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**No. ICC-02/05-01/20
Date: 15 December 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

**Decision on the Defence's requests for reconsideration and for leave to appeal
the rulings on the use and submission into evidence of certain items by the
Prosecution**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 20 November 2023, Trial Chamber I (the ‘Chamber’) rendered an oral ruling rejecting the Defence’s challenge to the Prosecution’s use of the Facebook profiles of D-0006 and [REDACTED] (the ‘social media items’), during the cross-examination of D-0011 (the ‘First Impugned Decision’).¹
2. On 22 November 2023, the Chamber issued its written decision providing the reasoning for the First Impugned Decision (the ‘Reasons’).²
3. On 27 November 2023, after the completion of the testimony of D-0011, and having received the parties’ submissions pursuant to the Directions on the conduct of proceedings,³ the Chamber recognised as submitted on the record of the case materials that were used during his testimony, including the aforesaid social media items (the ‘Second Impugned Decision’).⁴ The Defence requested reconsideration of this decision a few hours later that same day (the ‘Reconsideration Request’).⁵
4. On the same day, the Defence filed a request for leave to appeal the First Impugned Decision (the ‘Leave to Appeal Request’).⁶
5. On 28 November 2023, the Prosecution responded to the Reconsideration Request, opposing it (the ‘Reconsideration Response’).⁷
6. On 29 November 2023, the Chamber heard oral arguments on the Reconsideration Request.⁸
7. On 4 December 2023, the Prosecution filed its response to the Leave to Appeal Request, opposing it (the ‘Leave to Appeal Response’).⁹

¹ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG, p. 42-43.

² 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-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-1041-Red.

³ Directions on the conduct of proceedings, 4 October 2023, ICC-02/05-01/20-478, para. 31.

⁴ E-mail from the Chamber, 27 November 2023, at 12:02.

⁵ E-mail of 27 November 2023, at 15:03.

⁶ Demande d’autorisation d’interjeter appel de la décision orale du 20 novembre 2023, ICC-02/05-01/20-1042-Conf (notified on 28 November 2023). A public redacted version was notified on the same date, ICC-02/05-01/20-1042-Red.

⁷ E-mail of 28 November 2023, at 18:31.

⁸ Transcript of hearing, ICC-02/05-01/20-T-141-ENG, p. 56, line 17 to p. 59, line 5.

8. On 11 December 2023, the Chamber sought further information in respect of the disputed date of disclosure by the Prosecution of material to be used in cross-examination.¹⁰ The Defence and Prosecution replied on the same date.¹¹

II. Applicable Law

9. The Chamber incorporates by reference the general framework applicable to the reconsideration of judicial decisions.¹²

10. The Chamber further incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in previous decisions.¹³

III. Submissions and analysis

11. The Defence seeks leave to appeal the First Impugned Decision. In addition, the Defence seeks reconsideration of the Second Impugned Decision. It requests the Chamber to exclude item DAR-OTP-00005152 (the ‘Item’) from the list of documents submitted through D-0011.

A. Leave to Appeal Request

12. The Defence seeks leave to appeal the First Impugned Decision on four issues:

Au paragraphe 16 de ses Motifs, la Chambre erre-t-elle en droit en estimant que le fait que les pages Facebook disputées sont accessibles au public exclut tout préjudice de la Défense fondé sur la tardiveté de leur divulgation ? (the ‘First Issue’);¹⁴

⁹ Prosecution’s response to “Demande d’autorisation d’interjeter appel de la décision orale du 20 novembre 2023”, ICC-02/05-01/20-1045-Conf. A public redacted version was notified on 6 December 2023, ICC-02/05-01/20-1045-Red.

¹⁰ See E-mail from the Chamber, 11 December 2023, at 07:17, instructing the Defence to indicate whether it accepted the Prosecution’s assertion at paragraph 7 of the Leave to Appeal Response.

¹¹ E-mail from the Defence, 11 December 2023, at 15:33; E-mails from the Prosecution, 11 December 2023 at 10:26 and 16:07. Pursuant to Regulation 24(4) of the Regulations of the Court, the Chamber will disregard the Prosecution’s e-mails.

¹² Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10 (the ‘Decision on the reconsideration request of the cooperation decision’). A public redacted version was notified on the same date, ICC-02/05-01/20-650-Red.

¹³ Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. See also oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

¹⁴ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7. The Chamber has unofficially translated the issue as follows: At paragraph 16 of the Reasons, did the Chamber err in law by considering that the fact that the disputed Facebook pages are publicly available exclude any prejudice to the Defence occurred by their late disclosure?

*Au paragraphe 17 de ses Motifs, la Chambre erre-t-elle en droit en autorisant le BdP à demander à un témoin de commenter sur le contenu du témoignage ou d'une page Facebook d'une personne tierce ? (the 'Second Issue');*¹⁵

*Au paragraphe 18 de ses Motifs, la Chambre erre-t-elle en droit en omettant que l'absence totale du moindre indice d'authenticité d'un document constitue un motif d'exclusion de son admission en preuve en vertu de l'Article 69-4 du Statut? (the 'Third Issue');*¹⁶

*Au paragraphe 19 de ses Motifs, la Chambre erre-t-elle en fait et/ou en droit en autorisant le BdP à utiliser les pages Facebook qu'il n'avait jamais introduite en preuve au cours la présentation de sa preuve pour les besoins de son contre-interrogatoire des témoins de la Défense sur une question particulière? (the 'Fourth Issue');*¹⁷

13. The Defence submits that the four Issues directly and significantly affect the fair conduct of the proceedings and the outcome of the trial. It contends that if the First Impugned Decision is maintained, the Defence will run the risk of either withdrawing witnesses (as it did with D-0006) or the Prosecution obtaining a ruling admitting into evidence Facebook pages for future potential Defence witnesses.¹⁸

14. The Defence avers that the immediate resolution of the four Issues by the Appeals Chamber is indispensable for the advancement of the proceedings as this is essential in the Defence's decision to call new witnesses on behalf of Mr Abd-Al-Rahman.¹⁹

15. The Prosecution contends that none of the Issues are appealable and/or do not arise from the First Impugned Decision.²⁰ The Prosecution submits that the Issues do not affect the

¹⁵ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7. The Chamber has unofficially translated the issue as follows: At paragraph 17 of the Reasons, did the Chamber err in law by authorising the Prosecution to request a witness to comment on the content of the testimony or of a Facebook page of a third party?

¹⁶ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7. The Chamber has unofficially translated the issue as follows: At paragraph 18 of the Reasons, did the Chamber err in law by ignoring that the total absence of the slightest indicia of authenticity of a document renders it inadmissible pursuant to Article 69(4) of the Statute?

¹⁷ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7. The Chamber has unofficially translated the issue as follows: At paragraph 19 of the Reasons, did the Chamber err in fact and/or in law by authorising the Prosecution to use the Facebook pages that it had never introduced into evidence during its case-in-chief for the purpose of the cross-examination of Defence witnesses on a particular topic?

¹⁸ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 9.

¹⁹ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 10.

²⁰ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, paras 7-14.

fair and expeditious conduct of the proceedings or the outcome of the trial.²¹ It argues that their immediate resolution by the Appeals Chamber would not materially advance the proceedings.²²

16. Before dealing with the specific issues which are the subject of this application, in the light of some of the defence submissions, the Chamber makes the following general observations:

- For the reasons given in the First Impugned Decision,²³ the Prosecution is not prohibited from using material in cross-examination of defence witnesses, on the basis that it has not earlier been disclosed.
- Modern forms of communication, in particular the use of social media and other ‘open-source’ forae, has resulted in material derived from such sources being presented and accepted into evidence in domestic and international trials for many years.²⁴ The weight to be attached to such material is a matter left for the decision-makers when assessing the evidence presented.
- All competent counsel when deciding whether or not to call a witness in support of their case, will have made an assessment not only of whether the witness can provide relevant evidence but also whether that evidence can be undermined by material which is available as ‘open-source’. Having made proper investigation, an informed decision may then be made as to the desirability of calling the witness.

17. As regards the First Issue, the Chamber is satisfied that the Prosecution’s submission²⁵ that it does not arise from the First Impugned Decision, is correct. Contrary to the Defence’s submissions, the Chamber’s decision did not hinge solely upon the open source nature of the social media items. As observed by the Prosecution,²⁶ the Chamber also considered: (i) the absence of any Defence submissions concerning the Prosecution’s failure to fulfil its

²¹ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, paras 16-19.

²² Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, para. 20.

²³ Reasons, ICC-02/05-01/20-1041-Conf.

²⁴ See Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, 15 August 2017, ICC-01/11-01/17-2; Trial Chamber II, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 24; A. Daszko et al., ‘Prosecution of International Crimes Using Digitally Derived Evidence in National Courts: Cases from Bosnia and Herzegovina, Finland, Germany, Netherlands, Sweden, United Kingdom’, (2020); Eurojust, ‘Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union’ (1 February 2018), <https://www.eurojust.europa.eu/publication/prosecuting-war-crimes-outrage-upon-personal-dignity-based-evidence-open-sources-legal>.

²⁵ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, paras 7-9.

²⁶ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, para. 8.

disclosure obligations;²⁷ (ii) the effect the requested blanket prohibition would have on the Prosecution's investigations in preparation for the cross-examination of Defence witnesses;²⁸ and (iii) its power to decide on the appropriateness of using such items on a case-by-case basis.²⁹ Moreover, as noted above,³⁰ considering the immediate availability of open source material and that, as conceded by the Defence, '[m]uch of the material that purportedly relate to the [...] [REDACTED]' Facebook accounts was disclosed on 6 November 2023,³¹ and thus pursuant to the Directions on the conduct of proceedings, the Chamber finds that the fair trial issue articulated by the Defence³² does not arise from the First Impugned Decision.

18. As regards the Second Issue, the Chamber rejects the Defence's submissions that the Chamber drew any analogy between a witness's testimony and pages from their Facebook profile.³³ The Chamber recalls that in the First Impugned Decision it explicitly rejected 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.'³⁴ The Defence simply disagrees with the Chamber and repeats the submissions made in the context of that decision. Moreover, as noted by the Prosecution,³⁵ the Defence does not provide any concrete instances when it was purportedly prevented from asking Prosecution witnesses to comment on the testimony of other witnesses. Consequently, the equality of arms issue advanced by the Defence is unfounded.³⁶

19. As regards the Third Issue, the Defence simply misconstrues the First Impugned Decision as the Chamber did not rule upon the admissibility of any of the disputed items. Pursuant to the Directions on the conduct of proceedings, the Chamber considered a discrete issue, namely the Defence's objection regarding the use of social media items during the testimony of D-0011.³⁷ Furthermore, as rightly noted by the Prosecution,³⁸ the authenticity of the disputed documents is a factor to be considered by the Chamber at the same time as weight and reliability in the context of its Article 74 judgment.

²⁷ Reasons, ICC-02/05-01/20-1041-Conf, paras 6-7.

²⁸ Reasons, ICC-02/05-01/20-1041-Conf, para. 9.

²⁹ Reasons, ICC-02/05-01/20-1041-Conf, para. 20.

³⁰ See para. 16 above.

³¹ E-mail from the Defence, 11 December 2023, at 15:33.

³² Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, paras 3, 5, 7.

³³ Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7.

³⁴ Reasons, ICC-02/05-01/20-1041-Conf, para. 17.

³⁵ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, para. 10.

³⁶ See Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 7.

³⁷ Reasons, ICC-02/05-01/20-1041-Conf, paras 14-20.

³⁸ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, para. 13.

20. As regards the Fourth Issue, the Chamber is satisfied that it does not arise from the First Impugned Decision. As observed by the Prosecution,³⁹ and as noted above in relation to the First Issue, the Chamber held that, as a matter of principle, the Prosecution may rely on undisclosed material,⁴⁰ insofar as the timeline provided for in the Directions on the conduct of proceedings is followed. It further ruled that rulings on the use of such documents would be made on a case-by-case basis.⁴¹

21. The Chamber also rejects the Defence's submissions concerning the purported effect the First Impugned Decision had on its decision to withdraw D-0006 and on its decision to call future witnesses on behalf of Mr Abd-Al-Rahman.⁴²

22. As already stated,⁴³ open-source material should fall within the ambit of standard Defence investigations into its own witnesses. The decision whether a witness is to be called, remains at all times that of the calling party. As observed by the Prosecution,⁴⁴ the Defence did not request additional time, (as it has done in the past during the preparation of its case), to conduct its own investigations into the disputed items prior to making a decision whether to call D-0006. Nor was the Defence precluded from verifying their authenticity through other investigative methods. Consequently, the Defence's decision to withdraw D-0006 is one which the Defence made of its own accord. Further, as noted above, the Chamber will rule on the appropriateness of using such items in respect of future witnesses on a case-by-case basis, based on Defence objections.

23. In light of the above, the Chamber is satisfied that none of the Issues identified by the Defence are appealable within the meaning of Article 82(1)(d) of the Statute. The Chamber therefore rejects the Defence's request for leave to appeal the First Impugned Decision.

B. Reconsideration Request

24. In its Reconsideration Request, the Defence contends that D-0011 did not comment on the Item. It avers that its submission into evidence is prejudicial to the Defence.⁴⁵

³⁹ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, para. 14.

⁴⁰ Reasons, ICC-02/05-01/20-1041-Conf, para. 9.

⁴¹ Reasons, ICC-02/05-01/20-1041-Conf, paras 11-20.

⁴² Leave to Appeal Request, ICC-02/05-01/20-1042-Conf, para. 9.

⁴³ See para. 16 above.

⁴⁴ Leave to Appeal Response, ICC-02/05-01/20-1045-Conf, paras 17-18.

⁴⁵ E-mail from the Defence, 27 November 2023, at 15:03; Transcript of hearing, 29 November 2023, ICC-02/05-01/20-T-141-ENG, p. 58, lines 7-23.

25. The Prosecution submits that the Defence fails to satisfy the standard for reconsideration. It further contends that D-0011 commented on the Item. The Prosecution argues that the Defence is not prejudiced by its submission into evidence.⁴⁶

26. The Chamber observes that reconsideration is an exceptional measure. As such, it is incumbent upon the Defence to demonstrate that there was either a clear error of reasoning or that it is necessary to do so to prevent an injustice.⁴⁷ In the light of the Defence's explanation for failing to provide such grounds for its application 'as the most straightforward way of dealing with that issue'⁴⁸ the Chamber stresses that parties are not exempted from providing proper justification when they make such an exceptional request.

27. Regarding the first limb, the Defence has failed to demonstrate a clear error of reasoning. As noted by the Prosecution,⁴⁹ D-0011 commented on the Item by stating that he did not know [REDACTED]. As observed in the Second Impugned Decision, when the Defence objected to the Prosecution's question on the basis of lack of foundation, the Presiding Judge then re-formulated the question, which was answered by the witness 'as far as I know this person had enemies who could create this profile and publish it'⁵⁰, despite having earlier stated that he could neither read nor write and that his profiles had been set up and added to by a friend.⁵¹ No explanation is given by the Defence as to why the question and its answer bear no relation to the Item. The answer provided by the witness, together with the weight to be given to the item used will be analysed by the Chamber in its Article 74 judgment.

28. Regarding the second limb, the Chamber is not satisfied that the prejudice caused to the Defence by the Second Impugned Decision is 'by far exceeding the reasons for which the Trial Chamber now seeks' the 'admission' into evidence of the Item.⁵²

29. At the outset, the Chamber emphasises that in its decision it recognised the Item as formally submitted on the record of the case. No ruling was given by the Chamber

⁴⁶ E-mail from the Prosecution, 28 November 2023, at 18:31.

⁴⁷ Decision on the reconsideration request of the cooperation decision, 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10.

⁴⁸ Transcript of hearing, 29 November 2023, ICC-02/05-01/20-T-141-ENG, p. 57, lines 9-10.

⁴⁹ E-mail from the Prosecution, 28 November 2023, at 18:31.

⁵⁰ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG, p. 92, lines 3-4.

⁵¹ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG, p. 64, lines 2-11.

⁵² E-mail from the Defence, 27 November 2023, at 15:03.

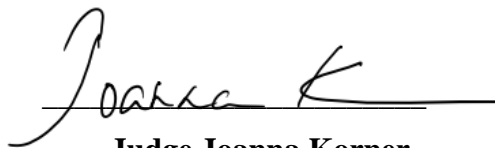
concerning its admissibility. As reiterated above, questions of weight and reliability will be considered by the Chamber in the context of its Article 74 judgment.

30. Furthermore, the Chamber recalls that reconsideration cannot be used to make new submissions that could have been made when the request was discussed.⁵³ As noted in the Second Impugned Decision,⁵⁴ the Defence's objections in respect of the Item concerned lack of foundation. No argument was raised by the Defence regarding the impossibility to verify its authenticity.

31. Moreover, considering the Chamber's findings above in respect of the use of social media items, and that submission into evidence of the Item is necessary for the completeness of the record, the Chamber finds that no prejudice has been caused to the Defence by the Second Impugned Decision.

32. For the above reasons, the Chamber finds that the Defence fails to identify a clear error of reasoning or new facts that justify reconsideration of the Second Impugned Decision.

33. Accordingly, the Chamber rejects the Defence's Requests in their entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this **15 December 2023**

At The Hague, The Netherlands

⁵³ Decision on the Defence's request for reconsideration or, alternatively, leave to appeal the Decision on the Defence's Request for postponement of the presentation of its case, 11 May 2023, ICC-02/05-01/20-938-Conf, para. 12. A public redacted version was notified on the same date, ICC-02/05-01/20-938-Red.

⁵⁴ Second Impugned Decision, 27 November 2023.