



Original: English

**No. ICC-02/05-01/20
Date: 11 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 the
Second Decision on the Prosecution's requests to introduce prior recorded
testimonies under Rule 68(2)(b)**

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

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I. Procedural History

1. On 8 September 2021, Trial Chamber I (the ‘Chamber’) set the commencement of trial and corresponding deadlines thereto.¹
2. On 4 October 2021, the Chamber adopted the ‘Directions on the conduct of proceedings’, setting out, *inter alia*, the procedure to submit applications pursuant to Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’) and establishing the deadlines for such applications on 5 January 2022.²
3. On 12 November 2021, noting the agreement among the parties, the Chamber granted the Prosecution’s request for an extension of time limit to submit applications pursuant to Rule 68 of the Rules until 3 February 2022.³
4. 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.⁴
5. On 2 February 2022, the Prosecution filed its third application to introduce the prior recorded testimonies of witnesses P-0010, P-0016, P-0039 and P-0040, pursuant to Rule 68(2)(b) of the Rules.⁵ On the same day, the Prosecution filed its fourth application regarding witnesses P-0756, P-0816, P-0867 and P-0927.⁶ The Defence

¹ Transcript of hearing on 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

² Directions on the conduct of proceedings, ICC-02/05-01/20-478, paras 46-48 (hereinafter: ‘Directions on the conduct of proceedings’).

³ Transcript of hearing on 12 November 2021, ICC-02/05-01/20-T-017-CONF-ENG, p. 28, line 21 to p. 29, line 14.

⁴ First Rule 68(3) Decision, ICC-02/05-01/20-559-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-559-Red.

⁵ Prosecution’s third application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0010, P-0016, P-0039 and P-0040, ICC-02/05-01/20-571-Conf with confidential Annex A. A public redacted version was notified on the same date, ICC-02/05-01/20-571-Red (hereinafter: ‘Third Rule 68(2)(b) Request’).

⁶ Prosecution’s fourth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0756, P-0816, P-0867 and P-0927, ICC-02/05-01/20-573-Conf with confidential Annex A. A public redacted version was notified on 7 February 2022, ICC-02/05-01/20-573-Red (hereinafter: ‘Fourth Rule 68(2)(b) Request’).

opposed the introduction of the prior recorded testimonies of witnesses P-0039 and P-0040,⁷ and the fourth application in its entirety.⁸

6. On 3 February 2022, the Prosecution filed its fifth application to introduce the prior recorded testimonies of witnesses P-0096, P-0120 and P-0558, pursuant to Rule 68(2)(b) of the Rules.⁹ The Defence opposed the request in its entirety.¹⁰

7. On 2 March 2022, the Chamber issued its first Rule 68(2)(b) decision related to the first and second Rule 68(2)(b) requests (the ‘First Rule 68(2)(b) Decision’).¹¹

II. Analysis

A. General framework

8. Rule 68(1) and (2) of the Rules, together with Articles 64(2), 67(1)(c) and 69(2) of the Rome Statute (the ‘Statute’), provide the legal framework for the determination of the present requests.

9. The Chamber refers to the general framework, as established in its First Rule 68(3) Decision, which is applicable to the assessment of requests for introduction of prior recorded statements pursuant to Rule 68 of the Rules.¹² The Chamber further refers to the legal framework specific to Rule 68(2)(b) of the Rules, as established in its First Rule 68(2)(b) Decision.¹³

⁷ Defence response to Prosecution’s third application under rule 68(2)(b) (witnesses P-0010, P-0016, P-0039 and P-0040), ICC-02/05-01/20-571, 14 February 2022, ICC-02/05-01/20-595-Conf. A public redacted version was notified on 16 February 2022, ICC-02/05-01/20-595-Red (hereinafter: ‘Third Response’).

⁸ Defence response to Prosecution’s fourth application under rule 68(2)(b) (witnesses P-0756, P-0816, P-0867, and P-0927), ICC-02/05-01/20-573, 9 February 2022, ICC-02/05-01/20-589-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-589-Red (hereinafter: ‘Fourth Response’).

⁹ Prosecution’s fifth application under rule 68(2)(b) to introduce into evidence prior recorded testimony of witnesses P-0096, P-0120 and P-0558, ICC-02/05-01/20-579-Conf with confidential Annex A. A public redacted version was notified on 7 February 2022, ICC-02/05-01/20-579-Red (hereinafter: ‘Fifth Rule 68(2)(b) Request’).

¹⁰ Defence response to Prosecution’s fifth application under rule 68(2)(b) (witnesses P-0096, P-0120, and P-0558), ICC-02/05-01/20-579, 11 February 2022, ICC-02/05-01/20-592-Conf. A public redacted version was notified on 13 February 2022, ICC-02/05-01/20-592-Red (hereinafter: ‘Fifth Response’).

¹¹ First Decision on the Prosecution’s requests to introduce prior recorded testimonies under Rule 68(2)(b), ICC-02/05-01/20-612-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-612-Red.

¹² First Rule 68(3) Decision, ICC-02/05-01/20-559-Red, paras 7-11, 15.

¹³ First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Red, paras 11-19.

B. General objections raised by the Defence

10. The Chamber notes the Defence general objections regarding the use of Rule 68(2)(b).¹⁴ These general objections are repetitive of those made by the Defence in respect of two earlier requests under Rule 68(2)(b) of the Rules, and which have since been rejected in the First Rule 68(2)(b) Decision.¹⁵ The Chamber incorporates by reference its previous ruling on such objections. As stated in the First Rule 68(2)(b) Decision, the Chamber will consider, on a case-by-case basis, whether the concerned prior recorded testimonies have sufficient indicia of reliability, as required under Rule 68(2)(b)(i) of the Rules.

11. The Chamber also reiterates that factors raised by the Defence, particularly the lack of cross-examination, can and will be considered by the Chamber in its assessment of the probative value and weight to be given to these testimonies in the context of the judgment pursuant to Article 74 of the Statute.¹⁶

C. The prior recorded testimonies to be submitted pursuant to Rule 68(2)(b) of the Rules

P-0010

12. P-0010 is a civilian eyewitness of alleged attacks by the Government of Sudan (the ‘GoS’) Forces and the Militia/*Janjaweed* on Arawala. The Prosecution submits that the statement is relevant to the contextual elements of crimes against humanity.¹⁷

13. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely photographs, an interpreter’s certification, maps and drawings used during the interview.¹⁸

14. The Defence does not oppose the request to introduce the evidence of witness P-0010 under Rule 68(2)(b) of the Rules.¹⁹

¹⁴ Third Response, ICC-02/05-01/20-595-Red, paras 5-6, 9-14; Fourth Response, ICC-02/05-01/20-589-Red, paras 5, 8-12; Fifth Response, ICC-02/05-01/20-592-Red, paras 5, 8-12.

¹⁵ First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Conf, paras 20-27.

¹⁶ First Rule 68(2)(b) Decision, ICC-02/05-01/20-612-Red, para. 27.

¹⁷ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, paras 9-10.

¹⁸ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para.11 and Annex A.

¹⁹ Third Response, ICC-02/05-01/20-595-Conf, para. 1.

15. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0010 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.²⁰

16. The Chamber notes the Prosecution's submission that P-0010's evidence regarding the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population, is cumulative to and corroborated by *viva voce* witnesses.²¹

17. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0010's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0016

18. P-0016 is a civilian who refers to the alleged attack by GoS Forces and the Militia/*Janjaweed* on Arawala. The Prosecution submits that the statement is relevant to the contextual elements of crimes against humanity.²²

19. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely a sketch of Arawala that P-0016 drew during the interview.²³

20. The Defence does not oppose the request to introduce the evidence of witness P-0016 under Rule 68(2)(b) of the Rules.²⁴

21. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0016 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.²⁵

²⁰ DAR-OTP-0088-0306-R01, pp. 22-24.

²¹ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 26. The Prosecution refers to the following witnesses as being corroborative of and cumulative to this evidence: P-0129, P-0584, P-0675, P-0718, P-0878, P-0907 and P-1021.

²² Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, paras 12-13.

²³ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 14 and Annex A.

²⁴ Third Response, ICC-02/05-01/20-595-Conf, para. 1.

²⁵ DAR-OTP-0088-0150-R02, paras 77-84.

22. The Chamber observes that the Prosecution does not seek to rely on paragraph 40 of P-0016's statement, in which P-0016 provides a physical description of 'Ali KOSHIP'.²⁶ Consequently, the Chamber will not take this part of the witness statement into account to establish the acts and conduct of the accused for the purpose of its judgment.

23. The Chamber notes the Prosecution's submission that P-0016's evidence regarding the contextual elements of crimes against humanity, in particular the widespread and systematic nature of the attack on the civilian population, is cumulative to and corroborated by *viva voce* witnesses.²⁷

24. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0016's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0039

25. P-0039, a civilian from Beida, refers to the local administrative structure of Beida and the alleged involvement of GoS and Militia/*Janjaweed* in incidents therein. The Prosecution submits that the statement is relevant to the contextual elements of crimes against humanity, in particular the alleged GoS supply and support to the Militia/*Janjaweed*.²⁸

26. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely a map of Beida, [REDACTED], [REDACTED] and some photographs.²⁹

27. The Defence disputes the Prosecution's characterisation of P-0039's evidence as pertaining solely to the contextual elements of crimes against humanity and submits that the evidence in question relates to core issues materially in dispute.³⁰

²⁶ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 15, *referring to* DAR-OTP-0088-0150-R02, para. 40.

²⁷ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 26. The Prosecution refers to the following witnesses as being corroborative of and cumulative to this evidence: P-0129, P-0584, P-0675, P-0718, P-0878, P-0907 and P-1021.

²⁸ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, paras 16-17.

²⁹ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 18 and Annex A.

³⁰ Third Response, ICC-02/05-01/20-595-Conf, para. 16.

28. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0039 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.³¹

29. The Chamber notes the Prosecution's submission that P-0039's evidence regarding the background of the armed conflict in Darfur and the contextual elements of crimes against humanity is cumulative to and corroborated by *viva voce* witnesses.³² In particular, the Prosecution seeks to rely on P-0039's evidence, among that of other witnesses, to establish that members of non-Arab tribes were often told that the police had insufficient resources to investigate their allegations.³³

30. Although, as noted by the Defence, parts of P-0039's evidence relate to issues that are materially in dispute,³⁴ the Chamber is of the view that, in the particular circumstances, the evidence of P-0039 is not unique or significant so as to preclude introduction of his statement under Rule 68(2)(b) of the Rules. Moreover, the witness's testimony makes no mention of the accused or his acts and conduct.

31. The Chamber acknowledges that parts of P-0039's evidence the Defence refers to in its Response is based on hearsay.³⁵ In line with the Chamber's Directions on the conduct of proceedings, full consideration of the standard evidentiary criteria for material introduced into evidence, in particular in terms of its relevance and probative value, is deferred to the Chamber's deliberation for its judgment pursuant to Article 74 of the Statute.³⁶

³¹ DAR-OTP-0094-0270-R02, paras 128-138.

³² Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to this evidence: P-0117, P-0131, P-0140, P-0547, P-0976 and P-0984.

³³ Corrected Version of "Prosecution's Trial Brief", 5 January 2022, ICC-02/05-01/20-550-Conf-Exp, 21 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr, para. 74, fn. 311. A public redacted version was notified on 4 February 2022, ICC-02/05-01/20-550-Corr-Red2 (hereinafter: 'Prosecution's Trial Brief'). 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 (confidential redacted version filed on the same date, ICC-02/05-01/20-551-Conf-Anx2-Red), p. 7.

³⁴ DAR-OTP-0094-0270-R02, paras 27-31, 41, 43-54, 66-70, 72, 77-79, 82-89, 100, 107-111, 114, 123-124.

³⁵ DAR-OTP-0094-0270-R02, paras 29-31, 41, 53, 82, 86, 89, 100, 107, 114, 123-124.

³⁶ Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 25.

32. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0039's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0040

33. P-0040 is a [REDACTED]. The Prosecution submits that the statement is relevant to the understanding of the background of the armed conflict in Darfur and the contextual elements of war crimes and crimes against humanity, in particular the alleged GoS support to the Militia/*Janjaweed*.³⁷

34. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely [REDACTED] and a timeline of burned villages in Darfur from 1996 to 2003.³⁸

35. The Defence objects to the Prosecution's characterisation of P-0040's evidence as pertaining solely to the contextual elements of war crimes and crimes against humanity, and claims that parts of his evidence do in fact relate to core issues materially in dispute.³⁹

36. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0040 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁴⁰

37. The Chamber notes the Prosecution's submission that P-0040's evidence regarding the background of the armed conflict in Darfur and the contextual elements of crimes against humanity is cumulative to and corroborated by *viva voce* witnesses.⁴¹ In particular, the Prosecution seeks to rely on P-0040's evidence, among that of other witnesses, to establish the roles of *nazir*, *emir* and *agids*;⁴² Mr Harun's speech in Al

³⁷ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, paras 19-20.

³⁸ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 22 and Annex A.

³⁹ Third Response, ICC-02/05-01/20-595-Conf, para. 19. DAR-OTP-0094-0165-R02, paras 36-38, 40-44, 54-57, 125.

⁴⁰ DAR-OTP-0094-0165-R02, paras 127-136.

⁴¹ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, para. 27. The Prosecution refers to the following witnesses as being corroborative of and cumulative to this evidence: P-0117, P-0131, P-0140, P-0547, P-0976 and P-0984.

⁴² Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 29, fns 132 and 138.

Geneina in July 2003;⁴³ benefits of State sponsorship and legitimisation conferred on the Militia/*Janjaweed* by the Government of Sudan;⁴⁴ and the denial of access to government resources to members of the Fur tribe.⁴⁵

38. Although, as noted by the Defence, parts of P-0040's evidence relate to issues that are materially in dispute, the Chamber is of the view that, in the particular circumstances, the evidence of P-0040 is not so unique or significant as to preclude introduction of his statement under Rule 68(2)(b) of the Rules. Moreover, the witness's testimony makes no mention of the accused or his acts and conduct.

39. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0040's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0756

40. P-0756 is a civilian who refers to the Militia/*Janjaweed* and the Sudanese Liberation Army/Movement. The Prosecution submits that this statement is relevant to the contextual elements of crimes against humanity and to the alleged crimes of murder and attempted murder in Mukjar and surrounding areas.⁴⁶ The Prosecution does not intend to rely on paragraphs 62 to 68 of the witness statement which it submits refer to the accused.⁴⁷

41. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely a witness colour chart, a headdress board and an investigation report to estimate the height of Mr Abd-Al-Rahman.⁴⁸

42. The Defence objects to the Prosecution's submission that P-0756's evidence pertains solely to the contextual elements of crimes against humanity and to the charged

⁴³ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 63, fn. 271.

⁴⁴ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 71, fns 295 and 297.

⁴⁵ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 72, fn. 307. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, pp. 7-8.

⁴⁶ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, paras 11-13.

⁴⁷ Third Rule 68(2)(b) Request, ICC-02/05-01/20-571-Conf, paras 15-16.

⁴⁸ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 14 and Annex A.

crimes of murder and attempted murder in Mukjar and surrounding areas, and submits that it relates to core issues materially in dispute.⁴⁹

43. The Defence also opposes the introduction of paragraph 70 of the witness statement because it refers to ‘Ali Kushayb’ and would therefore go to proof of matters related to the acts and conduct of the accused.⁵⁰

44. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0756 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁵¹

45. The Chamber notes the Prosecution’s submission that P-0756’s evidence on the contextual elements of crimes against humanity, and on murder in Mukjar and surrounding areas is further corroborated by, and cumulative to, the evidence to be provided by *viva voce* witnesses.⁵² In particular, the Prosecution seeks to rely on P-0756’s evidence, among that of other witnesses, to establish that Tiro was attacked in August 2003;⁵³ in early August 2003, rebel armed groups attacked the police station and the Central Reserve Forces (the ‘CRF’) base in Mukjar;⁵⁴ and the ill-treatment of detainees at Mukjar police station by the Militia/*Janjaweed* and GoS Forces.⁵⁵

46. Moreover, although the Chamber acknowledges the Defence’s submission that Ahmed Harun’s visit to Mukjar in February 2004 and his role in providing ammunition to the military are contested issues, this does not preclude the introduction of P-0756’s statement under Rule 68(2)(b) of the Rules, given P-0756’s evidence on the matter and in light of the entirety of the evidence expected to be submitted in the case. The Chamber notes in this regard that P-0756’s evidence is similar to that of other civilians

⁴⁹ Fourth Response, ICC-02/05-01/20-589-Conf, para. 14. DAR-OTP-0211-0039-R02 at 0052-0053, paras 55-61; at 0055-0057, paras 71-80.

⁵⁰ Fourth Response, ICC-02/05-01/20-589-Conf, para. 15. DAR-OTP-0211-0039-R02 at 0055, para. 70.

⁵¹ DAR-OTP-0211-0039-R02, paras 82-89.

⁵² Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, paras 34, 36. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of crimes against humanity: P-0007, P-0011, P-0029, P-0085, P-0717, and P-0757. It also refers to the following witnesses as regards alleged murder in Mukjar and surrounding areas: P-0012, P-0028, P-0029, P-0675, P-0877, P-0913, P-0932, and P-0976.

⁵³ Prosecution’s Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 82(a), fns 338-339; para. 83, fn. 866.

⁵⁴ Prosecution’s Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 215, fn. 754.

⁵⁵ Prosecution’s Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 363, fn. 1221; para. 369, fns 1272-1273. *See also* Prosecution’s submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, p. 31.

and/or bystanders, and in that sense, not unique or significant as to prevent the introduction of the evidence under Rule 68(2)(b) of the Rules.

47. The Chamber notes that the Prosecution has stated it will not rely on P-0756's evidence about seeing Mr Abd-Al-Rahman in Mukjar in February 2004,⁵⁶ and about hearing unidentified individuals mentioning that Mr Abd-Al-Rahman was the Militia/*Janjaweed* leader.⁵⁷ Accordingly, the Chamber will not take these parts of the witness statement into account to establish the acts and conduct of the accused for the purpose of its judgment.

48. In relation to paragraph 70 of P-0756's statement, which contains one reference to 'Ali KUSHAYB',⁵⁸ the Chamber finds that the reference to [REDACTED] cannot be equated with a reference to the acts and conduct of the accused. The Defence's submission on this point is therefore rejected.

49. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0756's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0816

50. P-0816, a civilian from [REDACTED] near Bindisi, refers to attacks on Bindisi and surrounding area and on Mukjar in 2003. The Prosecution submits that the statement is relevant to the charges of murder, pillaging, destruction of property and forcible transfer of civilians in Bindisi and surrounding areas.⁵⁹

51. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely a consent form, sketch maps of Bindisi and Mukjar, a witness colour chart and a headdress board.⁶⁰

52. The Defence objects to the Prosecution's characterisation of P-0816's evidence as pertaining primarily to the charges of crimes of murder, pillaging, destruction of property and forcible transfer of civilians between 15 and 16 August 2003 in Bindisi

⁵⁶ DAR-OTP-0211-0039-R02, paras 62-68.

⁵⁷ DAR-OTP-0211-0039-R02, para. 64.

⁵⁸ DAR-OTP-0211-0039-R02, para. 70.

⁵⁹ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 18.

⁶⁰ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 19 and Annex A.

and surrounding areas. Instead, the Defence avers that the witness statement also includes material on a Central Reserve Police camp near Bindisi at a time of relevance to the charges, the distribution of weapons and uniforms to *Janjaweed* by the GoS, and the presence of a military base in South-West Mukjar, which it submits are core issues materially in dispute.⁶¹

53. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0816 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁶²

54. The Chamber notes the Prosecution's submission that P-0816's evidence on murder, pillaging, destruction of property and forced displacement in Bindisi and surrounding areas is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses.⁶³ In particular, the Prosecution seeks to rely on P-0816's evidence, among that of other witnesses, to establish the circumstances of the attack on Bindisi in August 2003.⁶⁴

55. Although, as noted by the Defence, parts of P-0816's evidence relate to issues that are materially in dispute, the Chamber is of the view that, in the particular circumstances, the evidence of P-0816 is not unique or significant so as to preclude introduction of his statement under Rule 68(2)(b) of the Rules.

⁶¹ Fourth Response, ICC-02/05-01/20-589-Conf, paras 17-18. DAR-0214-0721-R02 at 0724-0725, para. 19; at 0726-0727, para. 26; at 0732, para. 46.

⁶² DAR-OTP-0214-0721-R02, paras 53-59.

⁶³ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, paras 37-40. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on alleged murder in Bindisi and surrounding areas: P-0007, P-0011, P-0012, P-0589, P-0874, P-0882, and P-0991. It also refers to the following witnesses as regards alleged pillaging in Bindisi and surrounding areas: P-0007, P-0012, P-0015, P-0029, P-0589, P-0834, P-0878, and P-1021. It further refers to the following witnesses with regard to evidence on destruction of property in Bindisi and surrounding areas: P-0007, P-0012, P-0015, P-0029, P-0085, P-0589, P-0874, and P-0878. Finally, it lists the following witnesses as evidence on forcible displacement from Bindisi and surrounding areas: P-0011, P-0012, P-0015, P-0868, P-0874, P-0882, P-0913, P-1021.

⁶⁴ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 189, fn. 657; para. 211, fn. 732; para. 213, fn. 750; para. 227, fn. 787; para. 230, fn. 792; para. 235, fn. 805; paras 244-245; para. 252, fn. 905; paras 264, 272, 274. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, pp. 32-33.

56. The Chamber notes that the Prosecution has stated it will not rely on P-0816's evidence referring to Ali Kushayb as being the *Janjaweed* leader in Garsila.⁶⁵ Accordingly, the Chamber will not take this part of the witness statement into account to establish the acts and conduct of the accused for the purpose of its judgment.

57. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0816's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0867

58. P-0867 is a civilian who refers to rebel armed groups and the emergence of the Militia/*Janjaweed*. The Prosecution submits that the statement is relevant to alleged crime of rape and the contextual elements of crimes against humanity.⁶⁶

59. The Defence contests the Prosecution's characterisation of P-0867's testimony as pertaining primarily to the contextual elements of crimes against humanity and to the charged crimes of rape in Bindisi and surrounding areas. It submits that P-0867's evidence on the emergence of the Militia/*Janjaweed* and more broadly on the alleged relationship between the Militia/*Janjaweed* and the Government of Sudan, as well as on the presence of a training camp in the South of Mukjar run by the *Janjaweed* and the police, are core issues materially in dispute.⁶⁷

60. The Defence further contends that the fact that P-0867 was 10 years old at the time of alleged events is an important factor for the assessment of the reliability of his evidence.⁶⁸

61. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0867 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁶⁹

⁶⁵ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Red, para. 20, *referring to* DAR-OTP-0214-0721-R02 at 0727, para. 27.

⁶⁶ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 23.

⁶⁷ Fourth Response, ICC-02/05-01/20-589-Conf, para. 21. DAR-OTP-0217-0173-R02 at 0177, para. 20; at 0189, para. 81; at 0191, para. 90.

⁶⁸ Fourth Response, ICC-02/05-01/20-589-Conf, para. 20.

⁶⁹ DAR-OTP-0217-0173-R02, pp. 20-22.

62. The Chamber acknowledges that some of the issues identified by the Defence in its submissions are materially in dispute in the present case. However, the Chamber also notes the Prosecution's submission that P-0867's evidence is corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses.⁷⁰ In particular, the Prosecution seeks to rely on P-0867's testimony for the purpose of establishing the circumstances of the attack on Gausir in August 2003, including instances of rape.⁷¹ Consequently, the Chamber concludes that P-0867's evidence is not so unique or significant as to preclude introduction of his statement under Rule 68(2)(b) of the Rules. Moreover, the witness's testimony makes no mention of the accused or his acts and conduct. The Chamber further notes that the parts of the evidence the Defence challenges in its Response rely mostly on hearsay. This factor will be considered by the Chamber in its assessment of the probative value and the weight to be given to this part of P-0867's evidence in the context of the judgment pursuant to Article 74 of the Statute.⁷²

63. The Chamber notes that the Prosecution has stated it will not rely on paragraphs 75-76 and 78-79 of P-0867's statement in relation to uncharged events.⁷³ The Prosecution will also not rely on P-0867's hearsay evidence that Mr Abd-Al-Rahman was one of the main Militia/*Janjaweed* leaders.⁷⁴ Accordingly, the Chamber will not take these parts of the witness statement into account to establish the acts and conduct of the accused for the purpose of its judgment.

64. In relation to the reference to 'Ali KUSHAYB' in paragraph 90 of P-0867's statement, the Chamber finds that the name is used merely as a point of reference and

⁷⁰ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, paras 34-35. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of crimes against humanity: P-0007, P-0011, P-0029, P-0085, P-0717, and P-0757. It also refers to the following witnesses as regards the contextual elements of sexual crimes alleged committed in neighbouring villages of Kodoom and Bindisi: P-0589, P-0874, P-0878, P-0921 and P-0932.

⁷¹ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 82(a), fns 337, 339-341; para. 291 fns 1000-1001. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, p. 34.

⁷² Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, para. 14.

⁷³ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Red, para. 24, *referring to* DAR-OTP-0217-0173-R02 at 0188-0189, paras 75-76 and 78-79.

⁷⁴ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Red, para. 24, *referring to* DAR-OTP-0217-0173-R02 at 0188, para. 75.

by no means refers to the acts and conduct of the accused. Consequently, the Defence's objection on this point is rejected.

65. The Chamber notes that P-0867 was around 10 years old at the time of the alleged events.⁷⁵ Considering that P-0867's evidence is corroborated by *viva voce* witnesses,⁷⁶ the Chamber finds that his age alone cannot preclude the introduction of his testimony under Rule 68(2)(b) of the Rules. Additionally, his age at the time of the events will be considered by the Chamber in its assessment of the probative value and the weight to be given to P-0867's evidence in the context of the judgment pursuant to Article 74 of the Statute.⁷⁷

66. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0867's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0927

67. P-0927 is a civilian eyewitness of the attack on Bindisi and surrounding area as well as the alleged crimes committed by Militia/*Janjaweed* and GoS Forces therein. The Prosecution submits that the statement is relevant to the charged crimes of persecution, pillaging, destruction of property, rape, and forcible displacement.⁷⁸

68. In addition to the witness statement, the Prosecution seeks the submission of two photographs as associated material.⁷⁹

69. The Defence opposes the Prosecution's characterisation of P-0927's evidence as relating primarily to the charged crimes in Bindisi and surrounding areas. It submits that the witness's evidence also contains information relating to core issues that are materially in dispute, including the departure of the Sudanese police and military from

⁷⁵ DAR-OTP-0217-0173-R02, at 0175, para. 12 *See also* email from the Prosecution, 7 March 2022, at 17:16, confirming the witness's date of birth.

⁷⁶ *See above*, fn. 70.

⁷⁷ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, para. 14.

⁷⁸ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 27

⁷⁹ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, para. 28 and Annex A.

Bindisi around June 2003, and the set-up of checkpoints around Mukjar in August 2003 which both pertain to the alleged implementation of the Government's strategy.⁸⁰

70. The Defence further argues that the witness's low level of literacy is a factor that ought to be taken into account when assessing the impact the method of questioning may have had on his testimony.⁸¹ The Chamber refers in this regard to its previous ruling on the Defence's general objections as regards issues of reliability.⁸² The Chamber reiterates that this factor will be considered by the Chamber in its assessment of the probative value and the weight to be given to these testimonies in the context of the judgment pursuant to Article 74 of the Statute.⁸³

71. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0927 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁸⁴

72. The Chamber observes that the Prosecution does not seek to rely on paragraphs 45 to 48 of P-0927's statement in relation to Mr Abd-Al-Rahman as they relate to uncharged events.⁸⁵ Accordingly, the Chamber will not take these parts of the witness statement into account to establish the acts and conduct of the accused for the purpose of its judgment.

73. The Chamber acknowledges that some of the issues identified by the Defence in its submissions are materially in dispute in the present case. However, the Chamber notes the Prosecution's submission that P-0927's evidence on pillaging, destruction of property, forcible displacement and rape in Bindisi and surrounding areas is

⁸⁰ Fourth Response, ICC-02/05-01/20-589-Conf, para. 25. DAR-OTP-0221-0523-R01 at 0527, para. 20; 0531, para. 36.

⁸¹ Fourth Response, ICC-02/05-01/20-589-Conf, para. 26. DAR-OTP-0221-0523-R01 at 0526, para. 14.

⁸² Decision on the Prosecution's fourth and fifth requests to introduce prior recorded testimonies under Rule 68(3), 21 February 2022, ICC-02/05-01/20-602-Conf, paras 13-15 (a public redacted version was notified on the same day, ICC-02/05-01/20-602-Red) (hereinafter: 'Third Rule 68(3) Decision'). *See also* Transcript of hearing, 8 February 2022, ICC-02/05-01/20-T-022-CONF, p. 17, line 21 to p. 18, line 3; Decision on the Prosecution's second and third requests to introduce prior recorded testimonies under Rule 68(3), 8 February 2022, ICC-02/05-01/20-588-Conf, para. 59 (a public redacted version was notified on the same day, ICC-02/05-01/20-588-Red) . *See also* jurisprudence referred to in the Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, fn. 18.

⁸³ Third Rule 68(3) Decision, ICC-02/05-01/20-602-Red, para. 14.

⁸⁴ DAR-OTP-0221-0523-R01, paras 50-56.

⁸⁵ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Red, para. 29, *referring to* DAR-OTP-0221-0523-R01, paras 45-48.

corroborative of, and cumulative to, the evidence to be provided by *viva voce* witnesses.⁸⁶ In particular, the Prosecution seeks to rely on P-0927's evidence, among that of other witnesses, to establish the circumstances of the attack on Bindisi and surrounding areas in August 2003.⁸⁷ Consequently, the Chamber concludes that P-0927's evidence is not so unique or significant as to preclude introduction of his statement under Rule 68(2)(b) of the Rules.

74. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0927's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

P-0096

75. P-0096 is a civilian who refers to alleged attacks on Arara village by the GoS Forces and the Militia/*Janjaweed*. The Prosecution submits that the statement is relevant to the contextual elements of crimes against humanity, including the alleged support by the GoS to the Militia/*Janjaweed*.⁸⁸

76. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely a map of the village of Arara, together with a list of locations, and a sketch of Arara's police station.⁸⁹

77. The Defence objects to the Prosecution's characterisation of P-0096's evidence as pertaining solely to the contextual elements of crimes against humanity and submits that they relate to core issues materially in dispute. In particular, the Defence avers that 'the alleged coordination between the GoS Forces and *Janjaweed* in joint operations, a

⁸⁶ Fourth Rule 68(2)(b) Request, ICC-02/05-01/20-573-Conf, paras 38-41. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on pillaging in Bindisi and surrounding areas: P-0007, P-0012, P-0015, P-0029, P-0589, P-0834, P-0878, and P-1021. It also refers to the following witnesses as regards the destruction of property in Bindisi and surrounding areas: P-0007, P-0012, P-0015, P-0029, P-0085, P-0589, P-0874, and P-0878. It further lists the following witnesses regarding the alleged forcible displacement from Bindisi and surrounding areas: P-0011, P-0012, P-0015, P-0868, P-0874, P-0882, P-0913, P-1021. Finally, it refers to the following witnesses as regards the alleged rapes in Bindisi and surrounding areas: P-0007, P-0011, P-0015, P-0874, P-0878, P-0882, and P-0921.

⁸⁷ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 181, fn. 637; para. 192, fns 667-668; para. 213, fns 737-742, 745-746; para. 215, fn. 753; para. 227, fn. 787; para. 265, fn. 941; para. 272, fn. 957; para. 276, fn. 976; para. 301, fns 1024-1025; para. 308, fns 1041-1042, 1044. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, pp. 47-48.

⁸⁸ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, paras 9-10.

⁸⁹ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 11 and Annex A.

historical relationship of cooperation, including through arming, the provision of uniforms, and of recruitment, and of the alleged failure of military and police authorities to punish criminal acts by members of the *Janjaweed* and/or limit civilian casualties' are core issues materially in dispute.⁹⁰

78. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted P-0096 during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁹¹

79. The Chamber acknowledges that some of the issues identified by the Defence in relation to P-0096's evidence are materially in dispute in the present case. However, the Chamber notes the Prosecution's submission that P-0096's evidence is corroborative of the evidence that will be provided by *viva voce* witnesses.⁹² Furthermore, the Chamber notes that the Prosecution seeks to rely on P-0096's testimony, in addition to that of other witnesses, for the purpose of establishing that the GoS conferred other benefits of State sponsorship and legitimisation on the Militia/*Janjaweed*, including uniforms.⁹³ Consequently, the Chamber is of the view that, in the particular circumstances, the evidence of P-0096 is not unique or significant as to preclude introduction of his statement under Rule 68(2)(b) of the Rules. Moreover, the witness's testimony makes no mention of the accused or his acts and conduct.

80. Accordingly, the Chamber is satisfied that the requirements under Rule 68(2)(b)(i) of the Rules are met and that the introduction of P-0096's prior recorded testimony pursuant to this provision will not occasion any prejudice to the accused.

⁹⁰ Fifth Response, ICC-02/05-01/20-592-Conf, para. 15. DAR-OTP-0113-0138-R02, paras 19, 77-87, 94, 96, 104-105, 108.

⁹¹ DAR-OTP-0113-0138-R02, paras 110-117.

⁹² Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 21. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of crimes against humanity: P-0012, P-0117, P-0131, P-0547, P-0643, P-0675, P-0769, P-0874, P-0878, P-0883, P-0885, P-0905, P-0921 and P-1021.

⁹³ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 71, fn. 296. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, p. 12.

P-0120

81. P-0120, a [REDACTED], refers to the background of the armed conflict in Darfur and the alleged GoS support to the Militia/*Janjaweed*. The Prosecution submits that the statement is relevant to the contextual elements of crimes against humanity, in particular the alleged involvement of senior GoS Officials in the counter-insurgency campaign.⁹⁴

82. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely [REDACTED].⁹⁵

83. The Defence disputes the Prosecution's characterisation of P-0120's evidence as pertaining solely to the contextual elements of crimes against humanity and submits that they relate instead to core issues materially in dispute. In particular, the Defence contends that the structure and functions of Security Committees, including the role of Ahmed Harun, and Border Intelligence Units, and the arming and mobilisation of the Militia/*Janjaweed* by the Government of Sudan, are all core issues materially in dispute.⁹⁶ The Defence further submits that P-0120's evidence should not be introduced under Rule 68(2)(b) of the Rules because it is based on hearsay or on his own legal expertise and practice.⁹⁷

84. The Chamber notes that the witness statement is signed by the witness and the interpreter who assisted during the interview. In the statement, the witness also acknowledges the use of the associated material to be introduced together with the statement and confirms that the testimony is provided voluntarily.⁹⁸

85. The Chamber acknowledges that some of the issues identified by the Defence in relation to P-0120's evidence are materially in dispute in the present case. However, the Chamber notes the Prosecution's submission that P-0120's evidence is corroborative of the evidence that will be provided by *viva voce* witnesses.⁹⁹ In

⁹⁴ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, paras 12-13.

⁹⁵ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 14 and Annex A.

⁹⁶ Fifth Response, ICC-02/05-01/20-592-Conf, para. 18. DAR-OTP-0124-0816-R02 at 0821-0823, paras 23-32; at 0824-0825, paras 38-40; at 0825-0826, paras 43-45.

⁹⁷ Fifth Response, ICC-02/05-01/20-592-Conf, para. 18. DAR-OTP-0124-0816-R02 at 0824, para. 38.

⁹⁸ DAR-OTP-0124-0816-R02, paras 66-72.

⁹⁹ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 21. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements

particular, the Prosecution seeks to rely on P-0120's evidence to establish that local administration and Security Committee decisions regarding the counter-insurgency campaign could be overridden by senior GoS Officials such as Abdel Raheem Muhammad Hussein.¹⁰⁰

86. The Chamber nonetheless finds that, given the fact that the witness bases his knowledge of the Security Committees on his legal expertise and practice, and the Prosecution is seeking to rely on this evidence, the Defence should be allowed to cross-examine him on his level of expertise.

87. Accordingly, the Chamber rejects the introduction of the prior recorded testimony of P-0120 pursuant to Rule 68(2)(b) of the Rules. Instead, the Prosecution is authorised to introduce P-0120's prior recorded testimony pursuant to Rule 68(3) of the Rules. The Chamber is satisfied that the introduction of P-0120's prior recorded testimony under Rule 68(3) will not occasion any prejudice to the accused since this provision allows for cross-examination.

88. In order to streamline the presentation of evidence, the Prosecution will have one hour for any supplementary examination.

P-0558

89. P-0558, [REDACTED], refers to the contextual elements of crimes against humanity. The Prosecution submits that the statement is relevant to the structure and activities of [REDACTED], and the role of Security Committees in Sudan.¹⁰¹

90. In addition to the witness statement, the Prosecution seeks the submission of associated material, namely [REDACTED], drawn map and sketch, [REDACTED].¹⁰²

91. The Defence opposes the Prosecution's characterisation of P-0558's evidence as relating to issues not materially in dispute and submits that his evidence does in fact relate to core issues in dispute, particularly the alleged implementation of the

of crimes against humanity: P-0012, P-0117, P-0131, P-0547, P-0643, P-0675, P-0769, P-0874, P-0878, P-0883, P-0885, P-0905, P-0921 and P-1021.

¹⁰⁰ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 60, fn. 262. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, p. 17.

¹⁰¹ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, paras 15-16.

¹⁰² Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 17 and Annex A.

Government of Sudan's strategy in West Darfur, the attributes and functioning of the intelligence organs of the Government of Sudan and the reporting structure within the NISS.¹⁰³

92. According to the Defence, the name 'Kushayb' was first raised by the interviewer who subsequently asked the witness several questions about this person.¹⁰⁴ The Defence also notes that P-0558 stated that his knowledge about 'Kushayb' stems from anonymous hearsay, including the media.¹⁰⁵ Finally, the Defence objects to the introduction of parts of the transcript which contain references to 'Kushayb', and in which P-0558 provides information on his source of knowledge for the alleged position of authority of this person *vis-à-vis* the Militia/*Janjaweed* and in Mukjar.¹⁰⁶

93. The Defence further notes that P-0558 has made serious allegations about the falsification of testimony and attempts to influence the Court by a committee of the NISS. The Defence therefore argues that '[d]istinct from demonstrating any specific probative value of this aspect of P-0558's evidence at this stage', the gravity and seriousness of these allegations strongly militates in favour of the witness testifying *viva voce*.¹⁰⁷

94. The Chamber notes the Prosecution's submission that P-0558's evidence is cumulative in nature and corroborative of the evidence that will be provided by *viva voce* witnesses.¹⁰⁸ In particular, the Prosecution seeks to rely on P-0558's evidence, among that of other witnesses, to establish that the GoS solicited assistance from local Arab tribal leaders to recruit and arm members of Militia/*Janjaweed*, some of whom were assimilated into GoS Forces, such as the CRF, the Popular Police Forces and the Popular Defence Forces;¹⁰⁹ that members of the Fur, Zaghawa, and Masalit tribes were

¹⁰³ Fifth Response, ICC-02/05-01/20-592-Conf, para. 21. DAR-OTP-0215-5670-R02 at 5674-5675, lines 105-141.

¹⁰⁴ DAR-OTP-0215-5670-R02 at 5672, line 48; at 5673, lines 96-97. *See also* Fifth Response, ICC-02/05-01/20-592-Conf, para. 22.

¹⁰⁵ DAR-OTP-0215-5670-R02 at 5672-5673, lines 55-95; at 5675, lines 156-162; at 5676-5679, lines 195, 235-285. *See also* Fifth Response, ICC-02/05-01/20-592-Conf, para. 22.

¹⁰⁶ DAR-OTP-0215-5670-R02 at 5677-5679, lines 255-285.

¹⁰⁷ Fifth Response, ICC-02/05-01/20-592-Conf, para. 23.

¹⁰⁸ Fifth Rule 68(2)(b) Request, ICC-02/05-01/20-579-Conf, para. 21. The Prosecution refers to the following witnesses as being corroborative of and cumulative to the evidence on the contextual elements of crimes against humanity: P-0012, P-0117, P-0131, P-0547, P-0643, P-0675, P-0769, P-0874, P-0878, P-0883, P-0885, P-0905, P-0921 and P-1021.

¹⁰⁹ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 68, fn. 281

excluded from recruitment or promotion into sensitive positions in GoS institutions;¹¹⁰ and that nothing was done to stop crimes committed by GoS Forces and the Militia/*Janjaweed* in West Darfur, despite being relayed to central military and intelligence authorities.¹¹¹

95. The Chamber notes that the Prosecution does not seek to rely on lines 48 to 95 of P-0558's transcript of 11 May 2016, in which he provides information that Ali Kushayb was a leader of the Militia/*Janjaweed* in West Darfur and carried out operations on the behalf of the GoS, including Harun.¹¹² It will also not rely on lines 166 to 233 of the same transcript which refer to the leadership role of Ali Kushayb in the Mukjar Locality in 2003-2004.¹¹³

96. However, the Chamber acknowledges that the references in the prior recorded testimony of P-0558 to 'fabricated testimonies'¹¹⁴ and attempts to influence the Court by a committee of the NISS¹¹⁵ merit close scrutiny by the Defence, as well as by the Chamber.

97. Accordingly, the Chamber rejects the introduction of the prior recorded testimony of P-0558 pursuant to Rule 68(2)(b) of the Rules. Instead, the Prosecution is authorised to introduce P-0558's prior recorded testimony pursuant to Rule 68(3) of the Rules. The Chamber is satisfied that the introduction of P-0558's prior recorded testimony under Rule 68(3) will not occasion any prejudice to the accused since this provision allows for cross-examination.

98. In order to streamline the presentation of evidence, the Prosecution will have one hour for any supplementary examination.

¹¹⁰ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 72, fn. 310.

¹¹¹ Prosecution's Trial Brief, ICC-02/05-01/20-550-Corr-Red2, para. 75, fn. 315. *See also* Prosecution's submission of the List of Witnesses and the List of Evidence, ICC-02/05-01/20-551-Conf-Anx2-Red, pp. 20-21.

¹¹² DAR-OTP-0215-5670-R02 at 5672-5673, lines 48-95.

¹¹³ DAR-OTP-0215-5670-R02 at 5675-5677, lines 166-213.

¹¹⁴ DAR-OTP-0215-5747-R02, at 5765, line 588.

¹¹⁵ DAR-OTP-0215-5747-R02 at 5761-5776; DAR-OTP-0215-5777-R02 at 5779-5785.

D. Disclosure of material

99. In respect of P-0039,¹¹⁶ P-0040,¹¹⁷ P-0756¹¹⁸, P-0816¹¹⁹, P-0867,¹²⁰ P-0927,¹²¹ P-0096,¹²² P-0120¹²³ and P-0558,¹²⁴ the Defence submits that irrespective of the modality of introduction of evidence, all previous interviews – including screening interviews, immigration records and resettlement documents – should also be admitted as associated material. It therefore requests the Chamber to order the disclosure of such material.

100. The Chamber notes that there is no information before it that the Prosecution has failed to disclose any material pursuant to Article 67(2) of the Statute or Rule 77 of the Rules.

101. Accordingly, no such order appears necessary.

E. Conclusion

102. For the foregoing reasons, the Chamber:

- a) Rejects the introduction of the prior recorded testimonies of P-0120 and P-0558 pursuant to Rule 68(2)(b) of the Rules. The Prosecution is nonetheless authorised to introduce their prior recorded testimonies 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;
- b) Authorises the introduction of the prior recorded testimonies of P-0010, P-0016, P-0039, P-0040, P-0756, P-0816, P-0867, P-0927, P-0096 pursuant to Rule 68(2)(b) of the Rules. The Chamber's preliminary ruling is subject to the receipt of the declaration as discussed in the First Rule 68(3) Decision.¹²⁵

¹¹⁶ ICC-02/05-01/20-595-Conf, para. 17.

¹¹⁷ ICC-02/05-01/20-595-Conf, para. 20.

¹¹⁸ ICC-02/05-01/20-589-Conf, para. 16.

¹¹⁹ ICC-02/05-01/20-589-Conf, para. 19.

¹²⁰ ICC-02/05-01/20-589-Conf, para. 23.

¹²¹ ICC-02/05-01/20-589-Conf, para. 27.

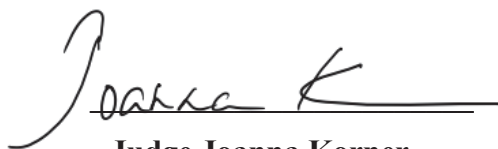
¹²² ICC-02/05-01/20-592-Conf, para. 16.

¹²³ ICC-02/05-01/20-592-Conf, para. 19.

¹²⁴ ICC-02/05-01/20-592-Conf, para. 24.

¹²⁵ See First Rule 68(3) Decision, ICC-02/05-01/20-612-Red, paras 17-19.

103. The Chamber orders the Registry, upon filing of the aforesaid declarations, to reflect in the eCourt metadata the introduction of the prior recorded testimonies as identified in the present decision.

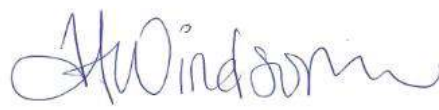


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 11 March 2022

At The Hague, The Netherlands