

Annex 26

Public

From: Trial Chamber I Communications
Sent: 01 April 2022 16:30
To: Nicholls, Julian; Trial Chamber I Communications; Laucci, Cyril
Cc: Abd Al Rahman Prosecution Team; V47 Abd Al Rahman LRV Team; D31 Abd-Al-Rahman Defence Team; Chamber Decisions Communication; Associate Legal Officer-Court Officer
Subject: Decision on the 'Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings »' (ICC-02/05-01/20-478)

Dear counsel,

The Chamber notes the list of material the Prosecution intends to use during its opening statements (e-mail from the Prosecution on 28 March 2022 at 19:43).

The Chamber notes the Defence's objections to the use of video DAR-OTP-0216-0119 (filing 657). In the Defence's opinion, this would constitute a serious violation of the accused's presumption of innocence and right to remain silent and not to be forced to contribute to his own incrimination.

In its reply, the Prosecution submits that using the video will not cause prejudice to the Defence. The Prosecution further explains why in its view the factual basis of the Defence's objections is inaccurate. Lastly, the Prosecution submits there was no violation of any Statutory provision in the taking of the video.

The Chamber recalls that, in principle, it will not rule on the admissibility of the evidence submitted during the trial and will ultimately assess the relevance, probative value and potential prejudice of the evidence as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute (Directions on the conduct of proceedings, filing 478, para. 25). At the same time, as announced in the Directions on the conduct of proceedings, the Chamber will make discrete determinations on the admissibility of specific evidence or categories of evidence in accordance with the requirements of the Statute, and in its discretion may decide to rule on any specific objection in advance of the judgment, particularly when it is necessary for a fair and expeditious trial as mandated by Article 64(2) of the Statute (Directions on the conduct of proceedings, filing 478, paras 26-28).

In the instant case, which does not concern the formal submission of an item of evidence but merely its use in court during the opening statements, the Chamber is of the view that a ruling on the admissibility of the video would be premature. This is a matter to be considered following the formal submission of the video by the Prosecution.

Moreover, the Chamber deems that the Prosecution will still be able to fully present and explain its case to the Chamber, and the public, without having to show the contested video. For the above reasons, the Chamber decides that the Prosecution cannot play the objected video during the opening statements.

Kind regards,

Trial Chamber I

From: Nicholls, Julian [REDACTED]
Sent: 01 April 2022 11:52
To: Trial Chamber I Communications [REDACTED]; Laucci, Cyril
 [REDACTED]

Cc: Abd Al Rahman Prosecution Team [REDACTED]; V47 Abd Al Rahman LRV Team
[REDACTED] D31 Abd-Al-Rahman Defence Team
[REDACTED]

Subject: RE: Filing Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings » (ICC-02/05-01/20-478)

Dear Trial Chamber I,
Dear colleagues

The Prosecution hereby responds to the Defence's "Objection en vertu du paragraph 17 des 'Directions on the conduct of the proceedings' (ICC-02/05-01/20-478)" (ICC-02/05-01/20-657) (the "Request"). In the Request the Defence request that the Prosecution be precluded from using video DAR-OTP-0216-0119 (the "Video") in its opening statement.

The Request should be denied as:

- (1) using the video in the opening will not cause prejudice to the Defence;
- (2) the factual basis of the request is inaccurate; and,
- (3) there has been no violation of article 55(2), nor any other provision of the Rome Statute or of "fundamental considerations of fairness," and using the video does not violate the "presumption of innocence."

No Prejudice

The content of the opening statement is not evidence – it is a party's opportunity to set out and explain its case to the Trial Chamber and the public, and to outline the evidence it will lead during the trial. The Video is just one piece of the large body of evidence that the Prosecution will submit in the trial, including much evidence on alias of the Accused. Following the logic of the Defence, the Prosecution would be prohibited from quoting from the many witness statements and other evidence that identify Mr Abd-Al-Rahman as Ali Kushayb its opening remarks.

The Defence's assertion in paragraph 4 of the Request that the Video will "compromise" its ability to cross-examine witnesses at trial regarding the alias is groundless. This is pure speculation, as the Defence demonstrate in "only hop[ing]" that their cross-examinations can be successful (Request paragraph 4). The Defence will have the opportunity to cross-examine witnesses called by the Prosecution, and will be able to deal with the Video being played in opening, to the extent (if at all) that it is relevant to the cross-examinations.

The Request is factually inaccurate

In paragraph 7 of the Request the Defence submits that the Prosecution "did not even mention" the Video in its submissions of 7 December 2020 (*Prosecution's submissions on the evidence demonstrating that Ali Abd-Al-Rahman is also known as Ali Kushayb* ICC-02/05-01/20-224). This is not correct.

To the contrary, at page 12 the Prosecution included a section in this public submission on the Accused's confirmation of his nickname in the Video:

d. Mr Abd-Al-Rahman has used the nickname Ali Kushayb when referring to himself

23. In addition to his conduct, in the period leading up to his surrender, Mr Abd-Al-Rahman used the nickname Ali Kushayb when referring to himself and confirmed that it is his nickname.

- a. On 21 March 2020, the Prosecution was sent a video from P-0869. The video shows Mr Abd-Al-Rahman introducing himself as follows: "I'm Ali Muhammad Ali Abd-al-Rahman, and my nickname is Kushayb".

Similarly, the Defence assert in paragraph 8 that at the confirmation hearing it was "only during rebuttal" that the Prosecution relied on the Video as evidence in the confirmation hearing and had not relied upon it before then. This is not correct.

Although the Prosecution first played the Video during rebuttal, the Prosecution made clear in its first submissions during the confirmation hearing on 24 May 2021 that it relied on its evidence contained in its filing of 7 December 2020. This filing expressly relied on the Video, as explained above. The Prosecution stated at page 27, lines 8-15:

Mr Abd-Al-Rahman, widely known during these events, and later, as Ali Kushayb, was one of the principal and notorious perpetrators of these crimes. He contests his alias, but there's no mistake Mr Abd-Al-Rahman is the man who is known as Ali Kushayb. Ali Kushayb -- the person known as Ali Kushayb is in the courtroom.

The evidence that Mr Abd-Al-Rahman was widely known as Ali Kushayb during the material times is set out in our filing to the Court of 7 December 2020. There is also some more information in the citations to footnote 1 of our Pre-Confirmation Brief, **and I won't repeat that information now.** (ICC-02/05-01/20-T-007-CONF-ENG ET 24-05-2021 27/100)

Thus, contrary to the Defence's assertion, the Prosecution relied on the Video as evidence both before the confirmation hearing in its 7 December 2021 filing and referred to this evidence during its presentation to the Pre-Trial Chamber during the confirmation hearing, and not first in rebuttal.

It has been clear from the beginning of the case that the Prosecution would rely on the Video. On 23 September 2020, the Prosecution provided the Defence with a courtesy copy of the Video and transcript. The Video and its transcript were disclosed on 7 December 2020. The Video (item 2342), transcripts and an investigation note explaining its provenance are listed in the Prosecution's List of Evidence filed on 16 April 2021 prior to the confirmation hearing, (ICC-02/05-01/20-346-Conf-AnxB 16-04-2021).

There has been no violation of article 55(2)

The Request states that its objection is limited to the Prosecution's use of the Video as part of the Prosecution's opening. The Prosecution will respond to any subsequent motion to exclude the Video from evidence. However, as the Request suggests that the Prosecution violated article 55(2) of the Statute and rule 112 of the Rules, the Prosecution will briefly outline of the facts which led to Video coming into its possession. These facts show that there was no violation of article 55(2) nor of any other provision of the Statute:

On 26 December 2019, P-0869, who was previously unknown to the Prosecution, sent an email to the Court's Public Affairs Unit (DAR-OTP-0217-0030, translation DAR-OTP-0215-6800). The email stated:

*"Dear Mr Fadi,
My name is [REDACTED]. We met at a lecture about the Court in the Netherlands in 2007, and in Belgium, at the Vrije Universiteit Brussel (Brussels Free University), in 2007. I have been interested in researching ICC cases since 2003. In 2004, I received a diploma on the Rome Statute in relation to Ali Kushayb ... I received ... the basic ... [sic]. Kindly call me on [...].
A call from him through one of his relatives [sic] and he indicated his willingness to co-operate with you. He can become a witness [incomprehensible] if possible. At present, it is possible to co-ordinate with him in order to listen to him. Accept, Sir, my appreciation and respect."*

The Court's Public Affairs Unit forwarded the email to the Prosecution.

After receiving the email, the Prosecution communicated with P-0869 and informed him that it required confirmation that he was in contact with the suspect (whom P-0869 had referred to as "Ali Kushayb in the email). See DAR-OTP-0215-7063.

On 21 March 2020, P-0869 sent the Video to the Prosecution.

Nothing in the conduct of the Prosecution in seeking to determine that P-0869 was actually in contact with the suspect, a basic step, was unethical nor was it in violation of article 55(2) of the Statute.

The Prosecution requests that the Trial Chamber deny the Request.

Thank you.

Best,

Julian

From: Trial Chamber I Communications [REDACTED]
Sent: 31 March 2022 15:04
To: Nicholls, Julian [REDACTED] Trial Chamber I Communications
 [REDACTED]; Laucci, Cyril [REDACTED]
Cc: Abd Al Rahman Prosecution Team [REDACTED] V47 Abd Al Rahman LRV Team
 [REDACTED]; D31 Abd-Al-Rahman Defence Team
 [REDACTED]
Subject: RE: Filing Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings » (ICC-02/05-01/20-478)

Dear Mr Nicholls,
 The Prosecution may reply by way of e-mail no later than noon tomorrow, 1 April.
 Best regards,
 [REDACTED]

From: Nicholls, Julian [REDACTED]
Sent: 31 March 2022 13:43
To: Trial Chamber I Communications [REDACTED]; Laucci, Cyril
 [REDACTED]
Cc: Abd Al Rahman Prosecution Team [REDACTED] V47 Abd Al Rahman LRV Team
 [REDACTED] D31 Abd-Al-Rahman Defence Team
 [REDACTED]
Subject: Filing Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings » (ICC-02/05-01/20-478)

Dear Counsel,
 Dear colleagues,

The Prosecution has this morning received filing “Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings » (ICC-02/05-01/20-478)”. The Prosecution intends to respond to this filing. Could we please know the deadline given that the opening statements are on 5 April?

Thank you.

Best,

Julian