

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 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 “CLRV Response to Defence ‘Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1182-Conf’”, 10 May 2024 (ICC-02/05-01/20-1184-Conf)

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. The Common Legal Representative of Victims (“CLR”) files this response to the Defence’s application for leave to appeal¹ the Trial Chamber’s decision of 4 September 2024,² rejecting the Defence’s renewed request³ seeking the admission of Witness D-0028’s (“D-28”) prior recorded testimony pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”).
2. In the CLR’s assessment, the two issues identified in the Application do not meet the test for leave to appeal under Article 82(1)(d) of the Rome Statute (“Statute”). The Defence motion should be dismissed.

II. Submissions

3. The CLR incorporates by reference the Trial Chamber’s previous findings on the law in respect of determining applications for leave to appeal under Article 82(1)(d) of the Statute.⁴
4. The Application articulates two issues purportedly arising from the Impugned Decision that satisfy the leave to appeal test:
 - i. “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 existe des indices indiquant qu’il ne souhaite pas comparaître?”⁵ (“First Issue”)

¹ Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-1182-Conf, 6 September 2024, ICC-02/05-01/20-1183-Conf (“Application”). The CLR will also file a public redacted version of this response.

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, 4 September 2024, ICC-02/05-01/20-1182-Conf (“Impugned Decision”) (public redacted version: [ICC-02/05-01/20-1182-Red](#)).

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

⁴ See, e.g., Decision on the Defence’s requests for leave to appeal the oral decisions on the inadmissibility of evidence and victims’ participation, 2 December 2021, [ICC-02/05-01/20-525](#), paras 10-14; T-020, p. 83, line 25-p. 86, line 25; T-028, p. 96, line 7-p. 98, line 11.

⁵ Informal CLR English translation: “In paragraph 15 of the Decision, did the Chamber err in law in its interpretation of paragraph 41 of the *Yekatom & Ngaïssona* OA4 Judgment excluding the unavailability of a witness under Rule 68-2-c of the RPE when there are indications that he or she does not wish to appear?”

- ii. “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?”⁶ (“Second Issue”)

(A) Submissions on the First Issue

5. The first issue does not arise from the Impugned Decision, and is instead based on a misunderstanding of the Chamber’s application of the Appeals Chamber’s judgment of 20 May 2024 in the *Yekatom & Ngaïssona* case.⁷
6. Paragraph 12 of the Impugned Decision accurately sets out the Appeals Chamber’s relevant holdings in the *Yekatom & Ngaïssona* Judgment, including 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’”.⁸
7. The Application asserts that in assessing D-28 as unwilling to testify, but nevertheless finding that he is not ‘unavailable’ to appear within the meaning of Rule 68(2)(c),⁹ the Chamber has understood and applied the Appeals Chamber’s jurisprudence in exactly the ‘opposite’ manner – namely, by determining that unwillingness precludes a finding of unavailability for purposes of Rule 68(2)(c).¹⁰
8. The Impugned Decision does no such thing. The Chamber, in application of the required ‘case-by-case’ assessment,¹¹ determined that the information submitted by the parties and CLRV¹² “suggests that D-0028 is unwilling to testify before the Chamber”.¹³ In conjunction with this assessment, and in line with the *Yekatom &*

⁶ Informal CLRV English translation: “In paragraph 15 of the Decision, did the Chamber err in fact in drawing from the prolonged absence of Witness D-28 a presumption that he no longer wishes to testify?”

⁷ *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”, 20 May 2024, ICC-01/14-01/18-2502-Red (“*Yekatom & Ngaïssona* Judgment”).

⁸ Impugned Decision, para. 12 (citing *Yekatom & Ngaïssona* Judgment, para. 41).

⁹ *Id.*, para. 15.

¹⁰ Application, para. 6.

¹¹ Impugned Decision, para. 12 (citing *Yekatom & Ngaïssona* Judgment, para. 38).

¹² Impugned Decision, paras 1-3, 7-10, 13-14.

¹³ *Id.*, para. 15.

Ngaïssona Judgment, the Chamber also determined that there are other relevant circumstances – namely the possibility of the Defence locating and communicating with D-28 regarding his appearance (including the Defence’s recent “more concerted efforts”), and the fact that D-28 is capable of travel¹⁴ – that can be ‘overcome’ with reasonable diligence to facilitate D-28’s appearance. This is evident in the Trial Chamber’s granting the Defence “further time to make a last attempt to arrange D-0028’s evidence”, and which the Defence appears to acknowledge itself, noting “il semblerait néanmoins que la Chambre considère que ce refus ne saurait être définitif puisqu’elle prie la Défense de tenter à nouveau de le localiser et de le convaincre de venir témoigner”.¹⁵

9. Logically, the Trial Chamber would not have provided the Defence yet another ‘last’ opportunity to organise D-28’s appearance had it not determined that D-28’s apparent present unwillingness to testify notwithstanding, there are other circumstances that can be overcome with reasonable diligence on the part of the Defence to facilitate and encourage D-28’s appearance. This is entirely in keeping with the Appeal’s Chamber’s jurisprudence in the *Yekatom & Ngaïssona* Judgment.
10. As the First Issue does not arise from the Decision, it may be dismissed *in limine*.

(B) Submissions on the Second Issue

11. The Application’s second purported issue, while arising from the Impugned Decision, is, firstly, not determinative of the Trial Chamber’s finding that the Rule 68(2)(c) test is not met, and, secondly, represents a mere disagreement with a factual finding of the Chamber, not an appealable issue for purposes of Article 82(1)(d).
12. The Application submits that the Impugned Decision’s finding that the information available suggests that D-28 is unwilling to testify, is based on “une spéculation” (a speculation). Even if that were the case, this does assist the Defence’s position. Had the Chamber made no finding in this respect, or even positively assessed that

¹⁴ Impugned Decision, paras 13-14.

¹⁵ Application, para. 7.

D-28 remains willing to testify, this would not impact on the Chamber's determination – as addressed above in respect to Issue 1 – that the obstacles that exist to the witness's appearance can be overcome with reasonable diligence on the part of the Defence, and therefore Rule 68(2)(c) is inapplicable.

13. Further, the Defence's claim of a speculative finding on the part of the Trial Chamber constitutes a mere disagreement with a determination of the Judges. The CLRV notes that it would appear to be the Defence itself that engages in speculation when it submits "le témoin D-28 avait reporté son entretien avec la Défense du 3 au 7 août 2024 dans l'espoir d'être de retour [REDACTED] à cette date".¹⁶ As far as the CLRV understands matters, nothing in the record submitted to the Chamber indicates that D-28 informed the Defence of his intention to [REDACTED], or that he intended to return from such travel by [REDACTED] to attend the postponed interview.¹⁷

14. The Chamber's assessment that the information available suggests D-28 is unwilling to testify was based, as indicated above,¹⁸ on all of the relevant information submitted by the parties and CLRV, including the fact – which the Defence fails to acknowledge in either the Renewed Request or the Application – that D-28 acted wholly contrary to his prior communication to the Defence, and on the basis of which the Chamber granted its first accommodation to delay his testimony until mid-September, that he (D-28) was entirely unavailable to travel for pressing personal reasons during the months of July and August.¹⁹

15. The Second Issue may therefore be dismissed on the basis that it does not identify a matter that is determinative for the Impugned Decision, and separately the fact

¹⁶ Impugned Decision, para. 7 (informal CLRV translation: "Witness D-28 had postponed his interview with the Defense from August 3 to 7, 2024 in the hope of being back [REDACTED] on that date").

¹⁷ See Renewed Request, para. 5 ("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.")

¹⁸ See fn. 12 *supra*.

¹⁹ Impugned Decision, para. 13 (internal citations omitted).

that it amounts to no more than a mere disagreement with a finding of the Chamber.

(C) Consideration of the remaining elements of the Article 82(1)(d) test

16. As submitted above, in the view of the CLRV, the Trial Chamber may properly dismiss both of the issues identified in the Application without considering the remaining elements of the test set out under Article 82(1)(d) of the Statute – namely, the issue involves a matter that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. The CLRV nevertheless provides brief submissions on these remaining elements to assist the Trial Chamber’s consideration of the Application.
17. The Impugned Decision is the latest example of the Trial Chamber going to great lengths to more than ensure the fairness of the judicial process for the parties and the participating victims, and undoubtably the Defence. The Chamber has granted the Defence several deadline extensions to prepare and present its case, often times, as was the case here, notwithstanding the Defence’s failure to request – let alone properly justify – an extension pursuant to Regulation 35 of the Regulations of the Court. As the CLRV has alluded to,²⁰ the Defence has been granted more than a ‘fair’ opportunity to seek to place D-28’s evidence before the Chamber, and cannot now claim potential unfairness²¹ (let alone the requisite ‘significant’ unfairness) in the context of the discretionary accommodations granted by the Chamber. Similarly, the expeditiousness of the proceedings would have been enhanced by the Chamber *not* granting the Defence these accommodations, which would have been entirely consistent with the Accused’s fundamental rights under Article 67(1) of the Statute.

²⁰ 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”, 30 August 2024, ICC-02/05-01/20-1181-Conf, paras 21-23 (public redacted version: [ICC-02/05-01/20-1181-Red](#)).

²¹ Application, para. 11.

18. Nor is it the case that the lack of inclusion of D-28's evidence in the record – if the Defence indeed is unable to facilitate his appearance by the extended final date of 24 September 2024 – would *significantly* impact the outcome of the Trial, as the Defence submits.²² As noted by the Trial Chamber in its first decision granting the Defence an accommodation to call D-28 as its final witness “in the interests of justice”,²³ “it is not anticipated that D-0028[’s expected evidence] will deal with new matters”.²⁴ Further, the fact that D-28 would [REDACTED] whose evidence would be before the Chamber, as the Defence argues,²⁵ would still not constitute [REDACTED], or evidence from [REDACTED], who might more authoritatively and credibly convey [REDACTED].

III. Conclusion

19. The CLRV respectfully requests the Trial Chamber to take into consideration the above submissions in determining the Defence Application.

Respectfully submitted,



Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 12 September 2024
At Berlin, Germany

²² Application, para. 12.

²³ 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, para. 24 (public redacted version: [ICC-02/05-01/20-1161-Red](#)).

²⁴ *Id.*, para. 26.

²⁵ Application, para. 12.