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No. ICC-02/05-01/20

Date: 29 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 eighth 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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Other

I. Procedural history

1. On 20 January 2022, the 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 (the ‘First Rule 68(3) Decision’).¹ Since then, the Chamber has issued a series of decisions dealing with subsequent Rule 68(3) applications.²
2. On 14 March 2022, the Prosecution filed its eighth application to introduce the prior recorded testimonies of witnesses P-0092, P-0591, P-0714, P-0935 and P-0955 pursuant to Rule 68(3) of the Rules (the ‘Eighth Application’).³ The Prosecution also requested time for a supplementary examination of each witness.
3. On 17 March 2022, the Defence filed its response to the Eighth Application (the ‘Response’).⁴

¹ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf. A public redacted version was notified on that same date, ICC-02/05-01/20-559-Red.

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; 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; 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 the same day, ICC-02/05-01/20-635-Red (hereinafter: ‘Fifth Rule 68(3) Decision’).

³ Prosecution’s eighth application under rule 68(3) to introduce into evidence prior recorded testimony of five witnesses, ICC-02/05-01/20-627-Conf. A public redacted version was notified on 16 March 2022, ICC-02/05-01/20-627-Red.

⁴ Defence response to Prosecution’s eighth application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0092, P-0591, P-0714, P-0935, and P-0955, ICC-02/05-01/20-627-Conf, ICC-02/05-01/20-633-Conf. A public redacted version was notified on 18 March 2022, ICC-02/05-01/20-633-Red.

II. Analysis

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

A. General objections of the Defence

5. The Defence incorporates, by reference, its previous submissions relating to the witness statement-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.⁶ It further incorporates its previous submissions on the impact of possible interference on witnesses' account, which could compromise the reliability of prior recorded testimonies.⁷

6. As anticipated by the Defence, the Chamber has since ruled on the above submissions and thus incorporates its reasons by reference.⁸

B. The prior recorded testimonies

P-0092

7. P-0092 is a civilian who provides evidence on alleged incidents which took place in Garsila and on related individuals/institutions involved therein. P-0092 further refers to Mr Abd-Al-Rahman's physical description and his alleged collaboration with the Militia/*Janjaweed*.⁹

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

⁶ Response, ICC-02/05-01/20-633-Conf, para. 5, *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 3 February 2022, ICC-02/05-01/20-576-Red.

⁷ Response, ICC-02/05-01/20-633-Conf, paras 6-7, *referring to* 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, 8 March 2022, ICC-02/05-01/20-621-Conf, paras 7-18. A public redacted version was notified on 17 March 2022, ICC-02/05-01/20-621-Red.

⁸ Fifth Rule 68(3) Decision, ICC-02/05-01/20-635-Red, paras 8-13.

⁹ DAR-OTP-0112-0175-R02, paras 12-49, 51-53, 55, 58-67, 73-79, 85-93, 105.

8. In addition to the witness statement, the Prosecution seeks the submission of a letter as associated material.¹⁰

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

10. The Chamber notes the Prosecution's submission that P-0092's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*.¹² The Chamber also observes the Prosecution's submission that it intends to adduce *viva voce* testimonies of witnesses who provide more extensive evidence on the acts and conduct of the accused.¹³ The Chamber further notes the Prosecution's submission that information provided by the witness on the accused's identity and background corroborates facts agreed between the parties.¹⁴

11. However, the Chamber notes the Defence objections to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules. In particular, as noted by the Defence, P-0092 refers to "Ali Kosheib"'s alleged (i) tribal affiliation, physical appearance and background;¹⁵ (ii) relation with Ja'far Abd-Al-Hakam and with the Government of Sudan ('GoS'), in particular to the procurement and distribution of weapons;¹⁶ (iii) presence in Garsila, including in the military compound;¹⁷ (iv) involvement in [REDACTED];¹⁸ and (v) presence at a purported meeting on reconciliation in Amar in 2003.¹⁹

12. The Chamber further notes the Defence's submissions that the details provided by P-0092 in support of the identification of Mr Abd-Al-Rahman as 'Ali Kushayb', his

¹⁰ Eighth Application, ICC-02/05-01/20-627-Conf, para. 13.

¹¹ Eighth Application, ICC-02/05-01/20-627-Conf, paras 7, 14-15.

¹² Eighth Application, ICC-02/05-01/20-627-Conf, paras 37-38, 41.

¹³ Eighth Application, ICC-02/05-01/20-627-Conf, para. 40, *referring to* P-0643, P-0883, P-0885, P-0905, P-0987 and P-0994.

¹⁴ Eighth Application, ICC-02/05-01/20-627-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, 14-15 (hereinafter: 'Third Joint Agreed facts'); DAR-OTP-0112-0175-R02, para. 36.

¹⁵ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, paras 12, 36, 40, 60.

¹⁶ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, paras 40, 62-63, 68.

¹⁷ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, paras 44, 50.

¹⁸ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, paras 85-87.

¹⁹ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, paras 58-63.

alleged speech in Amar as well as P-0092's apparent low-level of education indicate this is unique evidence.²⁰ In this regard, the Chamber reiterates its previous reason that this attribute does not automatically render an evidence unreliable.²¹ Even if appraised within a holistic assessment,²² the Chamber finds that this factor does not compromise the reliability of the statement. Nonetheless, and although the factors discussed above are not, *per se*, an obstacle to authorising the introduction of evidence under Rule 68(3) of the Rules, in the instant case, P-0092's evidence is sufficiently detailed and unique. In addition to the topics identified by the Defence above,²³ the witness develops detailed narrative on the [REDACTED].²⁴ Accordingly, the Chamber, in this particular circumstance, determines that it is preferable that the entirety of P-0092's evidence is heard *viva voce*.

P-0591

13. P-0591 is a civilian who provides evidence on Mr Abd-Al-Rahman's alleged speech in Waro. P-0591 further refers to the alleged Deleig operation as well as to information about Mr Abd-Al-Rahman.²⁵

14. In addition to the witness statement, the Prosecution seeks the submission of a sketch of Deleig drawn by P-0591 as associated material.²⁶

15. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* examination).²⁷

16. The Defence objects to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules. It highlights the statement's references to (i) 'Ali Kushayb' known as [REDACTED];²⁸ (ii) 'Ali Kushayb' addressing a crowd of *Janjaweed* in Waro on 27 May 2003, in presence of the military police;²⁹ (iii) the alleged possession

²⁰ Response, ICC-02/05-01/20-633-Conf, para. 9, *referring to* DAR-OTP-0112-0175-R02, para. 7.

²¹ Fifth Rule 68(3) Decision, ICC-02/05-01/20-635-Red, para. 11.

²² Response, ICC-02/05-01/20-633-Conf, para. 9.

²³ *See*, in particular, DAR-OTP-0112-0175-R02, paras 58, 63.

²⁴ *See e.g.* DAR-OTP-0112-0175-R02, paras 51 *et seq.*

²⁵ DAR-OTP-0202-0026-R02, paras 28-30, 34-36, 39-43, 46, 62, 64-65, 68-86, 91-96, 101.

²⁶ Eight Application, ICC-02/05-01/20-627-Conf, para. 19.

²⁷ Eight Application, ICC-02/05-01/20-627-Conf, paras 7, 20-21.

²⁸ Response, ICC-02/05-01/20-633-Conf, para. 11, *referring to* DAR-OTP-0202-0026-R02, paras 28-30.

²⁹ Response, ICC-02/05-01/20-633-Conf, para. 11, *referring to* DAR-OTP-0202-0026-R02, paras 34, 37-38.

of the inhabitant's animals and farms by the Arabs following Ali Kushayb's visit;³⁰ (iv) Ali Kushayb being in charge of the *Janjaweed* and the PDF in Deleig around March 2004;³¹ (v) Ali Kushayb beating detainees near Deleig police station;³² and (vi) detainees being loaded onto vehicles by PDF soldiers in the presence of Ali Kushayb and driven away, as well as related information.³³ In its view, the details provided by P-0591's statement in support of the identification of Mr Abd-Al-Rahman as 'Ali Kushayb' and his alleged presence in Waro addressing a crowd of *Janjaweed* indicate this is unique evidence.

17. The Chamber notes the Prosecution's submission that P-0591's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*. This concerns in particular the alleged (i) search of Deleig and arrest of Fur males displaced to Deleig from the surrounding areas;³⁴ (ii) use of derogatory language towards the Fur during the Deleig operation;³⁵ (iii) detention and mistreatment of male Fur civilians in the open area near the Deleig police station;³⁶ (iv) mistreatment of detainees by Mr Abd-Al-Rahman in the open area near Deleig police station;³⁷ (v) loading of detainees onto vehicles, which drove out of Deleig and returned empty, and the repeating of this process multiple times;³⁸ and (vi) presence of Mr Abd-Al-Rahman during, and supervision of, the process of loading detainees onto vehicles.³⁹

18. As for the acts and conduct of the accused, and in addition to its previous conclusions,⁴⁰ the Chamber notes the corroborative and/or cumulative nature of P-

³⁰ Response, ICC-02/05-01/20-633-Conf, para. 11, referring to DAR-OTP-0202-0026-R02, para. 36.

³¹ Response, ICC-02/05-01/20-633-Conf, para. 11, referring to DAR-OTP-0202-0026-R02, paras 69, 71.

³² Response, ICC-02/05-01/20-633-Conf, para. 11, referring to DAR-OTP-0202-0026-R02, paras 91-92.

³³ Response, ICC-02/05-01/20-633-Conf, para. 11, referring to DAR-OTP-0202-0026-R02, paras 72, 85, 91-92, 97.

³⁴ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(b), referring to P-0584, P-0671, P-0718, P-0907, P-0924, P-0973, P-0987 and P-0994.

³⁵ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(c), referring to P-0584, P-0718, P-0905, P-0924, P-0973 and P-0987.

³⁶ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(d), referring to P-0584, P-0671, P-0718, P-0879, P-0905, P-0907, P-0924, P-0931, P-0973, P-0987 and P-0994.

³⁷ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(e), referring to P-0584, P-0671, P-0879, P-0907, P-0924, P-0973 and P-0994.

³⁸ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(f), referring to P-0584, P-0879, P-0905, P-0907, P-0924 P-0973, P-0987 and P-0994.

³⁹ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(g), referring to P-0584, P-0879, P-0905, P-0907, P-0924, P-0973, P-0987 and P-0994.

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.

0591's statement in this regard.⁴¹ The Prosecution has also indicated that it intends to adduce *viva voce* testimonies of witnesses who provide more extensive evidence on this topic.⁴² The Chamber further notes the Prosecution's submission that information provided by the witness on the accused's identity and background corroborates agreed facts.⁴³ The Chamber also notes that the witness statement does not mention any direct interaction or particular proximity with the accused.

19. The Chamber finds that P-0591's evidence is not unique or otherwise particularly significant in the body of the expected evidence on the charged crimes. Moreover, in its supplementary examination, the Prosecution will seek to clarify P-0591's basis of knowledge for identifying Mr Abd-Al-Rahman as 'Ali Kushayb' as well as of the witness's evidence related to the Deleig incidents.⁴⁴

20. Accordingly, the Chamber is satisfied that the introduction of P-0591'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 identification of Mr Abd-Al-Rahman as 'Ali Kushayb' and his alleged presence in Waro addressing a crowd of *Janjaweed*.

P-0714

21. P-0714 is a civilian who provides evidence on the alleged attacks on Taringa by the GoS Forces and the Militia/*Janjaweed*. P-0714 further refers to alleged incidents in Deleig and those involved therein.⁴⁵

22. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely (i) a witness colour chart; (ii) a sketch drawn by P-0714; and (iii) three satellite images.⁴⁶

⁴¹ See e.g. paragraph 17(iv), (vi).

⁴² Eighth Application, ICC-02/05-01/20-627-Conf, para. 40, *referring to* P-0643, P-0883, P-0885, P-0905, P-0987 and P-0994.

⁴³ Eighth Application, ICC-02/05-01/20-627-Conf, para. 39, *referring to* Third Joint Agreed facts, ICC-02/05-01/20-504-AnxA, facts 11, 14-15; DAR-OTP-0202-0026-R02, paras 28-29.

⁴⁴ Eighth Application, ICC-02/05-01/20-627-Conf, para. 20.

⁴⁵ DAR-OTP-0209-1916-R03, paras 15, 19-22, 40-41, 45-46, 53-54, 57-58, 60-65, 69-78, 80, 83-84.

⁴⁶ Eighth Application, ICC-02/05-01/20-627-Conf, para. 24.

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

24. The Chamber notes the Defence's agreement to introduce this prior recorded testimony pursuant to Rule 68(3) of the Rules.⁴⁸ It also notes the Prosecution's submissions as to the corroborative and cumulative evidence to be provided by other witnesses who will testify entirely *viva voce*.⁴⁹

25. The Chamber is satisfied that the introduction of P-0714's prior recorded testimony will not occasion any prejudice to the accused since Rule 68(3) of the Rules allows for cross-examination.

P-0935

26. P-0935, [REDACTED], provides evidence on the leadership and command structure at the SAF military base in Garsila, and the alleged close relationship between SAF members and Mr Abd-Al-Rahman. P-0935 further refers to alleged incidents in Deleig.⁵⁰

27. In addition to the witness statement, the Prosecution seeks the submission of a sketch drawn by P-0935 of the Garsila SAF base as associated material.⁵¹

28. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).⁵²

29. The Defence objects to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules. It highlights the statement's references to the witness's knowledge of 'Ali Kushayb' since 2001-2002,⁵³ as well as to Ali Kushayb (i) [REDACTED];⁵⁴ (ii) as the government-appointed leader of the *Janjaweed*;⁵⁵ (iii)

⁴⁷ Eighth Application, ICC-02/05-01/20-627-Conf, paras 7, 25-26.

⁴⁸ Response, ICC-02/05-01/20-633-Conf, para. 3.

⁴⁹ Eighth Application, ICC-02/05-01/20-627-Conf, paras 37-38, 42.

⁵⁰ DAR-OTP-0218-0705-R02, paras 13, 16-17, 19, 21-25, 32-45, 51-54, 56-61, 63, 65-69, 73.

⁵¹ Eighth Application, ICC-02/05-01/20-627-Conf, para. 29.

⁵² Eighth Application, ICC-02/05-01/20-627-Conf, paras 7, 30-31.

⁵³ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, para. 51.

⁵⁴ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, para. 52.

⁵⁵ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, paras 19, 27-28, 38, 51, 53.

having direct access to the government in Khartoum and [REDACTED];⁵⁶ (iv) collecting boxes of weapons and land cruisers from the Garsila base;⁵⁷ and (v) [REDACTED].⁵⁸ In its view, the details provided by P-0935's statement in support of the identification of Mr Abd-Al-Rahman as 'Ali Kushayb' and his alleged "almightiness" over the *Janjaweed* indicate this is unique evidence.

30. The Chamber notes the Prosecution's submission that P-0935's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*.⁵⁹ The Prosecution has also indicated that it intends to adduce *viva voce* testimonies of witnesses who provide more extensive evidence on the acts and conduct of the accused.⁶⁰ The Chamber further notes the Prosecution's submission that information provided by the witness on the accused's identity and background corroborates facts agreed between the parties.⁶¹ Above all, the Chamber notes that the Prosecution initially intended to call P-0935 *viva voce*, but later submitted that the one hour supplementary examination under Rule 68(3) of the Rules would suffice.⁶²

31. Although the factors discussed above are not, *per se*, an obstacle to authorising the introduction of evidence under Rule 68(3) of the Rules, in the instant case, P-0935's evidence is sufficiently detailed and unique. As [REDACTED] at the time, the witness [REDACTED].⁶³ Accordingly, the Chamber, in this particular circumstance, determines that it is preferable that the entirety of P-0935's evidence is heard *viva voce*.

⁵⁶ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, paras 24-25, 27, 53.

⁵⁷ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, paras 23-25, 71-72.

⁵⁸ Response, ICC-02/05-01/20-633-Conf, para. 13, *referring to* DAR-OTP-0218-0705-R02, paras 56, 58, 60, 63, 68, 71-73.

⁵⁹ Eighth Application, ICC-02/05-01/20-627-Conf, paras 37-38, 41.

⁶⁰ Eighth Application, ICC-02/05-01/20-627-Conf, para. 40, *referring to* P-0643, P-0883, P-0885, P-0905, P-0987 and P-0994.

⁶¹ Eighth Application, ICC-02/05-01/20-627-Conf, para. 39, *referring to* Third Joint Agreed facts, ICC-02/05-01/20-504-AnxA, facts 11, 14-15; DAR-OTP-0218-0705-R02, para. 51.

⁶² Eighth Application, ICC-02/05-01/20-627-Conf, fn. 67.

⁶³ *See e.g.* DAR-OTP-0218-0705-R02, paras 17, 21-25, 27, 51-54, 58, 60, 72-73. *See also* Eighth Application, ICC-02/05-01/20-627-Conf, fn. 7.

P-0955

32. P-0955 is a civilian who provides evidence on the alleged attacks on Arawala and Forgo by the Militia/*Janjaweed* and GoS Forces. P-0955 further refers to alleged incidents in Deleig as well as to Mr Abd-Al-Rahman's identity and background.⁶⁴

33. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely (i) a list of P-0955's family members; (ii) a witness colour chart; (iii) a headdress board; (iv) a map sketched by P-0955; and (v) an interpreter certification relating to the remote interview.⁶⁵

34. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* examination).⁶⁶

35. The Defence objects to the introduction of this prior recorded testimony pursuant to Rule 68(3) of the Rules. It highlights the statement's references to (i) his knowledge of the identity of 'Ali Kushayb';⁶⁷ (ii) seeing Ali Kushayb at a pharmacy near Garsila market several times;⁶⁸ (iii) Ali Kushayb's physical appearance based on an encounter with him in Deleig;⁶⁹ (iv) [REDACTED];⁷⁰ (v) Ali Kushayb as the leader of the *Janjaweed*; and (vi) Ali Kushayb entering the house where [REDACTED].⁷¹ In its view, the details provided by P-0955's statement in support of the identification of Mr Abd-Al-Rahman as 'Ali Kushayb' and his direct implication in (uncharged) home searches in Garsila indicate this is unique evidence.

36. The Chamber notes the Prosecution's submission that P-0955's evidence is corroborative of and cumulative to that of other witnesses who will testify entirely *viva voce*. This concerns in particular the alleged (i) arrest of civilians in Garsila by Mr Abd-Al-Rahman and his men;⁷² (ii) search of Deleig and arrest of Fur men displaced to

⁶⁴ DAR-OTP-0220-0620-R02, paras 15-16, 18-27, 32-38, 40-43, 45-49, 51-53, 57.

⁶⁵ Eighth Application, ICC-02/05-01/20-627-Conf, para. 34.

⁶⁶ Eighth Application, ICC-02/05-01/20-627-Conf, paras 7, 35-36.

⁶⁷ Response, ICC-02/05-01/20-633-Conf, para. 15, *referring to* DAR-OTP-0220-0620-R02, paras 38, 53.

⁶⁸ Response, ICC-02/05-01/20-633-Conf, para. 15, *referring to* DAR-OTP-0220-0620-R02, para. 53.

⁶⁹ Response, ICC-02/05-01/20-633-Conf, para. 15, *referring to* DAR-OTP-0220-0620-R02, para. 35.

⁷⁰ Response, ICC-02/05-01/20-633-Conf, para. 15, *referring to* DAR-OTP-0220-0620-R02, para. 53.

⁷¹ Response, ICC-02/05-01/20-633-Conf, para. 15, *referring to* DAR-OTP-0220-0620-R02, paras 34-38, 42-43.

⁷² Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(a), *referring to* P-0643, P-0883, P-0973, P-0987 and P-0994.

Deleig from the surrounding areas;⁷³ (iii) detention and mistreatment of Fur civilian men in the open area near the Deleig police station;⁷⁴ (iv) loading of detainees onto vehicles, which drove out of Deleig and returned empty, and the repeating of this process multiple times;⁷⁵ (v) survival of several persons who were taken to execution sites;⁷⁶ (vi) detention of a group of community leaders in Deleig;⁷⁷ (vii) killing of a group of detainees, including several community leaders, in an area near Fere outside of Deleig;⁷⁸ (viii) identity and background of Mr Abd-Al-Rahman;⁷⁹ and (ix) the attack on Arawala.⁸⁰

37. As for the acts and conduct of the accused, and in addition to its previous conclusions,⁸¹ the Chamber notes the corroborative and/or cumulative nature of P-0955's statement in this regard.⁸² The Prosecution has also indicated that it intends to adduce *viva voce* testimonies of witnesses who provide more extensive evidence on this.⁸³ The Chamber further notes the Prosecution's submission that information provided by the witness on the accused's identity and background corroborates facts agreed between the parties.⁸⁴

38. The Chamber finds that P-0955's evidence is not unique or otherwise particularly significant in the body of the expected evidence on the charged crimes. The Chamber

⁷³ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(b), *referring to* P-0584, P-0671, P-0718, P-0907, P-0924, P-0973, P-0987 and P-0994.

⁷⁴ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(d), *referring to* P-0584, P-0671, P-0718, P-0879, P-0905, P-0907, P-0924, P-0931, P-0973, P-0987 and P-0994.

⁷⁵ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(f), *referring to* P-0584, P-0879, P-0905, P-0907, P-0924 P-0973, P-0987 and P-0994.

⁷⁶ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(h), *referring to* P-0584, P-0907, P-0924 and P-0987.

⁷⁷ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(i), *referring to* P-0973, P-0987 and P-0994.

⁷⁸ Eighth Application, ICC-02/05-01/20-627-Conf, para. 37(j), *referring to* P-0643, P-0671, P-0879, P-0883, P-0907, P-0973, P-0987, P-0924, P-0994 and P-1018.

⁷⁹ Eighth Application, ICC-02/05-01/20-627-Conf, para. 38(a), *referring to* P-0012, P-0589, P-0643, P-0769, P-0874, P-0878, P-0879, P-0883, P-0903, P-0905, P-0907, P-0921, P-0932, P-0973, P-0986, P-0987, P-0990 and P-0994.

⁸⁰ Eighth Application, ICC-02/05-01/20-627-Conf, para. 42, *referring to* P-0905.

⁸¹ 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.

⁸² See e.g. paragraph 36(i). See also Eighth Application, ICC-02/05-01/20-627-Conf, fn. 67, *referring to* Public Redacted Version of "Prosecution's sixth application under rule 68(3) to introduce into evidence prior recorded testimony of 21 witnesses", 3 February 2022, ICC-02/05-01/20-580-Conf, 8 February 2022, ICC-02/05-01/20-580-Red, para. 99, fn. 269.

⁸³ Eighth Application, ICC-02/05-01/20-627-Conf, para. 40, *referring to* P-0643, P-0883, P-0885, P-0905, P-0987 and P-0994.

⁸⁴ Eighth Application, ICC-02/05-01/20-627-Conf, para. 39, *referring to* Third Joint Agreed facts, ICC-02/05-01/20-504-AnxA, facts 11, 14-15; DAR-OTP-0220-0620-R02, paras 38, 53.

notes that the Prosecution seeks to clarify P-0955's basis of knowledge with regard to (i) Deleig incident, and Mr Abd-Al-Rahman's alleged presence and role in it; (ii) house searches and arrests of displaced persons, including [REDACTED]; and (iii) the alleged detention and subsequent killing of a group of community leaders outside of Deleig, including [REDACTED].⁸⁵

39. Accordingly, the Chamber is satisfied that the introduction of P-0955'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 identification of Mr Abd-Al-Rahman as 'Ali Kushayb' and his alleged direct implication in (uncharged) home searches in Garsila.

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

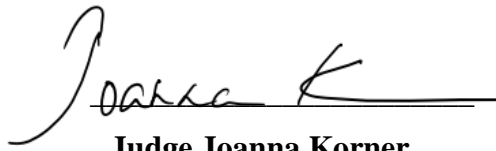
40. As regards the timing of supplementary examination, and bearing in mind the object and purpose of Rule 68(3) of the Rules, the Prosecution must streamline its examination in order to complete the formalities under this provision and conduct any supplementary questioning of each witness within the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

41. As anticipated in the Directions on the conduct of proceedings,⁸⁶ 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.

42. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber rejects the Prosecution's application in respect of witnesses P-0092 and P-0935, and authorises the introduction of the prior recorded testimonies of witnesses P-0591, P-0714 and P-0955, identified in the Eighth 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.


⁸⁵ Eighth Application, ICC-02/05-01/20-627-Conf, para. 35.

⁸⁶ Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478, para. 22.

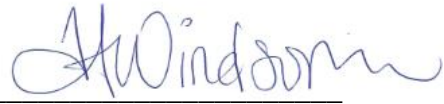


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 29 March 2022

At The Hague, The Netherlands