

**James Stewart**, former Deputy Prosecutor at the International Criminal Court

## **Republic v. Lieutenant Mohammed Juma**

### MOCK TRIAL

Wayamo training – Nairobi, Kenya – March 6-8, 2024

Prosecution case – Defence objection raises questions:

**Whether the forms of Open Source and/or Digital Information relied upon by the Prosecution can be tendered as Evidence and, if so, the weight that should be attributed to it.**

[Submissions to be led by Kenyan lawyers on applicable law, with submissions from internationals on relevant international jurisprudence and best practice.]

### **SUBMISSIONS ON ADMISSIBILITY AND WEIGHT**

**1 – Photograph (Annex A)**, taken on 16 June 2023 shows **bodies in the street** near houses in the West Kharfour capital **Al Jamima**. Photograph was taken by Witness 1. Metadata on digital photo corresponds to date in question. Witness 1 authenticated the photo in High Court proceedings when called by the Prosecution.

Photo (Annex A) admissible -> great weight

- Local humanitarian worker – < 1000 dead – mass graves in and around Al Jamima
- Photo taken by the witness and authenticated by him
- Metadata on digital photo further authenticates photo by date
- Greatly strengthens credibility and reliability of Witness 1's evidence
- Also supports eyewitness evidence of Witness 2 (Khamal Jamis), who identifies Accused directing attack in Al Jamima
- Also ties in with video evidence posted by QAF, where we see Accused thanking volunteers for clean-up in aftermath of massacre (massacre June 15/video June 16)

Such evidence admitted, without challenge, in *Al Mahdi* admission of guilt proceedings by Trial Chamber at the ICC

**2 – Satellite Imagery (Annex B)**, with source UN Commission of Inquiry Report & Google. Points on Google Earth view correspond to **witness testimony** on locations of alleged incidents **as well as their aftermath**; photo shared on Twitter (now X) on 16 January 2023; geolocation verification methods demonstrate that the location is within Al Jamima.

Satellite imagery (Annex B) admissible -> great weight

- Admissible, because this satellite imagery is authenticated, given that what is pictured corresponds, through Google Earth view and geolocation verification methods, with witness testimony relating to the date, respecting the incidents and their aftermath, and location being Al Jamima
- Satellite imagery supports eyewitness testimony, in turn, and helps demonstrate widespread or systematic nature of an attack, here the massacres of June 15
- Subsequent sharing on X doesn't detract from the reliability of this evidence

Satellite imagery evidence was admitted at ICTY, for example, to reveal the location and relocation of mass graves, in relation to the July 1995 Srebrenica massacre, in the *Krstić* case

**3 – Video (Annex C)**, shared on Twitter (now X) on 15 June 2023, showing **hundreds of refugees from Al Jamima fleeing towards Khad.**

Video (Annex C) admissible -> worth some weight

- Admissible because it is contemporaneous with events of June 15 and matches what eyewitnesses describe, even if origin unidentified
- Worthy of some weight as contextual evidence

See *Rutaganda* trial at ICTR – video compilation authenticated by a witness who compiled the videos, but did not make the films

**4 – Video (Annex D)**, shared on Twitter (now X) by the QAF on 16 June 2023, showing **Lieutenant Juma** supervising a clean-up operation in Al Jamima with members of the Nadusian Red Crescent present, some in Hazmat suits and gloves. The Accused is captured thanking the volunteers “for cleaning up and getting the **terrorists** off our streets.” Witness 3 testified that Hazmat suits are routinely used by the Nadusian Red Crescent in West Kharfour to “collect bodies since the conflict started”.

Video (Annex D) admissible -> solid weight

- Admissible, both to implicate the Accused and as context, because its authenticity derives from its source
- QAF itself posted the video the day after the massacres – and, in addition:
  - We see the Accused himself appearing in in the video, speaking, in effect, about a “clean-up” described by Witness 1 and Witness 5
  - Witness 5 also testified that the Accused ordered the clean-up and this accords with what the Accused is saying on the video
  - Witness 3 also testified about the use of Hazmat suits, which we see in the video
- So, no matter it was obtained from a social media source
- It deserves weight as evidence that supports the eyewitness identification of the Accused, and his role in events, given by Witness 2 and Witness 4, as well as by Witness 5

Evidence to be assessed on its own merit – at the ICC, it would be seen as submitted, and its relevance, admissibility, and weight assessed, in the context of all of the evidence, at the end of the trial (Judges’ retreat press release) – and see Appeal Judgment in *Bemba* and Trial Chamber ruling in *Ongwen*

**4 – Human Rights Watch report, “A Day in hell”**. Submitted in order to support **contextual elements** of the incident. [Only information presented above.]

HRW report admissible -> some weight

- Admissible, because HRW is a reputable organisation with extensive experience gathering information and evidence respecting situations of armed conflict and atrocity crimes
- Difficulty rests with “anonymous hearsay” source of information

- Here, the report is not admissible against the Accused directly, but only to assist in establishing the context – the chapeau elements of CAH
- Report is also consistent with testimonial, photographic, and video evidence, so it deserves some weight – but for a limited purpose

Without evidence on the methodology of how the report was compiled – how the compilers collected information and verified it – international criminal courts would be hostile to the admissibility of such a report – “anonymous hearsay” is the problem – if admitted, it might receive little weight – but it would not, necessarily, be rejected out of hand

**5 – United Nations Commission of Inquiry Report (15 September 2023),** submitted in order to support **contextual elements** of the incident.

UN report admissible -> solid weight

- Admissible, because it should be considered credible and reliable enough, given the role of a UN Commission of Inquiry, whose work is designed to inform further action by the UN
- It deserves to be afforded solid weight, not to implicate the Accused directly, but to help establish the context – chapeau elements of CAH
- It is also consistent with testimonial, photographic, and video evidence adduced in the trial, which tends to support its reliability

Such evidence was accepted in trials at the ICTR to prove the context of genocide, and fed into the ICTR Appeals Chamber decision in *Karemura* that trial chambers were bound to take judicial notice of the fact of the genocide of the Tutsis in Rwanda in 1994

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**Notes for examination-in-chief of Robin Taylor, expert witness on authentication and admissibility of digital evidence:**

***Qualification as an expert***

- Offering Robin Taylor as an expert witness, to assist the Court, on the matter of the authentication and admissibility of digital evidence in international criminal courts and tribunals

- o Defence accept him as an expert?
- o If not – take the witness quickly through his background – has he ever testified in court as an expert in this field? Was his evidence accepted?

***Ruling by the Court***

- Ask the Court to rule on whether the witness may testify as an expert

***Expert opinion evidence***

- Mr Taylor, could you please provide us with your evidence on how digital evidence is authenticated and its acceptance generally by international criminal courts and tribunals?