-Red, para. 13 (n. 26).

¹⁹ *Al Hassan P-0113 Decision*, ICC-01/12-01/18-1924, para. 13; *Ongwen Rule 68(2)(b) Decision*, ICC-02/04-01/15-596-Red, para. 13.

them to establish the acts and conduct of the accused for the purpose of its judgment.²⁰ The Chamber reiterates that the introduction under Rule 68 of the Rules should not be piecemeal, and prior recorded testimonies should be, in principle, admitted as a whole, including not only the statement or transcript of interview, but also associated material shown to the witness during the interview that are necessary to understand the prior recorded testimony.²¹

17. As regards the requirement under Rule 68(2)(b)(ii) and (iii) of the Rules, the Chamber notes that it is established practice to appoint the Registry's Senior Legal Adviser (the 'SLA') or a person delegated by the SLA, to witness declarations made pursuant to this provision.²² The Chamber further notes the Prosecution's suggestion that such certifications could be signed remotely, due to the current challenges imposed by the COVID-19 pandemic.²³

18. The Chamber considers that the Registry's SLA is responsible for the certifying function pursuant to Rule 68(2)(b) of the Rules. It is within the SLA's competence to delegate this function to other persons, including staff in country offices. It is also within the purview of the Registry and more specifically the SLA, to obtain such declarations remotely or digitally, as long as the requirements under Rule 68(2)(b)(ii) and (iii) are met.

19. Accordingly, any decision of the Chamber authorising the introduction of a prior recorded testimony under Rule 68(2)(b) is a preliminary ruling, subject to the filing on the case record of the aforesaid signed declarations accompanying the statements.

B. General objections raised by the Defence

20. In its First and Second Responses, the Defence generally opposes the use of Rule 68(2)(b) and submits that all witnesses should testify *viva voce*, or alternatively, pursuant to Rule 68(3) of the Rules. The Defence submits that the statutory framework

²⁰ *Al Hassan* P-0113 Decision, ICC-01/12-01/18-1924, para. 13; *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 13.

²¹ First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, para. 33.

²² Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice Edouard Ngaïssona*, Decision on the Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, 6 May 2020, ICC-01/14-01/18-508, para. 6; *Al Hassan* Rule 68(2)(b) Decision, ICC-01/12-01/18-1111-Red, paras 15-16.

²³ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, paras 1, 30; Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 23.

calls for ‘the utmost caution on behalf of the Chamber in striking the right balance between the principle of Article 67(1)(e) and its exception of Rule 68(2)(b)’.²⁴

21. First, incorporating by reference, ‘for the record and to preserve Mr Abd-Al-Rahman’s appeal rights’, the Defence reiterates earlier -already ruled upon- submissions that all witness statements are inadmissible as a result of the erroneous marking as ‘restricted’ instead of ‘confidential’.²⁵ The Chamber wishes to emphasise, again, that once a ruling has been made, it is expected that the parties will abide by the ruling, unless and until the Appeals Chamber has reversed or abrogated the ruling. The concept that it is necessary to ‘preserve appeal rights’ by repeating submissions on which rulings have been made, is not one which applies at this court.

22. Second, the Defence reiterates that ‘it is impossible to know how the witness statements were actually taken’ and therefore there is a risk the evidence is unreliable.²⁶ The Defence contends that without questioning by the Defence, the Chamber risks being deprived of assistance for its assessment of the reliability of the evidence on issues that are material to the evaluation of the accused’s liability.²⁷ The Defence submits that its concerns are not speculative and it cannot be presumed that no leading questions were used during the interviews.²⁸

23. Third, reiterating previous submissions, and noting that a Chamber’s ruling on that issue was pending at the time when its responses were filed, the Defence argues that the statements of witnesses interviewed in [REDACTED], before this country became a State Party to the Statute, cannot be introduced as evidence since the Court had no legal basis to undertake activities in that territory pursuant to Article 4(2) of the

²⁴ First Response, ICC-02/05-01/20-585-Conf, paras 3, 11; Second Response, ICC-02/05-01/20-586-Conf, paras 3, 11.

²⁵ First Response, ICC-02/05-01/20-585-Conf, para. 5; Second Response, ICC-02/05-01/20-586-Conf, para. 5. The Chamber’s rulings are: 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; First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, paras 18-19.

²⁶ First Response, ICC-02/05-01/20-585-Conf, para. 4; Second Response, ICC-02/05-01/20-586-Conf, paras 4, 13-14.

²⁷ First Response, ICC-02/05-01/20-585-Conf, paras 4, 8-9; Second Response, ICC-02/05-01/20-586-Conf, paras 4, 8-9.

²⁸ First Response, ICC-02/05-01/20-585-Conf, para. 10; Second Response, ICC-02/05-01/20-586-Conf, para. 10.

Statute.²⁹ The Defence similarly contends that the witness statement of P-0034, taken in [REDACTED] is also inadmissible as, the [REDACTED] is not a State Party to the Statute and the Defence is unaware of any valid special agreement with this country.³⁰ It also argues that P-0118's statement, taken in [REDACTED], is equally inadmissible.³¹

24. In respect of the inadmissibility of statements taken in [REDACTED], the Chamber notes that since the Defence filed its Second and Third Responses, it has issued a decision on that issue, rejecting the Defence submissions.³² For the same reasons, the Chamber finds that the admissibility of an interview conducted in [REDACTED] or any other non-State Party to the Statute is not inadmissible on that basis alone.³³

25. As regards the issues of reliability raised by the Defence, the Chamber recalls its prior rulings on the matter.³⁴ In particular, the Chamber emphasises that, as determined by the Appeals Chamber, reliability is to be considered on a case-by-case basis and the Chamber has the discretion to consider whether to take into account only formal requirements, or take into account other factors.³⁵ Accordingly, the Chamber finds that Rule 68(2)(b) contemplates that witnesses would not be subject to cross-examination provided that there are other indicia of reliability which accord with the fair trial rights of the accused.

²⁹ The Defence refers to the statements of P-0013, P-0065 and P-0290. First Response, ICC-02/05-01/20-585-Conf, paras 12, 25; Second Response, ICC-02/05-01/20-586-Conf, para. 21.

³⁰ First Response, ICC-02/05-01/20-585-Conf, para. 16.

³¹ Second Response, ICC-02/05-01/20-586-Conf, para. 12.

³² Second Rule 68(3) Decision, paras 9-17.

³³ In particular the Chamber reiterates: Even arguing, [...] were it to be established that there was an absence of a 'sufficient' legal framework with [REDACTED] at the time of their interviews, no submissions are made to suggest in what way this could affect the reliability or probative value of their statements or associated material or how the introduction of these testimonies of [the] witnesses, based on such a reason would in any way affect the accused's right to a fair trial. The blanket exclusion of such evidence, as sought by the Defence, would be disproportionate vis-à-vis the Chamber's obligation to determine the truth, particularly if the introduction of the prior recorded statements [...] does not operate unfairly against the accused. *See* Second Rule 68(3) Decision, para. 16.

³⁴ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, paras 13-15. *See also* ICC-02/05-01/20-T-022-CONF, p. 17, line 21 to p. 18, line 3; Second Rules 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 59. *See also* jurisprudence referred to in the Third Rule 68(3) Decision, fn 18.

³⁵ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, para. 14. *Referring to* 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 testimony under Rules 68(2)(b) and 68(3)", ICC-02/11-01/15-744, paras 101-103.

26. Accordingly, the Chamber rejects the general objections made by the Defence, which ultimately seek a blanket approach by which the Chamber would reject the use of Rule 68(2)(b) of the Rules for all witness statements taken by the Prosecution. Therefore, the Chamber will consider, on a case-by-case basis, whether the prior recorded testimonies concerned have sufficient indicia of reliability, as required under Rule 68(2)(b)(i) of the Rules.

27. The Chamber also reiterates that factors raised by the Defence, particularly the lack of cross-examination, can and will be considered by the Chamber in its assessment of the probative value and the weight to be given to these testimonies in the context of the judgment pursuant to Article 74 of the Statute.³⁶

C. The prior recorded testimonies to be submitted pursuant to Rule 68(2)(b) of the Rules

P-0013

28. P-0013, a Fur civilian, is a direct eyewitness of alleged incidents in Wadi Salih and Mukjar localities at the time of the charges. The Prosecution submits that the statement is relevant to the contextual elements of the crimes.³⁷

29. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely sketches created by the witness and an image shown to the witness during the interview.³⁸

30. The Defence submits that P-0013's statement goes to the proof of the acts and conduct of the accused. In particular, the Defence refers to paragraph 38 of the witness statement, where P-0013 refers to 'Ali Koship' as being among the *Janjaweed* that attacked Um Jameina around December 2003. The Defence also submits that P-0013 gives evidence of the cooperation and collaboration between the Militia/*Janjaweed* and the Government of Sudan, which is 'a critical issue that is materially in dispute', or that at the very least 'is an issue which the Prosecution is to be put to strict proof'.³⁹

³⁶ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, para. 14.

³⁷ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 12.

³⁸ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 13 and Annex A.

³⁹ First Response, ICC-02/05-01/20-585-Conf, paras 13-14. *See* witness statement [REDACTED].

31. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁴⁰

32. The Chamber notes the Prosecution's submission that P-0013's evidence is corroborative of other evidence on the contextual elements of the crimes.⁴¹ Although, as noted by the Defence, the single reference to 'Ali Koship' at paragraph 38 of P-0013's statement may possibly refer to the accused, the reference is in any case discrete and peripheral and thus does not bar *per se* the introduction of the statement under Rule 68(2)(b) of the Rules. In such a case, as noted above,⁴² the Chamber is entitled to admit the statement but will not take it into account as establishing the acts and conduct of the accused for the purpose of its judgment.

33. Further, although the Chamber acknowledges the Defence submission that the link between the Militia/*Janjaweed* and the Government of Sudan is a contested issue, the Chamber is not of the view, in light of P-0013's evidence on the matter and in light of the entirety of the evidence expected to be submitted in the case, that this is a factor precluding the introduction of P-0013's statement under Rule 68(2)(b) of the Rules. The Chamber further notes that the Prosecution seeks to rely on P-0013's testimony for the purpose of the contextual elements of the crimes, particularly the alleged attack on Arawala.⁴³

34. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0013's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

⁴⁰ [REDACTED].

⁴¹ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, paras 25-27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of war crimes: P-0012, P-0029, P-0103, P-0117, P-0131, P-0643, P-0935, P-0992, P-0994. It also refers to the following witnesses as regards the contextual elements of crimes against humanity: P-0131, P-0547, P-0769, P-0874, P-0883, P-0885, P-0932 and P-1021.

⁴² See para. 16 above.

⁴³ 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), p. 4. See also Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Exp, 5 January 2022 (confidential redacted version filed on the same date, ICC-02/05-01/20-550-Conf-Red), fns 192, 202, 354, 356, 358, 365.

P-0034

35. P-0034, a Fur civilian, refers to the contextual elements of the crimes, and particularly the link between the Government of Sudan and the Militia/*Janjaweed* at the time of the charges.⁴⁴

36. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely one organisation diagram used during the interview.⁴⁵

37. The Defence submits that P-0034 gives evidence about the alleged governmental policy of genocide. The Defence also argues that P-0034's evidence refers to the structure and attributes of the [REDACTED], the military and the militia, all of which are issues materially in dispute. The Defence acknowledges that the witness makes no mention of the accused or his alleged alias.⁴⁶

38. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the witness statement and confirms that the testimony is provided voluntarily.⁴⁷

39. As noted by the Defence, P-0034 provides evidence on the structure, functioning, command, policies and other issues related to the Government of Sudan at the time of the charges and its link with the Militia/*Janjaweed* (on which evidence the Prosecution intends to rely).⁴⁸ The Prosecution seeks to rely on P-0034's testimony for the purpose of establishing the background of the armed conflict.⁴⁹ The Chamber notes the Prosecution's submission that this witness's evidence is corroborative of other evidence on the contextual elements of the crimes.⁵⁰ The evidence does not go to the acts and conduct of the accused and has sufficient indicia of reliability.

⁴⁴ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 15.

⁴⁵ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 16 and Annex A.

⁴⁶ First Response, ICC-02/05-01/20-585-Conf, paras 17-19.

⁴⁷ [REDACTED].

⁴⁸ Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Red-Anx2, p. 6. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fns 249, 264, 282, 315, 601.

⁴⁹ Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Red-Anx2, p. 6. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fns 153, 154, 183, 185, 197, 205.

⁵⁰ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, paras 25-27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements

40. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0034's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0043

41. P-0043, [REDACTED] Justice and Equality Movement (the 'JEM'), refers in his evidence to the contextual elements of war crimes, particularly the [REDACTED] JEM and its participation in the armed conflict.⁵¹

42. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely six items including a list of names, an [REDACTED], two press articles and 11 photographs shown to the witness during the interview, as well as a screening note.⁵²

43. The Defence submits that 'there are cogent indicia of unreliability' in respect of P-0043, as the witness is untruthful since he lied to [REDACTED].⁵³ The Defence argues that given the [REDACTED], any claim by P-0043 that he fears persecution should be treated with great circumspection.⁵⁴ The Defence also contests the reliability of P-0043's evidence in relation to the alleged attack on Girgia, which occurred after the witness left Sudan and is therefore hearsay and of extremely limited probative value.⁵⁵

44. The Chamber notes that according to the Prosecution, P-0043's evidence is corroborative of other evidence on the contextual elements of the crimes.⁵⁶ The Chamber further notes that the Prosecution seeks to rely on P-0043's testimony for the purpose of the contextual elements of war crimes, and particularly as regards JEM.⁵⁷

of war crimes: P-0012, P-0029, P-0103, P-0117, P-0131, P-0643, P-0935, P-0992, P-0994. It also refers to the following witnesses as regards the contextual elements of crimes against humanity: P-0131, P-0547, P-0769, P-0874, P-0883, P-0885, P-0932 and P-1021.

⁵¹ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 18.

⁵² First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 19 and Annex A.

⁵³ First Response, ICC-02/05-01/20-585-Conf, paras 20-21.

⁵⁴ First Response, ICC-02/05-01/20-585-Conf, para. 22.

⁵⁵ First Response, ICC-02/05-01/20-585-Conf, para. 23.

⁵⁶ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, paras 25-27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of war crimes: P-0012, P-0029, P-0103, P-0117, P-0131, P-0643, P-0935, P-0992, P-0994.

⁵⁷ Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Exp-Anx2, p. 7. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fns 187, 190, 192.

Moreover, the witness's testimony makes no mention of the accused or his acts and conduct.

45. The Chamber notes, nonetheless, that P-0043 acknowledged [REDACTED]. Although this fact alone does not bar introduction pursuant to Rule 68(2)(b) of the Rules, the Chamber deems that in the instant case, the Defence has the right to explore this issue in cross-examination.

46. Accordingly, the Chamber rejects the introduction of the prior recorded testimony of P-0043 pursuant to Rule 68(2)(b) of the Rules. Instead, the Prosecution is authorised to introduce P-0043's prior recorded testimony pursuant to Rule 68(3) of the Rules. The Chamber is satisfied that the introduction of P-0043's prior recorded testimony under Rule 68(3) will not occasion any prejudice to the accused since this provision allows for cross-examination.

47. In order to streamline the presentation of evidence, the Prosecution will have one hour for any supplementary examination.

P-0065

48. P-0065, [REDACTED] evidence relates to the contextual elements of the crimes, including the organisation of armed groups in the armed conflict.⁵⁸

49. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely two organisation diagrams shown to the witness during the interview.⁵⁹

50. The Defence submits that P-0065 provides evidence on critical issues that are materially in dispute, including the structure and attributes of intelligence and security services of the Government of Sudan and the link to the Militia/*Janjaweed*. The Defence acknowledges P-0065 makes no mention of the accused or his alleged alias.⁶⁰

51. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted during the interview. In the statement, the witness also

⁵⁸ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 21.

⁵⁹ First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, para. 22 and Annex A.

⁶⁰ First Response, ICC-02/05-01/20-585-Conf, para. 26.

acknowledges the use of the associated material to be introduced together with the witness statement and confirms that the testimony is provided voluntarily.⁶¹

52. The Chamber notes the Prosecution's submission that this witness's evidence is corroborative of other evidence on the contextual elements of the crimes.⁶² Furthermore, the Chamber notes that the Prosecution seeks to rely on P-0065's testimony for the purpose of establishing the contextual elements of war crimes, particularly the role of [REDACTED] and its link with the Militia/*Janjaweed* at the time of the charges.⁶³ Although, as noted by the Defence, the above issues are materially in dispute, the Chamber is of the view that, in the particular circumstances, the evidence of P-0065 is not so unique or significant as to preclude introduction of his statement under Rule 68(2)(b) of the Rules. Moreover, the witness's testimony makes no mention of the accused or his acts and conduct.

53. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0065's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0118

54. P-0118, [REDACTED] Sudanese Armed Forces (the 'SAF'), provides evidence on the contextual elements of the crimes, including the link between the Government of Sudan and the Militia/*Janjaweed*.⁶⁴

55. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely 13 items used during the interview, including notes, organisational diagrams [REDACTED].⁶⁵

56. The Defence submits that P-0118's evidence does not pertain solely to the contextual elements of the crimes, but relates to core issues materially in dispute, including the alleged recruitment and training of the Militia/*Janjaweed* by the

⁶¹ [REDACTED].

⁶² First Rule 68(2)(b) Request, ICC-02/05-01/20-565-Conf, paras 25-27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of war crimes: P-0012, P-0029, P-0103, P-0117, P-0131, P-0643, P-0935, P-0992, P-0994.

⁶³ Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Exp-Anx2, p. 10. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fns 190, 192, 195, 197, 198, 200.

⁶⁴ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 10.

⁶⁵ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 9 and Annex A.

Government of Sudan, [REDACTED], and the planning and implementation of the State policy.⁶⁶ The Defence submits that given P-0118's position and experience, his information about the accused or his alias is 'remarkably limited'.⁶⁷ It also argues that P-0118's [REDACTED] 'constitute indicia of credibility problems'.⁶⁸ The Defence submits that 'there is evidence of a widespread fabrication of false evidence and corruption of witnesses in this case' on which the Defence 'will present submissions and evidence in due course'.⁶⁹

57. The Chamber notes that the witness statement is signed by P-0118 and the interpreter who assisted during the interview. In the statement, P-0118 also acknowledges the use of the associated material to be introduced together with the witness statement and confirms that the testimony is provided voluntarily.⁷⁰

58. The Chamber notes the Prosecution's submission that P-0118's witness statement is corroborative of other evidence to be presented at trial and relates mainly to the contextual elements of the crimes.⁷¹ Although, as noted by the Defence,⁷² P-0118's evidence touches upon issues other than the contextual elements of the crimes, the Prosecution intends to rely on P-0118's evidence solely to prove the contextual elements of the crimes against humanity.⁷³ Moreover, the Prosecution has stated it will not rely on a single reference to hearsay evidence that the accused was one of the leading Militia/*Janjaweed* leaders.⁷⁴ In such a case, as noted above,⁷⁴ the Chamber will not consider the reference to establish the acts and conduct of the accused for the purpose of its judgment.

59. The Chamber notes the Prosecution's submission that most of the evidence provided by this witness relates to issues which are not materially in dispute between

⁶⁶ Second Response, ICC-02/05-01/20-586-Conf, paras 15-16. The Defence refers to the witness statement [REDACTED].

⁶⁷ Second Response, ICC-02/05-01/20-586-Conf, para. 17.

⁶⁸ Second Response, ICC-02/05-01/20-586-Conf, para. 18.

⁶⁹ Second Response, ICC-02/05-01/20-586-Conf, para. 18.

⁷⁰ [REDACTED].

⁷¹ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, paras 7, 19-20, *referring to* P-0013, P-0034, P-0043, P-0065, P-0103, P-0117, P-0131, P-0547, P-0643, P-0883, P-0905, P-0976, P-0992, P-0994, P-0011, P-0029, P-0140, P-0874, P-0885, P-0932 and P-0984.

⁷² Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fns 125, 149, 152, 161, 170, 183, 207, 269, 297.

⁷³ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 12, *referring to* para. 198 of the witness statement. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fn. 404.

⁷⁴ *See* para. 16 above.

the parties and in relation to some facts there is an agreement among the parties.⁷⁵ Although the Defence disagrees with this submission, the Chamber notes that the Defence and the Prosecution recently have agreed on some facts related to the SAF.⁷⁶ Moreover, as regards the issue of training that the Defence identifies as core, the Chamber notes that the two paragraphs referred to by the Defence, do not provide significant evidence as to preclude introduction pursuant to Rule 68(2)(b) of the Rules.⁷⁷ The Chamber further notes that there are other witnesses who are expected to testify *viva voce* that would be in a similar or better position to testify about this issue identified as core by the Defence.⁷⁸

60. As regards the ‘indicia of credibility problems’ identified by the Defence, the Chamber considers that during the interview, P-0118 provided sufficiently clear information as [REDACTED].⁷⁹ The argument in this regard is, as acknowledged by the Defence, general and not based on any concrete (anticipated) evidence. Therefore, for the purposes of a Rule 68(2)(b) determination, no circumstances can be identified which would cast doubt on the credibility P-0118’s account. As noted above,⁸⁰ if the Defence so wishes, it may develop its argument and present evidence in this regard during trial.

61. Indeed, 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.⁸¹

62. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0118’s prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

⁷⁵ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 22, *referring to* e-mail communications between the parties and the agreed facts 1-6 and 11 (*available in* First Joint Submission on Agreed Facts, 5 March 2021, ICC-02/05-01/20-291-Anx A).

⁷⁶ Fourth Joint Prosecution and Defence Submission on Agreed Facts, 14 February 2022, ICC-02/05-01/20-594 with Annex A.

⁷⁷ [REDACTED].

⁷⁸ *See for example* [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ *See* para. 56 above.

⁸¹ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 25.

P-0290

63. P-0290, [REDACTED] SAF, was interviewed by the Prosecution [REDACTED] and associated items.⁸² P-0290 provides evidence on the contextual elements of the crimes, including the alleged link between the Government of Sudan and the Militia/*Janjaweed*.⁸³

64. The associated items the Prosecution seeks to submit include [REDACTED], a book on Sudanese law, correspondence and [REDACTED].⁸⁴

65. The Defence submits that contrary to the submissions of the Prosecution, the evidence provided by P-0290 relates to core issues that are materially in dispute, including [REDACTED] and the involvement of the Government of Sudan with the Militia/*Janjaweed*, including funding, training, recruitment and distribution of weapons.⁸⁵ The Defence further argues that there are ‘serious indicia of credibility problems’ in respect of P-0290, [REDACTED] to provide evidence.⁸⁶

66. The Defence challenges P-0290’s credibility on the basis that he was interviewed [REDACTED]. The Chamber notes in this regard that there is nothing in the legal framework preventing the introduction of prior recorded testimonies. The Chamber does not find that a witness [REDACTED] is, *per se*, untrustworthy.

67. The Chamber notes the Prosecution submissions that a significant part of the evidence relates to issues which are not materially in dispute between the parties, or have been agreed upon by the parties,⁸⁷ and that it intends to rely on P-0290’s testimony to prove the contextual elements of the crimes. The Chamber notes that the Defence disagrees with this, and submits that P-0290’s evidence relates to core issues that are materially in dispute.⁸⁸ In this regard, the Chamber notes that although other [REDACTED] witnesses are expected to testify *viva voce*, P-0290 as [REDACTED],

⁸² Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, paras 13-14. Annex A to First Joint Submission on Agreed Facts, ICC-02/05-01/20-291-Anx A.

⁸³ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 14.

⁸⁴ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 15 and Annex A.

⁸⁵ Second Response, ICC-02/05-01/20-586-Conf, para. 22. The Defence refers to [REDACTED].

⁸⁶ Second Response, ICC-02/05-01/20-586-Conf, para. 23. The Defence refers to [REDACTED].

⁸⁷ Second Rule 68(2)(b) Request, ICC-02/05-01/20-567-Conf, para. 22, *referring to* e-mail communications between the parties and the agreed facts 1-6 and 11 (*available in* First Joint Submission on Agreed Facts, 5 March 2021, ICC-02/05-01/20-291-Anx A). *See also* Fourth Joint Prosecution and Defence Submission on Agreed Facts, 14 February 2022, ICC-02/05-01/20-594 with Annex A.

⁸⁸ Second Response, ICC-02/05-01/20-586-Conf, para. 22. The Defence refers to [REDACTED].

may provide unique and significant evidence on disputed issues, such as the role of the Government of Sudan and its alleged involvement in the recruitment, training, arming and funding of the Militia/*Janjaweed*, as well as the commission of the alleged crimes.⁸⁹

68. Although the fact that P-0290 [REDACTED] does not bar, *per se*, the introduction of his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, in light of other factors identified above, the Chamber finds that in the instant case, the Defence has the right to explore this issue in cross-examination.

69. Accordingly, the Chamber rejects the introduction of the prior recorded testimony of P-0290 pursuant to Rule 68(2)(b) of the Rules. Instead, the Prosecution is authorised to introduce P-0290's prior recorded testimony pursuant to Rule 68(3) of the Rules. The Chamber is satisfied that the introduction of P-0290's prior recorded testimony under Rule 68(3) will not occasion any prejudice to the accused since this provision allows for cross-examination.

70. In order to streamline the presentation of evidence, the Prosecution will have one hour for any supplementary examination.

D. Disclosure of material

71. In respect of P-0013, P-0034, P-0043 P-0065, P-0118 and P-0290, the Defence submits that irrespective of the modality of introduction of evidence, 'all previous interviews – including screening interviews – should also be admitted as associated material'.⁹⁰ It therefore requests the Chamber to order the disclosure of such material.

72. The Chamber notes that there is no information before it that the Prosecution has failed to disclose any material pursuant to Article 67(2) of the Statute or Rule 77 of the Rules.

73. Accordingly, no such order appears necessary.

⁸⁹ Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Exp-Anx2, p. 20. *See also* Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, fn 295 and 296.

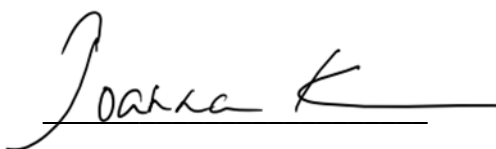
⁹⁰ First Response, ICC-02/05-01/20-585-Conf, paras 15, 19, 24, 27; Second Response, ICC-02/05-01/20-586-Conf, paras 19, 24.

E. Conclusion

74. For the foregoing reasons, the Chamber:

- a) Rejects the introduction of the prior recorded testimonies of P-0043 and P-0290 pursuant to Rule 68(2)(b) of the Rules. The Prosecution is nonetheless authorised to introduce their prior recorded testimonies 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.
- b) Authorises the introduction of the prior recorded testimonies of P-0013, P-0034, P-0065 and P-0118 pursuant to Rule 68(2)(b) of the Rules. The Chamber's preliminary ruling is subject to the receipt of the declaration discussed above.⁹¹

75. The Chamber orders the Registry, upon filing of the aforesaid declarations, 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 2 March 2022

At The Hague, The Netherlands

⁹¹ See paragraphs 17-19 above.