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**Cour
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**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/20
Date: 10 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")**

Confidential

**Prosecution's response to "Demande d'autorisation d'interjeter appel de la
Décision ICC-02/05-01/20-1182-Conf"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor Mr Karim A. A. Khan KC Ms Nazhat Shameem Khan Mr Julian Nicholls	Counsel for the Defence Mr Cyril Laucci Mr Iain Edwards
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The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States Representatives	Amicus Curiae

REGISTRY

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I. INTRODUCTION

1. The Prosecution respectfully requests the Chamber to reject the Defence's request for leave to appeal ("Request")¹ the "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" ("Decision").²

2. The Request mischaracterises the Decision. The issues that the Defence requests the Chamber to certify for appeal therefore do not arise from the Decision and are not appealable. The issues also do not satisfy the cumulative criteria for leave to appeal under article 82(1)(d) of the Rome Statute.

II. CLASSIFICATION

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

III. SUBMISSIONS

4. The Prosecution refers to the applicable legal framework for deciding a request for leave to appeal under article 82(1)(d) of the Statute as set out by the Chamber in its previous decisions.³

The Issues do not arise from the Decision and are not appealable issues

5. The Defence requests the Chamber to certify two issues for appeal under article 82(1)(d) of the Statute:

- a. *"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*

¹ Demande d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-1182-Conf, [ICC-02/05-01/20-1193-Conf](#).

² 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](#).

³ See e.g. Decision on the Defence's requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims' participation, [ICC-02/05-01/20-525](#), paras. 10-14.

existe des indices indiquant qu'il ne souhaite pas comparaître ?" (Issue One);
and

- b. *"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 ?" (Issue Two) (together, the "Issues").*⁴

6. The Issues mischaracterise the Decision and therefore not do not arise from it and are not appealable issues within the meaning of article 82(1)(d) of the Statute.

7. With regard to Issue One, the Chamber did not interpret paragraph 41 of the Appeals Chamber's judgment in *Yekatom & Ngaïssona*⁵ to exclude a finding of unavailability under rule 68(2)(c) of the Rules when there are indications that the witness does not wish to appear.⁶ To the contrary, the Chamber correctly stated the Appeals Chamber's finding 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".⁷

8. The Chamber then considered the information before it regarding the Defence's attempts to contact and secure D-0028's appearance,⁸ and found that it was "not satisfied that D-0028 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules."⁹ While noting that the "information before the Chamber *suggests* that D-0028 is unwilling to testify before the Chamber", the Chamber did not *conclude* that D-0028 was unwilling to testify, nor did it state that its finding regarding his unavailability was based on his apparent unwillingness.¹⁰ The Chamber therefore did not wrongly

⁴ [Request](#), para. 8.

⁵ *Yekatom & 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", [ICC-01/14-01/18-2502-Red](#) (OA4).

⁶ *Contra* [Request](#), para. 6.

⁷ [Decision](#), para. 12, citing to *Yekatom & 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", [ICC-01/14-01/18-2502-Red](#) (OA4), para. 41.

⁸ [Decision](#), paras. 13-14.

⁹ [Decision](#), para. 15.

¹⁰ [Decision](#), para. 15 (emphasis added).

interpret or apply the Appeals Chamber's jurisprudence in *Yekatom & Ngaïssona* in this case.

9. With regard to Issue Two, the Chamber did not presume that D-0028 was unwilling to testify.¹¹ As noted above, the Chamber simply observed, without drawing any conclusion, that the information before it *suggested* that D-0028 was unwilling to testify.¹² Furthermore, since the Chamber did not state that this observation formed the basis for its finding that D-0028 was not unavailable to testify within the meaning of rule 68(2)(c), it had no material impact on the Decision. The subject identified by the Defence in Issue One is therefore not "essential for the determination of matters arising in the judicial case under examination",¹³ and is not appealable.¹⁴

The Issues do not satisfy the cumulative requirements of article 82(1)(d)

10. Even if the Chamber were to consider that the Issues arise from the Decision and are appealable, they do not satisfy either of the cumulative requirements under article 82(1)(d) of the Statute.

The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

11. The Defence fails to demonstrate that the Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

12. The Defence submits that the Decision prevents the submission of D-0028's written statement into evidence, in violation of the Defence's right to present evidence, an essential guarantee of the right to a fair trial, as a result of the Chamber's indication that it would not entertain any further rule 68(2) applications for D-0028's evidence.¹⁵

¹¹ *Contra Request*, para. 7.

¹² *Decision*, para. 15.

¹³ *DRC Extraordinary Review Judgment*, para. 9.

¹⁴ See e.g. *Gbagbo & Blé Goudé* Leave to Appeal Decision on Admission of Prior Recorded Statements, [ICC-02/11-01/15-1023](#), para. 14; *Bemba et al.* Leave to Appeal Decision on Admissibility of Certain Materials, [ICC-01/05-01/13-1489](#), para. 8; *Abu Garda* Leave to Appeal Decision on Confirmation of Charges, [ICC-02/05-02/09-267](#), paras. 13, 18; *Ongwen* Leave to Appeal Decision on Witness Preparation, [ICC-02/04-01/15-537](#), para. 8.

¹⁵ *Request*, para. 11, referring to *Decision*, para. 15.

13. First, since the Defence does not seek leave to appeal the Chamber's indication that it would not entertain any further rule 68(2) request in relation to D-0028, its potential impact is irrelevant to the assessment of whether the Issues meet the criteria under article 82(1)(d). Second, the possibility that the Defence may wish to submit a future rule 68(2) request concerning D-0028's evidence is hypothetical and speculative, and therefore does not affect the fair and expeditious conduct of the proceedings. Third, while the Defence points to alleged unfairness, it does not explain how the Issues would significantly affect the expeditious conduct of the proceedings, which forms part of the cumulative criteria under article 82(1)(d).

14. The Request further submits that requiring the Defence to close its case without the "admission" into evidence of D-0028's written statement is likely to have an impact on the outcome of the trial to the extent that the Chamber will be required to render its article 74 judgment without the benefit of his evidence.¹⁶

15. This purported impact is again hypothetical and speculative, and the Request is therefore premature. In the Decision, the Chamber allowed the Defence "further time to make a last attempt to arrange D-0028's testimony".¹⁷ The Defence indicated in the Request that it is making ongoing efforts to secure the attendance of D-0028.¹⁸ It is therefore not a foregone conclusion that the Chamber will not have the benefit of D-0028's evidence for the purposes of its article 74 judgment. Furthermore, the Defence retains the possibility of raising these arguments as part of a final appeal under article 81 of the Statute, in the event the Decision eventually affects the outcome of the trial.

The immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings

16. The Defence does not address this criterion in the Request, and accordingly fails to demonstrate that immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings. Indeed, given the lack of material impact on the

¹⁶ [Request](#), para. 12.

¹⁷ [Decision](#), para. 15.

¹⁸ [Request](#), para. 2.

Decision, and the hypothetical and speculative nature of the purported impact of the Issues, determination by the Appeals Chamber would not materially advance the proceedings, but rather cause unnecessary delay.

IV. RELIEF REQUESTED

17. For the above reasons, the Prosecution respectfully requests the Chamber to reject the Request.



Karim A. A. Khan KC
Prosecutor

Dated this 10th day of September 2024

At The Hague, The Netherlands