



Original: English

No. ICC-02/05-01/20

Date: 7 June 2024

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

Decision on the submission of evidence through D-0037

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

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural history

1. On 4 October 2021, Trial Chamber I (the ‘Chamber’) issued its Directions on the conduct of proceedings.¹
2. On 21 May 2024, Witness D-0037 testified before the Chamber.²
3. On 22 May 2024, the Defence submitted its List of Material for Submission through D-0037.³
4. On the same day, the Prosecution submitted its List of Material for Submission, stating that it did not oppose the submission of the items requested by the Defence.⁴
5. On 28 May 2024, the Defence objected to the submission of all 68 items on the Prosecution's List of Material for Submission.⁵
6. On 29 May 2024, the Prosecution responded by requesting the Chamber to reject the Defence’s objection to the submission of the items on the Prosecution’s List of Material for Submission.⁶
7. On 31 May 2024, the Defence sought leave to reply to the Prosecution’s response of 29 May 2024,⁷ which was granted by the Chamber.⁸
8. On 3 June 2024, the Defence submitted its reply to the Prosecution’s response of 29 May 2024.⁹

II. Legal framework

9. The Chamber recalls the procedure for the formal submission of documentary evidence as set out in the Direction on the conduct of proceedings.¹⁰

III. Submissions

10. The Chamber notes that the submission of four items by the Defence is unopposed.¹¹

¹ Direction on the conduct of proceedings, ICC-02/05-01/20-478.

² Transcript of hearing, ICC-02/05-01/20-T-152-ENG.

³ Email from the Defence, at 13:56.

⁴ Email from the Prosecution, at 16:30.

⁵ Email from the Defence, at 23:47.

⁶ Email from the Prosecution, at 20:26.

⁷ Email from the Defence, at 13:45.

⁸ Email from the Chamber, at 14:23.

⁹ Email from the Defence, at 17:40.

¹⁰ Direction on the conduct of proceedings, ICC-02/05-01/20-478, paras 25-28, 31.

¹¹ Email from the Prosecution, 22 May 2024, at 16:30.

11. The Prosecution requests the submission of 68 items, consisting of Facebook materials and a chart shown to D-0037, who is an expert in the workings of Facebook.¹² The Defence raises a general objection to all 68 items submitted by the Prosecution and additional specific objections in respect of 8 items.¹³

12. The Prosecution's use of Facebook materials in cross-examination of Defence witnesses first arose on 20 November 2023 in respect of witness D-0011.¹⁴ The Defence's objections at that stage were based on late disclosure of the material, (which it was submitted should have formed part of the Prosecution's case)¹⁵ and a general submission that Facebook pages relating to non-witnesses should be prohibited.¹⁶

13. In its oral ruling on 20 November 2023, the Chamber allowed the use of Facebook entries for the purposes of D-0011's cross-examination, provided a foundation was laid for such use.¹⁷ Full reasons for the decision were provided on 22 November 2023.¹⁸ On 27 November 2023, the Chamber recognised as submitted on the record of the case, the Facebook entries put to the witness during cross-examination.¹⁹

14. On the same day, the Defence sought leave to appeal the oral ruling of 20 November 2023²⁰ and made a request for reconsideration of the decision on the submission of material through D-0011.²¹ Both applications were refused by the Chamber on 15 December 2023.²²

15. This issue arose again on 21 May 2024 when D-0037 was giving evidence.²³ The Prosecution, as required by the procedure set out in the Directions on the Conduct of

¹² Email from the Prosecution, 22 May 2024, at 16:30.

¹³ Email from the Defence, 28 May 2024, at 23:47. The specific objections relate to the following items: DAR-OTP-00011313; DAR-OTP-00005998; DAR-OTP-00006030; DAR-OTP-00006000; DAR-OTP-00006091; DAR-OTP-00011186; DAR-OTP-00006106; DAR-OTP-00011315.

¹⁴ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-CONF-ENG.

¹⁵ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-CONF-ENG, p. 10, lines 4-10.

¹⁶ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-CONF-ENG, p. 17, line 22 to p. 18, line 4.

¹⁷ Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-CONF-ENG, p. 43, lines 16-20.

¹⁸ 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 day, ICC-02/05-01/20-1041-Red.

¹⁹ Email from the Chamber, at 12:02.

²⁰ 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 day, ICC-02/05-01/20-1042-Red.

²¹ Email from the Defence, at 15:03.

²² 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, ICC-02/05-01/20-1047-Conf. A public redacted version was notified on the same day, ICC-02/05-01/20-1047-Red.

²³ Transcript of hearing, ICC-02/05-01/20-T-152-ENG.

Proceedings, had given notice that they proposed to use the Facebook entries in cross-examination.²⁴ The Defence then objected to the use in cross-examination by the Prosecution of screenshots of a series of interconnected Facebook accounts and a chart illustrating the connections between those accounts.²⁵ The objections in summary were that D-0037 had never been asked to carry out an analysis of the accounts and that no foundation had been established for questioning the witness about aspects of those accounts.

16. The Chamber gave a short oral ruling on the same day,²⁶ allowing their use in cross-examination and gave full reasons for the decision in a further oral ruling on 30 May 2024.²⁷

17. The general objection now raised by the Defence to the formal recognition of submission of the materials, is that ‘D37 was plainly uncomfortable about being expected to answer questions about documents he that he had not had sufficient time to study. The reliability of the answers he did give in cross-examination is therefore significantly affected’.²⁸ The Defence further submits that ‘reliability’ is not to be equated with ‘weight’ and that the conditions applicable to testimony via video-link i.e. ‘conducive to the giving of open and truthful testimony’ and ‘freely and voluntarily’ apply *mutatis mutandum* to courtroom testimony.²⁹

18. The Defence submits that the Prosecution deliberately chose not to show the documents to the witness in advance of his testimony, thereby putting the witness at a distinct disadvantage³⁰ and further argues that careful examination of the transcript should lead the Chamber to conclude that ‘notwithstanding the Presiding Judge’s care in not coercing him’, D-0037 ‘felt he had no choice but to answer the questions’.³¹

19. The Prosecution, in its response, argues that the Defence’s general objection is ‘in effect a request for the Chamber to rule on the admissibility of the items requested for submission’ and that the Chamber ‘should not depart from its usual practice of deferring the assessment of the standard evidentiary criteria to the conclusion of the case’.³²

²⁴ Email from the Prosecution, 20 May 2024, at 15:42.

²⁵ Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 24-47.

²⁶ Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 47-48.

²⁷ Transcript of hearing, 30 May 2024, ICC-02/05-01/20-T-153-ENG, pp. 2-6.

²⁸ Email from the Defence, 28 May 2024, at 23:47.

²⁹ Email from the Defence, 28 May 2024, at 23:47.

³⁰ Email from the Defence, 28 May 2024, at 23:47.

³¹ Email from the Defence, 28 May 2024, at 23:47.

³² Email from the Prosecution, 29 May 2024, at 20:26.

20. The Prosecution further submits that having been given time to review the materials, D-0037 declined the various offers by the Chamber to grant him further time if he so required and that the nature of the questions asked meant that none ‘were technical or complex such that the witness would have required more time or study to answer them’.³³

21. They emphasise that the concerns raised by the witness appeared to relate to his belief that he was being asked to opine on the authenticity of the Facebook accounts and that once it was explained clearly that there was no dispute between the parties that they were genuine downloads, he was content to continue.³⁴ Accordingly, the Prosecution submits that the testimony was free, voluntary and reliable.

22. In its reply, the Defence reiterates that a distinction should be made between the formal submission of the Facebook material and their admissibility for the purpose of cross-examination. Moreover, the Defence avers that ‘it would be intolerable for the Prosecution to be allowed to rely on the Facebook material, whether it has been admitted or merely formally submitted, in circumstances where it sprung the material on Mr Castellvi in Court and insisted that he comment thereon’.³⁵ The Defence further argues that simply showing a document to a witness does not amount to ‘using’ it; there must be a minimum of interaction between the witness and the exhibit.³⁶

IV. Analysis

23. In respect of the Defence’s general objection, the Chamber is satisfied that their arguments are not supported by the record of the proceedings, nor the general principles of the procedure relating to the submission of materials for inclusion on the record. The Chamber is satisfied that the answers by D-0037 were provided freely and voluntarily and were truthful. The circumstances under which he came to give that evidence, including the discomfort displayed at times during the course of his testimony, (as a result of his mistaken belief that he was being asked to opine on authenticity), will be considered during the assessment of his evidence for the purposes of the judgment under Article 74 of the Rome Statute (the ‘Statute’).

³³ Email from the Prosecution, 29 May 2024, at 20:26.

³⁴ Email from the Prosecution, 29 May 2024, at 20:26.

³⁵ Email from the Defence, 3 June 2024, at 17:40.

³⁶ Email from the Defence, 3 June 2024, at 17:40.

24. In respect of the specific objections, the Chamber finds that the witness did not answer the questions relating to DAR-OTP-00011186³⁷ and DAR-OTP-00006106.³⁸ As such, the witness did not provide any specific evidence on these documents.

25. The Chamber finds however, that these documents are all part of interconnected Facebook accounts. The items in question are screenshots (one page image) of a few Facebook accounts. The Chamber recalls that it has previously authorised the submission of the entirety of a document, even when only one part was used with the witness. Similarly, the Chamber finds it necessary, for the completeness of the record, to authorise the submission of items DAR-OTP-00011186 and DAR-OTP-00006106, as the items are related and constitute a single document with other screenshots used with D-0037 during the same questioning.

26. With regard to item DAR-OTP-00011313, the Chamber recalls that the Defence did not object to the line of questioning. Moreover, the Chamber finds that the witness was assisted by the document. The Chamber therefore authorises the submission of this item into evidence.

27. The Chamber finds that the remainder of the items that were subject to specific objections by the Defence were used with D-0037. The Chamber is satisfied that the submission of these items is necessary for its assessment and weighing of the witness's answers. In particular, the Chamber finds that an item has been 'used' with the witness when the proposition put by the Prosecution is not accepted by the witness³⁹ or if he is unsure,⁴⁰ when the question has been compounded,⁴¹ or when the witness's answers are of a general nature and provided after having been shown a series of documents.⁴²

28. Finally, the Chamber points out that the issue raised by the Defence in its general objection could have been avoided if the Prosecution had shown the documents to the witness

³⁷ Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, p. 99, lines 6-16.

³⁸ Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, p. 103, lines 8-19.

³⁹ See in relation to DAR-OTP-00011315, Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 104-105.

⁴⁰ See in relation to DAR-OTP-00005998, Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 70-71.

⁴¹ See in relation to DAR-OTP-00006000 and DAR-OTP-00006091, Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 94-95 and 9899 respectively.

⁴² See in relation to DAR-OTP-00006030, Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, pp. 72-73.

in advance of the hearing. As acknowledged by the Defence,⁴³ the overriding duty of an expert is to assist the court, whichever party calls him.

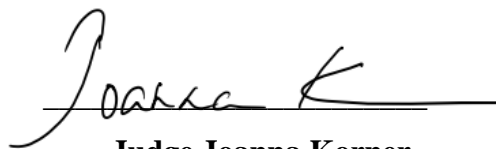
29. Accordingly, as a matter of good practice, an expert who is going to be examined or cross-examined on documents, should be given the opportunity to examine those documents before giving evidence. The Chamber finds however that failure to grant this opportunity to the expert witness does not prevent the submission of the documents the expert was asked to opine on.

V. Conclusion

30. Noting that the four items tendered by the Defence were used and discussed with D-0037, and that their submission is unopposed, the Chamber hereby recognises the items as formally submitted.

31. Considering the above, the Chamber hereby also recognises the 68 items submitted by the Prosecution as formally submitted.

32. In its judgment pursuant to Article 74 of the Statute, the Chamber will assess these items in light of all submissions received, including on the weighing of any prejudice against the probative value of the items, in order to decide on their admissibility.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 7 June 2024

At The Hague, The Netherlands

⁴³ Transcript of hearing, 21 May 2024, ICC-02/05-01/20-T-152-ENG, p.84, lines 20-21.