

**Original: English****No. ICC-02/05-01/20  
Date: 22 November 2023****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  
Reasons for the oral ruling on the Defence challenge to the Prosecution's use of  
items during cross-examination**

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

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**REGISTRY**

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**Victims Participation and Reparations  
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**Other**

1. On 17 November 2023, pursuant to paragraph 44 of the Directions on the conduct of proceedings,<sup>1</sup> the Prosecution transmitted the list of material it intended to use during the cross-examination of Defence witnesses D-0011 and D-0008 (the 'list of material').<sup>2</sup>
2. On 20 November 2023, when D-0011 was scheduled to testify, the Defence raised orally its objections to several items included in the Prosecution's list of material, namely: (i) forensic reports and data extracted from the accused's telephone containing his contacts and photos (the 'telephone items'), and (ii) screenshots of Facebook pages (allegedly related to Defence witnesses D-0011 and D-0006, and [REDACTED]) (the 'social media items').<sup>3</sup>
3. After hearing the oral submissions, the Chamber decided as follows:

PRESIDING JUDGE KORNER: [11:47:24] Yes. We have considered the Defence objections over the break. In respect of the downloads from the telephone, and the names that appear, we take the view that given this is from the defendant's phone seized by the Prosecution, or seized by the Court when he surrendered and handed it over to the Prosecution, and in light of the fact that it's been known from very a very early stage that there was a challenge to this accused bearing or having any connection with the nickname Kushayb, we find this is something the Prosecution should have disclosed at an earlier stage. We are surprised to see that it was at no stage relied upon and we therefore do not allow them to use this for the purposes of cross-examination. This we do feel is something that should be part of their case. As far as the general contention, we will give full reasons, may I say, Mr Edwards, at a later stage. But we haven't got time now, obviously. We reject again the Defence contention that the Prosecution is obliged to use or disclose every bit of evidence at its disposal as part of its case and that some -- we find that some evidence may only become of importance and relevance when the Defence case starts. And we'll give, as I say, full reasons. As far as the Facebook entries are concerned, we are not going to rule that they may not be used, but a foundation for using them is going to have to be laid, Ms Whitford. In other words, you can't just say, "Have a look at this and what do you say about it." So if a proper foundation is raised, then it seems to us that the Prosecution is entitled to use the Facebook entries in cross-examination.<sup>4</sup>

4. The Chamber hereby provides the reasoning for the above oral ruling.

**a) Disclosure and transmission of material**

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<sup>1</sup> Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478.

<sup>2</sup> Prosecution's list of material for D-0011 and D-0008, E-mail from the Prosecution to Trial Chamber I Communications at 16:59.

<sup>3</sup> Transcript of the hearing on 20 November 2023, ICC-02/05-01/20-T-138 ET, p. 2-42.

<sup>4</sup> Transcript of the hearing on 20 November 2023, ICC-02/05-01/20-T-138 ET, p. 42-43.

5. At the outset, the Chamber notes that in the oral submissions made, the Defence repeatedly confused two distinct procedural obligations of the Prosecution vis-à-vis the Defence.

6. Pursuant to Article 67(1) of the Statute (the ‘Statute’), the Prosecution has the obligation to disclose to the Defence any incriminatory material it intends to rely on to prove its case. Pursuant to this provision, the Chamber set a deadline for this disclosure obligation when it set the date of commencement of trial.<sup>5</sup> Any addition to the Prosecution’s list of evidence beyond that deadline was authorised solely when it was justified and on an exceptional basis.<sup>6</sup>

7. The Prosecution also has the obligation, pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), to disclose to the Defence any material that it deems is either exculpatory or could be useful for the preparation of the Defence. This obligation is ongoing. The Chamber notes that to date, the Defence has not made any submission indicating that the Prosecution has failed to fulfil its obligations in this regard.

8. The above disclosure must be distinguished from the Prosecution’s obligation, pursuant to paragraph 44 of the Directions on the conduct of proceedings, **to transmit** (and give notice) to the Defence, the list of material it intends to rely on for the purpose of cross-examination of Defence witnesses. Although this material may include items already disclosed to the Defence pursuant to the aforesaid statutory provisions, it may also include material that was not disclosed to the Defence pursuant to either Article 67 of the Statute or Rule 77 of the Rules.

9. Such material may include new items that the Prosecution only came into possession as a result of investigations in preparation for its cross-examination of Defence witnesses. It may also include material that, albeit being in the possession of

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<sup>5</sup> Transcript of hearing, 8 September 2021, ICC-02/05-01/20-T-013-ENG, p. 76, line 15 to p. 79, line 13.

<sup>6</sup> Decision on the Prosecution’s application to add a witness and related evidence to its List of Witnesses and List of Evidence, 18 August 2022, ICC-02/05-01/20-723-Conf (a public redacted version was notified on the same date, ICC-02/05-01/20-723-Red); Decision on the Prosecution’s applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, 11 April 2022, ICC-02/05-01/20-668-Conf (a public redacted version was notified on 5 May 2022, ICC-02/05-01/20-668-Red); Decision on the Prosecution’s request for an extension of time limit to disclose and add items to its list of evidence and list of witnesses, 24 December, 2021, ICC-02/05-01/20-545-Conf (a public redacted version was notified on 25 April 2022, ICC-02/05-01/20-545-Red).

the Prosecution, its relevance to the case only became apparent in light of the expected Defence witnesses' testimonies (namely, with the disclosure by the Defence of Defence witness statements). Disallowing, as a matter of principle, the Prosecution to rely on any undisclosed material, as suggested by the Defence in its oral submissions, would unreasonably inhibit the Prosecution from investigating or analysing any evidence in preparation for its cross-examination of Defence witnesses.

10. The Chamber considered the above distinction in deciding on the objections to the Prosecution's list of material to be used during the cross-examination of D-0011. Since the list of material was also intended to be used with D-0008, the present findings were also applicable in the cross-examination of the latter.

**a) Telephone items**

11. The Defence objects to the use by the Prosecution of several items related to the accused's telephone (forensic extraction reports and extracted data, including telephone contacts and photos).<sup>7</sup> The Defence submits that, given the late notice, it was unable to investigate forensic issues deriving from the extraction reports.<sup>8</sup>

12. As discussed on an earlier occasion when a similar objection was taken,<sup>9</sup> although the Prosecution is not obliged to use every single piece of evidence it has in the presentation of its case, the Chamber fails to understand why the Prosecution did not rely on the telephone items in the presentation of its case, particularly the contacts referring to 'Kushayb'. This, as the link between the accused and the nickname 'Kushayb' has been the major area of dispute in the case since the pre-trial stage.

13. The Chamber therefore rejects the use of telephone items. As already stated, their relevance to the present case and vis-à-vis the Defence challenges has been evident at least since the pre-trial confirmation hearing. Accordingly, in the present circumstances its recent disclosure to the Defence and its use during the cross-examination of Defence

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<sup>7</sup> Prosecution's list of material for D-0011 and D-0008, E-mail from the Prosecution to Trial Chamber I Communications at 16:59. These are items 9-16.

<sup>8</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 13-17. It was clarified in Court that although the items were included in the Prosecution's list of material for D-0011 and D-0008 on 17 November 2023, the contents to be relied upon had been disclosed to the Defence on 23 October 2023 and the forensic reports had been disclosed on 26 March 2021.

<sup>9</sup> Transcript of hearing, 25 October 2023, ICC-02/05-01/20-T-132-ENG-ET, p. 30-32, 40-72.

witnesses, would unfairly allow the Prosecution, as submitted by the Defence,<sup>10</sup> to bolster its case.

**a) The social media items**

14. The Defence objects to the use by the Prosecution of social media items.<sup>11</sup>

15. The Chamber notes that in its oral submissions, the Defence clarified that it did not object to the Prosecution showing to D-0011, the Facebook pages allegedly belonging to this Defence witness. However, the Defence objects the use of other person's Facebook profiles (namely that of D-0006 and the [REDACTED]) to cross-examine D-0011.

16. The Chamber notes that the social media items are open source material, and that as such, the items were always available and accessible to the Defence. Thus, any alleged prejudice for late disclosure is unfounded.

17. Moreover, the Chamber rejects the Defence's submission that the Prosecution should not be allowed to show this material to Defence witnesses, on the basis that it would be analogous to asking a witness to testify about what another witness said.<sup>12</sup> When proper foundation has been laid in the course of the cross-examination, counsel may put the **content** of a previous testimony or, in the present case, a Facebook page to the witness, and ask them if they agree therewith or wish to change a previous answer.

18. The Chamber equally rejects the Defence's submission that social media items of non-witnesses are not to be allowed unless such persons are called to testify.<sup>13</sup> In fact, the case law referred to by the Defence in its oral submissions,<sup>14</sup> makes it clear that the

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<sup>10</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 37, lines 9-25, to p. 38, lines 1-5.

<sup>11</sup> Prosecution's list of material for D-0011 and D-0008, E-mail from the Prosecution to Trial Chamber I Communications at 16:59. These are items 83-97.

<sup>12</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 16, line 16-25, to p. 17, lines 1-5.

<sup>13</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 17, lines 22-25, to p. 18, lines 1-4.

<sup>14</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 20-26. In support of its oral submissions, the Defence cited the following cases: Pre-Trial Chamber II, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', 14 May 2020, ICC-01/14-01/18-403-Red-Corr, paras 202, 211; Pre-Trial Chamber I, Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, Warrant of Arrest, 18 August 2017, ICC-01/11-01/17-2; Special

question is not whether the use in trial of items sourced from social media is allowed or disallowed or whether its submission or admission is excluded. It is rather a question of the weight to be given to such items for the purpose of the Chamber's Article 74 decision.

19. The fact that the Prosecution did not use the social media items in the presentation of its case does not prevent it from using these items in the cross-examination of Defence witnesses for a specific purpose. Given the nature of the social media items, it is reasonable to conclude that these items were tangentially relevant to the Prosecution case. As noted by the Prosecution in its oral submissions, their importance only became clear when the Prosecution read the Defence witnesses' statements.<sup>15</sup>

20. Accordingly, the Chamber rejects the Defence's position seeking a blanket refusal of such social media items. Instead, the Chamber will decide on the appropriateness of its use for the cross-examination of the witness, on a case-by-case basis, in light of the specific questions put to the witness.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 22 November 2023

At The Hague, The Netherlands

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Tribunal for Lebanon, Contempt Case against Al Jadeed [CO.] S.A.L./ NEW T.V. S.A.L. (N.T.V.) and Ms Karma Mohamed Tahsin Al Khayat, 9 April 2015, Case STL-14-05; Bemba et al case and also STL contempt case.

<sup>15</sup> Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 32-33.