

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 14/06/2024

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

Request for leave to appeal Decision on the submission of evidence through D-0037

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* to:

The Office of the Prosecutor Mr Karim A. A. Khan KC Ms Nazhat Shameem Khan Mr Julian Nicholls	Counsel for the Defence Dr Cyril Laucci, Lead Counsel Mr Iain Edwards, Associate Counsel
Legal Representatives of the Victims Ms Natalie von Wistinghausen Mr Anand Shah	Legal Representatives of the Applicant
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence Ms Marie O’Leary
States’ Representatives	Amicus Curiae
REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section Mr Juan Escudero
Deputy Registrar	
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ("Statute"), the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("the Defence", "Mr Abd-Al-Rahman") hereby seeks leave to appeal the Trial Chamber's decision on the submission of evidence through Duncan Castellvi ("D-0037") of 7 June 2024¹ ("Impugned Decision").

2. The Trial Chamber held that the general objection raised by the Defence to the formal recognition of submission of the materials is 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.² The Chamber found that D-0037's answers "were provided freely and voluntarily and were truthful",³ and that 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 Statute."⁴

3. In its consideration of the Defence submissions, the Trial Chamber made an error of fact and an error of law. These errors give rise to distinct appealable issues that meet the two-pronged test under Article 82(1)(d) of the Statute. They warrant review on the part of the Appeals Chamber, and justify the present request for leave to appeal.

II. PROCEDURAL HISTORY

4. On 21 May 2024, D-0037 was called by the Defence as an expert witness to testify about matters relating to Facebook.⁵

¹ [ICC-02/05-01/20-1144](#)

² Impugned Decision, para. 23.

³ Impugned Decision, para. 23.

⁴ Impugned Decision, para. 23.

⁵ ICC-02/05-01/20-T-152-ENG.

5. The following day, the Prosecution submitted its list of material for submission, containing 68 documents (“68 Items”).⁶ On 28 May 2024, the Defence objected to the submission of the 68 Items.⁷

6. On 29 May 2024, the Prosecution responded to the Defence’s objection.⁸ On 3 June 2024, the Defence submitted its reply to the Prosecution’s response of 29 May 2024,⁹ having been granted leave on 31 May.

III. APPLICABLE LAW

7. Leave to appeal pursuant to Article 82(1)(d) will be granted if the Party submitting the application has identified at least one issue of appeal that has been addressed in an impugned decision, and that meets the following two cumulative criteria as set out in that provision:¹⁰

- (a) It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- (b) It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. With respect to the meaning of an “appealable issue”, the Appeals Chamber has stated that “an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting

⁶ Email from the Prosecution, at 16:30.

⁷ Email from the Defence, at 23:47.

⁸ Email from the Prosecution, at 20:26.

⁹ Email from the Defence, at 17:40.

¹⁰ *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, [ICC-01/04-168](#), 13 July 2006, para. 9; *Prosecutor v. Katanga*, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, [ICC-01/04-01/07-108](#), 14 December 2007, p. 3; Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, [01/04-01/07-116](#), p. 4; *Prosecutor v. Yekatom & Ngaïssona*, Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, [ICC-01/14-01/18-525](#), 22 May 2020, para. 16.

opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹¹

IV. SUBMISSIONS

(a) Error of fact

9. It is submitted that the Trial Chamber erred in finding that D-0037’s discomfort during his testimony was “as a result of his mistaken belief that he was being asked to opine on authenticity”.¹² This is inaccurate to a significant degree. For example, the first most striking expression of the witness’s discomfort was made after he was asked to give an answer to a question about the length of time a Facebook account may have been in existence.¹³ He wished to give a nuanced answer and explained that “quite an extensive investigation” would ordinarily have to be carried out to “rule out as many of these factors as possible.” This had nothing to do with a question about authenticity.

10. A second example of a striking expression of his discomfort was made *after* he had been reassured that he was not being asked to give an assessment of authenticity, and related to the issue of named individuals linked to a Facebook account upon which he was asked to comment.¹⁴ The witness articulated his feeling of being “overwhelmed” and stated that he “really ha[d] to study what’s going on further.” This too had nothing to do with a question about authenticity.

11. The Trial Chamber’s rejection of the Defence’s general objection was based on its assessment of the record of proceedings, and particularly its view that a key factor underpinning the Defence’s arguments, that is, the witness’s discomfort, was based on the witness’s own mistaken belief. The Chamber’s assessment of the record of proceedings is demonstrably flawed.

¹¹ [ICC-01/04-168](#), para. 9; [ICC-01/14-01/18-525](#), para. 17.

¹² Impugned Decision, para. 23.

¹³ See ICC-02/05-01/20-T-152-ENG, page 56, line 12 to page 57, line 1.

¹⁴ See ICC-02/05-01/20-T-152-ENG, page 75, line 8 to page 76, line 8.

(b) Error of law

12. It is submitted that the Trial Chamber erred in law in finding that the Prosecution's failure to adhere to good practice – that is, giving D-0037 the opportunity to examine the documents upon which he was cross-examined before his testimony – “does not prevent the submission of the documents the expert was asked to opine on.”¹⁵ The Prosecution's tactical decision not to let the expert witness have sight of the 68 Items placed the witness in a deplorable position. D-0037 was backed into a corner in a way that no witness should ever be and that was, consequently, unfair.

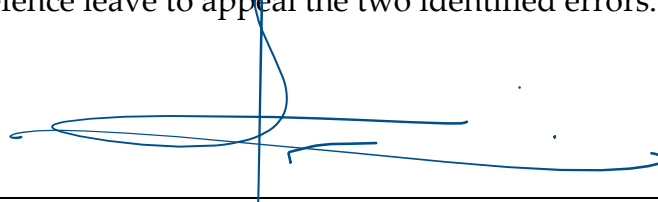
13. Immediate resolution of these issues would significantly affect the outcome of the trial since exclusion of the 68 Items would significantly weaken the Prosecution's contention that Mr Abd-Al-Rahman's own children referred to themselves using the name *Kushayb*, which would in turn weaken the Prosecution's more general position that Mr Abd-Al-Rahman is, or was, *Ali Kushayb*.

14. Further, immediate resolution by the Appeals Chamber may materially advance the proceedings. Notwithstanding the fact that the evidence phase of the trial is all but over, resolution by the Appeals Chamber may materially advance the proceedings in that valuable time and energy will be saved, and precious pages in both Parties' forthcoming trial briefs will be used to develop other arguments, in the event the Appeals Chamber holds that the Trial Chamber did indeed err in recognising the 68 Items as formally submitted. If the 68 Items ought not to have been formally submitted, of course, the Trial Chamber will not be called upon to rule on their admission during its assessment of D-0037's evidence for the purposes of the judgment under Article 74 of the Rome Statute.

¹⁵ Impugned Decision, para. 29

V. CONCLUSIONS

15. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber grant the Defence leave to appeal the two identified errors.



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

The Hague, The Netherlands,

Friday, June 14, 2024