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

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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 “Prosecution’s response to ‘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-02/05-01/20-1152-Conf**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence's request to admit into evidence Witness D-0028's prior recorded statement and associated material pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence ("Request").¹

II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential as it responds to a filing with the same classification.

III. SUBMISSIONS

3. The Request should be dismissed as the Defence has not demonstrated that the witness is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.

A) The Defence has not demonstrated that D-0028 is "unavailable to testify orally" due to obstacles that cannot be overcome with reasonable diligence

4. The Defence submits that it lost contact with D-0028 following his interview by the Defence in August 2023. [REDACTED].² According to the Defence, D-0028 is in [REDACTED], where he is uncontactable.³

5. Information provided to the Defence [REDACTED] indicates that D-0028 has been contactable and/or seen in [REDACTED].

6. Even though the Defence "lost contact" with D-0028 since August/September 2023, others have been able to make contact with D-0028 since then.⁴ [REDACTED]. [REDACTED].⁵

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](#) ("Request").

² Annex 1 à la 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-Anx1](#) ("Annex 1").

³ [Request](#), paras. 7-12.

⁴ [Request](#), para. 6.

⁵ Deuxième Rapport Périodique soumis en vertu de la Décision ICC-02/05-01/20-1057-Conf, [ICC-02/05-01/20-1088-Conf](#), para. 4 (*translated*): [REDACTED].

7. In addition, [REDACTED] testified that he saw D-0028 in [REDACTED]. D-0028 was therefore present [REDACTED] during at least part of the 20 September 2023 to 9 March 2024 period [REDACTED] made regular attempts to contact D-0028 in person.⁶

8. The Prosecution has also provided information to the Defence [REDACTED], since 26 February 2024. [REDACTED].⁷

9. [REDACTED] the Prosecution informed the Defence [REDACTED] in February, March and May 2024.

10. Therefore, there is a basis for the alternative explanation that D-0028 has been contactable and/or present in [REDACTED], on various occasions since August/September 2023,⁸ but is simply avoiding contact with the Defence.

11. Based on the information referred to above, the Prosecution considers it reasonable to infer that D-0028 is simply unwilling to testify.

12. Although an instance where a witness is “simply unwilling to testify” does not fall within the meaning of “unavailable” under rule 68(2)(c) of the Rules,⁹ this fact is not considered a determinative factor.¹⁰ The Appeals Chamber has 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.”¹¹

⁶ [Annex 1](#).

⁷ Annex, DAR-OTP-00012004.

⁸ [Request](#), paras. 5 and 6.

⁹ *Yekatom & Ngaïssona*, Rule 68(2)(c) Appeal Judgment, [ICC-01/14-01/18-2502-Red](#), para. 39. See also *Yekatom & Ngaïssona*, First Rule 68(2)(c) Decision, [ICC-01/14-01/18-1975-Red](#), para. 28, referring to *Al Hassan*, Decision on Request for Variation of Time Limit, [ICC-01/12-01/18-2445-Red](#), para. 23; *Yekatom & Ngaïssona*, Second Rule 68(2)(c) concerning Witness P-1819, [ICC-01/14-01/18-2021](#), paras. 13-14.

¹⁰ *Yekatom & Ngaïssona*, [Rule 68\(2\)\(c\) Appeal Judgment](#), para. 40.

¹¹ *Yekatom & Ngaïssona*, [Rule 68\(2\)\(c\) Appeal Judgment](#), para. 41.

13. The Prosecution further notes that an instance where “further efforts to locate [the witness] can still be made” similarly does not fall within the meaning of “unavailable” under rule 68(2)(c) of the Rules.¹²

14. The Defence has not demonstrated that any “unavailability” of D-0028 cannot be overcome with reasonable diligence. In particular, since the Prosecution informed the Defence [REDACTED] on 26 February 2024, [REDACTED].¹³ No indication is given of alternative steps taken to contact D-0028 during this period.

15. For example, the Defence does not mention any efforts to try and locate the witness in public places in [REDACTED] since 26 February 2024. [REDACTED]. Since then, the Defence has not indicated that any similar search was conducted. The Defence also does not suggest that any effort has been made to locate D-0028 at his place of work in [REDACTED] since early January 2024.¹⁴

16. The Defence fails to demonstrate that it tried to obtain a different or more recent phone number for the witness, [REDACTED]. The Prosecution notes that during cross-examination [REDACTED].

17. No reference is made to attempts to engage members of [REDACTED], other than [REDACTED] and the [REDACTED] referred to in Annex 1, to try and obtain more information about D-0028.

18. No efforts are described to secure an intermediary based inside [REDACTED] to try and locate the witness. No indication is given of efforts to make enquiries with other Defence witnesses who would be well placed to provide information on D-0028’s whereabouts, such as [REDACTED].¹⁵

¹² *Yekatom & Ngaïssona*, [Rule 68\(2\)\(c\) Appeal Judgment](#), para. 39. See also Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c), [ICC-02/05-01/20-603-Conf](#), para. 31.

¹³ [Annex 1](#).

¹⁴ [Annex 1](#) states that in [REDACTED].

¹⁵ [REDACTED].

19. Finally, aside from attempted telephone calls, it appears that no attempts have been made by the Defence intermediary to reach D-0028, at his house or anywhere else in [REDACTED], since 20 May 2024.¹⁶

20. As such, the Defence has not demonstrated that D-0028 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.

B) Whether the necessity of measures under article 56 could not be anticipated

21. The Prosecution takes no position in relation to whether the Defence could have anticipated the necessity of measures under article 56, as submitted by the Defence.¹⁷

C) D-0028's prior recorded testimony has sufficient indicia of reliability

22. The Prosecution accepts that the statement of D-0028 possesses sufficient indicia of reliability, as submitted by the Defence.¹⁸ In this regard, the Prosecution notes that the Appeals Chamber has held that, in their assessment of indicia of reliability under rule 68(2)(b)(i) of the Rules, trial chambers are not obliged to consider factors beyond formal requirement.¹⁹ Consistent with the submission regime adopted in this case, the Chamber will assess the standard evidentiary criteria – relevance, probative value and potential prejudice – of the prior recorded testimony of D-0028 during its holistic assessment of all evidence submitted in the case in its judgment under article 74 of the Statute.²⁰

23. Should the Chamber decide to submit the prior recorded testimony into evidence, the Prosecution does not object to the submission of the Laissez-Passer identify document relating to D-0028 as an associated exhibit, as requested by the Defence.²¹

¹⁶ Annex 1.

¹⁷ [Request](#), para. 12.

¹⁸ [Request](#), para. 14.

¹⁹ *Gbagbo & Blé Goudé*, Rules 68(2)(b) and 68(3) Appeal Judgment, [ICC-02/11-01/15-744 OA8](#), paras. 3, 103-104. *See also* *Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, [ICC-01/12-01/18-1413](#), para. 15.

²⁰ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), para. 25. *See also* Decision on the Prosecution's bar table motion, [ICC-02/05-01/20-885-Red](#), paras. 25-26; Decision on the submission of evidence through D-0037, [ICC-02/05-01/20-1144](#), para. 32.

²¹ [Request](#), para. 15; [DAR-D31-00000152](#).

IV. CONCLUSION

24. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Request.



Karim A. A. Khan KC
Prosecutor

Dated this 28th day of June 2024

At The Hague, The Netherlands