

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **21 June 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**

**Prosecution’s response to “Request for leave to appeal Decision on the  
submission of evidence through D-0037”**

**Source:** Office of the Prosecutor

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

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**Detention Section**

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## I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence's application for leave to appeal<sup>1</sup> ("Application") the "Decision on the submission of evidence through D-0037"<sup>2</sup> ("Decision"). The Application does not raise any appealable issues, nor does it meet the cumulative criteria for leave to appeal under article 82(1)(d) of the Rome Statute.

## II. SUBMISSIONS

2. The Defence submits that the Chamber erred in fact and in law in recognising as formally submitted into the case record 68 items used by the Prosecution with expert witness D-0037 ("68 Items").<sup>3</sup>

3. The Defence seeks leave to appeal the Decision on the following two issues ("Issues"):

- a. Whether the Chamber erred in fact 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'" ("First Issue");<sup>4</sup> and
- b. Whether the 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'" ("Second Issue").<sup>5</sup>

### **The Issues are not appealable issues**

4. An appealable issue is constituted by "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under

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<sup>1</sup> Request for leave to appeal Decision on the submission of evidence through D-0037, [ICC-02/05-01/20-1148](#).

<sup>2</sup> Decision on the submission of evidence through D-0037, [ICC-02/05-01/20-1144](#).

<sup>3</sup> [Application](#), paras. 1-3.

<sup>4</sup> [Application](#), para. 9.

<sup>5</sup> [Application](#), para. 12.

examination”.<sup>6</sup> A mere disagreement or conflicting opinion does not constitute an appealable issue.<sup>7</sup>

5. Neither of the Issues are appealable since they both constitute mere disagreement with the Chamber’s findings. In addition, the First Issue is not a subject the resolution of which is essential to the judicial cause under determination.

6. In relation to the First Issue, the Defence merely disagrees with the Chamber’s correct finding, based on the record of the proceedings, that the discomfort displayed by D-0037 at times during his testimony was as a result of his mistaken belief that he was being asked to opine on authenticity.<sup>8</sup> In support of its assertion, the Defence points to two examples in the transcript of the proceedings.<sup>9</sup>

7. Neither of the two examples—referenced by the Defence for the first time in the Application—raise any real question regarding the soundness of the Chamber’s finding. The first example does not even relate to the showing of any of the 68 Items to D-0037, but rather to general questioning regarding indicators relevant to the attribution of Facebook accounts.<sup>10</sup> That D-0037 wished to give a nuanced answer to a general question has no bearing on his level of comfort when later shown items from Facebook for comment. In relation to the second example, it is apparent from the record that when the question was simplified the expert was able to answer without difficulty.<sup>11</sup>

8. Furthermore, the First Issue is not a subject the resolution of which is essential to the judicial cause under determination. In submitting the 68 Items, the Chamber first satisfied itself, based on the record of the proceedings, that “the answers by D-

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<sup>6</sup> DRC Extraordinary Review Judgment, [ICC-01/04-168](#), para. 9; *Gbagbo & Blé Goudé* Leave to Appeal Decision on Admission of Prior Recorded Statements, [ICC-02/11-01/15-1023](#), para. 14; *Bemba et al.* Leave to Appeal Decision on Admissibility of Certain Materials, [ICC-01/05-01/13-1489](#), para. 8; *Abu Garda* Leave to Appeal Decision on Confirmation of Charges, [ICC-02/05-02/09-267](#), paras. 13, 18; *Ongwen* Leave to Appeal Decision on Witness Preparation, [ICC-02/04-01/15-537](#), para. 8.

<sup>7</sup> DRC Extraordinary Review Judgment, [ICC-01/04-168](#), para. 9; *Al Hassan* Witness Preparation and Familiarisation Reconsideration/Leave to Appeal Decision, [ICC-01/12-01/18-734](#), para. 14; *Yekatom & Ngaissona* Leave to Appeal Decision, [ICC-01/14-01/18-161](#), para. 21.

<sup>8</sup> [Decision](#), para. 23; [Application](#), paras. 9-11.

<sup>9</sup> [Application](#), paras. 9-11.

<sup>10</sup> [Application](#), para. 9, referring to [T-152-ET](#), p. 56, line 12-p. 57, line 1.

<sup>11</sup> [Application](#), para. 10, referring to [T-152-ET](#), p. 75, line 8-p. 76, line 8.

0037 were provided freely and voluntarily and were truthful”, before indicating that it would consider the circumstances under which D-0037 came to give his evidence, including the discomfort he displayed at times during his testimony, in its assessment of his evidence for the purpose of its judgment under article 74 of the Statute.<sup>12</sup>

9. The Defence has not sought leave to appeal the Chamber’s overall conclusion that D-0037’s answers were provided freely and voluntarily and were truthful, nor has it adequately explained how resolution of the First Issue would impact this conclusion or reverse the Chamber’s decision to submit the 68 Items. The Defence has therefore not demonstrated that resolution of the First Issue by the Appeals Chamber would have a material impact on the Decision.

10. In relation to the Second Issue, the Defence merely disagrees with the Chamber’s correct finding that failure to grant an expert witness the opportunity to examine documents on which they will be examined or cross-examined before giving evidence does not prevent the submission of the documents the expert was asked to opine on.<sup>13</sup> The Defence does not identify any legal principle that would prevent the submission of the evidence in these circumstances, nor does it explain how the Chamber is said to have violated any such principle.

11. Furthermore, the Defence’s assertion that D-0037 was “backed into a corner” in a way that was “unfair” is incorrect.<sup>14</sup> The record reflects that D-0037 was given time to examine the relevant materials, and indicated that he was willing and able to proceed; a position he later confirmed.<sup>15</sup> The Defence, having decided to call D-0037 to testify in relation to issues regarding Facebook, and having received disclosure of the relevant Facebook material more than six months prior,<sup>16</sup> had the opportunity to show the material to D-0037 before his testimony, but chose not to. The Defence also objected to a proposal from the Chamber that D-0037 be provided with an electronic version of

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<sup>12</sup> [Decision](#), para. 23.

<sup>13</sup> [Decision](#), para. 29; [Application](#), paras. 12-14.

<sup>14</sup> [Application](#), para. 12.

<sup>15</sup> [T-152-ET](#), p. 65, line 21-p. 66, line 9 and p. 90, line 25-p. 91, line 15.

<sup>16</sup> The relevant items were disclosed in November 2023 and D-0037 testified on 21 May 2024.

the materials and be given additional time to review them before continuing the cross-examination.<sup>17</sup> Furthermore, the record shows that none of the questions put to D-0037 were technical or complex such that he would have required more time or study to answer them.<sup>18</sup> The Defence's submissions regarding the Second Issue are therefore premised on an incorrect characterisation of the record.

### **The Issues do not satisfy the cumulative criteria under article 82(1)(d) of the Statute**

12. Even if the Chamber were to determine that the Issues are appealable, they do not satisfy either of the cumulative criteria under article 82(1)(d) of the Statute.

*The Issues would not significantly affect the outcome of the trial*

13. The Defence fails to demonstrate that the Issues would significantly affect the outcome of the trial. To satisfy this criterion, the Defence argues that "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*."<sup>19</sup>

14. The Defence's argument on the potential impact of the Issues on the outcome of the trial is speculative since the Decision only submits the 68 Items into evidence, and defers the assessment of their evidentiary weight and admissibility to the article 74 judgment stage.<sup>20</sup> As indicated in the Decision, the Chamber, when assessing D-0037's evidence at that stage, will also consider the circumstances in which he came to give his evidence, including the discomfort displayed at times during his testimony.<sup>21</sup>

<sup>17</sup> [T-152-ET](#), p. 83, line 17-p. 84, line 17.

<sup>18</sup> For example, the expert was asked to explain, by reference to the relevant material, certain general features of Facebook, such as the types of information inputted by a user (*see e.g.* [T-152-ET](#), p. 67, line 21-p. 68, line 7 and p. 74, lines 10-24 and p. 104, lines 15-22) and the impact of a change of account name on certain content (*see e.g.* [T-152-ET](#), p. 69, lines 11-15 and p. 71, lines 3-18 and p. 100, lines 4-12). The expert was also asked to indicate, again by reference to the relevant material, whether certain indicators would be relevant and/or significant with respect to attributing a Facebook account to a particular person, such as connections to accounts of possible family members (*see e.g.* [T-152-ET](#), p. 72, lines 11-20 and p. 92, lines 17-23 and p. 98, lines 1-9).

<sup>19</sup> [Application](#), para. 13.

<sup>20</sup> [Decision](#), para. 32.

<sup>21</sup> [Decision](#), para. 23.

Since the Chamber has not yet decided whether it will admit the 68 Items into evidence or how much weight, if any, it will afford them, the Application is premature.

*The immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings*

15. The Defence fails to demonstrate that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings. The Defence argues that “valuable time and energy will be saved, and precious pages in both Parties’ forthcoming trial briefs will be used to develop other arguments” if the Appeals Chamber finds that the items ought not to have been submitted, since the Chamber will not need to rule on them in its final judgement.<sup>22</sup>

16. Again, the Chamber has indicated that it will assess the 68 Items “in light of all submissions received, including on the weighing of any prejudice against the probative value of the items, in order to decide on their admissibility” in its judgment pursuant to article 74 of the Statute.<sup>23</sup> Further, when assessing D-0037’s evidence, the Chamber will consider the circumstances under which he came to give his evidence, including the discomfort he displayed at times during his testimony.<sup>24</sup>

17. The Defence will therefore have the opportunity to make submissions on the evidentiary weight and admissibility of the 68 Items—including what the Defence considers to be the correct interpretation of the record regarding the source of D-0037’s discomfort—prior to the final judgment. Saving time and energy, or pages in a final trial brief that could be used for other arguments, are not valid reasons for certifying an issue for appeal. The Defence has not demonstrated that an authoritative determination of the Issues by the Appeals Chamber would ensure that the proceedings follow the right course.<sup>25</sup>

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<sup>22</sup> [Application](#), para. 14.

<sup>23</sup> [Decision](#), para. 32.

<sup>24</sup> [Decision](#), para. 23.

<sup>25</sup> [DRC Extraordinary Review Judgment](#), para. 15.

18. Furthermore, in relation to the First Issue, since resolution of this issue is not essential to the judicial cause under determination, it would not materially advance the proceedings.<sup>26</sup>

19. Lastly, the final briefs of the Parties and Participants are due to be filed no later than eight weeks after the official closure of evidence, which is expected to occur in the near future.<sup>27</sup> In these circumstances, intervention by the Appeals Chamber is likely to cause unnecessary delay in the proceedings, rather than materially advance them.

### III. CONCLUSION

20. For the foregoing reasons, the Prosecution respectfully requests that the Chamber reject the Application.



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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 21<sup>st</sup> day of June 2024

At The Hague, The Netherlands

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<sup>26</sup> See above, para. 8.

<sup>27</sup> Third directions on the conduct of proceedings, [ICC-02/05-01/20-1046](#), para. 12. The Chamber ordered that this deadline be suspended over the summer judicial recess. See Email from the Chamber on 18 June 2024 at 09:28.