

**Cour
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**International
Criminal
Court**



Original: **English**

No.: **ICC-02/05-01/2**

Date: **13 May 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

With CONFIDENTIAL Annexes A, B, C and D

Defence request to admit Mr Duncan Castellvi as an expert witness and his expert report into evidence, under Rule 68(3)

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

1. On 6 November 2023, the Prosecution disclosed 509 documents to the Defence for Mr Abd-Al-Rahman ("Defence") extracted from Facebook,¹ subsequently adding some of these documents to their List of Material to be used in the cross-examination of witness D-11.² Prior to D-11's appearance, the Defence objected to the Prosecution's use of screenshots of certain Facebook accounts if questions were to be asked about comments and identifying information posted not by D-11 himself, but by third parties.³

2. In responding to the Defence's objections, the Prosecution made it clear that the case it was going to advance was that:

he [*ie.* Mr Abd-Al-Rahman's deceased son, Salah] *has used* the name "Ali Kushayb" on a Facebook page in 2016. Others are from *before the surrender*.

So it's only fair that we be able to put to these witnesses who say they've known the accused the whole time, they've known the family members and they've never heard this name that *the sons have had this posted on their page.*"⁴

3. The Trial Chamber ultimately allowed the Prosecution to use the contested material when cross-examining D-11, so long as a proper foundation was laid to this end.⁵

4. On 20 November 2023, during D-11's cross-examination, the Prosecution introduced evidence obtained from Facebook accounts purportedly belonging to Mr Abd-Al-Rahman's sons.⁶ This evidence included a screenshot from a Facebook profile

¹ Trial Package Incrim 192, 6 November 2023

² "D-0011 and D-0008 - Prosecution's List of Material," email sent by the Prosecution on 17 November 2023 at 16:59.

³ See ICC-02/05-01/20-T-138-CONF-ENG ET, pp 15-40.

⁴ ICC-02/05-01/20-T-138-CONF-ENG ET, p. 33, lns. 3-7 (emphasis added).

⁵ ICC-02/05-01/20-T-138-CONF-ENG ET, p. 43, lns. 10-20.

⁶ See ICC-02/05-01/20-T-138-CONF-ENG ET, p. 90, lns. 23-25 to p. 93, lns. 1-18. This extract includes an objection from the Defence to showing the Facebook page named "Yasir Ali Shabshabuni on the basis of a lack of foundation, and subsequent end to this line of cross-examination on Facebook evidence as the Presiding Judge indicated that "*I think Mr Edwards' objections are justified on this one.*"

purportedly in the name “Bush Kushayb”,⁷ an image of Salah Abd-Al-Rahman⁸ – possibly extracted from the same Facebook page⁹ – and an image of Yasser Abd-Al-Rahman¹⁰ extracted from a Facebook profile purportedly in the name “Yasir Ali Shabshabuni”¹¹ (collectively, “Facebook Material”). The Trial Chamber subsequently recognized the Facebook Material as formally submitted on 27 November 2023, rejecting the Defence objections to their submission.¹²

5. During the presentation of its case, the Prosecution did not seek to introduce any Facebook-related evidence such as that submitted during D-11’s evidence. Considering the specificities regarding *inter alia* the reliability of Facebook and other social media evidence, the Defence determined to identify and commission an expert witness to examine several features related to Facebook account security, and the impact of profile name alterations on prior postings.

6. On 26 February 2024, pursuant to Regulation 44(1) of the Regulations of the Court (“RoC”), Mr Duncan Castellvi (“the Expert”) was admitted to the list of experts before the Court as an expert in Cybersecurity, Operations Security, and Anti-Forensics.¹³ Mr Castellvi is a certified investigator in the specialist field of digital (forensic) research, a certified ethical hacker, and a cyber-intelligence expert.¹⁴

⁷ DAR-OTP-00005152 (ENG: DAR-OTP-00006014), recognized as formally submitted into evidence by the Trial Chamber on 27 November 2023 by email sent at 12:07.

⁸ DAR-OTP-00005868, recognized as formally submitted into evidence by the Trial Chamber on 27 November 2023 by email sent at 12:07.

⁹ DAR-OTP-00005168, *not sought for introduction into evidence*.

¹⁰ DAR-OTP-00006070, recognized as formally submitted into evidence by the Trial Chamber on 27 November 2023 by email sent at 12:07.

¹¹ DAR-OTP-00005831, *not sought for introduction into evidence*.

¹² Email Decision from the Trial Chamber entitled “Decision on the submission of material through D-0011”, 27 November 2023, at 12:07; *See also*: Defence objections the Prosecution’s List for Submission: Email entitled “RE: D-0011 - Prosecution’s List of Material for Submission” sent on 23 November 2023 at 15:11.

¹³ Email from the Registry to the Defence entitled “FW: expert Duncan Castellvi” sent on 7 March 2024 at 11:47 informing the Defence of Mr Castellvi’s admission to the List of Experts on 26 February 2024.

¹⁴ DAR-D31-00000313 (Report, Dutch, Original) (Confidential Annex A); DAR-D31-00000320 (Report, Official English Translation) (Confidential Annex B) (“Report”). *N.B: In the present submission, the Defence refers to the English version of the Report.*

7. The Defence respectfully applies to call Mr Castellvi as an expert witness, and to allow the introduction into evidence of his expert report ("Report")¹⁵ and *curriculum vitae* ("CV")¹⁶ under Rule 68(3) of the Rules of Procedure and Evidence ("Rules"). The Prosecution has helpfully indicated in *inter partes* discussions that it does not oppose the Expert's admission under Rule 68(3).

CONFIDENTIALITY

8. The present submission is classified as public but its Annexes A, B and C are confidential pursuant to RoC Regulation 23bis(1).

APPLICABLE LAW

9. In order to determine whether the testimony and/or report of a witness may be admitted as expert evidence, the Chamber must consider whether:

- (i) the proposed witness is an expert;
- (ii) the contents of the expert report and/or anticipated testimony fall within the area of expertise of the proposed witness; and
- (iii) the contents of the expert report and/or anticipated testimony will be of assistance to the Chamber.¹⁷

10. Rule 68(3) provides that the previously recorded testimony of a witness who is present before the Trial Chamber may be introduced if the witness does not object to the submission of the previously recorded testimony and the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings.

¹⁵ *Ibid.*

¹⁶ DAR-D31-00000316 ("CV") (Confidential Annex C).

¹⁷ *The Prosecutor v. Ruto and Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, 7 August 2013, [ICC-01/09-01/11-844](#), para. 12 ; *The Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, [ICC-01/04-02/06-1159](#), para. 8 ; *The Prosecutor v. Bemba and al.*, Decision on Prosecution Request to Exclude Defence Witness D22-0004, 24 February 2016, [ICC-01/05-01/13-1653](#), para. 11.

SUBMISSIONS

11. This Request is two-fold: the Defence submits first that the Expert should be admitted as an expert in this case (I), and second that his report should be admitted via Rule 68(3) (II).

I. Mr Castellvi should be admitted as an Expert witness

12. The Defence submits firstly that Mr Castellvi should be admitted as an expert witness as he is qualified to provide the expert evidence envisaged (A), his Report falls within his area of expertise (B) and the Report will assist the Chamber (C).

A. Mr. Castellvi is qualified to provide relevant expert evidence on issues related to Facebook

13. The Expert is a Digital Forensic Investigator at the *Nationaal Forensisch Onderzoeksbureau* (“NFO”), an independent forensic investigation agency, recognised and registered by the Dutch Ministry of and Security as an independent research institute.¹⁸ The NFO provides high-quality forensic research in a variety of fields relevant for criminal investigations including open-source intelligence, digital forensics, and cybercrime. The Court will recognise that analysis of social media accounts and their content is the bread-and-butter of digital forensic research and investigations, and open-source intelligence gathering. The expertise of the NFO is frequently called upon by companies and (government) organizations, as well as judicial authorities (courts) and legal advisers (law firms).¹⁹

14. Mr Castellvi has been working in the field of information and communication technology (“ICT”) for over 20 years. Since the beginning of his career in the late 1990s, Mr Castellvi has followed a multitude of trainings starting in 2000 in relation to digital

¹⁸ Report, Confidential Annex B, p. 2; *See also*: Nationaal Forensisch Onderzoeksbureau, official website: <https://www.forensischonderzoeksbureau.nl/organisatie/het-nfo.html>.

¹⁹ Report, Confidential Annex B, p. 2.

forensics investigations and has qualified as a computer hacking forensics investigator.²⁰ His professional experience further ranges from training individuals in ethical hacking and digital forensics to cyber threat analysis on both the Clear and Dark Web. Mr Castellvi has also volunteered as a research editor for issues related to online privacy violations.

15. At the NFO, Mr Castellvi is responsible for all matters relating to digital (forensic) research conducted for companies, government organizations, judicial authorities, and private lawyers.²¹ He has worked on dozens of cases in the context of court proceedings and has provided counter-appraisals at the stage of police investigations, making him familiar with providing expert evidence in a judicial setting.

16. Mr Castellvi is therefore more than adequately qualified as an expert in digital forensics related issues.

B. The Report falls within the Expert's area of expertise

17. On 15 February 2024, the Defence instructed the Expert to provide a report broadly dealing with authentication questions arising from Facebook material.²² The Defence instructed the Expert to address the following six questions in his Report ("the Instructed Questions"):

1. *Is it possible to create a fake Facebook account, ie. an account created by someone but that purports to belong to someone else? How could this be achieved?*
2. *Is it possible to hack into a person's Facebook account? What are the principal methods of doing so?*

²⁰ CV, Confidential Annex C.

²¹ Report, Confidential Annex B, p. 2.

²² DAR-D31-00000316 ("Letter of Instruction") (Annex D).

3. *Is it possible to verify who the creator or owner of a given Facebook account is? Is it possible to do so without having to ask Facebook itself, that is, the company?*
4. *Is it possible to change the name of a Facebook account after the account has been created? Does a Facebook timeline inevitably record such a change? Would this change be recorded in a manner visible to the owner only, or to the world at large?*
5. *If the name of a Facebook account is changed, does this change the account's name as it appears on the site prior to the name change?*
6. *Do changes of the name of a Facebook account change that name on past posts?*

18. The Instructed Questions all relate to technical issues well within the scope of Mr Castellvi's area of expertise. Indeed, social media material is an integral part of digital forensics and OSINT research and has formed part of the Expert's daily work for over twenty years. The Expert's command of digital forensic investigative methods further makes him adequately equipped to answer such practical questions based on his empirical knowledge. Consequently, the Report falls within the scope of Mr Castellvi's expertise.

C. The Report is relevant to the case and will be of assistance to the Chamber

19. The Expert's answers to the Instructed Questions go to the issue of the reliability, or lack thereof, of Facebook evidence, and the probative value that can be attributed to the Facebook Material..²³ The Defence submits in particular that the probative value of the Facebook screenshots purportedly from the profile of "Salah Bush Kushayb" is low. The Report describes the methods used to access Facebook accounts without authorisation.

20. The Expert also explains that the owner of a Facebook account may create the account in one profile name, but subsequently change the profile name. Posts made to

²³ See para. 2.

the Facebook account that post-date the profile name change will be shown under the new name. But importantly even posts made to the Facebook account that pre-date the profile name change will show the new profile name.

21. In sum, the Report demonstrates that:

- An account under the name “Person A” can be created by “Person B” without any link to “Person A”;
- An account can be accessed without authorisation by a variety of methods, even if some effort may be required;
- An account’s name can be changed, and this change affects posts retroactively.

22. The Defence intends to rely on the Expert’s Report to demonstrate that the Facebook Material, specifically the profile purportedly under the name of “Salah Bush Kushayb” is of little to no probative value in terms of being able to establish a link between Mr Abd-Al-Rahman and the alias “Ali Kushayb”, and of zero probative value of a link in 2003-2004. It is not possible to know when the Facebook account of Mr Abd-Al-Rahman’s deceased son Salah – assuming it is genuinely his account – acquired the profile name of “Salah Bush Kushayb”. The Defence cannot even envisage calling Salah to explain because he is dead.²⁴

23. This renders the Report all the more relevant to explore issues of Facebook authentication and reliability. It is submitted that this is specialised knowledge which likely falls outside of the ordinary knowledge and experience of the Trial Chamber and which can only be placed before the Chamber through the evidence of the Expert.

²⁴ See media articles reporting on Salah Abd-Al-Rahman’s death admitted through D-11: DAR-OTP-00000701 (Arabic original), DAR-OTP-00000838 (English translation); DAR-OTP-00000510 (Arabic original), DAR-OTP-00000811 (English translation), See also discussion on Salah’s death during submissions on the Facebook Items: ICC-02/05-01/20-T-138-CONF-ENG ET, p. 28, lns. 21-25 to p. 29, l. 9-20.

II. The Report fulfils the admission requirements under Rule 68(3)

24. It is submitted that admitting the Report under Rule 68(3) will be the most efficient and time-saving method of placing the Expert's evidence before the Trial Chamber without unnecessary oral repetition of the contents of his Report. As indicated above, the Prosecution has helpfully indicated that no objection would be taken to introduction of the Report under Rule 68(3). The Defence expects it may need an hour with the Expert in chief, after which the Prosecution, CLRV and Judges will have every opportunity to pose whatever questions they like.

25. The Defence can advise the Trial Chamber that it has been in contact with the Expert and that he is available to testify from 21 May 2024. Pentecost being a Dutch national holiday, albeit not a Court holiday, falls on Monday 20 May this year; the Expert is unfortunately not available on that date.

CONCLUSION

26. For the foregoing reasons, the Defence respectfully requests the Chamber to recognise Mr Castellvi as an expert, and to allow the submission of his Report under Rule 68(3).

Respectfully submitted,



Dr Cyril Laucci,

Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 13 May, 2024

At The Hague, The Netherlands.