



Original: English

No. ICC-02/05-01/20

Date: 5 July 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 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**

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 HISTORY

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
2. On 24 June 2024, the Prosecution² and the Common Legal Representative for Victims³ (the ‘CLR V’) responded to the Main Request (the ‘Prosecution’s Response’ and ‘CLR V’s Response’, respectively).
3. On 28 June 2024, with leave from the Chamber,⁴ the Defence replied to the Prosecution’s and the CLR V’s Responses and further modified its Main Request following the reappearance of D-0028 in [REDACTED] (the ‘Modified Request’).⁵
4. On 3 July 2024, upon instruction from the Chamber,⁶ the Prosecution⁷ and the CLR V⁸ responded to the Modified Request (the ‘Prosecution’s Response to the Modified Request’ and the ‘CLR V’s Response to the Modified Request’, respectively).

II. SUBMISSIONS

5. D-0028 is a [REDACTED]. The Defence intends to rely on his evidence to demonstrate that: (1) the accused is not the person nicknamed ‘Ali Kushayb’ against whom the charges are pending, and (2) the accused could never have had the authority

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 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”, ICC-02/05-01/20-1152-Conf. A public redacted version was notified on 28 June 2024, ICC-02/05-01/20-1152-Red.

³ CLR V 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”, ICC-02/05-01/20-1153-Conf, with one confidential annex. A public redacted version was notified on 25 June 2024, ICC-02/05-01/20-1153-Red.

⁴ Email from the Chamber, 25 June 2024, at 14:41; *see also* Email from the Defence, 25 June 2024, at 11:47, requesting leave to reply.

⁵ 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). A public redacted version was notified on 1 July 2024, ICC-02/05-01/20-1157-Red.

⁶ Email from the Chamber, 1 July 2024, at 12:59.

⁷ Email from the Prosecution, at 11:57.

⁸ Email from the CLR V, at 10:56.

of the leader of the *Janjaweed*/Militia or that of *Agid al-ogada* of the Ta'aisha tribe.⁹ D-0028 is expected to testify about his personal knowledge of the accused since 2001 and that the accused only had the nickname 'Abu Nasser'.¹⁰

6. The Defence submitted that it lost contact with D-0028 after his interview in August 2023.¹¹ The Defence had attempted to locate the witness on multiple occasions since September 2023.¹² In January 2024, the Defence requested the Prosecution's assistance in locating the witness. In February 2024, the Prosecution informed the Defence that D-0028 was residing in [REDACTED] and that he had joined [REDACTED].¹³

7. In May 2024, the Prosecution informed the Defence that D-0028 had returned to [REDACTED].¹⁴ The Defence submitted however that this information could not be verified. Moreover, the Defence argued that, during his cross-examination, D-0029, who personally knows D-0028 and has tried to locate him multiple times, did not accept the Prosecution's suggestion that D-0028 had returned to [REDACTED].¹⁵

8. The Defence further averred that D-0029's testimony relating to D-0028's unavailability, the information provided by the Prosecution in February 2024, and the news reports on the armed conflict in [REDACTED] are relevant factors which the Chamber must take into account when deciding on D-0028's unavailability pursuant to Rule 68(2)(c) of the Rules.¹⁶ Finally, the Defence contended that it could not have anticipated the necessity of measures under Article 56 of the Rome Statute (the 'Statute'). The Defence therefore requested the Chamber to find that D-0028 is unavailable to testify and to authorise the introduction of his testimony and associated material into evidence pursuant to Rule 68(2)(c) of the Rules.¹⁷

⁹ Main Request, ICC-02/05-01/20-1147-Conf, para. 16.

¹⁰ Main Request, ICC-02/05-01/20-1147-Conf, para. 16.

¹¹ Main Request, ICC-02/05-01/20-1147-Conf, paras 5-6.

¹² Annex 1 to the 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-Anx1.

¹³ Main Request, ICC-02/05-01/20-1147-Conf, para. 7.

¹⁴ Main Request, ICC-02/05-01/20-1147-Conf, para. 8.

¹⁵ Main Request, ICC-02/05-01/20-1147-Conf, para. 10.

¹⁶ Main Request, ICC-02/05-01/20-1147-Conf, para. 12.

¹⁷ Main Request, ICC-02/05-01/20-1147-Conf, para. 12.

9. The Defence sought to introduce into evidence D-0028's witness statement as well as [REDACTED] as an associated material.¹⁸

10. The Prosecution submitted that the Main Request should be dismissed as the Defence had not demonstrated that D-0028 was unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.¹⁹ The Prosecution argued that information provided to the Defence by D-0029, its own intermediary, as well as the Prosecution, indicated that D-0028 had been contactable and/or seen [REDACTED] at various times since August/September 2023.²⁰ According to the Prosecution, D-0028 is simply unwilling to testify.²¹

11. The Prosecution indicated that it takes no position in relation to whether the Defence anticipated the necessity of measures under Article 56 of the Statute.²² Finally, the Prosecution accepted that D-0028's statement possesses sufficient indicia of reliability and submits that it does not oppose the submission of the associated material, should the Chamber authorise introduction of his statement pursuant to Rule 68(2)(c) of the Rules.²³

12. The CLRV observed that, based on her investigations, the Defence has not demonstrated that D-0028 is 'unavailable' to appear before the Chamber pursuant to Rule 68(2)(c) of the Rules.²⁴ The CLRV stated that her interlocutor in [REDACTED] confirmed seeing D-0028 working [REDACTED] on the day of her filing, Monday 24 June 2024, and that he had been in [REDACTED] since at least May 2024.²⁵ In the CLRV's view, 'the information available suggests that D-0028 is not inaccessible or otherwise incapable of testifying [...], that a reasonable inference may be drawn that personal or other reasons are at the root of the witness having ceased communication with the Defence, and that there are no security issues in respect of the

¹⁸ DAR-D31-00000150-0001 and DAR-D31-00000152-0001 respectively; *see also* Main Request, ICC-02/05-01/20-1147-Conf, para. 15.

¹⁹ Prosecution's Response, ICC-02/05-01/20-1152-Conf, paras 3, 14.

²⁰ Prosecution's Response, ICC-02/05-01/20-1152-Conf, para. 5.

²¹ Prosecution's Response, ICC-02/05-01/20-1152-Conf, para. 11.

²² Prosecution's Response, ICC-02/05-01/20-1152-Conf, para. 21.

²³ Prosecution's Response, ICC-02/05-01/20-1152-Conf, paras 22-23.

²⁴ CLRV's Response, ICC-02/05-01/20-1153-Conf, paras 8, 10

²⁵ CLRV's Response, ICC-02/05-01/20-1153-Conf, para. 7, *see also* Annex to the 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".

witness that cannot be sufficiently addressed by protective measures that are at the Trial Chamber's disposal.²⁶

III. MODIFIED REQUEST

13. In its Modified Request, the Defence replies that the information provided by the Prosecution and the CLRV about D-0028 allegedly being present in [REDACTED] since February 2024 is incorrect and comes from anonymous sources whose relationship with D-0028 is unknown as are the circumstances of his identification.²⁷ The Defence further argues that both the Prosecution and the CLRV have chosen not to present rebuttal evidence, although they had the opportunity to do so if they had reliable contacts in [REDACTED].²⁸ The Defence therefore contends that the only evidence the Chamber should rely on regarding D-0028's absence from [REDACTED] is that of D-0029.²⁹

14. In its Modified Request, the Defence informs the Chamber that D-0028 returned to [REDACTED] on the evening of 26 June 2024 and that he is willing to appear before the Chamber, but not before the end of September 2024.³⁰

15. Considering D-0028 is now available to testify, this challenges the basis for the Defence's request under Rule 68(2)(c) of the Rules. The Defence therefore seeks to modify its initial request with respect to D-0028 and now requests his appearance before the Chamber.³¹

16. The Defence submits that if the Chamber authorises D-0028's appearance from [REDACTED] via video-link, this will delay the closure of evidence by at least three months. The Defence avers that, although this would have an impact on the accused's right to be tried within a reasonable time, he cannot be compelled to forego D-0028's appearance for this reason alone.³²

²⁶ CLRV's Response, ICC-02/05-01/20-1153-Conf, para. 10

²⁷ Modified Request, ICC-02/05-01/20-1157-Conf, paras 4, 9.

²⁸ Modified Request, ICC-02/05-01/20-1157-Conf, paras 6, 10.

²⁹ Modified Request, ICC-02/05-01/20-1157-Conf, paras 7, 12.

³⁰ Modified Request, ICC-02/05-01/20-1157-Conf, paras 22-23.

³¹ Modified Request, ICC-02/05-01/20-1157-Conf, para. 24.

³² Modified Request, ICC-02/05-01/20-1157-Conf, para. 24.

17. The Defence further contends that the Chamber could hear D-0028's testimony without undue delay by authorising his appearance via video-link [REDACTED].³³

18. Should the Chamber refuse either of these options, the Defence then maintains its request under Rule 68(2)(c) of the Rules and submits that the following circumstances make D-0028 unavailable to testify within the next three months: he has [REDACTED], and he has [REDACTED].³⁴ The Defence remarks in this regard that the Prosecution and the CLRV have confirmed that the other criteria under Rule 68(2)(c) of the Rules were met. Should the Chamber reject the options of hearing D-0028 via video-link from [REDACTED] or from [REDACTED], the Defence would thus request the introduction of D-0028's evidence under Rule 68(2)(c) of the Rules.³⁵

19. The Prosecution opposes the Modified Request for D-0028 to testify from [REDACTED]. The Prosecution further maintains its opposition to his statement being submitted under Rule 68(2)(c) of the Rules. According to the Prosecution, the deadline for calling witnesses for the Defence has passed and no application under Regulation 35 of the Regulations of the Court (the 'Regulations') has been filed. Even if the Defence was to file such an application, the Prosecution argues that there is no good cause under Regulation 35 of the Regulations. Finally, the Prosecution contends that the Chamber would not be assisted by D-0028's testimony as it is largely cumulative to D-0029's evidence and it would not be in the interests of justice to further delay the trial.³⁶

20. In her response to the Modified Request, the CLRV submits that the Defence fails to demonstrate that the legal and factual bases for the three specified alternative prongs of relief have been met. The CLRV argues that no application under Regulation 35 of the Regulations to vary the deadline of 14 June 2024 for the Defence to conclude the presentation of *viva voce* testimony has been filed. With respect to the first prong of relief, the CLRV contends that the Chamber has already considered and rejected a previous application requesting authorisation for D-0028 to appear via video-link from [REDACTED]. With respect to the Defence's secondary request for D-0028's

³³ Modified Request, ICC-02/05-01/20-1157-Conf, para. 24.

³⁴ Modified Request, ICC-02/05-01/20-1157-Conf, para. 25.

³⁵ Modified Request, ICC-02/05-01/20-1157-Conf, para. 25.

³⁶ Email from the Prosecution, 3 July 2024, at 11:57.

appearance via video-link from [REDACTED], the CLRV contends that the Defence has not shown good cause for variation of the 14 June 2024 deadline to permit D-0028's testimony commencing no earlier than October 2024. The CLRV suggests a number of conditions, should the Chamber nonetheless entertain the possibility of hearing D-0028's testimony from [REDACTED] via video-link. Finally, the CLRV refers to her previous submissions on the Defence's request under Rule 68(2)(c) of the Rules and maintains that the criteria have not been met.³⁷

IV. ANALYSIS

21. The Defence realistically accepts that D-0028's reappearance in [REDACTED] calls the Main Request into question.³⁸ The Chamber is satisfied that, as the witness appears to be available and willing to testify, there is no longer a basis for a request under Rule 68(2)(c) of the Rules. Accordingly, the Chamber rejects the Main Request.

22. With respect to the Modified Request, the Chamber deeply regrets the Defence's seemingly perfunctory attempts to find D-0028. In light of the information provided by the interlocutors of the Prosecution and the CLRV, independently confirming D-0028's presence in [REDACTED] before 26 June 2024, the Chamber finds that the Defence should have made greater efforts to locate the witness, particularly as arrangements were being finalised for the appearance of 'the last' Defence witnesses in June 2024.

23. The Chamber notes, as submitted by the CLRV,³⁹ that a previous request for D-0028 and others to appear via video-link from [REDACTED] has already been rejected.⁴⁰ The Chamber recalls that it had found no circumstances '[REDACTED]' for evidence elicited by means of audio-video link.⁴¹ Having considered the updated information regarding D-0028's personal circumstances submitted in the context of the Defence's arguments regarding his unavailability, the Chamber remains of the view

³⁷ Email from the CLRV, 3 July 2024, at 10:56.

³⁸ Modified Request, ICC-02/05-01/20-1157-Conf, para. 23.

³⁹ Email from the CLRV, 3 July 2024, at 10:56.

⁴⁰ Decision on Defence proposal related to the audio video-link testimony of D-0001, D-0002, D-0003, D-0005, D-0028, D-0029, D-0038 and D-0039, 3 May 2024, ICC-02/05-01/20-1118-Conf (hereinafter: 'Decision on AVL [REDACTED]'). *See also* Decision on the Defence's request for leave to appeal and for reconsideration of the 'Decision on Defence proposal related to the audio video-link testimony of D-0001, D-0002, D-0003, D-0005, D-0028, D-0029, D-0038 and D-0039', 15 May 2024, ICC-02/05-01/20-1129-Conf ('hereinafter: 'Decision on request for leave to appeal and for reconsideration of the Decision on AVL [REDACTED]').

⁴¹ Decision on AVL [REDACTED], ICC-02/05-01/20-1118-Conf, para. 9.

that no exceptional circumstances exist which warrant departure from the Court's framework, with respect to testimony via video-link. To the contrary, the Chamber notes that, on the basis of the information before it, it appears that D-0028 has been - and therefore is able to leave [REDACTED] for a number of consecutive days. He can therefore travel for the purpose of appearing for live testimony from [REDACTED]. Accordingly, the Chamber rejects the request to hear his testimony via video-link from [REDACTED].

24. The Chamber recalls that the Defence was instructed to plan and organise the appearance of its remaining witness no later than 14 June 2024.⁴² The Chamber nonetheless appreciates the difficulties the Defence has faced in identifying, keeping contact with, and securing the appearances of its witnesses. Although the Defence should have filed a request under Regulation 35 of the Regulations, as argued by the Prosecution and the CLRV,⁴³ the Chamber finds that an extension of time is warranted and a last opportunity should be afforded to the Defence to try to arrange the testimony of the last witness on its Amended List of Witnesses.⁴⁴ Having considered the stage of the proceedings, the Chamber decides that, in the interests of justice and in order to conclude the evidential phase of the trial, D-0028 is to give evidence between **16 and 20 September 2024** via video-link from [REDACTED].

25. The Chamber stresses that this is the last opportunity the Defence has to call D-0028. The Defence is to confirm D-0028's travel to [REDACTED] and indicate his precise date of testimony via email **at the latest by 29 August 2024**.

26. While the present decision impacts the timing of the closure of evidence, which had been expected to be declared prior to the summer judicial recess, the parties and participants are expected to have already started working on their final briefs and are expected to continue, as it is not anticipated that D-0028 will deal with new matters. Parties and participants should also prepare for shorter deadlines for the submission of their final briefs upon closure of the evidence.

⁴² Transcript of hearing, 24 April 2024, ICC-02/05-01/20-T-150-CONF-ENG, p. 20, lines 13-19. *See also* Decision on request for leave to appeal and for reconsideration of the Decision on AVL [REDACTED], ICC-02/05-01/20-1129-Conf, para. 25.

⁴³ Email from the Prosecution, 3 July 2024, at 11:57; Email from the CLRV, 3 July 2024, at 10:56.

⁴⁴ Annex 1 to the Mise à jour de la liste des témoins de la Défense et demande d'extension de délai pour le dépôt de sa liste définitive, 15 April 2024, ICC-02/05-01/20-1111-Conf-Anx1, pp. 8-9.

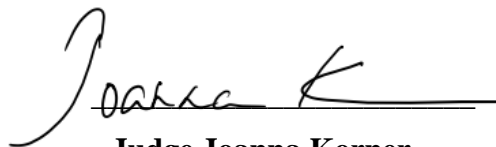
V. CONCLUSION

27. Considering the above, the Chamber:

REJECTS the Defence's Main Request to introduce D-0028's prior recorded testimony, as well as the associated material submitted, pursuant to Rule 68(2)(c) of the Rules;

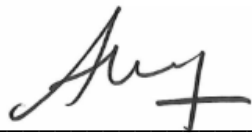
PARTIALLY AUTHORISES the Modified Request and **INSTRUCTS** the Defence to arrange D-0028's appearance via video-link from [REDACTED] between **16 and 20 September 2024**; and

INSTRUCTS the Defence to confirm D-0028's travel to [REDACTED] and indicate his precise date of testimony by **29 August 2024**.

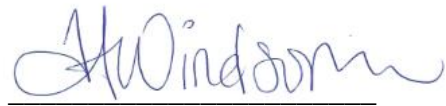


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 5 July 2024

At The Hague, The Netherlands