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

Date: **23 August 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 the
Renewed Request for Admission of Prior Recorded Testimony of Witness D-28
Under Rule 28(2)(c) of the Rules of Procedure and Evidence**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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I. INTRODUCTION

1. This is a renewed application for admission of the prior recorded testimony of the final Defence Witness, D-28, pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”). Although Witness D-28 was available and willing to testify in July 2024, he has since become unavailable. Admission of his prior recorded testimony is now the only means open to the Defence to place his evidence formally before the Trial Chamber.

II. SUBMISSIONS

2. On 5 July 2024, the Honourable Trial Chamber I issued its ruling (“the Decision”)¹ on the application (“First Application”) submitted by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”, “Mr Abd-Al-Rahman”)² for admission of the prior recorded testimony of Witness D-28³ and one associated document⁴ pursuant to Rule 68(2)(c) of the Rules. At paragraph 21 of its Decision, the Chamber found that there was no longer a basis for a request under Rule 68(2)(c) of the Rules “as the witness appears to be available and willing to testify”.⁵ The Chamber ordered the Defence to organize the appearance of Witness D-28 [REDACTED] during the week of 16 September 2024.⁶ The Defence was given until 29 August 2024 to confirm Witness D-28’s appearance and its exact date.

3. The Defence immediately took steps to organize Witness D-28’s appearance, resulting in an initial video-call with him on 11 July 2024. The same day, the Defence updated the Chamber and the Parties by email on progress made: in the course of the video-call, Witness D-28 had confirmed his willingness to testify and was advised that he would be put in touch with the Victims and Witnesses Unit (“VWU”) [REDACTED].⁷

4. During the video-call of 11 July 2024, the Defence indicated the need to establish contact with VWU as soon as possible [REDACTED]. Witness D-28 agreed [REDACTED] in view of his appearance on Monday, 16 September 2024. Witness D-28

¹ ICC-02/05-01/20-1161-Conf (public redacted version [ICC-02/05-01/20-1161-Red](#)).

² ICC-02/05-01/20-1147-Conf (public redacted version [ICC-02/05-01/20-1147-Red](#)).

³ DAR-D31-00000150-0001: Written Statement.

⁴ DAR-D31-00000152-0001: Associated Document.

⁵ ICC-02/05-01/20-1161-Conf (public redacted version [ICC-02/05-01/20-1161-Red](#)), par. 21.

⁶ ICC-02/05-01/20-1161-Conf (public redacted version [ICC-02/05-01/20-1161-Red](#)), par. 24.

⁷ E-mail from the Defence to the Chamber and the Parties, 11 July 2024, 15h53.

indicated that he had no phone himself and that all contacts should be made through [REDACTED].

5. Since 11 July 2024, the Defence continued its near-daily efforts to maintain contact with Witness D-28 and take steps in the preparation of his travel and appearance. However, the witness proved to be difficult to reach [REDACTED]. After two weeks of trying, a new video-call with Witness D-28 was finally scheduled on Friday 2 August 2024 to further discuss the importance of liaising with VWU and the Court's processes, [REDACTED] and schedule an appointment with VWU colleagues. This appointment was postponed by the witness a first time to Saturday 3 August, and then again to Wednesday 7 August 2024. On 7 August, Witness D-28 did not attend. The contact person was told [REDACTED] that he had left [REDACTED], and had not returned. No firm date was provided for his return.

6. The Defence has continued to be in near-daily contact with our contact person, impressing on him the importance of making contact with Witness D-28 and of the need for Witness D-28 to make himself available. All efforts to re-establish contact have been unsuccessful.

7. The Defence has attempted to corroborate the information that Witness D-28 had departed to [REDACTED], and has tried to make contact with him there via multiple channels, but with no success. For example, the Defence contacted [REDACTED] who indicated that he was aware of Witness D-28's departure [REDACTED], but could not confirm his destination, nor his current whereabouts; he said he was not even capable of confirming whether he was still alive or not. In addition, attempts to obtain information about Witness D-28's whereabouts from [REDACTED] led to no result. The Defence's contact person [REDACTED] has reached out to a total of seven different persons of his acquaintance [REDACTED] to enquire about the presence of Witness D-28 there, notably in places where the population gather, such as the market and mosque, also without success. The Defence is unaware of any address of Witness D-28 in [REDACTED].

8. On 19 August 2024, the Defence enquired with the Office of the Prosecutor ("OTP") and the Legal Representatives of Victims ("LRVs") whether they had more

information about Witness D-28's current whereabouts. The OTP reported the same information about Witness D-28's travel to [REDACTED].⁸ The OTP did not specify the source of this information. The LRVs responded that they would check with their source and would inform the Defence in case they had additional information,⁹ but has not been in further contact with the Defence.

9. On the day of submitting the present filing, the Defence simply does not know where Witness D-28 is, if he is still in [REDACTED], or if he has moved to another location. The only information in our possession is that the daily attempts of the Defence's contact person to reach him in [REDACTED] or obtain new information from [REDACTED] about his current location and expected date of return have proven unsuccessful. Consequently, the Defence has been unable to progress steps to arrange Witness D-28's contact with our VWU colleagues for the purpose of preparing his travel and appearance, which, even at today's date, makes the chances of his appearance during the week of 16 September 2024 extremely low.

10. In the absence of information about D-28's current whereabouts, the reasons for his departure from and failure to return to [REDACTED], and even information as to whether he is still alive, the Defence is compelled to conclude that Witness D-28 is not and will not be available to appear before the Trial Chamber. Although the Chamber gave until 29 August 2024 to confirm Witness D-28's appearance, the Defence has no confidence in the prospect of Witness D-28 reappearing in enough time to make arrangements with VWU [REDACTED] and testify for 16 September 2024.

11. Unlike in other cases and situations before the Court, the delivery of a summons to appear by the Trial Chamber is not a realistic option. It would have no chance of success in the absence of cooperation from Sudan and in light of the ongoing armed conflict. Darfur is a war zone outside of the control of Sudan's government entrenched in Port Sudan. The modalities of attempting to issue a summons would also seriously delay the conclusion of trial proceedings.

⁸ Email from the OTP to the Defence, 20 August 2024, 10h05.

⁹ Email from the LRVs to the Defence, 20 August 2024, 10h32.

12. In the absence of any other solution, the Defence is left with no option than renewing its earlier request for the admission of D-28's written statement and associated document under Rule 68(2)(c) of the Rules. This is an imperfect solution. It compels the Defence to sacrifice part of the enhanced probative value that the live testimony and cross-examination of Witness D-28 before the Judges may have added to his evidence. But the Defence has come to the conclusion that it is the only realistic option to place Witness D-28's evidence formally before the Chamber, its efforts to secure his appearance since 11 July 2024 having proved unsuccessful.

13. It is not in dispute that D-28 cannot testify from Sudan and that VWU has no access to Witness D-28 as long as he remains there. All efforts have failed to overcome that difficulty. In the absence of any reasonable expectation that the situation may improve significantly to ensure his timely appearance, and in order to avoid any further delay to the completion of trial proceedings, the Defence therefore gives notice that it no longer seeks to call Witness D-28 to testify live, and requests instead the admission of his written statement into evidence instead.

14. The factors mentioned at paragraphs 14 to 19 of the Defence's initial application¹⁰ plead in favour of the requested admission:

- Witness D-28's Written Statement and the associated document present sufficient indicia of reliability. In particular, his Written Statement was collected with the assistance of a certified interpreter of the Registry and is signed by Witness D-28;¹¹
- The content of Witness D-28's Written Statement is relevant to the Defence case: in particular, Witness D-28 describes his personal knowledge of Mr Abd-Al-Rahman, mentions that the only nickname he ever had is "Abu Nasser"¹² and that he never served as an *Aqid al Ogada* in the Ta'aisha tribe;¹³

¹⁰ ICC-02/05-01/20-1147-Conf (public redacted version [ICC-02/05-01/20-1147-Red](#)), par. 14-19

¹¹ DAR-D31-00000150, paras. 33-38 and pages 8-9.

¹² D-0028, DAR-D31-00000150, paras. 20 et 24.

¹³ D-0028, DAR-D31-00000150, para. 26.

- Witness D-28's Written Statement essentially corroborates the evidence adduced through other Defence Witnesses who have appeared before the Trial Chamber;¹⁴ and
- Witness D-28's Written Statement contains no information in relation to the alleged acts and conducts of the Accused mentioned in the charges.

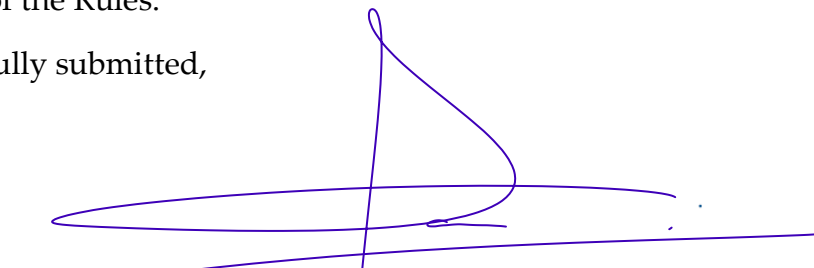
15. There is thus no valid reason preventing the admission into evidence of Witness D-28's Written Statement and Associated Document pursuant to Rule 68(2)(c) of the Rules.

CONFIDENTIALITY

16. In accordance with regulation 23bis(1) of the Regulations of the Court, this filing is classified as confidential since it contains sensitive information. A public redacted version will be filed immediately after.

THE DEFENCE THEREFORE PRAYS THE CHAMBER to admit the Written Statement and Associated Document of Witness D-28 into evidence pursuant to Rule 68(2)(c) of the Rules.

Respectfully submitted,



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 23rd day of August 2024 at The Hague, The Netherlands

¹⁴ D-0001, ICC-02/05-01/20-T-154-CONF-ENG ET 04-06-2024 T [Open Session], p.12, l.22-p.13, l.19 et p.37, l.-p.38, l.1 ; D-0002, ICC-02/05-01/20-T-156-CONF-ENG ET 06-06-2024 T [Open Session], p.50, l.17-p.51, l.13 ; D-0003, ICC-02/05-01/20-T-155-CONF-ENG ET 05-06-2024 T [Private Session], p.45, l.22-p.46, l.4, p.46, l.23-p.47, l.11 et p.69, l.11-p.70, l.9 ; D-0005, ICC-02/05-01/20-T-158-CONF-ENG ET 11-06-2024 T [Open Session], p.16, l.5-p.17, l.11 et p.20, l.13-24 ; D-0007, ICC-02/05-01/20-T-149-CONF-ENG ET 23-04-2024 T [Private Session], p.11, l.8-p.12, l.3 ; D-0008, ICC-02/05-01/20-T-139-CONF-ENG CT 21-11-2023 T [Open Session], T-139, p.21, l.13-18, p.78, l.6-10 et p.94, l.18-24 ; D-0011, ICC-02/05-01/20-T-138-CONF-ENG CT 20-11-2023 T [Private Session], p.58, l.14-25 et p.98, l.14-24 ; D-0029, ICC-02/05-01/20-T-157-CONF-ENG ET 10-06-2024 T [Open session], p. 31, l.12-20 ; D-0032, ICC-02/05-01/20-T-140-CONF-ENG ET 28-11-2023 T [Private Session], p.17, l.20-p.18, l.7 et p.23, l.1-p.24, l.8 ; ICC-02/05-01/20-T-141-CONF-ENG ET 29-11-2023 T [Private Session], p.44, l.2-21.