

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: 30 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 “CLRV Observations on ‘Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 28(2)(c) [*sic*] of the Rules of Procedure and Evidence’”

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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I. Introduction

1. Further to Trial Chamber I's instructions,¹ the Common Legal Representative of Victims ("CLRV") submits these observations on the Defence for Mr Abd-Al-Rahman's "Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 28(2)(c) [*sic*] of the Rules of Procedure and Evidence".²
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-28") 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. Procedural History

3. On 28 June 2024, following the Defence's miraculous reconnection with D-28 on [REDACTED],³ the Defence filed a revised application requesting, as one of three alternative prongs of relief, that D-28's appearance by video-link is authorised [REDACTED], but delayed for three months until October 2024.⁴ The requested postponement was based on D-28's reported inability to leave [REDACTED].⁵
4. In the Trial Chamber's decision of 5 July 2024, the Chamber, while agreeing with the Prosecution and CLRV that no Regulation 35 request had been made by the Defence, granted an extension of time to provide the Defence a "last opportunity" to call D-28 between 16 and 20 September 2024, and instructed the Defence to

¹ Trial Chamber I's email to the parties and CLRV, 23 August 2024 at 14h09.

² 23 August 2024, ICC-02/05-01/20-1176-Conf ("Renewed Request") (public redacted version: [ICC-02/05-01/20-1176-Red](#)).

³ Both the Prosecution and CLRV, based on their respective investigations, submitted that D-28 had been present and contactable [REDACTED] for some time prior to the Defence's reconnection with the witness. *See* 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-Conf ("Decision on Revised Defence Request"), paras 10, 12 (summarising the relevant Prosecution and CLRV submissions) (public redacted version: [ICC-02/05-01/20-1161-Red](#)).

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, 28 June 2024, ICC-02/05-01/20-1157-Conf ("Revised D-28 Application"), para. 24 (public redacted version: [ICC-02/05-01/20-1157-Red-Corr](#)).

⁵ Revised D-28 Application, para. 22 and Annex 2 thereto.

“confirm D-0028’s travel [REDACTED] and indicate his precise date of testimony by 29 August 2024”.⁶

5. On 11 July 2024, the Defence informed the Chamber, Prosecution and CLRV that the Defence, [REDACTED] had spoken to D-28, who confirmed he “will make arrangements to ensure that he can appear [REDACTED] on the week of 16 September” 2024.⁷
6. In the Renewed Request, the Defence summarises the difficulties it thereafter encountered in attempting to arrange a consultation between D-28 and the Victims and Witnesses Section. In particular, and contrary to the previous indication given on D-28’s inability to depart [REDACTED] for pressing personal reasons, the Defence advises that its “contact person” [REDACTED] “was told [REDACTED] that he had left [REDACTED], without a “firm date [...] provided for his return”.⁸
7. The Defence advises on the various efforts it has undertaken directly and through its contact person [REDACTED] to corroborate D-28’s departure [REDACTED], seek to locate and contact D-28 [REDACTED], and otherwise ascertain whether and when D-28 might return [REDACTED], all without success.⁹
8. Following the Defence’s inquiry with the Prosecution and CLRV on 19 August 2024, the Prosecution informed the Defence on 20 August 2024, that per information available to it, D-28 had travelled to [REDACTED].¹⁰
9. The Defence asserts, in view of the above, that it “simply does not know where Witness D-28 is, if he is still in [REDACTED], or if he has moved to another location”, and assesses the facilitation of “his appearance during the week of 16 September 2024 [as] extremely low”.¹¹
10. The Defence concludes, in light of these circumstances, and noting the unrealistic possibility of the Chamber issuing a summons to appear for D-28, and “the absence

⁶ Decision on Revised Defence Request.

⁷ Email from Defence Lead Counsel to Trial Chamber I, 11 July 2024 at 15h52.

⁸ Renewed Request, paras 5-6.

⁹ *Id.*, para. 7.

¹⁰ *Id.*, para. 8.

¹¹ *Id.*, para. 9.

of any other solution”, that it is compelled to renew its request for the admission of D-28’s prior recorded testimony pursuant to Rule 68(2)(c), and that the relevant elements for such admission are met.¹²

III. Observations on Renewed Request

11. The CLRV recalls and adopts her previous submissions on law in respect of admission of prior recorded testimony under Rule 68(2)(c), as set out in the CLRV’s filing of 24 June 2024,¹³ and her submissions by email of 3 July 2024,¹⁴ and further notes with agreement the Prosecution’s previous relevant submissions on the law.¹⁵
12. The CLRV accepts that the third element of the Rule 68(2)(c) test is satisfied (the prior recorded testimony has sufficient indicia of reliability), and takes no position on the second element (the party or participant must show they could not have anticipated the necessity of measures under Article 56 of the Rome Statute), but merely observes that she does not find it surprising that D-28 has once again cut off communication with the Defence.
13. In respect of the first element of the Rule 68(2)(c) test (a Chamber’s satisfaction that the witness in question is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence), the CLRV maintains her prior position that the trial schedule, in the present circumstances, is not a relevant factor for consideration, and the Defence has otherwise failed to meet its burden in respect of the unavailability assessment.
14. The CLRV respectfully advises, that following the Defence’s email of 19 August 2024, the Prosecution’s email response on 20 August, and the Defence’s further email reply of the same date confirming that it had received similar information regarding D-28’s possible travel [REDACTED], the CLRV requested the same

¹² Renewed Request, paras 11-15.

¹³ 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, paras 3, 9-10 (public redacted version: [ICC-02/05-01/20-1153-Red](#)).

¹⁴ CLRV email submissions to Trial Chamber I, 3 July 2024 at 10h56.

¹⁵ 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, paras 12-13.

trusted CLRV interlocutor¹⁶ to make inquiries with any contacts [REDACTED] regarding D-28's whereabouts. On 23 August 2024, the CLRV interlocutor advised the CLRV team that the interlocutor had been told by contacts [REDACTED] that D-28 had been [REDACTED], but it appears he had recently left. On 28 August 2024, the CLRV interlocutor, following additional inquiries with contacts [REDACTED], confirmed to the CLRV team his understanding that D-28 was no longer [REDACTED].

15. The CLRV interlocutor further advised the CLRV team that due to heavy rains in the area of [REDACTED], which were interfering with Starlink satellite connections that provide the only publicly accessible internet and telecommunication links, the interlocutor had been unable to check with his contacts there regarding D-28's presence. On 29 August 2024, the CLRV interlocutor requested [REDACTED] in a village approximately 30 / 40 kilometres from [REDACTED], where Starlink connections have remained more reliable, to travel to [REDACTED] and make casual inquiries regarding D-28's whereabouts ([REDACTED]). Today, 30 August 2024, the CLRV interlocutor updated the CLRV team that [REDACTED] had informed the interlocutor, based on [REDACTED] inquiries [REDACTED], that D-28 was not present [REDACTED], and that he appears to have departed [REDACTED] in [REDACTED].

16. The Defence, Prosecution, and CLRV's respective investigations accordingly appear to confirm and corroborate that D-28, who the Defence previously reported was unable to depart [REDACTED] until September 2024, travelled [REDACTED] to [REDACTED]. Based on the CLRV's inquiries, as outlined above, it appears that D-28 may have then departed [REDACTED]. Similar to the information provided by the Defence, to the CLRV's knowledge, D-28 has not returned to [REDACTED] as of yet.

17. In light of the above, as well as the Prosecution and CLRV's previous relevant submissions, and given the burden resting on the moving party, it is the CLRV's

¹⁶ See CLRV filing 1153-Conf and CLRV email submissions dated 3 July 2024.

view that the Chamber may properly determine that it is not satisfied that D-28 was indeed ‘unavailable’ prior to the Defence’s report of his timely reappearance [REDACTED], or that – contrary to the previously indicated position – he could not travel and testify between that date and the week of 16 September 2024.

18. In the CLRV’s view, D-28 has simply acted true to form, and once again broken off contact with the Defence, notwithstanding his prior reported indication of willingness to testify, and full knowledge of the steps that needed to be taken to facilitate his appearance. At all times he knew how to communicate with the Defence team, and it appears departed [REDACTED] without bothering to advise the Defence team of his plans.
19. Unwillingness or reluctance to testify, however, is not to be confused with ‘unavailability’ according to Rule 68(2)(c),¹⁷ where the focus of the assessment remains on whether the witness’s unavailability arises from obstacles that cannot be overcome by reasonable diligence.¹⁸
20. In the CLRV’s view, the information available permits the Chamber to draw the reasonable conclusion that D-28 is simply biding his time until the relevant deadlines for his travel and appearance have passed, and thereafter will return to his normal life activities. In the CLRV’s assessment, continued reasonable diligence on the part of the Defence in seeking to locate D-28 and/or awaiting his eventual return [REDACTED] is simply a matter of time.
21. The Trial Chamber has already assessed the Defence’s previous attempts at locating D-28 as “seemingly perfunctory” and found “that the Defence should have made greater efforts to locate the witness, particularly as arrangements were being finalised for the appearance of ‘the last’ Defence witnesses in June 2024”.¹⁹ In the

¹⁷ See, e.g., *Al Hassan*, Decision on the Defence’s request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, [ICC-01/12-01/18-2445-Red](#), para. 23.

¹⁸ *Yekatom and 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](#), paras 38-41.

¹⁹ Decision on Revised Defence Request, para. 23.

CLRV's view, the Defence's past conduct is a relevant factor for the Chamber's consideration of the Renewed Request, which cannot be wiped away by what appear to be more concerted efforts since 11 July 2024, albeit unsuccessfully, to maintain contact with D-28 and facilitate his appearance.²⁰

22. The 'last opportunity' granted by the Chamber – which has been more than accommodating in respect of the Defence's investigations and repeated requests for time extensions – to confirm the date of D-28's *viva voce* appearance has now passed. The Defence may not now rely on the Chamber's accommodation as a basis for seeking admission of D-28's prior recorded testimony under Rule 68(2)(c). That application must stand on its own merits, which, in the CLRV's opinion, for the reasons canvassed above, the Defence has failed to satisfy.

23. For the same reason, the Defence's claimed disadvantage based on the purported lack of efficacy should the Chamber issue a summons for D-28, or "the absence of any other solution",²¹ is beside the point. The Chamber's 'last opportunity' accommodation was strictly defined and did not envision or allow for any other proposed solution or further time extensions for the presentation of the Defence's case, which presently remains open, more than four years after the Accused's initial appearance before the Court, and more than two decades after the events which gave rise to the participating victims' status in these proceedings.

IV. Conclusion

24. The CLRV respectfully requests Trial Chamber I to take into account the above observations in considering the Renewed Request.

²⁰ See paras 5-7 *infra*.

²¹ Renewed Request, paras 11-12.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized flourish at the end.

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 30 August 2024
At Berlin, Germany