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**TRIAL CHAMBER I**

**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**

**Public redacted version of "Prosecution's response to 'Demande d'autorisation d'interjeter appel de la décision orale du 20 novembre 2023'", 4 December 2023,  
ICC-02/05-01/20-1045-Conf**

**Source: Office of the Prosecutor**

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

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## I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence's request for leave to appeal ("Request")<sup>1</sup> the Chamber's oral decision of 20 November 2023 on the use of Facebook documents during the cross-examination of Defence witnesses ("Decision").<sup>2</sup> None of the arguments made by the Defence satisfy the standard for leave to appeal. Further, the Request contains multiple misrepresentations.

## II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed as confidential since it responds to a filing with the same classification.

## III. SUBMISSIONS

3. The Prosecution refers to the applicable legal framework for deciding a request for leave to appeal under article 82(1)(d) of the Rome Statute as set out by the Chamber in its previous decisions.<sup>3</sup>

4. The Defence advances four purported issues to justify its request for leave to appeal the Decision ("Purported Issues"), summarised as follows:

- a. Did the Chamber err in law by finding that the fact that the Facebook pages in question are publicly available precludes any prejudice based on the lateness of their disclosure, in violation of Mr Abd-Al-Rahman's right to time for the preparation of his Defence under article 67(1) of the Statute ("First Purported Issue");<sup>4</sup>
- b. Did the Chamber err in law by allowing the Prosecution to ask a witness

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<sup>1</sup> Demande d'autorisation d'interjeter appel de la décision orale du 20 novembre 2023, [ICC-02/05-01/20-1042](#) ("Request").

<sup>2</sup> [T-138-CONF ET](#) ("Decision"), 43:16-20. *See also* Reasons for the oral ruling on the Defence challenge to the Prosecution's use of items during cross-examination, [ICC-02/05-01/20-1041-Red](#) ("Reasons").

<sup>3</sup> Decision on the Defence's request for reconsideration or, alternatively, leave to appeal the oral ruling maintaining the disclosure deadline and start of the Defence case, [ICC-02/05-01/20-1015](#), para. 9, citing [ICC-02/05-01/20-525](#), paras. 10-14.

<sup>4</sup> [Request](#), para. 7(i) (referring to [Reasons](#), para. 16).

to comment on the content of a third party's testimony or Facebook page because the Defence was prohibited from asking Prosecution witnesses about testimony of other witnesses, which was incompatible with the principle of equality of arms under article 67(1) of the Statute ("Second Purported Issue");<sup>5</sup>

- c. Did the Chamber err in law by omitting the fact that the complete absence of minimal indicia of authenticity of a document constitutes grounds for its exclusion under article 69(4) of the Statute ("Third Purported Issue");<sup>6</sup> and
- d. Did the Chamber err in fact and/or law in allowing the Prosecution to use Facebook materials that it did not introduce into evidence during the presentation of its case in its cross-examination of Defence witnesses on a particular issue ("Fourth Purported Issue").<sup>7</sup>

5. The Defence fails to identify any appealable issue within the meaning of article 82(1)(d) of the Statute in the Request.

6. The Prosecution notes that the Defence's arguments as now presented in the Purported Issues have already been the subject of extensive debate between the Parties. The Prosecution and Defence made oral submissions on the use of the Facebook materials [REDACTED] on 20 November 2023, which resulted in the oral Decision.<sup>8</sup> The Chamber complemented its oral Decision with written reasons on 22 November 2023.<sup>9</sup> The Defence then raised objections to the submission of these materials through Witness D-11 by the Prosecution, which the Chamber rejected on 27 November 2023.<sup>10</sup> Subsequently, the Defence raised these objections again in an email request for reconsideration of the D-11 submission decision that same day,<sup>11</sup> in relation

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<sup>5</sup> [Request](#), para. 7(ii) (referring to [Reasons](#), para. 17).

<sup>6</sup> [Request](#), para. 7(iii) (referring to [Reasons](#), para. 18).

<sup>7</sup> [Request](#), para. 7(iv) (referring to [Reasons](#), para. 19).

<sup>8</sup> [Decision](#), 6:24-8:2, 15:23-40:25.

<sup>9</sup> [Reasons](#), paras. 14-20.

<sup>10</sup> Email from the Chamber to the Parties and Participants, "Decision on the submission of material through D-0011", 27 November 2023 at 12:02 ("Decision on D-11 Submission").

<sup>11</sup> Email from the Defence to the Chamber, Parties and Participants on 27 November 2023 at 15:03.

to which the Chamber invited any further submissions from the Prosecution and Defence following Witness D-32's testimony on 29 November 2023.<sup>12</sup> These arguments, taken together, reiterated many of the Defence's submissions made during oral argument on 25 October 2023, during the testimony of Witness D-16.<sup>13</sup> Thus, the Defence has been afforded ample opportunity to articulate its objections. The Request simply disagrees with the Chamber's prior decisions without raising appealable issues.

*The First Purported Issue does not constitute an appealable issue and/or does not arise from the Decision*

7. First, the Defence's repeated submission that the social media material [REDACTED] was disclosed "late" is incorrect. This material was disclosed on 6 November 2023,<sup>14</sup> two weeks before the testimony of D-11 (not on 16 November 2023, as submitted by the Defence<sup>15</sup>). In accordance with paragraph 44 of the Directions on the conduct of proceedings, the non-calling party may transmit material that it intends to use during questioning one day prior to commencing its questioning.<sup>16</sup> The relevant material was therefore disclosed significantly earlier than required, and there was no prejudice to the Defence from the timing of its disclosure.

8. Second, while the Chamber noted that "any alleged prejudice for late disclosure is unfounded" due to the open source nature of the social media material,<sup>17</sup> this was not the sole basis for its Decision. The Chamber also noted that "to date, the Defence has not made any submission indicating that the Prosecution has failed to fulfil its obligation [to disclose material pursuant to article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence]."<sup>18</sup> The Chamber found that the Prosecution is permitted to use in cross-examination "new items that the Prosecution only came into

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<sup>12</sup> [T-141-CONF ET](#), 56:15-59:4.

<sup>13</sup> [T-132-CONF ET](#), 42:14-68:10.

<sup>14</sup> The relevant items were disclosed in Trial INCRIM package 192 of 6 November 2023. The Prosecution already corrected this disclosure date during the oral argument. See [Decision](#), 30:24-31:5.

<sup>15</sup> [Request](#), paras. 3, 5.

<sup>16</sup> Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 44. See also [Reasons](#), para. 8.

<sup>17</sup> [Reasons](#), para. 16.

<sup>18</sup> [Reasons](#), para. 7.

possession as a result of investigations in preparation for its cross-examination of Defence witnesses” and that “[d]isallowing, as a matter of principle, the Prosecution to rely on any undisclosed material [...] would unreasonably inhibit the Prosecution from investigating or analysing any evidence in preparation for its cross-examination of Defence witnesses.”<sup>19</sup> With respect to the relevant social media items, the Chamber indicated that it would decide on the “appropriateness of its use in cross-examination of the witness, on a case-by-case basis, in light of the specific questions put to the witness.”<sup>20</sup>

9. In light of the above, the First Purported Issue is not an appealable issue and/or does not arise from the Decision.

*The Second Purported Issue does not constitute an appealable issue and/or does not arise from the Decision*

10. First, the Defence’s submission that it was systematically prohibited from asking Prosecution witnesses to comment on the testimony of previous Prosecution witnesses does not reflect the record. The Defence does not provide a single concrete example of when it was purportedly prevented from doing so. Whilst the Chamber did rule on the proper form for such questions, the Defence was never prevented from putting to a witness a relevant proposition drawn from the testimony of another witness.<sup>21</sup> Any “equality of arms” issue therefore does not arise from the Decision.

11. Second, the Defence’s argument implies—incorrectly and without any support—that a Facebook page is equivalent to witness testimony and that showing such a page to a witness is equivalent to asking a witness to comment directly on a witness’s testimony.<sup>22</sup>

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<sup>19</sup> [Reasons](#), para. 9.

<sup>20</sup> [Reasons](#), para. 20. *See also* [Decision](#), 43:16-20.

<sup>21</sup> *See e.g.* [T-74-CONF CT3](#), 27:21-28:9 (“We’ve been through this a number of times, Mr Laucci. It may or may not be helpful, but it’s not a proper way saying, “The Court’s heard evidence from a witness.” Just put the proposition.”).

<sup>22</sup> The Prosecution notes that the Defence has also embedded a subsidiary argument about obtaining consent under rule 75(1) of the Rules in its formulation of this purported issue. Not only is this risible argument completely irrelevant to the use of materials in cross-examination, but it also in no way arises out of the Decision.

12. Accordingly, the Second Purported Issue is not an appealable issue and/or does not arise from the Decision.

*The Third Purported Issue does not constitute an appealable issue and/or does not arise from the Decision*

13. The Defence merely disagrees with the Chamber's exercise of its broad discretion to decide on the submission of evidence under article 69(4) of the Statute. With respect to indicia of reliability, the Defence does not appear to dispute that the relevant material was obtained by the Prosecution from publicly available Facebook pages, in the same manner as other Facebook items submitted, without objection, through Witness D-11.<sup>23</sup> In terms of attribution of the Facebook accounts, consistent with the submission regime adopted in this case, this is a question of weight and reliability that may be considered by the Chamber as part of its holistic assessment of all evidence submitted for the purpose its judgment under article 74. As such, the Third Purported Issue does not amount to an appealable issue arising from the Decision.

*The Fourth Purported Issue does not constitute an appealable issue and/or does not arise from the Decision*

14. The Defence, again, merely disagrees with the Decision. The Chamber found that, as a matter of principle, the Prosecution may use in the cross-examination of Defence witnesses items that were not introduced in its case.<sup>24</sup> The Chamber then considered the items that the Prosecution sought to use with Witness D-11 and D-8, and refused the use of items relating to the Accused's seized telephones,<sup>25</sup> while allowing the social media items.<sup>26</sup> The Defence merely disagrees with the Chamber's finding on the social media items. Accordingly, the Fourth issue is not an appealable issue and/or does not arise from the Decision.

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<sup>23</sup> DAR-OTP-00005733 (Translation at DAR-OTP-00006081); DAR-OTP-00005741 (Translation at DAR-OTP-00006071); DAR-OTP-00006603 (Translation at DAR-OTP-00006721); DAR-OTP-00006849 (Translation at DAR-OTP-00006853); DAR-OTP-00006850 (Translation at DAR-OTP-00006854).

<sup>24</sup> [Reasons](#), para. 8-10.

<sup>25</sup> [Reasons](#), paras. 12-13; [Decision](#), 43:1-9.

<sup>26</sup> [Reasons](#), paras. 14-20; [Decision](#), 43:16-20.

*The Purported Issues do not meet the remaining criteria for leave to appeal under article 82(1)(d)*

15. The Purported Issues do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would their immediate resolution by the Appeals Chamber materially advance the proceedings.

16. The Defence does not demonstrate that the Purported Issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence does not argue that the Purported Issues affect the expeditious conduct of the proceedings. The Defence contends that it has suffered prejudice twice as a result of the Decision: i) by forcing it to drop Witness D-6, and (ii) from the submission into evidence of item DAR-OTP-00005152.<sup>27</sup>

17. The Defence has suffered no prejudice with respect to its right under article 67(1) of the Statute to present evidence and call witnesses on the Accused's behalf. After receiving the relevant social media items, the Defence did not request additional time to conduct its own investigations into this material prior to making a decision whether to call Witness D-6. In fact, the Defence enjoyed an advantage in that the early disclosure of the Facebook material [REDACTED] gave the Defence the opportunity to use this material during the preparation of witnesses such as D-11, D-8, D-6 and D-32.

18. In addition, the Defence's argument that it was somehow precluded from investigating or verifying the authenticity of the Facebook pages [REDACTED] who are deceased is incorrect.<sup>28</sup> The Defence could have pursued other investigative methods, including, but not limited to, contacting [REDACTED] and engaging in its own open source searches.<sup>29</sup> Furthermore, the Defence has access to many witnesses who allegedly have close personal knowledge of [REDACTED] and can be asked about

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<sup>27</sup> [Request](#), para. 9.

<sup>28</sup> [Request](#), paras. 3, 7(i). [REDACTED]. See [Decision](#), 29:14-15.

<sup>29</sup> As observed by the Presiding Judge, these were materials that the Defence could have easily found themselves. See [Decision](#), 16:12-15. See also [Reasons](#), para. 16.



the authenticity of these accounts.

19. Similarly, the Defence has suffered no prejudice from the submission into evidence of item DAR-OTP-00005152. As reiterated multiple times by the Chamber, issues of weight and reliability will be considered by the Chamber in its final assessment of all submitted evidence for the purpose of its article 74 judgment.<sup>30</sup>

20. Finally, immediate resolution of the Purported Issues by the Appeals Chamber would not materially advance the proceedings. The Defence argues that resolution of the Purported Issues is necessary for its decision to call new witnesses on behalf of the Accused.<sup>31</sup> There is no prejudice to the Defence from the potential use by the Prosecution of the Facebook material in the cross-examination of Defence witnesses. In accordance with the Decision, 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."<sup>32</sup> There is therefore no impact on the Defence's right under article 67(1)(e) to present evidence and call witnesses on behalf of the Accused.

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<sup>30</sup> See e.g. Decision on D-11 Submission, "The Chamber reiterates its previous rulings, pursuant to the submission system adopted in this trial, that any issue on the weight and reliability of these items raised by the Defence will be considered by the Chamber in the context of the Article 74 judgment."

<sup>31</sup> [Request](#), para. 10.

<sup>32</sup> [Reasons](#), para. 20.

#### IV. CONCLUSION

21. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Request.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 6<sup>th</sup> day of December 2023

At The Hague, The Netherlands