



**Original: English**

**No. ICC-02/05-01/20  
Date: 12 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**

**Decision on the Defence's request for leave to appeal the Decision on the  
Defence's renewed request for admission of 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:

**The Office of the Prosecutor**

Karim A.A. Khan  
Nazhat Shameem Khan  
Julian Nicholls

**Counsel for the Defence**

Cyril Laucci  
Iain Edwards

**Legal Representatives of Victims**

Natalie von Wistinghausen  
Anand Shah

**Legal Representatives of Applicants**

**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**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. On 4 September 2024, Trial Chamber I (the ‘Chamber’) issued a 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 (the ‘Impugned Decision’), rejecting the Defence’s request but nevertheless allowing the Defence further time to make a last attempt to arrange the witness’s live testimony.<sup>1</sup>
2. On 6 September 2024, the Defence filed a request seeking leave to appeal the Impugned Decision pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’ and the ‘Request’).<sup>2</sup>
3. On 10 September 2024, the Common Legal Representative for Victims (the ‘CLR’)<sup>3</sup> and the Prosecution<sup>4</sup> filed their responses, submitting that the Request does not meet the test for leave to appeal under Article 82(1)(d) of the Statute.

### **I. Submission and analysis**

4. The Chamber incorporates by reference the applicable legal framework for authorising interlocutory appeals under Article 82(1)(d) of the Rome Statute<sup>5</sup>.
5. The Defence identifies two issues in respect of which it seeks leave to appeal:

***Au paragraphe 15 de la Décision, la Chambre a-t-elle erré en droit dans son interprétation du paragraphe 41 de l’Arrêt Yekatom & Ngaïssona OA4 excluant l’indisponibilité d’un témoin en vertu de la Règle 68-2-c du RPP dès lors qu’il existe des indices indiquant qu’il ne souhaite pas comparaître?*** (the ‘First Issue’)<sup>6</sup>

<sup>1</sup> 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, ICC-02/05-01/20-1182-Conf. A public redacted version was notified on 5 September 2024, ICC-02/05-01/20-1182-Red.

<sup>2</sup> Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1182-Conf, ICC-02/05-01/20-1183-Conf.

<sup>3</sup> CLR Response to Defence “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1182-Conf”, ICC-02/05-01/20-1184-Conf (the ‘CLR Response’). A public redacted version was issued on 12 September 2024, ICC-02/05-01/20-1184-Red.

<sup>4</sup> Prosecution’s response to “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1182-Conf”, ICC-02/05-01/20-1185-Conf (the ‘Prosecution Response’).

<sup>5</sup> 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.

<sup>6</sup> Request, ICC-02/05-01/20-1183-Conf, para. 8, *referring to Appeals Chamber, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision on 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-01/04-01/08-2502-Red (OA4), para. 41. The Chamber has unofficially translated the issue as follows: ‘In paragraph 15 of the Impugned Decision, did the Chamber err in law in its interpretation of paragraph 41 of the *Yekatom and Ngaïssona* Judgment (ICC-01/14-01/18 OA4), in not being satisfied that a witness is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules where there is information to suggest that he is unwilling to appear before the Chamber?’.

*Au paragraphe 15 de la Décision, la Chambre a-t-elle erré en fait en tirant de l'absence prolongée du témoin D-28 une présomption qu'il ne souhaite plus témoigner?* (the 'Second Issue', together the 'Issues')<sup>7</sup>

6. With respect to the First Issue, the Defence submits that the Chamber's conclusion, as stated in paragraph 15 of the Impugned Decision, that D-0028 could not be said to be unavailable because there was information suggesting that he was unwilling to testify, is based on a misinterpretation of the Appeals Chamber's jurisprudence and constitutes an error of law.<sup>8</sup> As regards the Second Issue, the Defence argues that the Chamber speculates and makes an erroneous factual presumption when – based on D-0028's prolonged absence – the Chamber finds that he is no longer willing to testify. In support of this argument, the Defence refers to other information which in its view proves the contrary.<sup>9</sup>

7. The Prosecution and the CLRV submit that the Defence did not identify appealable issues, arguing that the Issues do not arise from the Impugned Decision and/or mischaracterise it.<sup>10</sup>

8. The relevant circumstances and information, which had a bearing on the Chamber's conclusion that D-0028's unavailability had not been proven, are those identified and discussed at paragraph 13 of the Impugned Decision. As pointed out by both the CLRV<sup>11</sup> and Prosecution,<sup>12</sup> and contrary to the Defence's submission, the Chamber's finding that D-0028's unavailability had not been established, did not hinge upon its observation that information pointed to D-0028 being unwilling to testify but upon all the circumstances related to his appearance before the Chamber.<sup>13</sup> The CLRV further makes the point that the Chamber would not have provided the Defence with yet another 'last' opportunity to organise D-0028's appearance, had it not determined that D-0028's apparent present unwillingness to testify can be overcome with reasonable diligence on the part of the Defence.<sup>14</sup>

---

<sup>7</sup> Request, ICC-02/05-01/20-1183-Conf, para. 8. The Chamber has unofficially translated the issue as follows: 'In paragraph 15 of the Impugned Decision, did the Chamber err in fact in using the extended absence of Witness D-28 as a basis on which to predicate a presumption that he no longer wishes to testify?'

<sup>8</sup> Request, ICC-02/05-01/20-1183-Conf, paras 5-6.

<sup>9</sup> Request, ICC-02/05-01/20-1183-Conf, para. 7.

<sup>10</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, paras 5-15; Prosecution Response, ICC-02/05-01/20-1185-Conf, paras 6-9.

<sup>11</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, para. 8.

<sup>12</sup> Prosecution Response, ICC-02/05-01/20-1185-Conf, para. 8.

<sup>13</sup> Impugned Decision, ICC-02/05-01/20-1182-Red, para. 15.

<sup>14</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, para. 9.

9. On that basis, and as framed, the Chamber finds that the First Issue does not arise from the Impugned Decision and that the Defence's submissions misrepresent the Chamber's reasoning.

10. As to the Second Issue, both the Prosecution and CLRV submit that it cannot amount to an appealable issue. The Prosecution submits that the apparent unwillingness of the witness to testify was an observation by the Chamber and 'since the Chamber did not state that this observation formed the basis for its finding, [...] it had no material impact on the Decision.'<sup>15</sup> The CLRV points out that the Chamber made no finding to this effect and that it is the Defence who in fact indulges in speculation.<sup>16</sup> The Chamber is not satisfied that it identifies a matter that is determinative for the Impugned Decision and finds that it amounts to a mere disagreement with a finding of the Chamber.

11. In respect of the remaining criteria under Article 82(1)(d) of the Statute, the Defence avers that the Issues directly and significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. It submits that the exclusion of D-0028's evidence, (one of only two Fur Defence witnesses), means it cannot be taken into account in the Chamber's Article 74 judgment, and further argues that the importance of this now excluded evidence is made clear by the fact that the organisation of his appearance has delayed the closing of the trial since July 2024.<sup>17</sup>

12. The CLRV and the Prosecution both argue that the remaining elements of the test under Article 82(1)(d) of the Statute are not met. Noting the accommodations repeatedly granted by the Chamber, the CLRV submits that the Defence has been given more than a fair opportunity to seek to place D-0028's evidence on the record and cannot now claim unfairness.<sup>18</sup> The CLRV also avers that the exclusion of D-0028's evidence would not significantly impact the outcome of the trial.<sup>19</sup> The Prosecution points out that the Defence 'does not explain how the Issues would significantly affect the expeditious conduct of the proceeding'.<sup>20</sup> The Chamber is unpersuaded by the Defence's submissions on the impact the Issues would have on the fair and expeditious conduct of the trial and its outcome. These submissions are speculative and the

---

<sup>15</sup> Prosecution Response, ICC-02/05-01/20-1185-Conf, para. 9.

<sup>16</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, paras 12-14.

<sup>17</sup> Request, ICC-02/05-01/20-1183-Conf, paras 10-12.

<sup>18</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, para. 7.

<sup>19</sup> CLRV Response, ICC-02/05-01/20-1184-Conf, para. 8.

<sup>20</sup> Prosecution Response, ICC-02/05-01/20-1185-Conf, para. 13.

Defence notably fails to show that the expected evidence of D-0028 is particularly unique or important to its case.<sup>21</sup> To suggest that the fact that the Chamber allowed more time for the Defence to call this witness reflects the importance of the witness is once again speculation by the Defence.

13. Finally, the general fair trial argument articulated by the Defence in response to the Chamber's clarification that it 'will not entertain any further Rule 68(2) applications' is also without merit.<sup>22</sup> The Chamber's approach to the Defence's presentation of evidence has been particularly flexible, including re-scheduling D-0028's appearance multiple times.<sup>23</sup> The Defence's right to present evidence is not without limit and the deadlines set and upheld in the Impugned Decision, including regarding the filing of applications under Rule 68(2) of the Rules, are not only consistent but required by the Chamber's obligation to ensure that the trial is fair and expeditious. By allowing further time – until 13 September 2024 – for the Defence to make a last attempt to arrange D-0028's testimony on 23 and 24 September 2024,<sup>24</sup> the Impugned Decision provided the Defence yet one more opportunity to call D-0028.

14. In light of the above, the Chamber finds that the Defence has failed to demonstrate that the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the Chamber finds that an immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings.

## II. Conclusion

15. Having found that the requirements for the granting of leave to appeal under Article 82(1)(d) of the Statute are not met, the Chamber rejects the Request in its entirety.

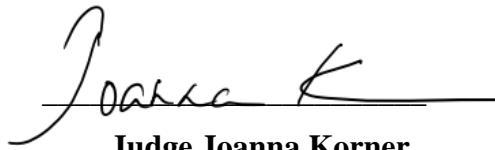
---

<sup>21</sup> In this respect, the Chamber recalls that it already found that it was not anticipated that D-0028's expected evidence would deal with new matters (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, 5 July 2024, ICC-02/05-01/20-1161-Red (the 'Prior Rule 68(2)(c) Decision'), para. 26).

<sup>22</sup> Request, ICC-02/05-01/20-1183-Conf, para. 11.

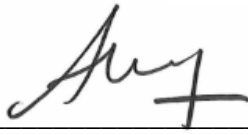
<sup>23</sup> See e.g. Prior Rule 68(2)(c) Decision, ICC-02/05-01/20-1161-Red. The Chamber further recalls the deadline of 14 June 2024 set for the Defence to conclude the calling of all *viva voce* evidence, as well as the deadline set to 6 June 2024 for the filing of any remaining Rule 68(2) applications (see the Chamber's decision of 15 May 2024, ICC-02/05-01/20-1129-Conf, para. 27).

<sup>24</sup> Impugned Decision, ICC-02/05-01/20-1182-Red, para. 15.

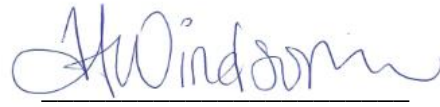


**Judge Joanna Korner**

**Presiding Judge**



**Judge Reine Alapini-Gansou**



**Judge Althea Violet Alexis-Windsor**

Dated this Thursday, 12 September 2024

At The Hague, The Netherlands