Cour Pénale Internationale



International Criminal Court

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No. ICC-02/05-01/20 Date: 3 June 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 eleventh 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:

<b>The Office of the Prosecutor</b> Karim A.A. Khan Nazhat Shameem Khan Julian Nicholls	<b>Counsel for the Defence</b> Cyril Laucci Iain Edwards
<b>Legal Representatives of Victims</b> Natalie von Wistinghausen Anand Shah	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants for Participation/Reparations
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States Representatives	Amicus Curiae
REGISTRY	
<b>Registrar</b> Peter Lewis	Counsel Support Section
Victims and Witnesses Unit Nigel Verrill	Detention Section
<b>Victims Participation and Reparations</b> <b>Section</b> Philipp Ambach	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.<sup>1</sup>

The Chamber has since issued a series of decisions dealing with subsequent Rule 68(3) applications.<sup>2</sup>

3. On 24 May 2022, the Prosecution filed an application to introduce the prior recorded testimonies of P-0007, P-0012 and P-0718 pursuant to Rule 68(3) of the Rules (the 'Application').<sup>3</sup>

4. On 25 May 2022, the Chamber invited the parties to make submissions on the use of Rule 68(2)(b) of the Rules for P-0007.<sup>4</sup>

5. On 31 May 2022, the Prosecution indicated that it supports the use of Rule 68(2)(b) of the Rules for P-0007 (the 'E-mail Submission').<sup>5</sup>

<sup>&</sup>lt;sup>1</sup> 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').

<sup>&</sup>lt;sup>2</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. A public redacted version was notified on the same day, ICC-02/05-01/20-588-Red; Decision on the Prosecution's fourth and fifth request to introduce prior recorded testimonies under Rule 68(3), 21 February 2022, ICC-02/05-01/20-602-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-602-Red; 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; Decision on the Prosecution's seventh application to introduce prior recorded testimonies under Rule 68(3), 18 March 2022, ICC-02/05-01/20-635-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-635-Red; Decision on the Prosecution's eighth application to introduce prior recorded testimonies under Rule 68(3), 29 March 2022, ICC-02/05-01/20-649-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-649-Red; Seventh Decision on Prosecution's applications to introduce prior recorded testimonies under Rule 68(3), 29 March 2022, ICC-02/05-01/20-651-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-651-Red; Decision on the Prosecution's tenth application to introduce prior recorded testimonies under Rule 68(3), 4 April 2022, ICC-02/05-01/20-660-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-660-Red.

<sup>&</sup>lt;sup>3</sup> Prosecution's eleventh application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0007, P-0012 and P-0718, ICC-02/05-01/20-694-Conf with Confidential Annex A. A public redacted version was notified on 27 May 2022, ICC-02/05-01/20-694-Red.

<sup>&</sup>lt;sup>4</sup> Email from the Chamber at 15:45.

<sup>&</sup>lt;sup>5</sup> E-mail from the Prosecution at 13:46.

6. On 1 June 2022,<sup>6</sup> the Defence responded to the above use of Rule 68(2)(b) of the Rules for P-0007, opposing it (the 'E-mail Response').<sup>7</sup>

7. On that same date, the Defence filed its response, opposing the use of Rule 68(3) for P-0012 and P-0718. It does not object to the use of Rule 68(3) of the Rules for P-0718 (the 'Response').<sup>8</sup>

#### II. Analysis

8. The Chamber incorporates by reference the general framework applicable to the assessment of applications for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.<sup>9</sup> The Chamber further refers to the legal framework specific to Rule 68(2)(b) of the Rules, as established in its previous decisions.<sup>10</sup>

## A. Timing of the Application

9. The Defence objects in general to the tardiness of the Application, referring to the original deadline established by the Chamber for the submission of such applications.<sup>11</sup> The Chamber finds that the Defence's argument is without merit and ignores the Chamber's directions in this regard, which specifically requested the Prosecution to evaluate the further use of Rule 68 for its upcoming witnesses.<sup>12</sup> Although the deadline of 5 January 2022 was established for the Prosecution to submit its Rule 68 applications before the commencement of trial, the Chamber has clearly stated that the 'introduction of prior recorded testimony under Rule 68(3) of the Rules can in principle be considered an option on the spot for every witness appearing before

 <sup>&</sup>lt;sup>6</sup> See e-mails from Trial Chamber I Communications on 24 May 2022 at 16:04 and on 25 May at 15:45.
<sup>7</sup> E-mail from the Defence at 15:15.

<sup>&</sup>lt;sup>8</sup> Defence response to Prosecution's eleventh application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0007, P-0012 and P-0718, ICC-02/05-01/20-694-Conf, ICC-02/05-01/20-698-Conf. A public redacted version was notified on 2 June 2022, ICC-02/05-01/20-694-Red.

<sup>&</sup>lt;sup>9</sup> First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, paras 7-17.

<sup>&</sup>lt;sup>10</sup> First Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-612-Conf, paras 11-19. A public redacted version was notified on the same date, ICC-02/05-01/20-612-Red, paras 11-19; Second Decision on the Prosecution's requests to introduce prior recorded testimonies under Rule 68(2)(b), 11 March 2022, ICC-02/05-01/20-625-Conf, paras 8-9. A public redacted version was notified on the same day, ICC-02/05-01/20-625-Red.

<sup>&</sup>lt;sup>11</sup> Response, ICC-02/05-01/20-698-Conf, para. 5.

<sup>&</sup>lt;sup>12</sup> Transcript of hearing on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 46, line 13 to p. 47, line 4.

the Chamber, even if a request under Rule 68 of the Rules had previously not been made'.<sup>13</sup> Accordingly, this aspect of the Defence's response is dismissed.

# B. The prior recorded testimonies

#### *P-0007*

10. P-0007 is a civilian who provides evidence on the context and background of Bindisi. The witness also provides evidence on the alleged attack in Bindisi, and connected alleged acts of murder, rape, pillaging, destruction of property, displacement and persecution. P-0007 further refers to [REDACTED].<sup>14</sup>

As regards the accused, the witness refers to 'Ali Kushayb' only once. Moreover,
P-0007's evidence in this regard is insignificant and mostly hearsay.<sup>15</sup>

12. The Chamber further notes the Prosecution's submission that P-0007's evidence, is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce* as regards the contextual elements of the crimes,<sup>16</sup> the alleged attacks in Kodoom, Bindisi and surrounding areas.<sup>17</sup>

13. In addition to the witness statement, the Prosecution seeks to introduce as associated material [REDACTED], as well as a sketch drawn during his interview.<sup>18</sup>

14. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).<sup>19</sup>

15. As regards the use of Rule 68(2)(b) of the Rules for P-0007, the Chamber notes the Prosecution's submission that P-0007's prior recorded testimony does not go to the acts and conduct of the accused, and, as noted above, is broadly cumulative and corroborative of other evidence. Moreover, the Prosecution submits the prior recorded

<sup>&</sup>lt;sup>13</sup> First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 14.

<sup>&</sup>lt;sup>14</sup> Application, ICC-02/05-01/20-694-Conf, paras 10-11. See also DAR-OTP-0088-0060-R02.

<sup>&</sup>lt;sup>15</sup> DAR-OTP-0088-0060-R02, para. 35.

<sup>&</sup>lt;sup>16</sup> Application, ICC-02/05-01/20-694-Conf, para. 34, *referring to* P-0029, P-0027, P-0103, P-0011, P-0029, P-0547, P-0878, P-0131, P-1021.

<sup>&</sup>lt;sup>17</sup> Application, ICC-02/05-01/20-694-Conf, para. 31, *referring to* P-0011, P-0029, P-0878, P-0874, P-0878, P-1021, P-0589, P-0011, P-0921, P-1073, P-1074.

<sup>&</sup>lt;sup>18</sup> Application, ICC-02/05-01/20-694-Conf-AnxA, p. 2.

<sup>&</sup>lt;sup>19</sup> Application, ICC-02/05-01/20-694-Conf, paras 13-14.

testimony has sufficient indicia of reliability and its introduction into evidence will contribute to the streamlining of proceedings, thus serving the interest of justice.<sup>20</sup>

16. The Defence objects to the use of Rule 68(2)(b) of the Rules for P-0007. The Defence notes in particular that in paragraph 35 of his statement, P-0007 refers to the acts and conduct of the accused and that it is therefore 'too prejudicial to be allowed to go unchallenged through cross-examination'.<sup>21</sup> It further notes that given the nature of P-0007's evidence, and particularly the [REDACTED], his testimony must be tested in court. The Defence also notes this is the first witness to provide evidence on allegations of sexual and gender-based violence in Bindisi. The Defence submits that 'he should be called pursuant to Rule 68(3) of the Rules' or alternatively, if Rule 68(2)(b) is used, paragraph 35 of P-0007's statement should be excluded.<sup>22</sup>

17. Although the Chamber considered the introduction of P-0007's evidence pursuant to Rule 68(2)(b) of the Rules, the Chamber has taken note of the Defence's submissions above. Moreover, the Chamber notes that although P-0007 only briefly mentions the accused in paragraph 35 of his statement, he provides a detailed account of other aspects of the alleged attacks in Mukjar and Bindisi. The Defence does not object to the introduction of P-0007's prior recorded testimony pursuant to Rule 68(3) of the Rules. The Chamber is thus satisfied that the introduction of P-0007's prior recorded testimony will not occasion any prejudice to the accused.

#### *P-0012*

18. P-0012 is a civilian who provides evidence on the context and background of Bindisi. The witness also provides evidence on the Militia/*Janjaweed* and its relation with the Government of Sudan (the 'GoS'). P-0012 also refers to the alleged attack by the GoS forces and the Militia/*Janjaweed* on Bindisi, and connected alleged acts of pillaging, destruction of property, murder, persecution and forced displacement.<sup>23</sup>

19. As regards the accused, the witness's evidence refers to his background, his identity, his physical appearance and his alleged position as *agid al-ogada* in Wadi Salih at the time of the charges. P-0012 also refers to an alleged meeting between the

<sup>&</sup>lt;sup>20</sup> E-mail Submission.

<sup>&</sup>lt;sup>21</sup> E-mail Response.

<sup>&</sup>lt;sup>22</sup> E-mail Response.

<sup>&</sup>lt;sup>23</sup> Application, ICC-02/05-01/20-694-Conf, paras 15-16, 19-21.

accused and Ahmed Harun in Mukjar, as well as a meeting between the accused and other *agids* during the Bindisi attack. P-0012 further provides evidence in relation to the accused's alleged leadership role in the Militia/*Janjaweed* during the Sindu operation and the execution of persons detained at Mukjar police station.<sup>24</sup>

20. The Chamber notes the Prosecution's submission that P-0012's evidence, is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce* as regards the contextual elements of the crimes,<sup>25</sup> the alleged incidents in Kodoom, Bindisi and surrounding areas,<sup>26</sup> as well as in Mukjar.<sup>27</sup> The Chamber notes that as regards the evidence on the accused, the Prosecution submits that some of P-0012's evidence is corroborative of agreed facts and corroborative of and cumulative to the evidence to be provided by *viva voce* witnesses.<sup>28</sup>

21. In addition to the witness statement, the Prosecution also seeks to introduce an additional note with clarifications to the statement made by the witness.<sup>29</sup>

22. The Prosecution requests 1.5 hours to conduct a supplementary examination (instead of the 4.5-6 hours estimated for *viva voce* examination).<sup>30</sup>

23. The Defence submits that P-0012 'fulfils the uniqueness criterion as applied by the Chamber' and refers to fundamental issues in dispute.<sup>31</sup> In particular, the Defence submits that P-0012's testimony as regards the identification of the accused as Ali Kushayb is unique.<sup>32</sup> Moreover, the Defence submits that P-0012 provides unique evidence on the alleged position of authority of Ali Kushayb and the relationship with

<sup>&</sup>lt;sup>24</sup> Application, ICC-02/05-01/20-694-Conf, paras 17-19. *See* DAR-OTP-0119-0503-R01, paras 33, 35, 37-38, 62-104.

<sup>&</sup>lt;sup>25</sup> Application, ICC-02/05-01/20-694-Conf, para. 34, *referring to* P-0029, P-0027, P-0103, P-0011, P-0029, P-0547, P-0878, P-0131, P-1021.

<sup>&</sup>lt;sup>26</sup> Application, ICC-02/05-01/20-694-Conf, para. 31, *referring to* P-0011, P-0029, P-0878, P-0874, P-0878, P-1021, P-0589, P-0011, P-0921, P-1073, P-1074.

<sup>&</sup>lt;sup>27</sup> Application, ICC-02/05-01/20-694-Conf, para. 32, *referring to* P-0029, P-0129, P-0188, P-0877, P-0903, P-0905, P-0919, P-0976, P-0984, P-0990, P-0992, P-0979, P-1040.

<sup>&</sup>lt;sup>28</sup> Application, ICC-02/05-01/20-694-Conf, para. 32, *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 10, 11 and 15, as well as the statements of P-0092, P-0129, P-0643, P-0878, P-0903, P-0907, P-0987.

<sup>&</sup>lt;sup>29</sup> Application, ICC-02/05-01/20-694-Conf-AnxA, p. 3.

<sup>&</sup>lt;sup>30</sup> Application, ICC-02/05-01/20-694-Conf, paras 22-23.

<sup>&</sup>lt;sup>31</sup> Response, ICC-02/05-01/20-698-Conf, para. 9.

<sup>&</sup>lt;sup>32</sup> Response, ICC-02/05-01/20-698-Conf, para. 6.

the GoS, as well as his alleged role in the Bindisi attack in 2003. The Defence also notes that P-0012 provides evidence of numerous close interactions with Ali Kushayb.<sup>33</sup>

While uniqueness has been previously considered by the Chamber in the exercise 24. of its discretion, it 'is not, per se, an obstacle to authorise the introduction of evidence under Rule 68(3) of the Rules'.<sup>34</sup> Indeed this is not a requirement appearing in the Rule. Factors which militate in favour of the use of Rule 68(3) as set out in the Chamber's First Rule 68(3) Decision, include 'good trial management, particularly streamlining of the presentation of evidence and the expeditiousness of proceedings'.<sup>35</sup> In considering these aspects, the Chamber takes into account that this lengthy and detailed statement was taken in 2007, when events were fresher in the mind of the witness. To require a witness to provide such detailed evidence viva voce is inimical to the interest of justice in that it will increase the length of the time needed for that evidence to be given and will require a test of the witness's memory which is inappropriate in this case.<sup>36</sup> Fairness is required in respect of both sides, and the Defence will be given as much time as it requires to cross-examine the witness. Whilst accepting the Defence submissions that the evidence of P-0012 is in some instances unique, the Chamber considers, for the reasons stated, that it is in the interests of justice to introduce his statement pursuant to Rule 68(3) of the Rules. The Chamber is thus satisfied that the introduction of P-0012's prior recorded testimony will not occasion any prejudice to the accused.

## P-0718

25. P-0718 is a civilian who provides evidence on the alleged attack on Taringa and other villages near Deleig. He also refers to the alleged arrests in Deleig, including [REDACTED].<sup>37</sup>

<sup>&</sup>lt;sup>33</sup> Response, ICC-02/05-01/20-698-Conf, paras 7-8, *referring to* DAR-OTP-0119-0503-R01, paras 33-41, 45, 53, 61-63, 67, 69, 78-82, 84, 86, 93-100.

<sup>&</sup>lt;sup>34</sup> Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, ICC-02/05-01/20-588-Conf, para. 72.

<sup>&</sup>lt;sup>35</sup> First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, para. 15.

<sup>&</sup>lt;sup>36</sup> See for example Transcript of hearaing on 8 April 2022, ICC-02/05-01/20-T-029-CONF-ENG, p. 81, line 24 to p. 82, line 12; p. 82, line 24 to p. 83, line 11.

<sup>&</sup>lt;sup>37</sup> Application, ICC-02/05-01/20-694-Conf, para. 25.

26. As regards the accused, the witness states he personally saw the accused in Deleig at the time of the events, including when he questioned [REDACTED]. P-0718 also states the accused released [REDACTED] (who later were allegedly executed).<sup>38</sup>

27. In addition to the witness statement, the Prosecution also seeks to introduce as associated material two sketches and a document with images used during the interview.<sup>39</sup>

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

29. The Chamber notes the Prosecution's submission that P-0718's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce* on the contextual elements of the crimes,<sup>40</sup> and the incidents in Deleig.<sup>41</sup>

30. The Defence submits, referring to the Chamber's previous decisions, that P-0718's testimony as regards the identification of the accused as Ali Kushayb is unique. The Defence additionally states that these are fundamental issues in dispute.<sup>42</sup>

31. The Chamber is satisfied that the introduction of P-0718's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination. Moreover, the Defence will have adequate opportunity to question P-0718 on issues it has identified as fundamental, including the identity of the accused.

32. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the Chamber considers that the Prosecution must focus its examination in order to complete the formalities under this provision and conduct any supplementary questioning of each witness within the estimated time requested.

<sup>&</sup>lt;sup>38</sup> Application, ICC-02/05-01/20-694-Conf, paras 25-26.

<sup>&</sup>lt;sup>39</sup> Application, ICC-02/05-01/20-694-Conf-AnxA, p. 4.

<sup>&</sup>lt;sup>40</sup> Application, ICC-02/05-01/20-694-Conf, para. 34, *referring to* P-0029, P-0027, P-0103, P-0011, P-0029, P-0547, P-0878, P-0131, P-1021.

<sup>&</sup>lt;sup>41</sup> Application, ICC-02/05-01/20-694-Conf, para. 33, *referring to* P-0584, P-0027, P-0671, P-0907, P-0924, P-0973, P-0994, P-0987, P-0905, P-0092, P-0931.

<sup>&</sup>lt;sup>42</sup> Response, ICC-02/05-01/20-698-Conf, paras 6, 10-13, *referring to* DAR-OTP-0209-2004-R02, paras 62, 68-71, 75-85.

33. 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 P-0007, P-0012 and P0718 identified in the Application and its corresponding 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

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Judge Reine Alapini-Gansou

Judge Althea Violet Alexis-Windsor

Dated this 3 June 2022 At The Hague, The Netherlands