

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 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

Public Redacted Version of “CLRv Observations on ‘Demande de la Défense aux fins d’admission de la déclaration écrite du témoin D-0028 et d’un document associé en vertu de la Règle 68-2-c du Règlement de Procédure et de Preuve’”, 24 June 2024 (ICC-02/05-01/20-1153-Conf)

Source: The Common Legal Representative of Victims

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

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Unrepresented Victims

**Unrepresented Applicants
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Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The Common Legal Representative of Victims (“CLRV”) submits these observations on the “Demande de la Défense aux fins d’admission de la déclaration écrite du témoin D-0028 et d’un document associé en vertu de la Règle 68-2-c du Règlement de Procédure et de Preuve”.¹
2. As addressed herein, based on the CLRV’s investigations and the information available, the CLRV is of the view that the Defence has not demonstrated that Witness D-0028 (“D-0028”) is ‘unavailable’ to appear before Trial Chamber I to provide his testimony under the standard required pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”).

II. Applicable Law

3. As previously established by the Trial Chamber, in order for a witness’s prior recorded testimony to be submitted under Rule 68(2)(c): (i) the Chamber must be “satisfied that the witness is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence”; (ii) the party or participant must show they could not have anticipated the necessity of measures under Article 56 of the Rome Statute; and (iii) the prior recorded testimony has sufficient indicia of reliability.²

III. Submissions on Defence Application

4. The CLRV accepts that the second and third elements of the Rule 68(2)(c) test appear to be met on the basis of the information provided in the Application, and notes the efforts undertaken by the Defence to try to locate and re-establish communication with D-0028, as specified in the Application and Confidential Annex 1 thereto, including “almost daily” attempts to reach D-28 by phone.³

¹ Demande de la Défense aux fins d’admission de la déclaration écrite du témoin D-0028 et d’un document associé en vertu de la Règle 68-2-c du Règlement de Procédure et de Preuve, 13 June 2024, ICC-02/05-01/20-1147-Conf (“Application”) (public redacted version: [ICC-02/05-01/20-1147-Red](#)).

² Decision on the Defence’s request to introduce prior recorded testimony of D-0022 under Rule 68(2)(c), 3 November 2023, ICC-02/05-01/20-1037-Conf, para. 8.

³ ICC-02/05-01/20-1147-Conf-Anx1.

5. The Defence premises its satisfaction of the first element of the Rule 68(2)(c) test on the Defence's understanding – through its efforts, the evidence of D-0029, and information received from the Prosecution on 14 February 2024 – that D-0028 [REDACTED], and the fact that the Defence is unable to contact D-0028 by phone or through third parties [REDACTED].⁴ The Defence submits in light of the information available that it has no way of confirming whether D-0028 is even alive.⁵
6. The CLRV understands that the Prosecution takes a contrary position based on its investigations, and as communicated by the OTP to the Defence via email on 15 May 2024, believes that D-0028 [REDACTED] by that date.⁶ During the cross-examination of D-0029 on 10 June 2024, the Prosecution indicated that it maintained this position, including that D-0028 has [REDACTED] in recent weeks, and was seen there [REDACTED].⁷
7. Based on information that she considers reliable, the CLRV shares the Prosecution's belief. As set out in the annexed Case Manager's Note,⁸ the CLRV, through the same trusted interlocutor she has previously relied on in making factual submissions to the Trial Chamber,⁹ understands that D-0028 was seen working at [REDACTED]¹⁰ in [REDACTED] on 18 June 2024 and has been present in [REDACTED] for at least the 10 days previous to this. The CLRV interlocutor¹¹ was able to provide this information to the CLRV team within a few minutes of the CLRV's inquiry to the interlocutor, and further advised, *inter alia*, that D-0028 is [REDACTED], and continues to act in this capacity. Following this initial provision of information, and at the CLRV's request, its interlocutor was able to confirm D-

⁴ Application, paras 6-11.

⁵ *Id.*, para. 11.

⁶ Confidential Annex 2 to the Application (ICC-02/05-01/20-1147-Conf-Anx2).

⁷ T-157-CONF-ENG ET, p. 48, line 19 to p. 49, line 14.

⁸ See Confidential Annex to the present observations.

⁹ See CLRV email observations of 30 April 2024 at 12h13 with attached Case Manager's Note; CLRV email response of 14 May 2024 at 9h25.

¹⁰ In his prior recorded testimony, D-0028 lists his current occupation as [REDACTED] (DAR-D31-00000150-0001, at p. 0001).

¹¹ As previously communicated in the CLRV Case Manager's Note submitted by email on 30 April 2024, the CLRV interlocutor is a participating victim whom the CLRV is regularly in contact with [REDACTED].

28's presence [REDACTED] today (24 June 2024), and that D-28 has been present [REDACTED] since at least [REDACTED] 2024.

8. The investigative efforts of the Prosecution and CLRV suggest that D-0028 is, on an objective assessment, alive and contactable, and not 'unavailable' for purposes of Rule 68(2)(c) of the Rules.
9. Trial Chamber V, in *Yekatom and Ngaïssona*, rejected a Prosecution application to submit a witness's testimony under Rule 68(2)(c) on grounds that "the witness is simply unwilling to testify because of personal and/or professional concerns that the Prosecution has been unable to allay", that "[t]here is no information [...] which could suggest that the witness is inaccessible or otherwise incapable of testifying", nor "information suggesting that the witness's security concerns are such that protective measures, or otherwise a testimony via video-link, would be insufficient to address them".¹² Trial Chamber VII, in *Bemba et al.*, indicated that the term 'unavailable' in Rule 68(2)(c) should be interpreted broadly, and referred, in respect of the particular witness in question when granting the application, to "obstacles to her ability to cooperate with the Court and to the ability of the Court to secure her oral testimony that cannot be overcome with reasonable diligence".¹³
10. In the CLRV's view, the framework set out by Trial Chamber V when assessing the 'unavailability' of a witness for purposes of Rule 68(2)(c) is proper and correct and should be applied in the present proceedings. Under this framework, it is the CLRV's observation that the Defence has not met its burden under Rule 68(2)(c). In particular, in the CLRV's view, the information available suggests that D-0028 is not inaccessible or otherwise incapable of testifying (or that other 'obstacles' as referred to by Trial Chamber VII exist to the witness's ability to cooperate with the Court), that a reasonable inference may be drawn that personal or other reasons

¹² Trial Chamber V, *Yekatom and Ngaïssona*, Second Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(c) of the Rules concerning Witness P-1819, 11 August 2023, [ICC-01/14-01/18-2021](#), para. 13.

¹³ Trial Chamber VII, *Bemba et al.*, Corrected public redacted version of Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, [ICC-01/05-01/13-1481-Red-Corr](#), paras 16-17.

are at the root of the witness having ceased communication with the Defence, and that there are no security issues in respect of the witness that cannot be sufficiently addressed by protective measures that are at the Trial Chamber's disposal.

IV. Conclusion

11. The CLRV respectfully requests Trial Chamber I to take into account the above observations in considering the Defence Application.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a long horizontal flourish extending to the right.

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 25 June 2024
At Berlin, Germany