



Original: English

**No. ICC-02/05-01/20
Date: 5 September 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 Decision on the Defence's renewed request for admission of the prior recorded testimony of Witness D-0028 under Rule 68(2)(c) of the Rules of Procedure and Evidence

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

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I. PROCEDURAL HISTORY

1. On 13 June 2024, the Defence filed a request to introduce the prior recorded testimony of D-0028 pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (the 'Rules') (the 'Main Request').¹ In its Main Request, the Defence submitted that it had been unable to reach D-0028 since September 2023.²
2. On 26 June 2024, the Defence was able to establish contact with D-0028, who confirmed that he had returned [REDACTED] and was willing to appear before Trial Chamber I (the 'Chamber').³
3. On 28 June 2024, following D-0028's reappearance, the Defence filed a modified request (the 'Modified Request'), asking, *inter alia*, that the Chamber allow D-0028's appearance before the Chamber.⁴ The Defence indicated that given [REDACTED], D-0028 would not be able to appear before October 2024, should the Chamber authorise his appearance [REDACTED].⁵
4. On 5 July 2024, the Chamber issued its decision rejecting the Defence's Main Request to introduce D-0028's prior recorded testimony under Rule 68(2)(c) of the Rules, but partially authorising the Defence's Modified Request. Noting D-0028's ability to travel, the Chamber instructed the Defence to arrange D-0028's appearance [REDACTED] between 16-20 September 2024 and to confirm any travel arrangements

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, ICC-02/05-01/20-1147-Conf, with two confidential annexes (notified on 14 June 2024). A public redacted version was notified on 14 June 2024, ICC-02/05-01/20-1147-Red.

² Main Request, ICC-02/05-01/20-1147-Red, para. 6.

³ Réplique aux écritures ICC-02/05-01/20-1152-Conf et ICC-02/05-01/20-1153-Conf et Modification de la mesure demandée à titre principal dans la Requête ICC-02/05-01/20-1147-Conf, ICC-02/05-01/20-1157-Conf (with one confidential *ex parte* annex and one confidential annex), paras 22-23. A public redacted version was notified on 1 July 2024, ICC-02/05-01/20-1157-Red. Annex 2 to the Modified Request, ICC-02/05-01/20-1157-Conf-Anx2.

⁴ Réplique aux écritures ICC-02/05-01/20-1152-Conf et ICC-02/05-01/20-1153-Conf et Modification de la mesure demandée à titre principal dans la Requête ICC-02/05-01/20-1147-Conf, ICC-02/05-01/20-1157-Conf (with one confidential *ex parte* annex and one confidential annex). A public redacted version was notified on 1 July 2024, ICC-02/05-01/20-1157-Red.

⁵ Modified Request, ICC-02/05-01/20-1157-Conf, paras 22-23; Annex 2 to the Modified Request, ICC-02/05-01/20-1157-Conf-Anx2.

and exact date of testimony by 29 August 2024 (the ‘Decision on D-0028’s Rule 68(2)(c) Request’).⁶

5. On 23 August 2024, the Defence filed a renewed request to introduce the prior recorded testimony of witness D-0028 pursuant to Rule 68(2)(c) of the Rules (the ‘Renewed Request’).⁷

6. On 30 August 2024, within the time limit set by the Chamber,⁸ the Prosecution⁹ and the Common Legal Representative for Victims (the ‘CLR’V’),¹⁰ responded to the Renewed Request, opposing it (the ‘Prosecution’s Response’ and the ‘CLR’V’s Observations’, respectively).

II. SUBMISSIONS

7. In its Renewed Request, the Defence submits that following the Decision on D-0028’s Rule 68(2)(c) Request, it immediately took steps to organise D-0028’s appearance, which resulted in an initial video call on 11 July 2024.¹¹ According to the Defence, D-0028 did not attend any further video calls in preparation for his appearance.¹² The Defence asserts that near-daily efforts to re-establish contact with D-0028 have been unsuccessful and that the witness has ‘proved difficult to reach’.¹³ The Defence contends that, although it has made several efforts to ascertain D-0028’s whereabouts, including: (i) contacting [REDACTED];¹⁴ (ii) maintaining near-daily communication with [REDACTED];¹⁵ (iii) contacting seven acquaintances

⁶ Decision on the Defence’s request to introduce the prior recorded testimony of D-0028 under Rule 68(2)(c) and on the Defence’s modified request of 28 June 2024, ICC-02/05-01/20-1161-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-1161-Red.

⁷ Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 28(2)(c) of the Rules of Procedure and Evidence, ICC-02/05-01/20-1176-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-1176-Red.

⁸ Email from the Chamber, 23 August 2024, at 14:09.

⁹ Prosecution’s Response to “Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 68(2)(c) of the Rules of Procedure and Evidence”, ICC-02/05-01/20-1180-Conf. A public redacted version was notified on 3 September 2024, ICC-02/05-01/20-1180-Red.

¹⁰ CLR’V Observations on “Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 68(2)(c) [*sic*] of the Rules of Procedure and Evidence”, ICC-02/05-01/20-1181-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-1181-Red.

¹¹ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 3.

¹² Renewed Request, ICC-02/05-01/20-1176-Conf, para. 5.

¹³ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 5.

¹⁴ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 7.

¹⁵ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 6.

[REDACTED] to enquire about D-0028's presence there;¹⁶ and (iv) making inquiries with the Prosecution and the CLRV,¹⁷ it has been unable to do so.

8. The Defence submits that due to the loss of contact with D-0028, and absence of information on his whereabouts, it has no confidence in the prospect of making the necessary arrangements for D-0028's appearance on 16 September 2024.¹⁸ The Defence asserts that a summons to appear would be unrealistic, given the absence of cooperation from Sudan and the ongoing armed conflict.¹⁹ The Defence, therefore, contends that the 'admission' of D-0028's prior recorded testimony under Rule 68(2)(c) of the Rules is now the only means to place his evidence formally before the Chamber.²⁰

9. The Prosecution submits that the Defence has failed to demonstrate that D-0028 is objectively unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.²¹ More specifically, the Prosecution contends that the Defence has failed to make reference to any additional efforts to secure D-0028's appearance, namely providing the witness with a phone,²² engaging [REDACTED],²³ securing an intermediary [REDACTED],²⁴ sending the Defence's contact person to [REDACTED],²⁵ or establishing contact with any of the witness's relatives.²⁶ The Prosecution submits that the Defence appears to have abandoned its efforts to secure D-0028's appearance before the Chamber.²⁷ The Prosecution avers that due to the Defence's lack of diligence in locating the witness, it has not been established whether D-0028 is reluctant or unwilling to testify.²⁸

10. The CLRV submits that the Defence has failed to demonstrate that the witness is unavailable to testify.²⁹ The CLRV submits that D-0028 has cut contact with the Defence, but has not sought to re-establish contact in spite of knowing how to

¹⁶ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 7.

¹⁷ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 8.

¹⁸ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 10.

¹⁹ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 11.

²⁰ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 12.

²¹ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 7.

²² Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 8.

²³ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 8.

²⁴ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 9.

²⁵ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 9.

²⁶ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 9.

²⁷ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 10.

²⁸ Prosecution's Response, ICC-02/05-01/20-1180-Conf, para. 11.

²⁹ CLRV's Observations, ICC-02/05-01/20-1181- Conf, paras 13-17.

communicate with the Defence team.³⁰ The CLRV avers that unwillingness to testify should not be confused with ‘unavailability’ under Rule 68(2)(c) of the Rules.³¹ The CLRV asserts that D-0028 is simply biding his time before the relevant deadlines for his appearance before the Chamber expire.³² The CLRV submits that the Defence’s last opportunity to confirm D-0028’s has now passed and that the issuance of a summons to appear or any other solution are immaterial to the issue at hand.³³

III. ANALYSIS

11. The Chamber incorporates by reference the general legal framework applicable to the assessment of applications for the introduction of prior recorded statements pursuant to Rule 68(2)(c) of the Rules.³⁴

12. The Chamber further notes that the Appeals Chamber has recently determined that the ‘notion of “unavailability” may cover different situations and needs to be assessed on a case-by-case basis’.³⁵ Additionally, the Appeals Chamber held that a ‘witness’s reluctance or unwillingness to testify does not preclude a finding that the witness is “unavailable to testify orally” pursuant to rule 68(2)(c) of the Rules, if it is established that there are other circumstances that cannot be overcome with reasonable diligence’.³⁶

13. The Chamber recalls that in its Modified Request, the Defence requested that the Chamber schedule D-0028’s testimony in October 2024, should it authorise his appearance [REDACTED].³⁷ The Defence indicated that D-0028 could not travel [REDACTED].³⁸ As observed by the CLRV,³⁹ new information before the Chamber

³⁰ CLRV’s Observations, ICC-02/05-01/20-1181- Conf, para. 18.

³¹ CLRV’s Observations, ICC-02/05-01/20-1181- Conf, para. 19.

³² CLRV’s Observations, ICC-02/05-01/20-1181- Conf, para. 20.

³³ CLRV’s Observations, ICC-02/05-01/20-1181- Conf, paras 22-23.

³⁴ Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c), 21 February 2022, ICC-02/05-01/20-603-Conf, paras 6-7.

³⁵ Appeals Chamber, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, 20 May 2024, ICC-01/14-01/18-2502-Red (OA4) (hereinafter: ‘*Yekatom and Ngaïssona* Rule 68(2)(c) Appeal Judgment’), para. 38.

³⁶ *Yekatom and Ngaïssona* Rule 68(2)(c) Appeal Judgment, ICC-01/14-01/18-2502-Red (OA4), para. 41.

³⁷ Modified Request, ICC-02/05-01/20-1157-Conf, paras 22-23; Annex 2 to the Modified Request, ICC-02/05-01/20-1157-Conf-Anx2.

³⁸ Modified Request, ICC-02/05-01/20-1157-Conf, paras 22-23; Annex 2 to the Modified Request, ICC-02/05-01/20-1157-Conf-Anx2.

³⁹ CLRV’s Observations, ICC-02/05-01/20-1181-Conf, para. 16.

indicates [REDACTED], D-0028 left [REDACTED] and travelled [REDACTED].⁴⁰ Although the witness's exact whereabouts are currently unknown,⁴¹ the Chamber considers that this information confirms D-0028's ability to travel and be away from his home and family for the purpose of his appearance before the Chamber.

14. The Chamber further notes that the Defence has made more concerted efforts since at least 5 July 2024 to secure the witness's appearance before the Chamber.

15. The Chamber is not satisfied that D-0028 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules. The information before the Chamber suggests that D-0028 is unwilling to testify before the Chamber. In the interests of justice, the Chamber will allow the Defence further time to make a last attempt to arrange D-0028's testimony on 23 and 24 September 2024 [REDACTED]. The Chamber directs that by 13 September 2024 the Defence should either confirm D-0028's appearance as scheduled or provide notice of the closure of the presentation of its case. Furthermore, the Chamber will not entertain any further Rule 68(2) applications for D-0028's evidence. Any other remaining procedural or evidentiary issue should be raised sufficiently in advance so as to allow for its resolution before the deadline of 13 September 2024.

IV. CONCLUSION

16. Considering the above, the Chamber:

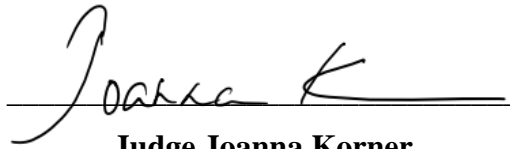
REJECTS the Defence's Renewed Request to introduce D-0028's prior recorded testimony, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules;

DECIDES it is prepared to hear the testimony of D-0028 [REDACTED] between **23 and 24 September 2024**; and

⁴⁰ CLRV's Observations, ICC-02/05-01/20-1181-Conf, paras 14-16; Renewed Request, ICC-02/05-01/20-1176-Conf, para. 9.

⁴¹ Renewed Request, ICC-02/05-01/20-1176-Conf, para. 9; CLRV's Observations, ICC-02/05-01/20-1181- Conf, paras 13-16.

INSTRUCTS the Defence to either confirm D-0028's appearance for his scheduled testimony or provide notice of the closure of the presentation of its case by **13 September 2024**.

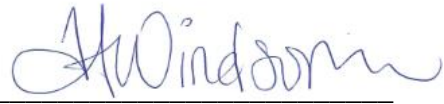


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 4 September 2024

At The Hague, The Netherlands