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**No. ICC-02/05-01/20
Date: 8 February 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 second and third requests 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 12 January 2022, the Office of the Prosecutor (the ‘Prosecution’) filed its second application to introduce pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), the prior recorded testimonies of five witnesses (P-0008, P-0044, P-0105, P-0114, and P-0755), related to alleged incidents in Mukjar, Deleig and surrounding areas (the ‘Second Request’).¹ The Prosecution also requested time for a supplementary examination of each witness.
2. On 19 January 2022, the Chamber granted the Defence’s request for an extension of time limit to respond to the Second Request pending the receipt of information related to three witnesses (P-0008, P-0044 and P-0105).²
3. On 20 January 2022, the Chamber issued its ‘First Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(3)’ (the ‘First Rule 68(3) Decision’), setting out the general framework for the introduction of prior testimonies pursuant to this provision.³
4. On 21 January 2022, the Prosecution filed its third application to introduce pursuant to Rule 68(3) of the Rules, the prior recorded testimonies of other four witnesses (P-0657, P-0673, P-0843 and P-0954) (the ‘Third Request’).⁴ The Prosecution also requested time for a supplementary examination of each witness.

¹ Prosecution’s second application under rule 68(3) to introduce into evidence prior recorded testimony of witnesses P-0008, P-0044, P-0105, P-0114, and P-0755, ICC-02/05-01/20-555-Conf with confidential annex A (hereinafter: ‘Second Request’). A public redacted version was filed on 14 January 2022, ICC-02/05-01/20-555-Red. A corrigendum of Annex A was filed on 18 January 2022, ICC-02/05-01/20-555-Conf-AnxA-Corr.

² E-mail from Trial Chamber I, 19 January 2022, at 13:19.

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

⁴ 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, ICC-02/05-01/20-560-Conf with confidential annex A (hereinafter: ‘Third Request’). A public redacted version was filed on 24 January 2022, ICC-02/05-01/20-560-Red.

5. On 31 January 2022, the Defence filed its response to the Second Request, opposing it in its entirety (the ‘Second Response’).⁵

6. On 2 February 2022, the Defence filed its response to the Third Request, opposing it in its entirety (the ‘Third Response’).⁶

II. Analysis

7. The Chamber refers to the general framework applicable to the assessment of requests for introduction of prior recorded statements pursuant to Rule 68(3) of the Rules.⁷

8. In the Second and Third Requests, the Prosecution notes that, after *inter partes* consultation, the Defence submits that the use of Rule 68(3) for any of the witnesses concerned is inappropriate, on the basis that their evidence relates to the identity of the accused and his acts and conduct.⁸ As regards this general objection from the Defence, the Chamber reiterates its conclusion in the First Rule 68(3) Decision, namely that the Rome Statute (the ‘Statute’) and Rule 68(3) of the Rules clearly foresee the introduction of prior recorded testimony for fact witnesses and on issues concerning the acts and conducts of the accused.⁹ The Chamber will nevertheless analyse individually each of the prior recorded testimonies of the seven witnesses concerned, bearing in mind the rights of the accused.

⁵ Defence’s Response to Request ICC-02/05-01/20-555-Conf, ICC-02/05-01/20-568-Conf (hereinafter: ‘Second Response’). A public redacted version was filed on 1 February 2022, ICC-02/05-01/20-568-Red.

⁶ 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, ICC-02/05-01/20-576-Conf (hereinafter: ‘Third Response’). A public redacted version was filed on 3 February 2022, ICC-02/05-01/20-576-Red.

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

⁸ Second Request, ICC-02/05-01/20-555-Conf, para. 53; Third Request, ICC-02/05-01/20-560-Conf, para. 40.

⁹ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf, para. 21.

Admissibility of witness statements taken in [REDACTED] and Sudan

9. In its Second Response, the Defence argues that the statements of P-0008, P-0044 and P-0105, which [REDACTED], are inadmissible. The Defence argues that since [REDACTED] was not a State Party to the Statute, and there was no agreement authorising the Court to perform activities on its territory at the time, all evidence collected is inadmissible. The Defence thus submits that all investigations on the territory of [REDACTED] at the time had no legal basis.

10. The Chamber further notes that in respect of [REDACTED], who was interviewed in Sudan [REDACTED], the Defence similarly suggests that since there was no special agreement pursuant to Article 4(2) of the Statute between the Court and Sudan at the time of the interview, the witness statement is also inadmissible.¹⁰

11. As regards the witnesses interviewed in [REDACTED], the Chamber notes the Defence's submission that it is yet to receive [REDACTED]. It also notes the Defence's submissions that, although the said [REDACTED] is yet to be disclosed, 'it is unlikely that it would equate to a valid "special agreement"'.¹¹ The Defence argues that the [REDACTED] (as reported by the Registry), is not a valid agreement under Article 4(2) of the Statute. On the basis that, at the time of the Second Response, the Defence had a pending request for leave to appeal on a related and almost identical issue, the Defence also states it has no choice but to reiterate its earlier submission with respect to the absence of valid Article 4(2) special agreement.¹²

12. The Chamber notes that since the filing of the Second Response, the aforesaid Defence's request for leave to appeal has been rejected.¹³ Although the question regarding P-0008, P-0044 and P-0105 relates to the cooperation of the Court with

¹⁰ Third Response, ICC-02/05-01/20-576-Conf, para. 5.

¹¹ Second Response, ICC-02/05-01/20-568-Conf, paras 7-8. The Chamber notes that only the parties, and if applicable, the participants, have disclosure obligations. Although the Registry may decide to transmit to the parties and participants [REDACTED], such information is not, *per se*, subject to disclosure.

¹² Second Response, ICC-02/05-01/20-568-Conf, paras 5-11.

¹³ Transcript of the hearing on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG. The impugned decision is: Decision on Defence submissions on cooperation with Sudan, 21 January 2022, ICC-02/05-01/20-561-Conf (hereinafter: 'Cooperation Decision'). A public redacted version was filed on that same date, ICC-02/05-01/20-561-Red)

[REDACTED] (whilst the Cooperation Decision relates to Sudan), some of the Chamber's findings in the Cooperation Decision are relevant to the Defence's Second Response, which are discussed below.

13. The Chamber reiterates its finding that the operational effectiveness of the cooperation regime within the relevant legal framework is a matter within the purview of the Registry.¹⁴ Moreover, the Chamber reiterates that a cooperation agreement can be qualified as such on the basis of its purpose, scope and contents, regardless of whether it refers to Article 4(2) of the Statute.¹⁵ The Chamber also notes that the statutory framework, particularly Article 87(5)(a) of the Statute, allows the Court to enter into *ad hoc* arrangements or agreements with non-State Parties and therefore to act in the territory of non-State Parties on the basis of such arrangements. Accordingly, arrangements were in place for the Court to operate, as confirmed by the Registry.¹⁶

14. As regards the Defence's suggestion that in respect of [REDACTED], there was no legal framework for the Court to operate or investigate in Sudan at the time of the interview, the Chamber recalls that the Court's jurisdiction to act in the territory of Sudan as of 31 March 2005 has been confirmed by the Appeals Chamber.¹⁷

15. The Chamber nonetheless notes that the Defence suggests, for [REDACTED] and also for P-0008, P-0044 and P-0105, that even if there was a legal framework for the Court to act in [REDACTED] or Sudan at the time the interview with the witnesses took place, it was insufficient.

16. Even *arguendo*, as regards the prior recorded testimonies of P-0008, P-0044, P-0105 and [REDACTED], were it to be established that there was an absence of a 'sufficient' legal framework with [REDACTED] or Sudan at the time of their interviews, no submissions are made to suggest in what way this could affect the reliability or probative value of their statements or associated material or how the

¹⁴ Cooperation Decision, ICC-02/05-01/20-561-Red, para. 38.

¹⁵ Cooperation Decision, ICC-02/05-01/20-561-Red, para. 23.

¹⁶ Second Response, ICC-02/05-01/20-568-Conf, para. 7, *referring to* e-mail from the Registry on 17 January 2022.

¹⁷ Cooperation Decision, ICC-02/05-01/20-561-Red, paras 17-18.

introduction of these testimonies of these four witnesses, based on such a reason would in any way affect the accused's right to a fair trial. The blanket exclusion of such evidence, as sought by the Defence, would be disproportionate *vis-à-vis* the Chamber's obligation to determine the truth, particularly if the introduction of the prior recorded statements pursuant to Rule 68(3) of the Rules, as will be analysed below, does not operate unfairly against the accused.

17. Accordingly, the Chamber rejects the Defence's general objection to the admissibility of the statements of P-0008, P-0044, P-0105 and P-0954.

P-0008

18. P-0008, a Fur civilian, is a witness of alleged incidents in Mukjar, particularly in relation to the charges of torture, other inhumane acts and outrages upon personal dignity. P-0008 also provides evidence on the contextual elements of the crimes, principally the armed conflict in Darfur and the structure of the Sudanese Armed Forces in Mukjar.¹⁸

19. As regards the accused, the witness's evidence refers to his position in the Militia/*Janjaweed* and his role as head of the *agids*; a meeting allegedly attended by the accused; his alleged participation in the attacks in Mukjar in August 2003; his alleged role in the recruitment of fighters; his alleged role in the establishment of checkpoints, beatings and execution of detainees and destruction of property in Mukjar at the time of the charges.¹⁹

20. The Prosecution does not seek to introduce any of P-0008's associated material into evidence.²⁰

21. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* examination).²¹

¹⁸ Second Request, ICC-02/05-01/20-555-Conf, paras 8-9.

¹⁹ Second Request, ICC-02/05-01/20-555-Conf, paras 8-11.

²⁰ Second Request, ICC-02/05-01/20-555-Conf, para. 8.

²¹ Second Request, ICC-02/05-01/20-555-Conf, paras 13-14.

22. The Defence argues that P-0008 provides evidence as regards a core and disputed issue of the Defence case (*i.e.* the alias ‘Ali Kushayb’), particularly in the context of incidents in Mukjar in August 2003. The Defence also submits the witness fails to identify a basis of knowledge.²² This factor alone does not bar the introduction of the witness’s prior recorded testimony pursuant to Rule 68(3) of the Rules, particularly since P-0008’s evidence as regards the accused does not appear to be unique or otherwise particularly significant, in the body of the expected evidence on the issue.

23. Moreover, the Chamber notes that the parties have agreed to facts relating to the biographical details of the accused, while other evidence of P-0008 (*i.e.* pertaining to the accused as leader of the Militia/*Janjaweed*) is not unique and appears to be corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.²³ The Chamber also notes the Prosecution’s submission that the evidence provided by P-0008 in relation to the alleged acts of torture, other inhuman acts and outrages upon personal dignity in Mukjar are corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.²⁴ It also submits that P-0008’s evidence related to [REDACTED] alleged arrest is corroborative, as [REDACTED] will testify *viva voce* about this (and also, as noted below, P-0114).²⁵

24. The Chamber is satisfied that the introduction of P-0008’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 still have ample opportunity to question the witness on issues identified as core to its case, particularly the identity of the accused, and in relation to P-0008, the witness’s basis of knowledge and possible contradictions in the witness’s account.

²² Second Response, ICC-02/05-01/20-568-Conf, paras 13-14.

²³ Second Request, ICC-02/05-01/20-555-Conf, paras 54-55, *referring to* P-0012, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

²⁴ Second Request, ICC-02/05-01/20-555-Conf, para. 50, *referring to* P-0012, P-0028, P-0029, P-0129, P-0188, P-0675, P-0720, P-0877, P-0892, P-0903, P-0905, P-0913, P-0919, P-0932, P-0976, P-0984, P-0990 and P-0992.

²⁵ Second Request, ICC-02/05-01/20-555-Conf, para. 50.

P-0044

25. P-0044, who according to the Prosecution was [REDACTED], provides testimony on the alleged incidents in Bindisi and Mukjar, particularly in relation to charges of torture, other inhumane acts and outrages upon personal dignity, as well as the contextual elements of the crimes and background information on the conflict. P-0044 also refers to the [REDACTED] structures in Darfur at the time of the charges.²⁶

26. As regards the accused, the witness's evidence refers to his identity; his alleged role in the Militia/*Janjaweed* under the leadership of Ahmad Muhammad Harun; and his alleged role in the attack on Bindisi and Mukjar in July-August 2003 and on Mukjar in August-September 2003.²⁷

27. Together with the witness statement, the Prosecution seeks the submission of associated material, namely an investigator's note related to the witness's [REDACTED].²⁸

28. The Prosecution requests one hour to conduct a supplementary examination (instead of the 2.5 hours estimated for *viva voce* examination).²⁹

29. The Chamber notes the Defence's submission that P-0044 provides evidence as regards a core and disputed issue of the Defence case, as is the alias 'Ali Kushayb', and in respect of P-0044, the time period between August 2003 and January 2004. The Chamber observes the Defence's submissions that P-00044 fails to identify a basis of knowledge ([REDACTED]) for the portions of his testimony related to the alleged role of the accused [REDACTED].³⁰ The Chamber also notes the Defence's submission that the evidence of P-0044 and P-0008 as regards the accused differ and lack a basis of knowledge.³¹ The Chamber further notes the Defence's submission that P-0044's evidence on the role of the accused in the alleged murder [REDACTED] in Mukjar requires clarification.³²

²⁶ Second Request, ICC-02/05-01/20-555-Conf, paras 16-17.

²⁷ Second Request, ICC-02/05-01/20-555-Conf, paras 16-17.

²⁸ Second Request, ICC-02/05-01/20-555-Conf, para. 18 and Annex A.

²⁹ Second Request, ICC-02/05-01/20-555-Conf, paras 19-21.

³⁰ Second Response, ICC-02/05-01/20-568-Conf, paras 15, 20.

³¹ Second Response, ICC-02/05-01/20-568-Conf, paras 16, 19.

³² Second Response, ICC-02/05-01/20-568-Conf, paras 17-18.

30. The Chamber is satisfied that the matters identified above by the Defence do not bar the introduction of the witness's prior recorded testimony pursuant to Rule 68(3) of the Rules, particularly since P-0044's evidence as regards the accused does not appear to be unique or otherwise particularly significant, in the body of the expected evidence on the issue. Indeed, as noted by the Prosecution, in addition to the agreed facts relating to the biographical details of the accused, the evidence of P-0044 pertaining to the accused as leader of the Militia/*Janjaweed*, is corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.³³ Furthermore, as recognised by the Defence,³⁴ the Prosecution seeks to clarify some of the issues above during its supplementary examination.³⁵

31. The Chamber further notes the Prosecution's submission that the evidence provided by the witness in relation to the alleged acts of torture, other inhuman acts and outrages upon personal dignity in Mukjar are corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.³⁶ Likewise, the Chamber notes the Prosecution's submission that P-0044's evidence on the charges of torture, other inhumane acts and outrages upon personal dignity in Deleig,³⁷ as the evidence on the charges of murder and attempted murder in alleged incidents in Mukjar³⁸ and Deleig,³⁹ is corroborative of, and cumulative to, the evidence provided by other witnesses who will also testify entirely *viva voce*.

32. The Chamber is satisfied that introduction of P-0044'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 still have full opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused, and in relation to P-0044, the parts of his account that appear to have no basis of knowledge

³³ Second Request, ICC-02/05-01/20-555-Conf, paras 54-55, *referring to* P-0012, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

³⁴ Second Response, ICC-02/05-01/20-568-Conf, para. 18.

³⁵ Second Request, ICC-02/05-01/20-555-Conf, para. 20.

³⁶ Second Request, ICC-02/05-01/20-555-Conf, para. 50, *referring to* P-0012, P-0028, P-0029, P-0129, P-0188, P-0675, P-0720, P-0877, P-0892, P-0903, P-0905, P-0913, P-0919, P-0932, P-0976, P-0984, P-0990 and P-0992.

³⁷ Second Request, ICC-02/05-01/20-555-Conf, para. 51, *referring to* P-0643, P-0883 and P-0905.

³⁸ Second Request, ICC-02/05-01/20-555-Conf, para. 52, *referring to* P-0129, P-0188, P-0675, P-0913, and P-0919.

³⁹ Second Request, ICC-02/05-01/20-555-Conf, para. 52, *referring to* P-0584, P-0907 and P-0924.

(or for which P-0044's [REDACTED]) or those parts of his testimony that appear to contradict other evidence on the record or require clarification.

P-0105

33. P-0105, a Fur civilian, provides evidence on alleged incidents in Mukjar and surrounding areas, particularly in relation to charges of torture, other inhumane acts, and outrages upon personal dignity. P-0105 also refers to the presence of Sudanese government forces and the Militia/*Janjaweed* in Mukjar, including the distribution of weapons and uniforms and training camps.⁴⁰

34. As regards the accused, the witness's evidence refers to his identity, his leadership role in the Militia/*Janjaweed*; his presence in Mukjar; and his participation in the arrests of males in Mukjar.⁴¹

35. Together with the witness statement, the Prosecution seeks the submission of associated material, namely a sketch drawn by the witness.⁴²

36. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3.5 hours estimated for *viva voce* examination).⁴³

37. The Defence submits that P-0105's evidence related to the background and position of the accused, and particularly the alias and his alleged role in the distribution of weapons, lacks a basis of knowledge.⁴⁴ It also submits the issue of the alias is a core and disputed issue of the Defence case.⁴⁵ The Defence also argues that P-0105's testimony contains references to events that are not charged and presents inconsistencies.⁴⁶

38. The Chamber is satisfied that the issues above do not bar its introduction pursuant to Rule 68(3) of the Rules, particularly since P-0105's evidence as regards the accused does not appear to be unique or otherwise particularly significant, in the body of the

⁴⁰ Second Request, ICC-02/05-01/20-555-Conf, paras 23-24.

⁴¹ Second Request, ICC-02/05-01/20-555-Conf, paras 23-24.

⁴² Second Request, ICC-02/05-01/20-555-Conf, paras 22-25 and Annex A.

⁴³ Second Request, ICC-02/05-01/20-555-Conf, paras 26-28.

⁴⁴ Second Response, ICC-02/05-01/20-568-Conf, paras 21-22.

⁴⁵ Second Response, ICC-02/05-01/20-568-Conf, para. 24.

⁴⁶ Second Response, ICC-02/05-01/20-568-Conf, para. 23.

expected evidence on the issue. For example, as observed by the Defence, P-0105's only direct contact with the accused appears to be sightings from afar, including during an alleged public speech.⁴⁷ Moreover, the Chamber notes the Prosecution's submission that in addition to the agreed facts relating to the biographical details of the accused, the evidence of P-0105 pertaining to the accused as leader of the Militia/*Janjaweed*, is corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.⁴⁸

39. The Chamber is satisfied that the introduction of P-0105'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 still have ample opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused, and in relation to P-0105's statement, the witness's basis of knowledge as well as any inconsistencies and contradictions identified by the Defence.

P-0114

40. P-0114, a Fur [REDACTED], provides evidence on alleged incidents in Kodoom, Bindisi, Mukjar and Deleig and other areas in Darfur, particularly in relation to charges of murder, attempt murder and persecution, as well as the contextual elements of the crimes. According to the Prosecution, P-0114 [REDACTED] the alleged incidents in West and South Darfur at the time of the charges, [REDACTED].⁴⁹ P-0114 also refers to the discriminatory speeches by Government of Sudan officials and its support for the Militia/*Janjaweed*.⁵⁰

41. As regards the accused, P-0114 [REDACTED] and refers to his alleged participation in attacks in Bindisi and Deleig, including his alleged participation in the torture of execution of men, and his alleged attendance of meetings with officials of the Government of Sudan.⁵¹

⁴⁷ Second Response, ICC-02/05-01/20-568-Conf, para. 22.

⁴⁸ Second Request, ICC-02/05-01/20-555-Conf, paras 54-55, *referring to* P-0012, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

⁴⁹ Second Request, ICC-02/05-01/20-555-Conf, paras 30-31.

⁵⁰ Second Request, ICC-02/05-01/20-555-Conf, paras 32, 34-35.

⁵¹ Second Request, ICC-02/05-01/20-555-Conf, paras 30-32, 34.

42. Together with the witness statement, the Prosecution seeks the submission of associated material, namely, records [REDACTED].⁵²

43. The Prosecution requests one hour to conduct a supplementary examination (instead of the 4.5 hours estimated for *viva voce* examination).⁵³

44. The Chamber notes the Defence's submission that P-0114's prior recorded testimony [REDACTED] and therefore P-0114 has no direct or personal knowledge of the person identified as 'Ali Kushayb' in his statement, although this is a core and disputed issue to the Defence case. The Defence further submits that P-0114's [REDACTED] is unclear and casts serious doubts on the probative value of this witness's statement and associated material.⁵⁴

45. The Chamber notes that indirect evidence is not, *per se*, barred from introduction via Rule 68(3) of the Rules.⁵⁵ The Chamber further notes the Prosecution's submission that the evidence provided by P-0114 in relation to the alleged acts of torture, other inhuman acts and outrages upon personal dignity in Mukjar are corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.⁵⁶ For example, as regards P-0114's evidence related to [REDACTED] alleged arrest, the Prosecution states it is corroborative of the evidence to be provided *viva voce* by [REDACTED] (and also, as noted above, of P-0008's evidence).⁵⁷

46. As regards the evidence related to the identity of the accused and the alias 'Ali Kushayb', the Chamber notes the Prosecution's submission that in addition to the agreed facts relating to the biographical details of the accused, the evidence of P-0114

⁵² Second Request, ICC-02/05-01/20-555-Conf, paras 33, 36 and Annex A.

⁵³ Second Request, ICC-02/05-01/20-555-Conf, paras 38-40.

⁵⁴ Second Response, ICC-02/05-01/20-568-Conf, paras 25-27.

⁵⁵ See 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, paras 106-107. The Appeals Chamber referred to ICTY, *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, IT-95-14/1, para. 15.

⁵⁶ Second Request, ICC-02/05-01/20-555-Conf, para. 50, referring to P-0012, P-0028, P-0029, P-0129, P-0188, P-0675, P-0720, P-0877, P-0892, P-0903, P-0905, P-0913, P-0919, P-0932, P-0976, P-0984, P-0990 and P-0992.

⁵⁷ Second Request, ICC-02/05-01/20-555-Conf, para. 50.

pertaining to the accused as leader of the Militia/*Janjaweed*, is corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.⁵⁸

47. The Chamber is satisfied that the introduction of P-0114'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 still have the opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused, and in relation to P-0114's testimony, [REDACTED], as well as the basis of knowledge for any assertions contained in the statement and the associated material to be introduced via this witness.

P-0755

48. P-0755, a Fur civilian, provides evidence on alleged incidents in Mukjar and surrounding areas, particularly in relation to charges of torture, other inhumane acts and outrages upon personal dignity. P-0755 also refers to alleged mass graves [REDACTED], and 'gates' around Mukjar and searches to locate and arrest displaced males.⁵⁹

49. As regards the accused, P-0755's evidence refers to the accused's alleged presence in Mukjar and his interaction with Ahmad Muhammad Harun at the time of the charges; his alleged instructions to the police to arrest individuals coming from Sindu; and his alleged participation in the beating and execution of detainees, including [REDACTED].⁶⁰

50. Together with the witness statement, the Prosecution seeks the submission of associated material, namely a form signed by the P-0755 and images shown to the witness during the interview.⁶¹

⁵⁸ Second Request, ICC-02/05-01/20-555-Conf, paras 54-55, *referring to* P-0012, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

⁵⁹ Second Request, ICC-02/05-01/20-555-Conf, paras 42-44.

⁶⁰ Second Request, ICC-02/05-01/20-555-Conf, paras 42-44.

⁶¹ Second Request, ICC-02/05-01/20-555-Conf, paras 41, 45 and Annex A.

51. The Prosecution requests one hour to conduct a supplementary examination (instead of the 3 hours estimated for *viva voce* examination).⁶²

52. The Chamber notes the Defence's submission that P-0755's evidence as regards the accused and the alias 'Ali Kushayb' is mostly hearsay, although this is a core and disputed issue to the Defence case.⁶³ In this regard, the Chamber reiterates that indirect evidence is not, *per se*, barred from introduction via Rule 68(3) of the Rules.⁶⁴ The Chamber further notes the Prosecution's submission that the evidence provided by the witness in relation to the alleged acts of torture, other inhuman acts and outrages upon personal dignity in Mukjar are corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.⁶⁵ As regards the accused, the Chamber notes that in addition to the agreed facts relating to the biographical details of the accused, the Prosecution submits that evidence of P-0755 pertaining to the accused as leader of the Militia/*Janjaweed*, is corroborative of, and cumulative to, the evidence provided by other witnesses who will testify entirely *viva voce*.⁶⁶

53. The Chamber is satisfied that the introduction of P-0755'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 still have ample opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused, as well as the basis of knowledge for any assertions contained in P-0755's statement.

P-0657

54. P-0657, a Fur civilian, is a [REDACTED] who provides evidence related to the accused's background, physical description and residence and pharmacy in Garsila.⁶⁷

⁶² Second Request, ICC-02/05-01/20-555-Conf, paras 46-48.

⁶³ Second Response, ICC-02/05-01/20-568-Conf, paras 28-30.

⁶⁴ See para. 45 above.

⁶⁵ Second Request, ICC-02/05-01/20-555-Conf, para. 50, *referring to* P-0012, P-0028, P-0029, P-0129, P-0188, P-0675, P-0720, P-0877, P-0892, P-0903, P-0905, P-0913, P-0919, P-0932, P-0976, P-0984, P-0990 and P-0992.

⁶⁶ Second Request, ICC-02/05-01/20-555-Conf, paras 54-55, *referring to* P-0012, P-0092, P-0129, P-0643, P-0878, P-0903, P-0907 and P-0987.

⁶⁷ Third Request, ICC-02/05-01/20-560-Conf, para. 9.

Although the witness also refers in his statement to other issues, including [REDACTED],⁶⁸ it appears from the Third Request that the Prosecution does not intend to rely on these other aspects of the P-0657's testimony.⁶⁹

55. Together with the witness statement, the Prosecution seeks the submission of associated material, namely eleven items, including an interview note as well as images and sketches discussed with the witness during the interview.⁷⁰

56. The Prosecution requests one hour to conduct a supplementary examination (instead of the three hours estimated for *viva voce* examination).⁷¹

57. The Chamber notes the Defence's general submission that P-0657's statement, as that of other witnesses subject to the Third Request, is unreliable as the witness was interviewed for several days and there 'is simply no way of knowing what conversations took place', whether the witness was instructed not to discuss the evidence provided, or whether the witness was asked leading questions or whether the interviewers, even inadvertently, influenced the answers.⁷² The Defence also submits that the amount of time to be saved (one third of the estimated time) is nugatory.⁷³ The Defence further asserts that since P-0657 provides evidence on a contested issue that 'goes to the heart of the Prosecution's case', as is the identity of the accused as Ali Kushayb, the witness should be called to testify entirely *viva voce*.⁷⁴

58. The Chamber notes that the Prosecution intends to rely on P-0657 namely for the purpose of the identification of the accused.⁷⁵ Although the issue of the accused's alias has been identified by the Defence as an issue it will contest in trial, this issue is not, as suggested by the Defence, 'the heart of the Prosecution case', as reflected in the Trial Brief submitted before the Chamber.⁷⁶ Moreover, Chamber notes the Prosecution's

⁶⁸ [REDACTED].

⁶⁹ See also Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Exp-Anx2, pp. 25-26.

⁷⁰ Third Request, ICC-02/05-01/20-560-Conf, paras 9-10 and Annex A.

⁷¹ Third Request, ICC-02/05-01/20-560-Conf, paras 11-13.

⁷² Third Response, ICC-02/05-01/20-576-Conf, paras 7-8.

⁷³ Third Response, ICC-02/05-01/20-576-Conf, paras 9-10.

⁷⁴ Third Response, ICC-02/05-01/20-576-Conf, paras 12-14.

⁷⁵ Prosecution's submission of the List of Witnesses and the List of Evidence, 5 January 2022, ICC-02/05-01/20-551-Conf-Exp-Anx2, pp. 26-27.

⁷⁶ See Prosecution's Trial Brief, ICC-02/05-01/20-550-Conf-Red, paras 2-26.

submission that P-0657's statement is cumulative to, and corroborated by other witnesses who will testify entirely *viva voce*.⁷⁷ Likewise, the Chamber notes that according to the Prosecution, the parties have agreed on at least 19 facts related to the accused's background that corroborate this witness's testimony.⁷⁸

59. The Chamber is satisfied that the introduction of P-0657'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 still have ample opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused. The circumstances of the interview process, raised by the Defence in their submissions (for the first time) are no more than pure speculation and are matters which may be dealt with in the normal course of cross-examination

P-0673

60. P-0673, a Fur civilian, is an eyewitness who provides evidence on alleged incidents in Deleig, in relation to charges of murder and persecution and the contextual elements of the crimes, particularly the alleged arrest and execution of [REDACTED]. P-0673 also refers to an alleged speech of Ahmad Muhammad Harun in Mukjar in August 2003.⁷⁹

61. As regards the accused, the witness's evidence refers to his identity and physical appearance (at the time [REDACTED] were allegedly arrested and at a later stage when the witness allegedly [REDACTED]).⁸⁰

62. Together with the witness statement, the Prosecution seeks the submission of associated material, namely three sketches and a signed acknowledgement used by the witness during the interview.⁸¹

⁷⁷ Third Request, ICC-02/05-01/20-560-Conf, para. 34, *referring to* P-0589, P-0643, P-0874, P-0879, P-0905, P-0907, P-0932, P-0955, P-0973, P-0986, P-0987, P-0990 and P-0994.

⁷⁸ Third Request, ICC-02/05-01/20-560-Conf, para. 38.

⁷⁹ Third Request, ICC-02/05-01/20-560-Conf, paras 14-15.

⁸⁰ Third Request, ICC-02/05-01/20-560-Conf, paras 14-15. *See* [REDACTED].

⁸¹ Third Request, ICC-02/05-01/20-560-Conf, paras 14, 16 and Annex A.

63. The Prosecution requests one hour to conduct a supplementary examination (instead of the three hours estimated for *viva voce* examination).⁸²

64. As noted above, the Defence makes a general submission that P-0673's statement, as that of other witnesses subject to the Third Request, is unreliable and the amount of time to be saved (one third of the estimated time) is nugatory.⁸³ The Defence also submits that since P-0673 provides evidence on a contested issue that 'goes to the heart of the Prosecution's case', as is the identity of the accused as Ali Kushayb, the witness should be called to testify entirely *viva voce*.⁸⁴

65. The Chamber notes the Prosecution's submission that P-0673's evidence related to the identity and physical description of the accused, the contextual elements and the charges crimes is cumulative to, and corroborated by, other witnesses who will testify entirely *viva voce*.⁸⁵ Additionally, as regards the identity and alias of the accused, the Chamber notes that according to the Prosecution the parties have agreed on at least 19 facts related to the accused's background that corroborate P-0673's testimony.⁸⁶ Furthermore, the Chamber is satisfied that P-0673's testimony is not unique or otherwise particularly significant, in the body of expected evidence on the issue.

66. The Chamber is satisfied that introduction of P-0673'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 still have full opportunity to question the witness on issues identified as core for its case, particularly the identity of the accused, as well as general issues of reliability of the interview process and witness statement raised by the Defence.

P-0843

67. P-0843, a [REDACTED], provides evidence on the alleged incidents in Deleig, particularly in relation to charges of persecution, sexual violence and the contextual

⁸² Third Request, ICC-02/05-01/20-560-Conf, paras 17-19.

⁸³ See para. 59 above. Third Response, ICC-02/05-01/20-576-Conf, paras 9-10.

⁸⁴ Third Response, ICC-02/05-01/20-576-Conf, paras 15-16.

⁸⁵ Third Request, ICC-02/05-01/20-560-Conf, para. 35, *referring to* P-0012, P-0015 and P-0878.

⁸⁶ Third Request, ICC-02/05-01/20-560-Conf, para. 38.

elements of the crimes. The witness also refers to the presence of Government Forces of Sudan in Garsila at the time of the charges.⁸⁷

68. As regards the accused, the witness's evidence refers to his identity and background; his alleged leadership in the Militia/*Janjaweed*; his alleged use of discriminatory language and [REDACTED].⁸⁸

69. Together with the witness statement, the Prosecution seeks the submission of associated material, namely twelve items that include [REDACTED], handwritten notes, a letter and [REDACTED].⁸⁹

70. The Prosecution requests one hour to conduct a supplementary examination (instead of the three hours estimated for *viva voce* examination).⁹⁰

71. As noted above, the Defence makes a general submission that P-0843 statement, as that of other witnesses subject to the Third Request, is unreliable and the amount of time to be saved (one third of the estimated time) is nugatory.⁹¹ The Defence also submits that since the witness provides evidence on a contested issue that 'goes to the heart of the Prosecution's case', as is the identity of the accused as Ali Kushayb, the witness should be called to testify entirely *viva voce*.⁹² The Defence also submits that this witness has [REDACTED] and is thus a '*prima facie* damaging witness' that should be called to testify in the courtroom.⁹³

72. The Chamber notes that parts of P-0843's evidence is cumulative to, and corroborated by, other witnesses that will testify entirely *viva voce*.⁹⁴ As regards the accused, the parties have agreed on at least 19 facts related to the accused's background that may corroborate P-0843's testimony.⁹⁵ P-0843 may provide unique testimony, [REDACTED].⁹⁶ [REDACTED].⁹⁷ Although these factors are not, *per se*, an obstacle

⁸⁷ Third Request, ICC-02/05-01/20-560-Conf, paras 20-21.

⁸⁸ Third Request, ICC-02/05-01/20-560-Conf, paras 20-21.

⁸⁹ Third Request, ICC-02/05-01/20-560-Conf, paras 20, 22 and Annex A.

⁹⁰ Third Request, ICC-02/05-01/20-560-Conf, paras 23-25.

⁹¹ See para. 59 above. Third Response, ICC-02/05-01/20-576-Conf, paras 9-10.

⁹² Third Response, ICC-02/05-01/20-576-Conf, paras 17, 20.

⁹³ Third Response, ICC-02/05-01/20-576-Conf, paras 18-19.

⁹⁴ Third Request, ICC-02/05-01/20-560-Conf, para. 36, *referring to* P-0012, P-0041, P-0547, P-0589, P-0883, P-0984 and P-1021.

⁹⁵ Third Request, ICC-02/05-01/20-560-Conf, para. 38.

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

to authorise the introduction of evidence under Rule 68(3) of the Rules, in the instant case, P-0843's evidence appears to be in this aspect unique and different to that of other witnesses expected to testify about the accused and his identity. Accordingly, the Chamber, in the particular circumstances, determines that it is preferable that the entirety of P-0843's evidence is heard *viva voce*.

P-0954

73. P-0954, a [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 [REDACTED] and his alleged involvement in funding and supplying weapons.⁹⁸

74. Together with the witness statement, the Prosecution seeks the submission of one associated material, namely a note written by the witness.⁹⁹

75. The Prosecution requests two hours to conduct a supplementary examination (instead of the five hours estimated for *viva voce* examination).¹⁰⁰

76. The Chamber notes the Defence's submission that P-0954 provides evidence on a contested issue that 'goes to the heart of the Prosecution's case', as is the identity of the accused as Ali Kushayb, the witness should be called to testify entirely *viva voce*.¹⁰¹ The Defence further submits that P-0954, who claims to be a [REDACTED] acknowledges he does not know the accused's identity. The Defence argues that P-0954's evidence 'contributes to casting doubts about the link' between the accused and the alias Ali Kushayb.¹⁰²

77. The Chamber notes the Prosecution's submission that the evidence provided by P-0954 related to the accused's identity and his individual criminal responsibility and on the contextual elements of the crimes is cumulative to, and corroborated by, other

⁹⁸ Third Request, ICC-02/05-01/20-560-Conf, paras 27-29.

⁹⁹ Third Request, ICC-02/05-01/20-560-Conf, para. 26 and Annex A.

¹⁰⁰ Third Request, ICC-02/05-01/20-560-Conf paras 30-32.

¹⁰¹ Third Response, ICC-02/05-01/20-576-Conf, paras 22, 25.

¹⁰² Third Response, ICC-02/05-01/20-576-Conf, paras 23-24.

witnesses who will testify entirely *viva voce*.¹⁰³ The Chamber also notes that the parties have agreed on at least 19 facts related to the accused's background that may corroborate the witness's testimony.¹⁰⁴

78. Nonetheless, the Chamber notes that according to the Prosecution, P-0954 could have been [REDACTED]. P-0954 is therefore [REDACTED] who could provide unique evidence not only as regards the identity of the accused, but also on matters of individual criminal responsibility. Although these factors are not, *per se*, an obstacle to authorise the introduction of evidence under Rule 68(3) of the Rules, in the instant case, P-0954's evidence appears to be in this aspect unique and different to that of other witnesses expected to testify about the accused and his identity and his individual criminal responsibility. Accordingly, the Chamber, in the particular circumstances, determines that it is preferable that the entirety of P-0954's evidence is heard *viva voce*.

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

79. 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.

80. As anticipated in the Directions on the conduct of proceedings,¹⁰⁵ 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.

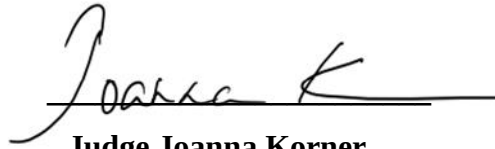
81. For the reasons above, and given the nature and content of the witness statements and associated material, the Chamber authorises the introduction of the prior recorded testimonies of P-0008, P-0044, P-0105, P-0114, P-0755, P0657 and P-0673, identified in the Second and Third Requests and their corresponding annexes, pursuant to Rule 68(3) of the Rules. The Chamber's preliminary ruling is subject to witnesses'

¹⁰³ Third Request, ICC-02/05-01/20-560-Conf, para. 37, *referring to* P-0011, P-0103, P-0117, P-0131, P-0140, P-0547, P-0584, P-0591, P-0643, P-0671, P-0769, P-0874, P-0883, P-0885, P-0905, P-0921, P-0935, P-0973, P-0976, P-0984, P-0992, P-0994 and P-1021.

¹⁰⁴ Third Request, ICC-02/05-01/20-560-Conf, para. 38.

¹⁰⁵ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 22.

appearance before the Chamber and their consent to the introduction of their testimony pursuant to this provision. For the reasons above, the Chamber rejects the Third Request in respect of P-0843 and P-0954.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 8 February 2022

At The Hague, The Netherlands