



**Original: English**

**No. ICC-02/05-01/20**

**Date: 2 May 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')***

**Confidential**

**Decision on the Prosecution's second application to introduce a prior recorded  
testimony under Rule 68(2)(c)**

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

**The Office of the Prosecutor**

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**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**

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**Registrar**

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**Detention Section**

**Victims Participation and Reparations  
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**Other**

1. On 8 February 2022, Trial Chamber I (hereinafter: ‘Chamber’) issued a decision rejecting the Prosecution’s application to introduce P-0954’s prior recorded testimony pursuant to Rule 68(3) of the Rules of Procedure and Evidence (hereinafter: ‘Rules’).<sup>1</sup>
2. On 21 February 2022, the Chamber issued its ‘Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c)’ (hereinafter: ‘First Rule 68(2)(c) Decision’), setting out the general framework for the introduction of prior testimonies pursuant to this provision.<sup>2</sup>
3. On 30 March 2022, the Prosecution filed an application for the introduction of the prior recorded testimony of P-0954 pursuant to Rule 68(2)(c) of the Rules (hereinafter: ‘Application’).<sup>3</sup>
4. On 11 April 2022, the Defence responded to the Application, objecting to the introduction of P-0954’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules (hereinafter: ‘Response’).<sup>4</sup>
5. The Chamber refers to the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(2)(c) of the Rules.<sup>5</sup>
6. P-0954, [REDACTED], provides evidence on the identity and the individual criminal responsibility of the accused. The witness statement refers in general to the command structure, and more specifically to the accused’s authority in the *Militia/Janjaweed*. It also refers to his command in areas of operation (Arawala,

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<sup>1</sup> 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 (hereinafter: ‘Second Rule 68(3) Decision’). A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red.

<sup>2</sup> ICC-02/05-01/20-603-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-603-Red.

<sup>3</sup> Prosecution’s second application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0954, ICC-02/05-01/20-656-Conf. A public redacted version was notified on 31 March 2022, ICC-02/05-01/20-656-Red.

<sup>4</sup> Réponse à la Requête ICC-02/05-01/20-656-Conf, ICC-02/05-01/20-669-Conf (notified on 12 April 2022). A public redacted version was notified on the same day, ICC-02/05-01/20-669-Red.

<sup>5</sup> First Rule 68(2)(c) Decision, ICC-02/05-01/20-603-Conf, paras 6-7.

Bindisi, Kodoom, Garsila, Mukjar, Deleig and Sindu), and his alleged involvement in funding and supplying weapons.<sup>6</sup>

7. The Prosecution submits that P-0954 died on [REDACTED]. The Prosecution submits a copy of a court order confirming P-0954's death,<sup>7</sup> which was also confirmed by the witness's family members, [REDACTED].<sup>8</sup> The Prosecution submits that the use of Article 56 of the Rome Statute (hereinafter: 'Statute') was not foreseeable, as the witness affirmed his willingness to cooperate with the Court in September 2021, only a few months before his death.<sup>9</sup>

8. Together with the witness statement, the Prosecution seeks to introduce a note written by the witness as associated material.<sup>10</sup>

9. The Defence opposes the Application and submits that the same reasons for opposing the admission of P-0954's prior recorded testimony under Rule 68(3) of the Rules now apply to its opposition to the admission of his evidence under Rule 68(2)(c) of the Rules.<sup>11</sup>

10. The Defence further refers to the Chamber's reasoning for rejecting the Prosecution's Rule 68(3) application in respect of P-0954,<sup>12</sup> and argues that admitting P-0954's evidence without the possibility of cross-examination would cause Mr Abd-Al-Rahman a clearly exorbitant prejudice and would be incompatible with his right to examine Prosecution witnesses under Article 67(1)(e) of the Statute.<sup>13</sup> Finally, the Defence argues that, following the Appeals Chamber's case law in the *Bemba* case, the Application must be rejected because P-0954's testimony addresses issues that are

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<sup>6</sup> Prosecution's third application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0657, P-0673, P-0843 and P-0954, 21 January 2022, ICC-02/05-01/20-560-Conf, paras. 27-29. A public redacted version was notified on 24 January 2022, ICC-02/05-01/20-560-Red.

<sup>7</sup> DAR-OTP-0220-3013 (English translation at DAR-OTP- DAR-OTP-0220-3143).

<sup>8</sup> DAR-OTP-0220-3271 and DAR-OTP-0220-3272.

<sup>9</sup> Application, ICC-02/05-01/20-656-Conf, para. 7.

<sup>10</sup> Application, ICC-02/05-01/20-656-Conf, para. 5 and Annex A to the Prosecution's second application under rule 68(2)(c) to introduce into evidence the prior recorded testimony of witness P-0954, ICC-02/05-01/20-656-Conf-AnxA.

<sup>11</sup> Response, ICC-02/05-01/20-669-Conf, paras 1-3.

<sup>12</sup> Response, ICC-02/05-01/20-669-Conf, para. 4, *referring to* First Rule 68(2)(c) Decision, ICC-02/05-01/20-603-Conf, paras. 73-78.

<sup>13</sup> Response, ICC-02/05-01/20-669-Conf, para. 5.

disputed and at the core of the case, namely Mr Abd-Al-Rahman's identity, his link to the alias 'Ali Kushayb' and his individual criminal responsibility.<sup>14</sup>

11. The Chamber recalls that in its Second Rule 68(3) Decision, while finding that there was no obstacle, *per se*, to the introduction of P-0954's prior statement under Rule 68(3) of the Rules, it rejected the Prosecution's application, on the grounds that his evidence appeared to be unique and different to that of other witnesses expected to testify about the accused's identity and individual criminal responsibility.<sup>15</sup> Instead, the Chamber held that, in the particular circumstances, it was preferable that the entirety of P-0954's evidence is heard *viva voce*.<sup>16</sup> Thus, the rejection of the Prosecution's Rule 68(3) application in respect of P-0954 was not in application of a strict legal requirement but based on the circumstances at the time, in the exercise of the Chamber's discretion. Consequently, the rejection under Rule 68(3) of the Rules alone cannot be the basis for rejecting the Prosecution's Application pursuant to Rule 68(2)(c) of the Rules in relation to the same witness. The Chamber must consider the Application on the basis of this provision.

12. The Chamber finds that the Prosecution has provided sufficient evidence that P-0954 is deceased.<sup>17</sup> Moreover, the Chamber accepts that measures under Article 56 of the Statute could not have been anticipated.<sup>18</sup> The Chamber also notes that P-0954's prior recorded testimony has sufficient basic indicia of credibility, in that the witness statement is signed by the witness attesting that it was given voluntarily and the interpreter certified that the interview was translated into a language that the witness speaks and understands.<sup>19</sup>

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<sup>14</sup> Response, ICC-02/05-01/20-669-Conf, paras 6-8, *referring to Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 78.

<sup>15</sup> Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 78.

<sup>16</sup> Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 78.

<sup>17</sup> Annex A to Prosecution's second application under rule 68(2)(c) to introduce into evidence prior recorded testimony of witnesses, 30 March 2022, ICC-02/05-01/20-656-Conf-AnxA.

<sup>18</sup> Application, ICC-02/05-01/20-656-Conf, para. 7.

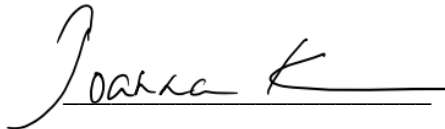
<sup>19</sup> DAR-OTP-0221-0571-R01 at 0585 and 0586.

13. The Chamber notes further, 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, and that Rule 68(2)(c) of the Rules does not prohibit the introduction of prior testimony which goes to the acts and conduct of an accused. It also notes the Prosecution's argument that P-0954's evidence on the accused's individual criminal responsibility is corroborated by witnesses who will testify entirely *viva voce* on the topic.<sup>20</sup>

14. However, the Chamber finds, as it did in its Second Rule 68(3) Decision,<sup>21</sup> that P-0954 provides evidence that is unique and cannot be supplemented by that of other witnesses who will testify *viva voce*. Moreover it is self-evident that greater caution is mandated when considering the admission - under the relevant rules - of statements made by "insider" witnesses who may well have a motive to assign responsibility for their actions to others.

15. Considering the uniqueness of P-0954's testimony and the Defence's inability to cross-examine him, the Chamber finds that the introduction sought would be prejudicial to the accused. In the absence of any measures capable of mitigating that prejudice, granting the Application would be inconsistent with the rights of the accused.

16. For the foregoing reasons, the Chamber rejects the Application to introduce the prior recorded testimony of P-0954 and related material pursuant to Rule 68(2)(c) of the Rules.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 2 May 2022

At The Hague, The Netherlands

<sup>20</sup> Application, ICC-02/05-01/20-656-Conf, para. 15, referring to P-0027, P-0029, P-0131, P-0584, P-0643, P-0671, P-0718, P-0874, P-0883, P-0885, P-0903, P-0905, P-0907, P-0926, P-0973 and P-1021.

<sup>21</sup> Second Rule 68(3) Decision, ICC-02/05-01/20-588-Conf, para. 78.