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No.: ICC-02/05-01/20
Date: 18 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 ‘Requête aux fins de
reconsidération de la Décision ICC-02/05-01/20-1182-Conf’”, 17 September 2024,
ICC-02/05-01/20-1189-Conf**

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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 request ("Request")¹ for reconsideration of the "Decision on the Defence's renewed request for admission of prior recorded testimony of Witness D-0028 under Rule 68(2)(c) of the Rules of Procedure and Evidence" ("Decision").² The Request does not satisfy the standard for reconsideration.

II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(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

3. As previously noted by the Chamber, reconsideration is exceptional and should only take place if a "clear error of reasoning" has been demonstrated or if it is necessary to do so to prevent an injustice. New facts arising since the original decision was rendered may be relevant to this assessment.³ Nothing in the Request satisfies these criteria.

4. The facts described by the Defence are neither new nor relevant to the Chamber's disposition of the issue at hand. The Defence has not employed any new tactic to try and contact D-0028, and simply relied on the same unsuccessful avenues it explored before,⁴ such as maintaining contact, [REDACTED].⁵ Once again, no reference is made to efforts to contact D-0028's family in [REDACTED] or [REDACTED].⁶ The Defence further highlights the difficulty caused by D-0028's lack

¹ Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-1182-Conf, [ICC-02/05-01/20-1187-Conf](#) ("Request").

² Decision on the Defence's renewed request for admission of 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](#) ("Decision"). This response is filed in accordance with the Chamber's order that any responses be filed by 17 September 2024 at 16:00, see Email titled "TC I: Deadline for responses to filing 1187", 13 September 2024 15:49h.

³ Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", [ICC-02/05-01/20-650-Red](#), para. 10.

⁴ Renewed Request for Admission of Prior Recorded Testimony of Witness D-28 Under Rule 28(2)(c) of the Rules of Procedure and Evidence, [ICC-02/05-01/20-1176-Conf](#) ("Renewed request"), para. 7.

⁵ [Request](#), paras. 7, 10.

⁶ 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", [ICC-02/05-01/20-1180-Conf](#) ("Prosecution's response to renewed request"), paras. 6, 8, 9.

of a telephone,⁷ which the Prosecution has already noted could have been relatively easily avoided by the Defence.⁸

5. Although the Defence mentions that [REDACTED] to search for D-0028 [REDACTED],⁹ [REDACTED] departure was halted by the Defence following information received from the Prosecution that D-0028 [REDACTED].¹⁰ In the end, [REDACTED] did not deploy anywhere, as the Defence claims it was unable to confirm whether D-0028 was [REDACTED].¹¹ [REDACTED] non-departure does not amount to a new fact, it simply reflects the Defence's own choice not to take action, even after the Prosecution had stated that it "would certainly not suggest that you suspend any efforts to locate [D-28] in [REDACTED] or elsewhere".¹²

6. The information that the witness has reportedly [REDACTED], moreover, does not impact the reasoning behind the Decision. The information before the Chamber still "suggests that D-0028 is unwilling to testify",¹³ and the Defence continues to fail to demonstrate that D-0028 is objectively unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.¹⁴ The Defence chose not to [REDACTED] and does not mention which efforts were made to try and locate D-0028 [REDACTED]. Although the witness's exact whereabouts are unknown, his possible location is circumscribed to [REDACTED], and the Defence made no reasonable efforts to locate him [REDACTED].

7. Additionally, the Defence also appears to have failed to take basic steps in its search for the witness, such as trying to locate D-0028's profile on social media. In a cursory search in preparation of this motion, the Prosecution was able to find a profile [REDACTED] that contains the name, known nickname and clear photo of D-0028.

⁷ [Request](#), para. 11.

⁸ [Prosecution's response to renewed request](#), para. 8.

⁹ [Decision](#), paras. 15-16.

¹⁰ [Request](#), para. 8.

¹¹ [Request](#), paras. 9-10.

¹² E-mail titled "RE: Update on Witness D-28", 10 September 2024 15:45h.

¹³ [Decision](#), para. 15.

¹⁴ See [Decision](#), para. 12.

[REDACTED].¹⁵ This information, and the link to D-0028's [REDACTED] profile were provided to the Defence on 16 September 2024.¹⁶

8. The existence of a publicly accessible means to communicate with D-0028 that was not explored in due time to ensure the witness's appearance, again shows that the Defence has not demonstrated that the witness is unavailable due to obstacles that cannot be overcome with reasonable diligence. The Decision, thus, is unaffected by the alleged new facts invoked in the Request.

9. Lastly, the Defence argues, without providing any reasons, that reconsideration would be necessary to prevent an injustice. However, as with the similar allegation made in its request for leave to appeal the Decision,¹⁷ the Defence again fails to even begin to show how "the expected evidence of D-0028 is particularly unique or important to its case".¹⁸ Besides re-hashing its array of general complaints about alleged obstacles it faced in the course of the procedure¹⁹— all of which have been properly responded to in due course²⁰— and misrepresenting the Chamber's decision on its finding of non-cooperation by Sudan,²¹ the Defence has not attempted to address the Chamber's finding regarding the importance of this particular evidence to the case. As such, no injustice has been demonstrated. The Request, therefore, should be dismissed.

¹⁵ See [REDACTED].

¹⁶ E-mail titled "RE: Update on Witness D-28", 16 September 2024 16:53h. [REDACTED]. E-mails titled "Re: Update on Witness D-28", 16 September 2024 18:32h and 17 September 2024 09:16h.

¹⁷ Demande d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-1182-Conf, [ICC-02/05-01/20-1183-Conf](#), para. 13.

¹⁸ Decision on the Defence's request for leave to appeal the Decision on the Defence's renewed request for admission of prior recorded testimony of Witness D-0028 under Rule 68(2)(c) of the Rules of Procedure and Evidence, [ICC-02/05-01/20-1186](#).

¹⁹ [Request](#), para. 14.

²⁰ See e.g. Prosecution's response to "Demande d'autorisation de répliquer aux écritures ICC-02/05-01/20-1085-Conf", [ICC-02/05-01/20-1095-Conf](#), paras. 12-14, [REDACTED]; [T-115-ET](#), p. 34, line 7-p. 35, line 15, referring to Prosecution's response to "Requête aux fins de report de la phase de présentation de la Défense", 14 March 2023, ICC-02/05-01/20-902-Conf-Red, [ICC-02/05-01/20-906-Conf](#), see specially paras. 15-17, 27-32.

²¹ Contrary to the Defence's claim, the Chamber's decision not to refer the matter of Sudan's non-cooperation to the United Nations Security Council was not based on the fact that non-cooperation affected exclusively the Defence and not the Registry, but rather that failure to provide the Defence with documents did not meet the requirements under article 87(7) for such referral (see paras. 26-28). Reference to cooperation with the Registry is made as an example of how cooperation was not completely halted, but certainly it was not a basis for the decision. In fact, the Chamber's conclusion at paragraph 29 of that decision clearly states that "[c]onsidering the complex and transitional political situation in Sudan and the fact that the object and purpose of Article 87(7) of the Statute is to foster cooperation, the Chamber is not persuaded that a referral of the present matter to the UN Security Council would lead to the provision of the requested documents by Sudan". Decision on the Defence's requests for a finding of non-compliance by Sudan, [ICC-02/05-01/20-913-Conf](#).

IV. RELIEF REQUESTED

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



Karim A. A. Khan KC
Prosecutor

Dated this 18th day of September 2024

At The Hague, The Netherlands