



**Original: English**

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

**Date: 12 July 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 twelfth 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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**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

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**Detention Section**

**Victims Participation and Reparations  
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## 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>
2. The Chamber has since issued a series of decisions dealing with subsequent Rule 68(3) applications.<sup>2</sup>
3. On 23 June 2022, the Prosecution filed an application to introduce the prior recorded testimonies of P-0028, P-0913 and P-0932 pursuant to Rule 68(3) of the Rules (the 'Application').<sup>3</sup>
4. On 4 July 2022, the Defence responded to the Application, opposing it (the 'Response').<sup>4</sup>

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<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>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; Decision on the Prosecution's eleventh application to introduce prior recorded testimonies under Rule 68(3), 3 June 2022, ICC-02/05-01/20-699-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-699-Red.

<sup>3</sup> Prosecution's twelfth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0028, P-0913 and P-0932, ICC-02/05-01/20-706-Conf with Confidential Annex A. A public redacted version was notified on 28 June 2022, ICC-02/05-01/20-706-Red. *See* Email from the Prosecution on 28 June 2022 at 13:44, reporting a typo in paragraph 33 of the Application and Annex A—A3 in the description of DAR-OTP-0222-0729: it should refer to P-0932's injuries and not to those of P-0913.

<sup>4</sup> Defence response to Prosecution's twelfth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0028, P-0913, and P-0932, ICC-02/05-01/20-706-Conf.

## II. Analysis

5. 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>5</sup>

### A. *General objection*

6. The Defence submits that the Chamber referred to the three witnesses concerned by the Application (as being cumulative and corroborative and *viva voce*) in previous decisions authorising the use of Rule 68(3) of the Rules. The Defence submits that constant changes in the mode of introduction of evidence may have an impact on the legality of these previous decisions and more generally on the rights of Mr Abd-Al-Rahman to a fair trial.<sup>6</sup>

7. Although P-0028, P-0932 and P-0913 were previously scheduled to testify *viva voce*, this does not prevent the introduction of their prior recorded statements pursuant to Rule 68(3) of the Rules. As already stated by the Chamber, ‘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’.<sup>7</sup> Likewise, in all instances in which the Chamber has referred to these three witnesses as being corroborative or cumulative, the Chamber has referred to other witnesses who are also corroborative of or cumulative to the testimonies authorised under Rule 68(3) of the Rules.<sup>8</sup> Moreover, the cumulative and or corroborative factor is only one aspect of the Chamber’s general assessment on whether it is appropriate to use Rule 68(3) of the Rules, particularly vis-à-vis the rights of the accused. Nonetheless, the Chamber will bear in mind the Defence’s submissions in evaluating the prior recorded testimonies below.

### B. *The prior recorded testimonies*

#### *P-0028*

8. P-0028 is a civilian who provides evidence on the alleged crimes committed in Mukjar and surrounding areas in February/March 2004. His evidence further relates to

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

<sup>6</sup> Response, ICC-02/05-01/20-706-Conf, para. 7.

<sup>7</sup> First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 14.

<sup>8</sup> See for example, First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, fn. 26.

the contextual elements of crimes against humanity, as well as Mr Abd-Al-Rahman's alleged authority in the Militia/*Janjaweed* and contribution to the Mukjar incident.<sup>9</sup>

9. In addition to the witness statement, the Prosecution seeks to introduce as associated material (i) a sketch map of Mukjar; and (ii) a list of persons allegedly arrested and killed in the context of the Sindu operation.<sup>10</sup>

10. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).<sup>11</sup>

11. The Chamber notes the Prosecution's submission that P-0028's evidence is corroborative of and cumulative to that of other witnesses who have already testified or will testify entirely *viva voce* as regards: (i) the charges of persecution, torture, other inhumane acts, and outrages upon personal dignity regarding the arrest and the conditions of detention of men perceived to be associated with or supportive of rebel armed groups;<sup>12</sup> (ii) the murder and attempted murder of detainees;<sup>13</sup> (iii) the contextual elements of crimes against humanity;<sup>14</sup> and (iv) Mr Abd-Al-Rahman being a leader of the Militia/*Janjaweed*.<sup>15</sup>

12. The Defence objects to the use of Rule 68(3) of the Rules for P-0028, noting that evidence pertaining to Ali Kushayb relates to uncharged events and falls outside the scope of the charges.<sup>16</sup> However, as noted above, P-0028 provides evidence that is relevant to the charges. In particular, the Chamber notes that P-0028 allegedly saw the accused in Mukjar in February/March 2004,<sup>17</sup> and specifically during the alleged transport and execution of detainees.<sup>18</sup>

<sup>9</sup> Application, ICC-02/05-01/20-706-Conf, para. 13. *See also* paras 10-13.

<sup>10</sup> Application, ICC-02/05-01/20-706-Conf, para. 14.

<sup>11</sup> Application, ICC-02/05-01/20-706-Conf, paras 15-16.

<sup>12</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0029, P-0129, P-0129, P-0188, P-0877, P-0903, P-0905, P-0919, P-0976, P-0984, P-0990, P-0992, P-0979.

<sup>13</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0129, P-0188, P-0919, P-0979, P-1040.

<sup>14</sup> Application, ICC-02/05-01/20-706-Conf, para. 38, *referring to* P-0092, P-0011, P-0029, P-0905, P-0643, P-0643, P-0935, P-0926, P-0992, P-0885, P-0885, P-0874, P-0874, P-1021, P-1021, P-1021, P-0769, P-0769, P-0027, P-0547, P-0921.

<sup>15</sup> Application, ICC-02/05-01/20-706-Conf, para. 40, *referring to* among others, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907, P-0987.

<sup>16</sup> Response, ICC-02/05-01/20-706-Conf, para. 5.

<sup>17</sup> DAR-OTP-0094-0423-R01 at 0437-0438, paras 59-60.

<sup>18</sup> DAR-OTP-0094-0423-R01 at 0437-0438, paras 67-68.

13. The Chamber is thus satisfied that, contrary to the submissions of the Defence, the evidence of P-0028 is relevant to the charges. Moreover, bearing in mind its cumulative and corroborative nature vis-à-vis- other evidence to be relied on at trial, the introduction of P-0028'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-0028.

**P-0913**

14. P-0913 is [REDACTED], who provides evidence on the charged crimes of murder and forcible transfer during the attack on Kodoom and Bindisi, and the alleged crimes committed in Mukjar in February/March 2004. His evidence further relates to Mr Abd-Al-Rahman's alleged authority in the Militia/*Janjaweed*.<sup>19</sup>

15. In addition to the witness statement, the Prosecution seeks to introduce as associated material (i) sketch maps; (ii) a list of detainees taken from the Mukjar police station on trucks; (iii) a list of Militia/*Janjaweed* leaders and of some victims.<sup>20</sup>

16. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).<sup>21</sup>

17. The Chamber notes the Prosecution's submission that P-0913's evidence is corroborative of and cumulative to that of other witnesses who have already testified or will testify entirely *viva voce* as regards the Kodoom, Bindisi and surrounding areas incident. This concerns in particular: (i) the intentional targeting of civilians;<sup>22</sup> (ii) the displacement of civilians as a result of the attack;<sup>23</sup> (iii) the murder of civilians in Bindisi;<sup>24</sup> (iv) the burning of civilian property;<sup>25</sup> (v) the pillaging of goods;<sup>26</sup> and (vi) the rape of women during the attack.<sup>27</sup> As for the Mukjar incident in February/March

<sup>19</sup> Application, ICC-02/05-01/20-706-Conf, para. 23. *See also* paras 18-22.

<sup>20</sup> Application, ICC-02/05-01/20-706-Conf, para. 24.

<sup>21</sup> Application, ICC-02/05-01/20-706-Conf, paras 25-26.

<sup>22</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0011, P-0029, P-0878.

<sup>23</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0874, P-0878, P-1021.

<sup>24</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0878, P-0011, P-0589, P-0874, P-0874, P-0874, P-0874, P-0878.

<sup>25</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0589, P-0874, P-0878.

<sup>26</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0878, P-0874, P-0874, P-0589, P-1021.

<sup>27</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0011, P-0874, P-0878, P-0921, P-1073, P-1074.

2004, other *viva voce* witnesses cover: (i) the charges of persecution, torture, other inhumane acts, and outrages upon personal dignity regarding the arrest and the conditions of detention of men perceived to be associated with or supportive of rebel armed groups;<sup>28</sup> and (ii) the murder and attempted murder of detainees.<sup>29</sup> Finally, further corroboration relates to Mr Abd-Al-Rahman alleged being a leader of the Militia/*Janjaweed*.<sup>30</sup>

18. The Defence objects to the use of Rule 68(3) of the Rules for P-0913. It submits that P-0913's evidence is highly prejudicial and unique, as [REDACTED] Mukjar at the time of the charges. In particular, the Defence refers to P-0913's testimony that Ali Kushayb allegedly collected ammunition,<sup>31</sup> his alleged ill-treatment and execution of detainees,<sup>32</sup> and his role in the incident in Kodoom and Bindisi.<sup>33</sup>

19. However, as noted above, P-0913 is not the sole witness expected to testify on these contested issues. In particular, the Chamber notes that other witnesses due to testify in the trial were also members of the police and the Popular Police Forces in Mukjar at the time of the charges.<sup>34</sup>

20. The Chamber is thus satisfied that the introduction of P-0913'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-0913 on issues it has submits are 'hotly contested', such as the identification of the accused.<sup>35</sup>

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<sup>28</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0029, P-0129, P-0129, P-0188, P-0877, P-0903, P-0905, P-0919, P-0976, P-0984, P-0990, P-0992, P-0979.

<sup>29</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0129, P-0129, P-0188, P-0919, P-0979, P-1040.

<sup>30</sup> Application, ICC-02/05-01/20-706-Conf, para. 40, *referring to* among others, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907, P-0987.

<sup>31</sup> Response, ICC-02/05-01/20-706-Conf, para. 6, *referring to* paras 79-81 of statement DAR-OTP-0218-0021.

<sup>32</sup> Response, ICC-02/05-01/20-706-Conf, para. 6, *referring to* paras 93, 98, 106, 113 of statement DAR-OTP-0218-0021.

<sup>33</sup> Response, ICC-02/05-01/20-706-Conf, para. 6, *referring to* paras 27, 37 of statement DAR-OTP-0218-0021.

<sup>34</sup> For example, P-0931, P-0041 and P-0188.

<sup>35</sup> Response, ICC-02/05-01/20-706-Conf, para. 4.

**P-0932**

21. P-0932 is a civilian who provides evidence on the charged crimes in Kodoom and Bindisi. The evidence further relates to the alleged Mukjar incidents in February/March 2004, as well as to the contextual elements of crimes against humanity, identification of Ali Kushayb and Mr Abd-Al-Rahman's individual criminal responsibility.<sup>36</sup>

22. In addition to the witness statement, the Prosecution seeks to introduce as associated material pictures and a list of injuries allegedly suffered by the witness.<sup>37</sup>

23. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).<sup>38</sup>

24. The Chamber notes the Prosecution's submission that P-0932's evidence is corroborative of and cumulative to that of other witnesses who have already testified or are expected to testify entirely *viva voce* as regards Kodoom, Bindisi and surrounding areas incident. This concerns in particular: (i) the intentional targeting of civilians;<sup>39</sup> (ii) the displacement of civilians as a result of the attack;<sup>40</sup> (iii) the murder of civilians in Bindisi;<sup>41</sup> (iv) the burning of civilian property;<sup>42</sup> (v) the pillaging of goods;<sup>43</sup> and (vi) the rape of women during the attack.<sup>44</sup> As for the Mukjar incident in February/March 2004, other *viva voce* witnesses cover: (i) the charges of persecution, torture, other inhumane acts, and outrages upon personal dignity regarding the arrest and the conditions of detention of men perceived to be associated with or supportive of rebel armed groups;<sup>45</sup> and (ii) the murder and attempted murder of detainees.<sup>46</sup> His evidence

<sup>36</sup> Application, ICC-02/05-01/20-706-Conf, para. 32. *See also* paras 28-31.

<sup>37</sup> Application, ICC-02/05-01/20-706-Conf, para. 33.

<sup>38</sup> Application, ICC-02/05-01/20-706-Conf, paras 34-35.

<sup>39</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0011, P-0029, P-0878.

<sup>40</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0874, P-0878, P-1021.

<sup>41</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0878, P-0011, P-0589, P-0874, P-0874, P-0874, P-0874, P-0878.

<sup>42</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0589, P-0874, P-0878.

<sup>43</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0029, P-0878, P-0874, P-0874, P-0589, P-1021.

<sup>44</sup> Application, ICC-02/05-01/20-706-Conf, para. 36, *referring to* P-0011, P-0874, P-0878, P-0921, P-1073, P-1074.

<sup>45</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0029, P-0129, P-0129, P-0188, P-0877, P-0903, P-0905, P-0919, P-0976, P-0984, P-0990, P-0992, P-0979.

<sup>46</sup> Application, ICC-02/05-01/20-706-Conf, para. 37, *referring to* P-0129, P-0129, P-0188, P-0919, P-0979, P-1040.



on contextual elements of crimes against humanity<sup>47</sup> as well as Mr Abd-Al-Rahman allegedly being the leader of the Militia/*Janjaweed* is also corroborative of, and cumulative to the evidence provided by *viva voce* witnesses who have testified or will testify in trial.<sup>48</sup> Furthermore on the contested issue of Mr Abd-Al-Rahman's identity, the Chamber notes the Prosecution's submission that P-0932's evidence supports the agreed fact that, upon retirement from the Sudanese Armed Forces, he lived in Garsila and had a shop from which he sold medication.<sup>49</sup>

25. Although the Defence objects to the use of Rule 68(3) of the Rules for P-0932, it does not make any witness-specific submissions.<sup>50</sup>

26. The Chamber is satisfied that the introduction of P-0932'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-0932 on issues it considers central.

27. 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.

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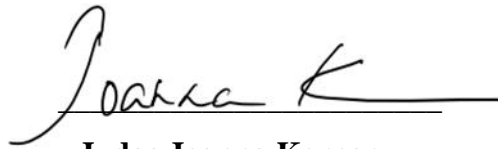
<sup>47</sup> Application, ICC-02/05-01/20-706-Conf, para. 38, *referring to* P-0092, P-0011, P-0029, P-0905, P-0643, P-0643, P-0935, P-0926, P-0992, P-0885, P-0885, P-0874, P-0874, P-1021, P-1021, P-1021, P-0769, P-0769, P-0027, P-0547, P-0921.

<sup>48</sup> Application, ICC-02/05-01/20-706-Conf, para. 40, *referring to* among others, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907, P-0987.

<sup>49</sup> Application, ICC-02/05-01/20-706-Conf, para. 39, *referring to* Annex A to the Third Joint Prosecution and Defence Submission on Agreed facts, 2 November 2021, ICC-02/05-01/20-504-AnxA, facts 11 and 15.

<sup>50</sup> Response, ICC-02/05-01/20-706-Conf, para. 7.

28. 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-0028, P-0913 and P-0932 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**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 12 July 2022

At The Hague, the Netherlands