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No. ICC-02/05-01/20

Date: 18 March 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

Decision on the Prosecution's seventh application to introduce prior recorded testimonies under Rule 68(3)

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

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**Victims Participation and Reparations
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Other

I. Procedural history

1. On 20 January 2022, Trial Chamber I ('the Chamber') issued its first decision on the Prosecution's application to introduce prior recorded testimonies under Rule 68(3) of the Rules of Procedure and Evidence (the 'Rules'), setting out the general framework for the introduction of prior testimonies pursuant to this provision.¹
2. Since then, the Chamber has issued a series of decisions dealing with subsequent Rule 68(3) application.²
3. On 3 March 2022, the Prosecution filed its seventh application to introduce the prior recorded testimonies of witnesses P-0015 and P-0918 pursuant to Rule 68(3) of the Rules (the 'Seventh Application').³
4. On 8 March 2022, the Defence filed its response to the Seventh Application (the 'Response').⁴

II. Analysis

5. The Chamber incorporates by reference the general framework applicable to the assessment of application for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.⁵

¹ First Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-559-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-559-Red (hereinafter: 'First Rule 68(3) Decision').

² Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-588-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red (hereinafter: 'Second Rule 68(3) Decision'); Decision on the Prosecution's fourth and fifth request to introduce prior recorded testimonies under Rule 68(3), ICC-02/05-01/20-602-Conf, A public redacted version was notified on that same date, 21 February 2022, ICC-02/05-01/20-602-Red (hereinafter: 'Third Rule 68(3) Decision'); Decision on the Prosecution's sixth request to introduce prior recorded testimonies under Rule 68(3), 16 March 2022, ICC-02/05-01/20-630-Conf. A public redacted version was notified the same day, ICC-02/05-01/20-630-Red (hereinafter: 'Fourth Rule 68(3) Decision').

³ Prosecution's seventh application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0015 and P-0918, ICC-02/05-01/20-614-Conf. A public redacted version was notified on 4 March 2022, ICC-02/05-01/20-614-Red.

⁴ Defence response to Prosecution's seventh application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0015 and P-0918, ICC-02/05-01/20-614-Conf, ICC-02/05-01/20-621-Conf. A public redacted version was notified on 17 March 2022, ICC-02/05-01/20-621-Red.

⁵ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

A. General objections raised by the Defence

6. First, incorporating by reference its previous submissions,⁶ the Defence once again repeats that all witness statements are inadmissible as a result of the erroneous marking as ‘restricted’ instead of ‘confidential’.⁷ This has been ruled upon by this Chamber on multiple occasions.⁸ The Chamber has cautioned the Defence, hopefully for the last time, that repeating submissions that have already been ruled upon and rejected is unnecessary, and that it is also unwarranted to preserve the accused’s rights to appeal.⁹

7. Second, for the record and to preserve Mr Abd-Al-Rahman’s appeal rights, the Defence incorporates, by reference, its submissions on the absence of a valid special agreement under Article 4(2) of the Rome Statute between the Court and non-States Parties, [REDACTED], where P-0015 may have been interviewed.¹⁰ The Chamber notes that this issue has also been discussed at length and ruled upon.¹¹ Accordingly, the Chamber will disregard this aspect of the Defence’s submissions.¹²

8. Third, in respect of both witnesses in the Seventh Application, the Defence incorporates, by reference, its previous submissions relating to the witness statement-

⁶ Réponse à la Requête ICC-02/05-01/20-547-Conf, 5 January 2022, ICC-02/05-01/20-549-Conf, paras 14-15. A public redacted version was notified on 10 January 2022, ICC-02/05-01/20-549-Red.

⁷ Response, ICC-02/05-01/20-621-Red, para. 5.

⁸ First Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), 2 March 2022, ICC-02/05-01/20-612-Conf, para. 21. A public redacted version was notified on the same day, ICC-02/05-01/20-612-Red (hereinafter: ‘First Rule 68(2)(b) Decision’). *See also* 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, 12 November 2021, ICC-02/05-01/20-T-017-Red-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.

⁹ First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Conf, para. 21. *See also* Transcript of hearing, 8 March 2022, ICC-02/05-01/20-T-024-CONF-ENG, p. 23 lines 6-8. The Chamber understands that the Defence’s response was filed before the caution was given during the Status Conference.

¹⁰ Response, ICC-02/05-01/20-621-Red, para. 5. *See also* Defence’s Response to Request ICC-02/05-01/20-555-Conf, 31 January 2022, ICC-02/05-01/20-568-Conf, paras 5-11. A public redacted version was notified on 1 February 2022, ICC-02/05-01/20-568-Red.

¹¹ First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Conf, para. 24, *referring to* Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, paras 9-17. *See also* Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-561-Red.

¹² First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Conf, para. 24; Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, paras 9-17.

taking process which, in its view, produces unreliable statements and which, if introduced via Rule 68(3) of the Rules, would result in prejudice to the accused.¹³

9. The Defence further argues that, in the Third Rule 68(3) Decision, the Chamber misapprehended its arguments on the reliability of prior recorded testimonies by finding that the Defence’s arguments were ‘no more than pure speculation and [were] matters which may be dealt with in the normal course of cross-examination’.¹⁴ The Defence avers that its arguments were not definitive in nature, and that ‘the ways in which witness statements are taken means there is *a risk* of witness statements being unreliable.’¹⁵

10. The Defence claims that there are no means by which these risks can realistically be explored in cross-examination,¹⁶ without providing any support for such claim. Similarly, the Defence’s argument that ‘the principle of precaution militates in favour of the statements [...] not being allowed to stand wholly or partly as their evidence-in-chief pursuant to Rule 68(3)’¹⁷ finds no support in the Court’s legal texts or case law.

11. The Chamber finds that the speculative element of the Defence’s arguments lies not in stating that a certain witness has a low level of education, but in implying that the witness’s low level of education automatically renders their evidence unreliable.

12. The Chamber stresses again that it has discretion as to what factors it may take into account when assessing a witness’s reliability.¹⁸ Moreover, these factors can also be considered by the Chamber when it assesses the probative value and weight to be

¹³ Response, ICC-02/05-01/20-621-Red, para. 6, *referring to* Transcript of hearing, 8 February 2022, ICC-02/05-01/20-T-022-CONF-ENG, p. 11, lines 21-25 to p. 21, line 15; Defence response to Prosecution’s third application under rule 68(3) (witnesses P-0657, P-0673, P-0843 and P-0954), ICC-02/05-01/20-560, 2 February 2022, ICC-02/05-01/20-576-Conf, paras 7-11. A public redacted version was notified on the same day, ICC-02/05-01/20-576-Red.

¹⁴ Response, ICC-02/05-01/20-621-Red, para. 7, *referring to* Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, paras 13-15.

¹⁵ Response, ICC-02/05-01/20-621-Red, para. 8.

¹⁶ Response, ICC-02/05-01/20-621-Red, para. 8.

¹⁷ Response, ICC-02/05-01/20-621-Red, para. 8.

¹⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 103.

given to these testimonies in the context of its judgment under Article 74 of the Statute.¹⁹

13. 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-0015

14. P-0015, a civilian from Bindisi, provides evidence on the alleged attack on Bindisi town on or around 15 and 16 August 2003.²⁰

15. As regards the accused, the witness's evidence refers to his alleged participation in the detention and execution of men in Mukjar in August 2003,²¹ his position as a leader in the Militia/*Janjaweed*,²² and his attendance of a meeting in Mukjar in December 2003 with Ahmad Harun and others.²³

16. The prior recorded testimony of P-0015 is comprised of one witness statement.²⁴ Additionally, the Prosecution seeks the submission of associated material, namely, hand drawn sketches, the photocopy of a page from a book used by the witness to illustrate the rape of women, a list of codes used for explanatory purposes, and an investigator's note.²⁵

17. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).²⁶

18. The Defence objects to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules. First, it submits that the witness statement relates, *inter alia*, to the identity and alleged position of 'Ali Koshib' and his alleged role in alleged crimes in Mukjar in December 2003.²⁷ The Defence also notes that the witness reports seeing

¹⁹ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, para. 14.

²⁰ DAR-OTP-0088-0187-R03, paras 23-27, 31-45, 48-50, 52-65, 105.

²¹ DAR-OTP-0088-0187-R03, paras 62-64.

²² DAR-OTP-0088-0187-R03, paras 71-72.

²³ DAR-OTP-0088-0187-R03, paras 66-68.

²⁴ Seventh Application, ICC-02/05-01/20-614-Red, para. 9.

²⁵ Seventh Application, ICC-02/05-01/20-614-Red, para. 12 and Annex A.

²⁶ Seventh Application, ICC-02/05-01/20-614-Red, paras 13, 15.

²⁷ Response, ICC-02/05-01/20-621-Red, para. 21, *referring to* DAR-OTP-0088-0187-R03, paras 62-64, 72.

‘Ali Koshib’ in Garsila and Mukjar in December 2003, and describes him as an *agid* and the leader of the *Janjaweed* from Mukjar to Garsila, based on common knowledge and personal belief.²⁸ The Defence particularly notes that the witness’s basis of knowledge for identifying Mr Abd-al-Rahman as ‘Ali Kushayb’ is one of the issues that the Prosecution seeks to raise in the context of a supplementary examination.²⁹ Finally, the Defence observes that the witness described an encounter between ‘Ali Koshib’ and Ahmad Harun in the presence of *Asakir* and *Janjaweed*, in December 2003.³⁰

19. The Chamber notes the Prosecution’s submission that the evidence of P-0015 is corroborative of, and cumulative to, other witnesses who will testify entirely *viva voce* on the charged crimes. This concerns in particular the charge of intentionally directing attacks against the civilian population, notably on the fact that there was no rebel presence in Kodoom or Bindisi at the time of the attack;³¹ murder;³² pillaging;³³ destruction of property;³⁴ other inhumane acts and outrages upon personal dignity;³⁵ rape;³⁶ forcible transfer;³⁷ persecution;³⁸ the contextual elements of crimes against humanity, in particular violence directed against the civilian population and preparatory meetings and public speeches promoting and encouraging attacks against the civilian population.³⁹

²⁸ Response, ICC-02/05-01/20-621-Red, para. 21, *referring to* DAR-OTP-0088-0187-R03, paras 62-63, 71-72.

²⁹ Response, ICC-02/05-01/20-621-Red, para. 21.

³⁰ Response, ICC-02/05-01/20-621-Red, para. 21, *referring to* DAR-OTP-0088-0187-R03, para. 66.

³¹ Seventh Application, ICC-02/05-01/20-614-Red, para. 24, *referring to* P-0874, P-0878 and P-0986; P-0015’s evidence is also corroborated by that of P-0868, whose evidence has been submitted under Rule 68(3) of the Rules.

³² Seventh Application, ICC-02/05-01/20-614-Red, para. 25, *referring to* P-0007, P-0012, P-0874, P-0878 and P-0921.

³³ Seventh Application, ICC-02/05-01/20-614-Red, para. 26, *referring to* P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.

³⁴ Seventh Application, ICC-02/05-01/20-614-Red, para. 27, *referring to* P-0007, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.

³⁵ Seventh Application, ICC-02/05-01/20-614-Red, para. 28, *referring to* P-0011 and P-0589.

³⁶ Seventh Application, ICC-02/05-01/20-614-Red, para. 29, *referring to* P-0007, P-0011 and P-0878.

³⁷ Seventh Application, ICC-02/05-01/20-614-Red, para. 30, *referring to* P-0011, P-0012, P-0874, P-0913, P-0932 and P-1021.

³⁸ Seventh Application, ICC-02/05-01/20-614-Red, para. 31, *referring to* P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0913, P-0932 and P-0986.

³⁹ Seventh Application, ICC-02/05-01/20-614-Red, para. 32, *referring to* P-0011, P-0012, P-0029, P-0188 and P-0878.

20. With regard to the acts and conduct of the accused, and in addition to the conclusions set out previously by the Chamber,⁴⁰ the Chamber notes the Prosecution's submission that P-0015's evidence that the accused was a leader of the Militia/*Janjaweed* is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*.⁴¹

21. The Chamber notes in this regard that P-0015's evidence is not unique or otherwise particularly significant in the body of the expected evidence on the aforesaid charged crimes. In fact, P-0015 states that she only [REDACTED],⁴² and [REDACTED].⁴³

22. The Chamber observes that the witness statement does not mention any direct interaction or particular proximity with the accused. The Chamber further notes that the Prosecution seeks to clarify P-0015's basis of knowledge for identifying Mr Abd-Al-Rahman as 'Ali Koshib'.⁴⁴

23. The Chamber is satisfied that the introduction of P-0015'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 have adequate opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused. Specifically, the Defence will have the opportunity to question the witness on the basis of her knowledge for identifying Mr Abd-al-Rahman as 'Ali Koshib' and his alleged role in crimes committed in Mukjar in December 2003.

P-0918

24. P-0918, a civilian from Kodoom, provides testimony on the alleged attack on Kodoom and surrounding areas on or around 15 and 16 August 2003.⁴⁵

⁴⁰ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 20-25; Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, para. 7.

⁴¹ Seventh Application, ICC-02/05-01/20-614-Red, para. 35, fn. 77 referring to P-0012, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

⁴² DAR-OTP-0088-0187-R03, para. 63.

⁴³ DAR-OTP-0088-0187-R03, para. 72.

⁴⁴ Seventh Application, ICC-02/05-01/20-614-Red, para. 14.

⁴⁵ DAR-OTP-0218-0120, paras 22, 26-31.

25. Together with the witness statement, the Prosecution seeks the submission of associated material, namely, a hand drawn sketch, a headdress board, a colour chart, an aircraft chart, P-0918's handwritten notes, a list of people allegedly killed during the attacks in Kodoom, and a list of persons allegedly raped during the attacks in Kodoom.⁴⁶

26. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).⁴⁷

27. The Defence objects to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules, particularly noting the parts of the statement which refer to the identity, background, and physical description of 'Ali Kushayb'⁴⁸ and his alleged role in the alleged crimes in Kodoom.⁴⁹ The Defence questions the witness's basis of knowledge for identifying 'Ali Kushayb' and notes that the Prosecution seeks to explore this basis of knowledge in its limited supplementary examination.⁵⁰

28. The Chamber notes the Defence's submission that P-0918's evidence 'carries a greater risk of presenting an altered account of the events', due to his 'relative lack of formal education', which the Defence claims is a manifestation of vulnerability.⁵¹ The Chamber rejects this argument and refers to its findings *supra* on the reliability of prior recorded testimonies.⁵² The Defence will have the opportunity to question the witness on his purported vulnerability and any other issue important to the Defence during its cross-examination of the witness. This is without prejudice to the weight to be given to P-0918's evidence in the context of the Article 74 judgment.

⁴⁶ Seventh Application, ICC-02/05-01/20-614-Red, paras 16, 19.

⁴⁷ Seventh Application, ICC-02/05-01/20-614-Red, paras 20, 22.

⁴⁸ DAR-OTP-0218-0120-R03, paras 14, 16, 30, 50(i).

⁴⁹ DAR-OTP-0218-0120-R03, para. 28.

⁵⁰ Response, ICC-02/05-01/20-621-Conf, para. 22.

⁵¹ Response, ICC-02/05-01/20-621-Conf, para. 23.

⁵² *See supra* paras 8-10.

29. The Chamber notes the Prosecution's submission that P-0918's evidence on murder,⁵³ pillaging,⁵⁴ destruction of property⁵⁵ and persecution⁵⁶ is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*.

30. With regard to the acts and conduct of the accused, and in addition to the conclusions set out previously by the Chamber,⁵⁷ the Chamber notes the Prosecution's submission that P-0918's evidence on Mr Abd-Al-Rahman's individual criminal responsibility, is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses.⁵⁸ Note is also taken of the Prosecution's submission that, P-0918's evidence relating to the accused's identity corroborates two facts that were already agreed between the Defence and the Prosecution, namely that upon his retirement from the Sudanese Armed Forces, Mr Abd-Al-Rahman lived in Garsila, where he opened a pharmacy.⁵⁹

31. The Chamber finds that P-0918's evidence is not unique or otherwise particularly significant in the body of the expected evidence on the charged crimes. The Chamber observes that the witness statement does not mention any direct interaction or particular proximity with the accused. In fact, P-0918 states that [REDACTED],⁶⁰ and that [REDACTED].⁶¹

32. The Chamber further notes that the Prosecution seeks to clarify P-0918's basis of knowledge of the list of rape victims as well as his basis of knowledge for identifying Mr Abd-Al-Rahman as 'Ali Kushayb'.⁶²

⁵³ Seventh Application, ICC-02/05-01/20-614-Red, para. 25, referring to P-0007, P-0012, P-0874, P-0878 and P-0921.

⁵⁴ Seventh Application, ICC-02/05-01/20-614-Red, para. 26, referring to P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.

⁵⁵ Seventh Application, ICC-02/05-01/20-614-Red, para. 27, referring to P-0007, P-0012, P-0029, P-0589, P-0874, P-0878, P-0932, P-0986 and P-1021.

⁵⁶ Seventh Application, ICC-02/05-01/20-614-Red, para. 31, referring to P-0007, P-0011, P-0012, P-0029, P-0589, P-0874, P-0913, P-0932 and P-0986.

⁵⁷ See First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 20-25; Third Rule 68(3) Decision, ICC-02/05-01/20-602-Conf, para. 7.

⁵⁸ Seventh Application, ICC-02/05-01/20-614-Red, para. 33, referring to P-0012, P-0029, P-0874, P-0921 and P-1021.

⁵⁹ Seventh Application, ICC-02/05-01/20-614-Red, para. 34, referring to Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 9 November 2021, ICC-02/05-01/20-504-AnxA, facts 11 and 15.

⁶⁰ DAR-OTP-0218-0120-R03, para. 21.

⁶¹ DAR-OTP-0218-0120-R03, para. 15.

⁶² Seventh Application, ICC-02/05-01/20-614-Red, para. 21.

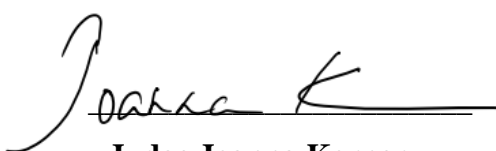
33. The Chamber is satisfied that the introduction of P-0918's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination.

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

34. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the 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.

35. As anticipated in the Directions on the conduct of proceedings,⁶³ 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.

36. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber authorises the introduction of the prior recorded testimonies of witnesses P-0015 and P-0918, identified in the Seventh Application and its annex, pursuant to Rule 68(3) of the Rules. The Chamber's preliminary ruling is subject to witnesses' appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 18 March 2022

At The Hague, The Netherlands

⁶³ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 22.