



**Original: English**

**No. ICC-02/05-01/20**

**Date: 9 July 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 Defence's Second Bar Table Motion**

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

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Participation/Reparations**

**The Office of Public Counsel for Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Oswaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Procedural history

1. On 4 October 2021, Trial Chamber I (the ‘Chamber’) issued the ‘Directions on the conduct of proceedings’,<sup>1</sup> setting out the procedure for the submission of evidence other than through a witness.<sup>2</sup>
2. On 11 December 2023, and as discussed with the parties during the hearing of 5 December 2023,<sup>3</sup> the Chamber instructed the Defence to file any bar table motion within two weeks after the testimony of the last Defence witness.<sup>4</sup>
3. On 21 March 2024, the Chamber instructed the Defence to file its bar table motions on a rolling basis<sup>5</sup> and on 12 June 2024, upon receiving the confirmation that it was hearing the last Defence witness, it directed the Defence to file its last motion by 28 June 2024.<sup>6</sup>
4. On 17 May 2024, the Defence filed its first bar table motion (the ‘First Bar Table Motion’).<sup>7</sup>
5. On 29 May 2024, the Prosecution responded to the First Bar Table Motion, opposing the submission of four items.<sup>8</sup>
6. On 3 June 2024, with leave from the Chamber,<sup>9</sup> the Defence replied to the Prosecution’s response to the First Bar Table Motion.<sup>10</sup>
7. On 13 June 2024, the Chamber issued its decision on the First Bar Table Motion, authorising the submission of all but one item.<sup>11</sup>

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<sup>1</sup> Directions on the conduct of proceedings, ICC-02/05-01/20-478 with Annex A (hereinafter: ‘Directions on the conduct of proceedings’).

<sup>2</sup> Directions on the conduct of proceedings, ICC-02/05-01/20-478, paras 55-56.

<sup>3</sup> Transcript of hearing, 5 December 2023, ICC-02/05-01/20-T-143-CONF-ENG, p. 34, lines 1-10.

<sup>4</sup> Third Directions on the conduct of proceedings, ICC-02/05-01/20-1046, para. 8. After hearing the last Defence witness on 12 June 2024, this deadline was set by the Chamber to 28 June 2024, *see* Transcript of hearing, 12 June 2024, ICC-02/05-01/20-T-159-CONF-ENG RT, p. 21, lines 8-13.

<sup>5</sup> Transcript of hearing, ICC-02/05-01/20-T-147-CONF-ENG, p. 20, lines 10-12.

<sup>6</sup> Transcript of hearing, ICC-02/05-01/20-T-143-CONF-ENG, p. 18, lines 9-15.

<sup>7</sup> Requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite («Bar Table»), ICC-02/05-01/20-1134, with one confidential annex.

<sup>8</sup> Prosecution’s Response regarding four items objected to in the Defence Bar Table Motion, ICC-02/05-01/20-1137-Conf. A public redacted version was notified on 14 June 2024, ICC-02/05-01/20-1137-Red.

<sup>9</sup> Email from the Chamber, 31 May 2024, at 15:43.

<sup>10</sup> Defence Reply to “Prosecution Response Regarding Four Items Objected to in the Defence Bar Table Motion”, ICC-02/05-01/20-1142-Conf.

<sup>11</sup> Decision on the Defence’s Bar Table Motion, ICC-02/05-01/20-1146-Conf.

8. On 28 June 2024, the Defence filed its second motion to submit evidence other than through a witness (the ‘Second Bar Table Motion’).<sup>12</sup>

9. On 3 July 2024, as instructed by the Chamber,<sup>13</sup> the Prosecution filed its response to the Second Bar Table Motion (the ‘Response’).<sup>14</sup> It objects to the formal submission of one item and does not object to the submission of the remaining six items requested by the Defence.<sup>15</sup>

10. On 4 July 2024, the Defence requested leave to reply to the Response.<sup>16</sup> The Prosecution objected to this request on the following day.<sup>17</sup>

## II. Submissions

11. In its Second Bar Table Motion, the Defence seeks to submit the following items, categorised as follows:

12. Reports. Two reports, namely a Human Rights Watch briefing paper<sup>18</sup> and an information report prepared by the United Nations High Commissioner for Human Rights<sup>19</sup> – to which the Prosecution objects – (the ‘OHCHR Report’).<sup>20</sup>

13. Witness Asylum Applications. One asylum application provided by state authorities.<sup>21</sup>

14. Media Articles. Two media articles, namely a screenshot from Radio Dabanga’s website<sup>22</sup> and a book entitled ‘Hidden Countryside’<sup>23</sup> (and translation of certain extracts of this book).<sup>24</sup>

<sup>12</sup> Deuxième requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite (« Bar Table») with one confidential annex, ICC-02/05-01/20-1158.

<sup>13</sup> Transcript of hearing, 12 June 2024, ICC-02/05-01/20-T-143-CONF-ENG, p. 18, lines 9-15.

<sup>14</sup> Prosecution’s response to “Deuxième requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite (« Bar Table»)”, ICC-02/05-01/20-1160-Conf. A public redacted version was notified on 4 July 2024, ICC-02/05-01/20-1160-Red.

<sup>15</sup> Response, ICC-02/05-01/20-1160-Conf, para. 1.

<sup>16</sup> E-mail from the Defence, at 16:38.

<sup>17</sup> E-mail from the Prosecution, at 09:22.

<sup>18</sup> Annex to Deuxième requête de la Défense aux fins d’admission d’éléments de preuve par voie de procédure écrite (« Bar Table»), ICC-02/05-01/20-1158-Conf-AnxI (hereinafter : ‘Annex to the Second Bar Table Motion’), DAR-OTP-0160-0002.

<sup>19</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-OTP-0011-0111.

<sup>20</sup> Response, ICC-02/05-01/20-1160-Conf, paras 3-17.

<sup>21</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-OTP-00004155-R01.

<sup>22</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-D31-00000351.

<sup>23</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-D31-00000349.

<sup>24</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-D31-00000350.

15. Diplomatic cables. A diplomatic cable sent from the United States Embassy in Khartoum – which was published on Wikileaks.<sup>25</sup>

16. In its Response, the Prosecution opposes the submission of the OHCHR Report (which the Prosecution indicates was prepared by the United Nations Commission of Inquiry in Darfur, the ‘UNCOI’), but accepts the remaining six items.<sup>26</sup> Specifically, the Prosecution submits that the item in question cannot be submitted via a bar table motion given its testimonial nature.<sup>27</sup> Relying on decisions in the *Ongwen*,<sup>28</sup> *Ruto & Sang*,<sup>29</sup> *Yekatom & Ngaïssona*,<sup>30</sup> *Katanga*<sup>31</sup> and *Bemba et al.* cases,<sup>32</sup> the Prosecution contends that, considering the circumstances in which the statement was taken, it should be considered a prior recorded testimony.<sup>33</sup> Further, the Prosecution argues that given the testimonial nature of the interviews carried out by the UNCOI, it did not seek to submit them through a bar table motion in the presentation of its case.<sup>34</sup>

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<sup>25</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI, DAR-D31-00000352.

<sup>26</sup> Response, ICC-02/05-01/20-1160-Conf, para. 1.

<sup>27</sup> Response, ICC-02/05-01/20-1160-Conf, paras 3-16.

<sup>28</sup> Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Submit 470 Items of Evidence, 14 November 2019, ICC-02/04-01/15-1670, paras 9-10; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795, paras 19-20; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Public redacted version of Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016 (notified on 1 December 2016), ICC-02/04-01/15-596-Red, para. 9.

<sup>29</sup> Trial Chamber V(A), *The Prosecutor v. Wiliam Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution’s Application for Admission of Documentary Evidence Related to the Testimony of Witness 13, 4 February 2015, ICC-01/09-01/11-1804, para. 27; Trial Chamber V(A), *The Prosecutor v. Wiliam Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecution’s Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, paras 17, 86-88.

<sup>30</sup> Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359, paras 16-19; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Public redacted version of Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence, 1 April 2021, ICC-01/14-01/18-907-Red, para. 11.

<sup>31</sup> 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. 49.

<sup>32</sup> Appeals Chamber, *The Prosecutor v. Bemba et al.*, Public redacted version of Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para. 581; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32.

<sup>33</sup> Response, ICC-02/05-01/20-1160-Conf, paras 3-16.

<sup>34</sup> Response, ICC-02/05-01/20-1160-Conf, para. 17.

### III. Analysis

17. The Chamber refers to its previous findings on its approach to the submission of evidence other than through a witness.<sup>35</sup>

18. As a preliminary matter, the Chamber considers that further submissions will not assist its determination of the Second Bar Table Motion and accordingly rejects the Defence's request for leave to reply.

19. The Chamber recalls that similar objections were raised by the Defence in respect of the Prosecution's Bar Table Motion. In its Decision, the Chamber stated that:

Although the Chamber acknowledges that reports such as those submitted by the Prosecution are based, at least in part on interviews with witnesses to events, these reports are not prior recorded testimonies. The Chamber also fully appreciates the Defence's objections relating to the reports and will take these objections into account when assessing these reports for relevance, probative value and potential prejudice, as part of the holistic assessment of all evidence submitted, in its judgment pursuant to Article 74 of the Statute. The same criteria will be applied to other documents which the Defence claims are testimonial in nature, such as minutes of meetings and media articles. The Chamber notes that, whilst such documents summarise or narrate a person's accounts or discussions, they are not a 'compilation of witness statements', as submitted by the Defence, or in any other way a prior recorded testimony in the sense of Rule 68 of the Rules.<sup>36</sup>

20. Applying that criteria to the OHCHR Report, having reviewed its content, the Chamber finds that it is not testimonial in nature, as submitted by the Prosecution.<sup>37</sup> Whilst the report contains an individual's account concerning attacks in the Nyala region, as well as information on tribal structures and hierarchies, there is no indication that it was read back to or signed by the individual, or any attestation as to the truthfulness of its contents. Moreover, the Chamber notes that the OHCHR Report contains what appear to be investigator's notes woven into the individual's narrative. As such, the item in question is not a prior recorded testimony within the meaning of Rule 68 of the Rules of Procedure and Evidence. On this basis, and further considering that there appear to be no other procedural bars to the submission of this item, the Chamber authorises its submission from the bar table.

21. With regard to the remainder of the Second Bar Table Motion, the Chamber is satisfied that it was filed in accordance with the Chamber's directions. The Chamber further observes

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<sup>35</sup> Public redacted version of Decision on the Prosecution's bar table motion, 27 February 2023, ICC-02/05-01/20-885-Red (hereinafter: 'Bar Table Motion Decision'), para. 22.

<sup>36</sup> Bar Table Motion Decision, ICC-02/05-01/20-885-Red, para. 40.

<sup>37</sup> Response, ICC-02/05-01/20-1160-Conf, paras 3-16.

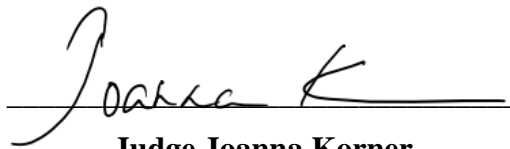
that, as directed,<sup>38</sup> the Defence provided specific submissions on the relevance and probative value of each document submitted in the annex to its Motion.<sup>39</sup>

22. The Chamber notes that the Prosecution does not object to the remainder of the items submitted by the Defence.<sup>40</sup> Accordingly, the Chamber formally recognises their submission. In line with previous decisions by the Chamber, items are to be submitted as a whole, but the Chamber will take into consideration the parts identified by the Defence as relevant when analysing the evidence for the purpose of its Article 74 judgment.<sup>41</sup>

#### IV. Conclusion

23. For these reasons, the Chamber:

- i. Authorises the submission of all the items listed in the annex to the Second Bar Table Motion; and
- ii. Directs the Registry to reflect the formal submission of the items in the eCourt metadata.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 9 July 2024

At The Hague, The Netherlands

<sup>38</sup> Directions on the conduct of proceedings, ICC-02/05-01/20-478, paras 55-56.

<sup>39</sup> Annex to the Second Bar Table Motion, ICC-02/05-01/20-1158-Conf-AnxI.

<sup>40</sup> These are items: DAR-OTP-0160-0002; DAR-OTP-00004155-R01; DAR-D31-00000351; DAR-D31-00000349; DAR-D31-00000350; DAR-D31-00000352.

<sup>41</sup> See e.g., Bar Table Motion Decision, ICC-02/05-01/20-885-Red, para. 51. With respect to the Book DAR-D31-00000349, the Chamber will only consider the extracts for which a translation has been provided.