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No.: ICC-02/05-01/20  
Date: 3 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 "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'", 30 August 2024, ICC-02/05-01/20-1180-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 renewed request to admit into evidence Witness D-0028's prior recorded testimony pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence ("Renewed Request").<sup>1</sup> The Defence has again failed to demonstrate that D-0028 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence. The Renewed Request was also filed prematurely.

## II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(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 Defence has confirmed that it re-established contact with D-0028 on 28 June 2024, at which time the witness confirmed his willingness to testify.<sup>2</sup> The Defence again directly communicated with the witness on 11 July through a video-call, during which he again confirmed his willingness to testify.<sup>3</sup>

4. The Defence states that after various efforts to contact the witness after 11 July, a new video-call was eventually scheduled for 2 August 2024. This was then postponed to 3 August at the specific request of the witness, and then again to 7 August 2024.<sup>4</sup>

5. However, the witness did not attend this second video-call, and the Defence's contact person was informed by [REDACTED] that the witness had travelled to [REDACTED] on 2 August 2024. D-0028 has apparently since been uncontactable despite some efforts made by the Defence to re-establish contact with the witness. Such

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<sup>1</sup> 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-02/05-01/20-1176-Conf](#) ("Renewed Request").

<sup>2</sup> 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](#) ("Defence's Modified Request"), paras. 21-22. Annexe 2 à la 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 ("Annex 2 to Defence's Modified Request"), [ICC-02/05-01/20-1157-Conf-Anx2](#).

<sup>3</sup> [Renewed Request](#), paras. 3-4.

<sup>4</sup> [Renewed Request](#), para. 5.

efforts have reportedly included: contacting [REDACTED] and [REDACTED]; requesting its resource person (notably, with whom the Defence is now able to maintain “near-daily contact”,<sup>5</sup> despite previously claiming difficulties with network communication in Sudan<sup>6</sup>) to try and reach D-0028 in person in [REDACTED] to gather information about his whereabouts and expected return. The resource person is also said to have contacted seven acquaintances in the “[REDACTED] to enquire about the presence of Witness D-28 there”.<sup>7</sup>

6. The Prosecution confirms<sup>8</sup> that on 19 August 2024, the Defence communicated to the Prosecution and the Legal Representative of the Victims that it had lost contact with D-0028 and that it was informed that the witness was not in [REDACTED]. The Defence made no reference then to the possibility of the witness being in [REDACTED].<sup>9</sup> That same day, the Prosecution was able to liaise with a source in Darfur and, on 20 August 2024, informed the Defence that D-0028 was “visiting family members nearby in [REDACTED]”.<sup>10</sup> In response, the Defence stated that “[t]he information about [REDACTED] is what [REDACTED] is saying to our contact person as well, but we could not verify it. It is questioned by other sources. We are looking for solutions to send someone there to find him, but time is running against us. We will have to take a decision soon”.<sup>11</sup>

7. The Chamber has previously found that it “deeply regrets the Defence’s seemingly perfunctory attempts to find D-0028”, and that “the Defence should have made greater efforts to locate the witness.”<sup>12</sup> Yet the Defence has, once again, failed to demonstrate that any “unavailability” of D-0028 cannot be overcome with reasonable

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<sup>5</sup> [Renewed Request](#), para. 6.

<sup>6</sup> See e.g. [T-123-ET](#), p. 30, line 11-p. 31, line 9; T-138-CT, p. 14, lines 8-16; Premier Rapport Périodique soumis en vertu de la Décision ICC-02/05-01/20-1057-Conf, [ICC-02/05-01/20-1062-Conf](#), paras. 8-9; Request for postponement of Defence case, [ICC-02/05-01/20-983-Conf](#), paras. 10-11; Update on Progress in the Defence Preparation, [ICC-02/05-01/20-977-Conf](#), para. 4(iv).

<sup>7</sup> [Renewed Request](#), paras. 6-10.

<sup>8</sup> [Renewed Request](#), para. 8.

<sup>9</sup> E-mail “CONFIDENTIAL - Whereabouts of Witness D-28”, 19 August 2024 16:10h.

<sup>10</sup> E-mail “RE: CONFIDENTIAL - Whereabouts of Witness D-28”, 20 August 2024 10:05h.

<sup>11</sup> E-mail “RE: CONFIDENTIAL - Whereabouts of Witness D-28”, 20 August 2024, 12:11h.

<sup>12</sup> 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](#) (“Decision on modified request”), para. 22.

diligence, which militates against the introduction of the witness' prior recorded testimony pursuant to rule 68(2)(c) of the Rules.<sup>13</sup>

8. The Defence has not indicated whether upon regaining contact with D-0028 in June 2024 and being informed he did not possess a phone,<sup>14</sup> it took the relatively simple step of providing the witness with a phone to facilitate his communication with the Defence and also with the Victims and Witnesses' Section. The Defence also makes no reference to attempts to engage [REDACTED],<sup>15</sup> to try and obtain more information about the witness.

9. No efforts are described to secure an intermediary based in [REDACTED] or to send the Defence's resource person to [REDACTED], as mentioned in the Defence's previous e-mail to the Prosecution.<sup>16</sup> Instead, the Defence seeks to simply rely on information from the resource person's unidentified "acquaintances" about whether D-0028 has been seen in [REDACTED]. Moreover, the Defence indicates that it is "unaware of any address of Witness D-28 in [REDACTED]",<sup>17</sup> however it was informed by the Prosecution that D-0028 was reportedly there visiting relatives. Nonetheless, no specific reference is made in the Renewed Request to efforts to contact any of D-0028's family members in [REDACTED].

10. Furthermore, at the time the Renewed Request was filed, there was still ample time for Witness D-0028 to travel to [REDACTED] by 9 September or a date soon after [REDACTED].<sup>18</sup> At the request of the Prosecution, P-1271 previously made the journey [REDACTED] in three days travelling on public transport.<sup>19</sup> [REDACTED]. Thus, if the Defence had made efforts to contact D-0028 during the last week it is possible that he could have appeared in time for his scheduled testimony, particularly given his previously expressed willingness to testify. The Prosecution notes that the Defence appears to have abandoned efforts to secure the availability of D-0028 on 23 August

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<sup>13</sup> [Prosecution's Response to the Main Request](#), paras. 12-13.

<sup>14</sup> [Annex 2 to Defence's Modified Request; Renewed Request](#), para. 4.

<sup>15</sup> [Renewed Request](#), paras. 5, 7.

<sup>16</sup> See above para. 6.

<sup>17</sup> [Renewed Request](#), para. 7.

<sup>18</sup> See [Renewed Request](#), para 4.

<sup>19</sup> [DAR-OTP-00009137](#).

(the date of filing of the Renewed Request), almost one week prior to the Chamber's deadline for an update on his availability.<sup>20</sup> Given this lack of diligence, 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.

11. As regards D-0028's subjective availability, given this lack of diligence by the Defence, it has further not been established whether D-0028 is reluctant or unwilling to testify. In this regard, the Prosecution notes the previous finding by the Appeals Chamber that a witness' reluctance or willingness 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."<sup>21</sup> As set out above, the Defence has failed to demonstrate this requisite level of diligence. Therefore the Defence has not established that D-0028 is "unavailable to testify orally" within the meaning of rule 68(2)(c) of the Rules.

#### IV. CONCLUSION

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




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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 3<sup>rd</sup> day of September 2024

At The Hague, The Netherlands

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<sup>20</sup> [Decision on modified request](#), paras. 25, 27.

<sup>21</sup> *Yekatom & Ngaïssona* Rule 68(2)(c) AJ, [ICC-01/14-01/18-2502-Red](#), paras. 39-41.