



Original: English

No. ICC-02/05-01/20

Date: 27 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

**Decision on the Defence's request for leave to appeal the Decision on the
submission of evidence through D-0037**

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 21 May 2024, Witness D-0037 testified before Trial Chamber I (the ‘Chamber’).¹
2. On 22 May 2024, the Defence submitted its List of Material for Submission through D-0037.²
3. On the same day, the Prosecution submitted its List of Material for Submission.³
4. On 28 May 2024, the Defence objected to the submission of all 68 items on the Prosecution's List of Material for Submission.⁴
5. On 29 May 2024, the Prosecution responded by requesting the Chamber to reject the Defence’s objection to the submission of the items on the Prosecution’s List of Material for Submission.⁵
6. On 3 June 2024, after being granted leave from the Chamber,⁶ the Defence replied to the Prosecution’s response of 29 May 2024.⁷
7. On 7 June 2024, the Chamber issued its decision on the submission of evidence through D-0037 (the ‘Impugned Decision’), recognising the 68 items submitted by the Prosecution as formally submitted.⁸
8. On 14 June 2024, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).⁹
9. On 21 June 2024, the Prosecution responded to the Request (the ‘Response’).¹⁰

¹ Transcript of hearing, ICC-02/05-01/20-T-152-ENG.

² Email from the Defence, at 13:56.

³ Email from the Prosecution, at 16:30.

⁴ Email from the Defence, at 23:47.

⁵ Email from the Prosecution, at 20:26.

⁶ Email from the Chamber, at 14:23. The Defence had sought leave to reply on 31 May 2024, *see* Email from the Defence, at 13:45.

⁷ Email from the Defence, at 17:40.

⁸ Decision on the submission of evidence through D-0037, ICC-02/05-01/20-1144.

⁹ Request for leave to appeal Decision on the submission of evidence through D-0037, ICC-02/05-01/20-1148.

¹⁰ Prosecution’s response to “Request for leave to appeal Decision on the submission of evidence through D-0037”, ICC-02/05-01/20-1151.

II. Applicable Law

10. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in previous decisions.¹¹

III. Submissions

11. The Defence submits that the Chamber erred in finding that D-0037’s discomfort during his testimony was ‘a result of his mistaken belief that he was being asked to opine on authenticity’ of the documents (the ‘First Issue’).¹² The Defence further submits that 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.”’ (the ‘Second Issue’).¹³

12. Finally, the Defence avers that immediate resolution by the Appeals Chamber ‘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*’, and may materially advance the proceedings by saving time and energy for the upcoming final briefs if the Appeals Chamber finds that the Chamber erred in recognising the 68 items as formally submitted.¹⁴

13. The Prosecution responds that the Request does not raise any appealable issues, nor does it meet the cumulative criteria for leave to appeal under Article 82(1)(d) of the Statute.¹⁵ Specifically, the Prosecution argues that the two issues identified by the Defence are not appealable as they both constitute mere disagreements with the Chamber’s findings. Moreover, the Prosecution contends that the First Issue is not a subject the resolution of which is essential to the judicial cause under determination¹⁶ and that the Second Issue fails to identify any principle of law, let alone explain any alleged violation thereof.¹⁷

¹¹ Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, ICC-02/05-01/20-525, paras 10-14. *See also* oral ruling rendered on 7 February 2022, ICC-02/05-01/20-T-020-CONF-ENG, p. 83, line 25 to p. 86, line 25; oral ruling rendered on 7 April 2022, ICC-02/05-01/20-T-028-ENG, p. 96, line 7 to p.98, line 11.

¹² Request, ICC-02/05-01/20-1148, para. 9.

¹³ Request, ICC-02/05-01/20-1148, para. 12.

¹⁴ Request, ICC-02/05-01/20-1148, paras 13-14.

¹⁵ Response, ICC-02/05-01/20-1151, para. 1.

¹⁶ Response, ICC-02/05-01/20-1151, para. 5.

¹⁷ Response, ICC-02/05-01/20-1151, para.10.

14. The Prosecution further contends that the Defence fails to demonstrate that the Issues would significantly affect the outcome of the trial since the Chamber is yet to decide on the admission of the 68 items.¹⁸ Finally, the Prosecution avers that the Defence fails to show that the immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings,¹⁹ and indeed, given the stage which has been reached, is likely to delay the continuation of the proceedings.²⁰

IV. Analysis

15. With regard to the First Issue, the Chamber finds that the Defence simply disagrees with the Chamber's assessment of D-0037's demeanour during his testimony. This is further illustrated by the two examples provided by the Defence, in which it is argued that the witness was not asked to opine on authenticity.²¹ The Defence does not point to any error in the Chamber's reasoning on this point. The Chamber also accepts the Prosecution's argument that the Defence has not demonstrated that resolution of the First Issue by the Appeals Chamber would have a material impact on the Impugned Decision.²² The Chamber notes in this regard that the finding that D-0037's discomfort during his testimony was a result of his mistaken belief that he was being asked to opine on authenticity of the documents did not form part of the Chamber's determination whether or not to recognise the 68 items as formally submitted. The Chamber therefore considers that the First Issue is not an appealable one.

16. With respect to the Second Issue, as argued by the Prosecution,²³ the Defence does not identify any legal principle that prevents the submission of evidence through an expert witness if the expert was not able to examine the relevant documents ahead of his or her testimony. As with the First Issue, the Defence simply disagrees with the Chamber's finding, without demonstrating any error. Consequently, the Chamber finds that the Second Issue is also not an appealable one.

17. Since the Defence has failed to identify any appealable issues, the Chamber does not need to consider the remainder of the Request. However, the Chamber notes that the Defence also fails to demonstrate that the Issues would significantly affect the outcome of the trial. The Chamber recalls that it ruled on the *submission* of the 68 items, and not on their *admission*. The

¹⁸ Response, ICC-02/05-01/20-1151, paras 13-14.

¹⁹ Response, ICC-02/05-01/20-1151, paras 15-17.

²⁰ Response, ICC-02/05-01/20-1151, para. 19.

²¹ Request, ICC-02/05-01/20-1148, paras 9-10.

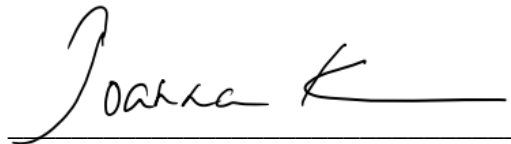
²² Response, ICC-02/05-01/20-1151, paras 8-9.

²³ Response, ICC-02/05-01/20-1151, para. 10.

Impugned Decision clearly indicates that the Chamber defers the assessment of the evidentiary weight and admissibility of the 68 items to the judgment under Article 74 of the Statute.²⁴ Since the Chamber is yet to decide on the reliability and probative value of the items, it is premature to argue that the Issues would significantly affect the outcome of the trial.²⁵ Finally, the Chamber accepts the Prosecution's argument that '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.'²⁶

V. Disposition

18. For the above reasons, the Chamber rejects the Request in its entirety.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 27 June 2024

At The Hague, The Netherlands

²⁴ Response, ICC-02/05-01/20-1151, para. 23.

²⁵ Response, ICC-02/05-01/20-1151, para. 14.

²⁶ Response, ICC-02/05-01/20-1151, para. 17.