



**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**

**Public redacted version of  
'Decision on the Defence's Bar Table Motion', 13 June 2024, ICC-02/05-01/20-  
1146-Conf**

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

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## 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. The Chamber instructed the Defence to file its bar table motions on a rolling basis<sup>5</sup> and to file its first motion by 17 May 2024.<sup>6</sup>
4. On 17 May 2024, the Defence filed a motion to submit evidence other than through a witness (the ‘Bar Table Motion’).<sup>7</sup>
5. On 29 May 2024, the Prosecution filed its response to the Bar Table Motion (the ‘Prosecution’s Response’).<sup>8</sup> It objects to the formal submission of four items and agrees to the submission of the remainder of the Bar Table Motion.<sup>9</sup>
6. On 3 June 2024, with leave from the Chamber,<sup>10</sup> the Defence filed a reply to the Prosecution’s Response (the ‘Defence’s Reply’).<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, 21 March 2024, ICC-02/05-01/20-T-147-CONF-ENG, p. 20, lines 10-12.

<sup>6</sup> Transcript of hearing, 24 April 2024, ICC-02/05-01/20-T-150-CONF-ENG, p. 12, lines 5-15.

<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.

<sup>9</sup> Prosecution’s Response, ICC-02/05-01/20-1137-Conf, paras 1-2.

<sup>10</sup> Email from the Chamber, 31 May 2024, at 15:43.

<sup>11</sup> Defence Reply to “Prosecution Response Regarding Four Items Objected to in the Defence Bar Table Motion”, ICC-02/05-01/20-1142-Conf.

## II. Submissions

7. The Defence has grouped its Bar Table Motion into the following categories of items:

8. Certificates and administrative documents. The Defence seeks to submit five certificates and administrative documents. These official documents are comprised of [REDACTED],<sup>12</sup> [REDACTED],<sup>13</sup> [REDACTED]<sup>14</sup> and the translation of these documents when relevant.

9. Reports. The Defence seeks to submit four reports. Two of the documents<sup>15</sup> are reports from the Government of Sudan (“GoS”) and drawn up as part of a periodic review under the aegis of the African Commission on Human and Peoples’ Rights (the ‘ACHPR’). The other two documents<sup>16</sup> are the observations and recommendations emanating from the ACHPR.

10. Screening notes and [REDACTED]. The Defence seeks to submit three screening notes<sup>17</sup> and an investigator's report<sup>18</sup> - to which the Prosecution objects<sup>19</sup> and [REDACTED] of two Prosecution witnesses,<sup>20</sup> to which the Prosecution does not object.

11. Media articles. The Defence seeks to submit three items. DAR-D31-0000014, dating from 2006, highlights the impossibility for the Prosecution to go to Darfur. Items DAR-D31-00000127 and DAR-D31-00000164 are PowerPoint presentations containing press articles on the ongoing conflict in Sudan.

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<sup>12</sup>Annex to the 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-Conf-Anx, DAR-D31-0001-0003 and its translation DAR-D31-0001-0004 (hereinafter : ‘Annex to the Bar Table Motion’).

<sup>13</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-D31-0001-0004.

<sup>14</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-D31-0002-0006.

<sup>15</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-00005132 and DAR-D31-00000276.

<sup>16</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-D31-00000277 and DAR-D31-00000278.

<sup>17</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0194-0178-R01; DAR-OTP-0214-0179-R01; DAR-OTP-0113-0473-R01.

<sup>18</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0222-5176.

<sup>19</sup> Prosecution’s Response, ICC-02/05-01/20-1137-Conf, paras 7-16.

<sup>20</sup>Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-00004863-R01; DAR-OTP-00004487-R01.

12. Other. The Defence seeks to submit three items. Items DAR-OTP-00005974 and DAR-D31-00000321 were disclosed by the Prosecution in February 2024 and provide terminological clarification of the name ‘Kushayb’. The Chamber previously instructed the Defence to submit item DAR-OTP-00001013 during the presentation of its case.<sup>21</sup>

13. In its response, the Prosecution opposes the submission of the three screening notes<sup>22</sup> and the investigator's report.<sup>23</sup> The Prosecution argues that a party should not be permitted to tender documents for the purpose of impeachment, unless a witness has been confronted with the relevant document or specific allegation relied upon therein and given an opportunity to comment or clarify.<sup>24</sup> The Prosecution further submits that, because a screening note is not authored, read back or signed by a witness, it is unfair, prejudicial and of no probative value to later request its formal submission, for the purpose of undermining or impeaching a witness's credibility.<sup>25</sup>

14. Finally, the Prosecution objects to the formal submission of the investigator's report because the prejudice to the fair evaluation of the evidence of the relevant witness occasioned by its introduction would outweigh its probative value, as required by Article 69(4) of the Rome Statute (the ‘Statute’).<sup>26</sup>

15. In its Reply, the Defence avers that its request for the submission of the screening notes is not a renewed request.<sup>27</sup> Moreover, the Defence denies that it seeks their submission in order to impeach or challenge the credibility of witnesses P-0040, P-0816 and P-0096.<sup>28</sup> It argues that this is necessary to demonstrate that, even at a time more proximate to the events in question than their statements to the Prosecution, none of the three witnesses mentioned the involvement of the accused or of ‘Ali Kushayb’, even though the names of other alleged perpetrators were volunteered.<sup>29</sup> The Defence thus

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<sup>21</sup> Decision on Defence's request for leave to appeal the Decision on the Prosecution's bar table motion, 10 March 2023, ICC-02/05-01/20-899, para. 10.

<sup>22</sup> See Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0194-0178-R01, DAR-OTP-0214-0179-R01, DAR-OTP-0113-0473-R01 respectively.

<sup>23</sup> See Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0222-5176.

<sup>24</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, para. 1.

<sup>25</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, para. 11.

<sup>26</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, para. 2.

<sup>27</sup> Defence's Reply, ICC-02/05-01/20-1142-Conf, paras 3-6.

<sup>28</sup> Defence's Reply, ICC-02/05-01/20-1142-Conf, para. 7.

<sup>29</sup> Defence's Reply, ICC-02/05-01/20-1142-Conf, para. 7.

concludes that no point of fundamental unfairness to the witnesses or prejudice to the fair evaluation of their evidence arises.<sup>30</sup>

16. Finally, the Defence submits that it did not have the opportunity to cross-examine P-0868 as the witness was withdrawn by the Prosecution. Therefore, the Defence argues that it would be prejudiced, were it to be deprived of the opportunity to submit the investigation note as evidence.<sup>31</sup>

### III. Analysis

17. The Chamber refers to its previous findings on its approach on the submission of evidence other than through a witness.<sup>32</sup>

18. With regard to the two PowerPoint presentations with media articles, the Chamber notes that the Prosecution does not object to their submission.<sup>33</sup> The Chamber nonetheless questioned the Defence on their relevance to the case.<sup>34</sup> After consideration of the Defence's oral submission on the matter, the Chamber is satisfied that the items are relevant and authorises their submission from the bar table.

19. With respect to the three screening notes to which the Prosecution objects,<sup>35</sup> the Chamber finds that, contrary to the Prosecution's argument,<sup>36</sup> their submission has not previously been rejected. The Chamber recalls that the Prosecution did not include the screening notes in its applications under Rule 68(2)(b) of the Rules of Procedure and Evidence (the 'Rules').<sup>37</sup> Moreover, the legal criteria for introduction into evidence under Rule 68(2)(b) of the Rules is different and separate from the one for submission of evidence from the bar table.

20. With regard to the Prosecution's arguments on the potential prejudice and probative value of the screening notes,<sup>38</sup> the Chamber defers its consideration of these

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<sup>30</sup> Defence's Reply, ICC-02/05-01/20-1142-Conf, para. 8.

<sup>31</sup> Defence's Reply, ICC-02/05-01/20-1142-Conf, paras 9-11.

<sup>32</sup> Decision on the Prosecution's bar table motion, ICC-02/05-01/20-885-Conf, para. 22.

<sup>33</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-D31-00000127 and DAR-D31-00000164.

<sup>34</sup> Transcript of hearing, 12 June 2024, ICC-02/05-01/20-T-159-CONF-ENG RT, p. 17, line 23 to p. 21, line 5.

<sup>35</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0194-0178-R01; DAR-OTP-0214-0179-R01; DAR-OTP-0113-0473-R01.

<sup>36</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, paras 5, 8, 10.

<sup>37</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, para. 7.

<sup>38</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, paras 11-12.

objections until its deliberation for the judgment pursuant to Article 74(2) of the Statute. The Chamber has considered the admissibility of the three screening notes in the context of the statutory exclusionary rules, including procedural bars, obstacles and preconditions,<sup>39</sup> and finds that, at this stage, there is no bar on the submission of these items.

21. In relation to the investigator's report to which the Prosecution objects,<sup>40</sup> the Chamber observes that the item relates to a person who is not a witness in the present case, [REDACTED]. In effect the Defence, in their reasons for submission are inviting the Chamber to speculate. Moreover, as the Prosecution argues,<sup>41</sup> the contents of [REDACTED] referred to in the investigator's report are unknown, as are the reasons for [REDACTED]. As such, the Chamber finds that this item has no link to a known issue in the case and is not persuaded that it has any relevance. Consequently, the Chamber rejects the submission of this item from the bar table.

22. With regard to the remainder of the Motion, the Chamber is satisfied that the Defence filed the Motion in accordance with the Chamber's directions. The Chamber further observes that, as directed,<sup>42</sup> the Defence provided specific submissions on the relevance and probative value of each document submitted in the annex to its Motion.<sup>43</sup>

23. The Chamber notes that the Prosecution does not object to the remainder of the items submitted by the Defence.<sup>44</sup> Accordingly, the Chamber formally recognises their submission.

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<sup>39</sup> Decision on the Prosecution's bar table motion, ICC-02/05-01/20-885-Conf, para. 28.

<sup>40</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx, DAR-OTP-0222-5176.

<sup>41</sup> Prosecution's Response, ICC-02/05-01/20-1137-Conf, para. 15.

<sup>42</sup> Directions on the conduct of proceedings, ICC-02/05-01/20-478, paras 55-56.

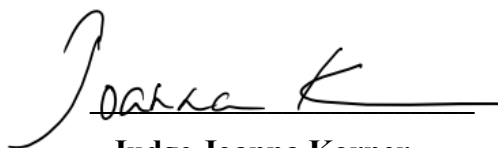
<sup>43</sup> Annex to the Bar Table Motion, ICC-02/05-01/20-1134-Conf-Anx.

<sup>44</sup> These are items: DAR-D31-0001-0003, DAR-D31-0001-0009, DAR-D31-0001-0004, DAR-D31-0002-0002, DAR-D31-0002-0006, DAR-OTP-0000513, DAR-D31-00000277, DAR-D31-00000276, DAR-D31-00000278, DAR-OTP-00004863-R01, DAR-OTP-00004487-R01, DAR-D31-00000014, DAR-D31-00000127, DAR-D31-00000164, DAR-OTP-00005974, DAR-D31-00000321, DAR-OTP-00001013.

**IV. Conclusion**

24. For these reasons, the Chamber:

- i. Authorises the submission of all the items listed in the annex to the Bar Table Motion, with the exception of item DAR-OTP-0222-5176;
- ii. directs the Registry to reflect the formal submission of the items in the eCourt metadata;
- iii. instructs the Prosecution and Defence to file public redacted version of their Response and Reply, respectively, within one week of the notification of the present decision.



**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this 9 July 2024

At The Hague, The Netherlands