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**No. ICC-02/05-01/20
Date: 24 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 redacted version of the

**Decision on the Defence's request 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)**

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

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**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 13 June 2024, the Defence filed a request to introduce the prior recorded testimony of D-0028 pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’) (the ‘Main Request’).¹ In its Main Request, the Defence submitted that it had been unable to reach D-0028 since September 2023.²
2. On 26 June 2024, the Defence was able to establish contact with D-0028, who confirmed that he had returned to [REDACTED] and was willing to appear before Trial Chamber I (the ‘Chamber’).³
3. On 28 June 2024, following the re-establishment of contact with D-0028, the Defence filed a modified request (the ‘Modified Request’), requesting, *inter alia*, D-0028’s appearance before the Chamber.⁴
4. On 5 July 2024, the Chamber issued its decision rejecting the Defence’s Main Request to introduce D-0028’s prior recorded testimony under Rule 68(2)(c) of the Rules. Instead, the Chamber instructed the Defence to arrange D-0028’s appearance *via* video-link from [REDACTED] between 16-20 September 2024.⁵
5. On 23 August 2024, the Defence filed a renewed request to introduce D-0028’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules (the ‘Renewed Request’).⁶
6. On 4 September 2024, the Chamber rejected the Renewed Request, but allowed the Defence further time to make a last attempt to arrange D-0028’s testimony (the ‘Second

¹ 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, ICC-02/05-01/20-1147-Conf, with two confidential annexes (notified on 14 June 2024). A public redacted version was notified on 14 June 2024, ICC-02/05-01/20-1147-Red.

² Main Request, ICC-02/05-01/20-1147-Red, para. 6.

³ 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 (with one confidential *ex parte* annex and one confidential annex), paras 22-23. A public redacted version was notified on 1 July 2024, ICC-02/05-01/20-1157-Red. Annex 2 to the Modified Request, ICC-02/05-01/20-1157-Conf-Anx2.

⁴ Modified Request, ICC-02/05-01/20-1157-Red.

⁵ 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. A public redacted version was notified on the same date, ICC-02/05-01/20-1161-Red.

⁶ 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. A public redacted version was notified on the same date, ICC-02/05-01/20-1176-Red.

Decision on D-0028's Rule 68(2)(c) Request').⁷ The Chamber also instructed the Defence to either confirm D-0028's appearance for his scheduled testimony or provide notice of the closure of the presentation of its case by 13 September 2024.⁸

7. On 6 September 2024, the Defence requested leave to appeal the Second Decision on D-0028's Rule 68(2)(c) Request (the 'Defence's request for leave to appeal').⁹

8. On 12 September 2024, the Chamber rejected the Defence's request for leave to appeal in its entirety (the 'Decision on the Defence's request for leave to appeal').¹⁰

9. On 13 September 2024, the Defence filed a request for reconsideration of the Second Decision on D-0028's Rule 68(2)(c) Request (the 'Reconsideration Request').¹¹

10. On the same date, the Defence notified the Chamber, the Prosecution and the participants of the closure of the presentation of its evidence, subject to the Chamber's decision on the Reconsideration Request as well any further documentation which may be received from the Sudanese authorities.¹²

11. On 17 September 2024, upon request from the Chamber,¹³ the Prosecution responded to the Reconsideration Request (the 'Prosecution's Response'),¹⁴ and the Common Legal Representative for Victims (the 'CLRV') joined the Prosecution's Response.¹⁵

⁷ 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. A public redacted version was notified on 5 September 2024, ICC-02/05-01/20-1182-Red.

⁸ Second Decision on D-0028's Rule 68(2)(c) Request, ICC-02/05-01/20-1182-Red, para. 15.

⁹ Demande d'autorisation d'interjeter appel de la Décision ICC-02/05-01/20-1182-Conf, ICC-02/05-01/20-1183-Conf. A public redacted version was notified on 11 September 2024, ICC-02/05-01/20-1183-Red.

¹⁰ 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.

¹¹ Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-1182-Conf, ICC-02/05-01/20-1187-Conf. A public redacted version was notified on the same date, ICC-02/05-01/20-1187-Red. On 23 September 2024, the Defence informed the Chamber that D-0028 may currently be in [REDACTED], see Email from the Defence, at 16:00.

¹² CLÔTURE DE LA PRÉSENTATION DE LA DÉFENSE, ICC-02/05-01/20-1188-Conf, para. 10. A public redacted version was notified on the same date, ICC-02/05-01/20-1188-Red.

¹³ Email from the Chamber, 13 September 2024, at 15:49.

¹⁴ Prosecution's response to 'Requête aux fins de reconsidération de la Décision ICC-02/05-01/20-1182-Conf', ICC-02/05-01/20-1189-Conf. A public redacted version was notified on 18 September 2024, ICC-02/05-01/20-1189-Red.

¹⁵ Email from the CLRV, at 15:52.

II. Submissions

12. The Defence seeks reconsideration of the Chamber's decision to reject the admission into evidence of D-0028's prior recorded statement and associated material under Rule 68(2)(c) of the Rules.¹⁶ The Defence submits that, since the notification of the Second Decision on D-0028's Rule 68(2)(c) Request, it has continued and intensified its efforts to locate and re-establish contact with D-0028.¹⁷ The Defence had planned to send [REDACTED] to search for D-0028, but was informed by the Prosecution that D-0028 [REDACTED].¹⁸

13. The Defence argues that the continuous and renewed efforts to locate D-0028 and the newly received information from the Prosecution regarding D-0028's whereabouts amount to a new circumstance warranting reconsideration of the Chamber's finding that 'D-0028's apparent present unwillingness to testify can be overcome with reasonable diligence on the part of the Defence'.¹⁹

14. Finally, the Defence avers that, if upheld, the Second Decision on D-0028's Rule 68(2)(c) Request would jeopardise procedural fairness by preventing the Defence from submitting D-0028's prior recorded statement into evidence; therefore reconsideration is necessary to prevent this injustice.²⁰

15. The Prosecution responds that the facts described by the Defence are neither new nor relevant to the Chamber's disposition of the issue at hand.²¹ The Prosecution further argues that, although D-0028's exact whereabouts are unknown, the Defence has made no reasonable efforts to locate him in [REDACTED].²² In addition, the Prosecution submits that the Defence has not demonstrated that the witness is unavailable due to obstacles that cannot be overcome with reasonable diligence as the Defence has failed to explore in due time the existence of what appears to be a social media profile of D-0028 and attempt to communicate with him through this mean.²³

¹⁶ Main Request, ICC-02/05-01/20-1147-Conf, para. 15. The Defence requested the submission of D-0028's witness statement (DAR-D31-00000150-0001) and [REDACTED] as associated material (DAR-D31-00000152-0001) into evidence. *See also* Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 1.

¹⁷ Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 7.

¹⁸ Reconsideration Request, ICC-02/05-01/20-1187-Conf, para. 8.

¹⁹ Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 4, *referring to* Decision on the Defence's request for leave to appeal, ICC-02/05-01/20-1186, para. 8.

²⁰ Reconsideration Request, ICC-02/05-01/20-1187-Red, paras 14-16.

²¹ Prosecution's Response, ICC-02/05-01/20-1189-Red, para. 4.

²² Prosecution's Response, ICC-02/05-01/20-1189-Conf, paras 4-6.

²³ Prosecution's Response, ICC-02/05-01/20-1189-Conf, paras 7-8.

16. Finally, the Prosecution avers that the Defence has failed to show that D-0028's evidence is particularly unique or important to its case, and has therefore failed to demonstrate that reconsideration would be necessary to prevent an injustice.²⁴

III. Analysis

17. The Chamber recalls that trial chambers of this Court have determined that reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.²⁵ The Appeals Chamber has clarified that the standard for assessing a witness's unavailability to testify orally under Rule 68(2)(c) of the Rules is the existence of 'obstacles that cannot be overcome with reasonable diligence' and not 'insurmountable obstacles', which covers, *inter alia*, 'other potential situations that may arise in the course of the Court's work as a permanent institution'.²⁶

18. The Defence's main argument is that reconsideration of the Second Decision on D-0028's Rule 68(2)(c) Request is necessary to prevent an injustice.²⁷ In the Defence's view, maintaining the refusal to admit D-0028's statement into evidence despite all the efforts deployed by the Defence would only further encroach upon Mr Abd-Al-Rahman's right to a fair trial.²⁸

19. The Chamber acknowledges the challenges caused by the ongoing conflict which have persisted throughout the Defence's presentation of evidence. It is against that background that the Chamber must evaluate the efforts deployed by the Defence to locate the witness,²⁹ and now acknowledges the poor prospect of being able to successfully arrange D-0028's testimony *via* video-link.

²⁴ Prosecution's Response, ICC-02/05-01/20-1189-Red, para. 9.

²⁵ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table', 22 February 2018, ICC-01/04-02/06-2241, para. 4; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4.

²⁶ See Appeals Chamber, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard 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 (OA4), paras. 38, 40 (hereinafter: '*Yekatom and Ngaïssona* Appeals Decision on Rule 68(2)(c)').

²⁷ Reconsideration Request, ICC-02/05-01/20-1187-Red, paras 14-16.

²⁸ Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 16.

²⁹ Reconsideration Request, ICC-02/05-01/20-1187-Conf, para. 7; Defence's request for leave to appeal, ICC-02/05-01/20-1183-Red, para. 2; Renewed Request, ICC-02/05-01/20-1176-Conf, paras 3-9.

20. Moreover, the Chamber finds that, pursuant to the Appeals Chamber's finding in *Yekatom and Ngaïssona*,³⁰ if reasonable efforts are made to locate a witness, apparent unwillingness to testify is only one factor to consider with regards to 'unavailability' under Rule 68(2)(c) of the Rules.

21. In the light of the further steps taken by the Defence to locate witness D-0028, and taking into account all the relevant circumstances, the Chamber finds, as argued by the Defence,³¹ that it did exert *reasonable* diligence in searching for him. Accordingly, the Chamber finds it appropriate to reconsider its finding that it 'is not satisfied that D-0028 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules.'³² Considering the Defence's right to present evidence, the Chamber accepts its submission that reconsidering the Second Decision on D-0028's Rule 68(2)(c) Request is necessary to prevent an injustice.³³ Consequently, the Chamber does not find it necessary to entertain the Defence's argument on whether the efforts deployed to locate D-0028 since the issuance of the Second Decision on D-0028's Rule 68(2)(c) Request constitute new facts justifying the reconsideration of said decision.

22. In respect of the remainder of the criteria under Rule 68(2)(c) of the Rules, the Chamber notes that the Prosecution³⁴ and the CLRV³⁵ agree that D-0028's statement has sufficient indicia of reliability. The Chamber further notes that the CLRV agrees that the Defence could not have anticipated the necessity of measures under Article 56 of the Rome Statute,³⁶ and that the Prosecution has not taken any position in this regard.³⁷ Consequently, the Chamber finds that the remaining criteria under Rule 68(2)(c) of the Rules have also been met.

23. Notwithstanding the above, the Chamber finds that, as properly argued by the Prosecution,³⁸ the Defence misinterprets the Chamber's decision on its finding of non-

³⁰ *Yekatom and Ngaïssona* Appeals Decision on Rule 68(2)(c), ICC-01/14-01/18-2502-Red (OA4), para. 41.

³¹ Reconsideration Request, ICC-02/05-01/20-1187-Conf, para. 11.

³² Second Decision on D-0028's Rule 68(2)(c) Request, ICC-02/05-01/20-1182-Red, para. 15.

³³ Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 16.

³⁴ 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, para. 22 (hereinafter: 'Prosecution's Response to the Main Request'). A public redacted version was notified on 28 June 2024, ICC-02/05-01/20-1152-Red.

³⁵ 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 3-4 (hereinafter: 'CLRV Observations on the Main Request'). A public redacted version was notified on 25 June 2024, ICC-02/05-01/20-1153-Red.

³⁶ CLRV Observations on the Main Request, ICC-02/05-01/20-1153-Red, para. 4.

³⁷ Prosecution's Response to the Main Request, ICC-02/05-01/20-1152-Red, para. 21.

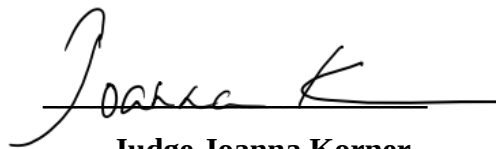
³⁸ Prosecution's Response, ICC-02/05-01/20-1189-Red, para. 9.

cooperation by Sudan.³⁹ The Chamber also recalls that it has granted the Defence a remarkable degree of latitude and flexibility in the preparation and presentation of its evidence.⁴⁰ The Defence's assertion that the Chamber's decisions according more time to the Defence are of limited use,⁴¹ is not borne out by the evidence.

IV. Conclusion

24. Accordingly, the Chamber grants the Reconsideration Request and authorises the submission of D-0028's prior recorded testimony and associated material into evidence.

25. Considering D-0028's prior recorded testimony and associated material are the last materials the Chamber decides upon in the present case, the Defence's closure of evidence comes into effect as of the day of notification of the present decision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 24 September 2024

At The Hague, The Netherlands

³⁹ Decision on the Defence's requests for a finding of non-compliance by Sudan, 31 March 2023, ICC-02/05-01/20-913-Conf. A public redacted version of notified on 31 May 2023, ICC-02/05-01/20-913-Red. *See also*, Prosecution's Response, ICC-02/05-01/20-1189-Red, para. 9 and fn. 21.

⁴⁰ Decision on the Defence's request for leave to appeal, ICC-02/05-01/20-1186, para. 13 and fn. 23; Decision on the Defence's request for postponement of the resumption of the Defence case, 23 January 2024, ICC-02/05-01/20-1057-Conf; Decision on the Second Defence Application for Postponement of its case and the Notice of an Alibi Defence, 7 July 2023, ICC-02/05-01/20-990-Conf (with public redacted version, ICC-02/05-01/20-990-Red); Decision on the Defence's Request for postponement of the presentation of its case, 17 April 2023, ICC-02/05-01/20-916-Conf-Exp (with confidential redacted and public redacted versions, ICC-02/05-01/20-916-Conf-Red and ICC-02/05-01/20-916-Red respectively).

⁴¹ Reconsideration Request, ICC-02/05-01/20-1187-Red, para. 16.