

Status Conference

(Open Session)

ICC-02/05-01/20

1 International Criminal Court

2 Trial Chamber I

3 Situation: Darfur, Sudan

4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman

5 ("Ali Kushayb") - ICC-02/05-01/20

6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and Judge Althea Violet

7 Alexis-Windsor

8 Status Conference - Courtroom 2

9 Tuesday, 5 September 2023

10 (The hearing starts in open session at 9.31 a.m.)

11 THE COURT USHER: [9:32:01] All rise.

12 The International Criminal Court is now in session.

13 Please be seated.

14 PRESIDING JUDGE KORNER: [9:32:26] Yes, good morning to everybody, and  
15 welcome back after, I've no doubt for everybody, a relaxing summer break.

16 Yes, I can see Mr Laucci shaking his head.

17 Yes, let's start with the appearances.

18 Prosecution, please.

19 MR NICHOLLS: [9:32:54] Good morning, Madam President. Good morning, your  
20 Honours. Good morning everybody in the courtroom. It is good to be back.

21 Julian Nicholls with Claire Sabatini, Laura Morris, Rachel Mazarella, Alison  
22 Whitford and Edward Jeremy. Thank you.

23 PRESIDING JUDGE KORNER: [9:33:06] Yes, well, Mr Nicholls, I can see the  
24 summer has caused a major change --

25 MR NICHOLLS: [9:33:14] It's probably temporary. Thank you.

1 PRESIDING JUDGE KORNER: [9:33:17] Yes, thank you very much.

2 The Defence, please.

3 MR LAUCCI: [9:33:20] (Interpretation) Good morning, Madam President, your  
4 Honours. Good morning colleagues, here in the courtroom and in the gallery. My  
5 client, Mr Ali Abd-Al-Rahman, is present; Audrey Mateo, legal adviser; Ahmad Issa,  
6 case manager; and myself, Cyril Laucci, counsel.

7 PRESIDING JUDGE KORNER: [9:33:44] Yes, thank you, Mr Laucci.

8 Yes, representatives of the victims.

9 MS VON WISTINGHAUSEN: [9:33:49] Yes, good morning, Madam President,  
10 your Honours. Good morning, dear colleagues. And good morning to everyone in  
11 and around the courtroom. The victims today are represented by associate counsel,  
12 Anand Shah, our case manager, Saif Kassis and myself, Natalie von Wistinghausen.  
13 Thank you.

14 PRESIDING JUDGE KORNER: [9:34:12] Thank you very much, Ms von  
15 Wistinghausen.

16 Yes, and the Registry, please.

17 MR VANAVERBEKE: [9:34:15] Good morning, Madam President, your Honours.  
18 The Registry today is represented by Ms Natacha Schauder, senior manager VWS;  
19 Vera Wang, external affairs coordinator, Registry; and Marie Lucas, associate legal  
20 officer; and myself, Pieter Vanaverbeke, acting chief CSS.

21 PRESIDING JUDGE KORNER: [9:34:29] Yes. I mean, the only issue -- well, I  
22 suppose the witnesses issue is a matter, but it's to do with this question of the  
23 property of Mr Al-Rahman; so which of you actually can deal with the prison  
24 regulations? Can you just say?

25 MR VANAVERBEKE: [9:34:53] Me and Marie, Ms Lucas.

1 PRESIDING JUDGE KORNER: [9:34:57] All right. Thank you very much.

2 Yes, all right, first of all, can I start this morning, I'm afraid, by a small -- I don't say  
3 complaint is the right word, but -- which is to do with your filing, Mr Laucci, 991,  
4 which was -- it was a complaint and you described it as something to set the record  
5 straight about what was in our ruling.

6 The rule says quite clearly that the only filings you can make in motions are those on  
7 which a Chamber can make a ruling, and you didn't actually ask for a ruling, because  
8 it was just - if I can put it in the vernacular - a long whinge about what you said were  
9 mistakes we'd made of fact. And the trouble with that is, that what then happens is,  
10 the Prosecution responded disagreeing with you about some of the matters and the  
11 Chamber is not in any position, nor being asked to make a ruling; so it's a waste of  
12 everybody's time.

13 So if you want to set the record straight, we are in court, you can do that, but you  
14 cannot file motions like this and, in future - and this applies to both -- well, actually to  
15 all sides - the filings won't be accepted. So I am just firing that shot across your bow.  
16 Right, having said that, can we start then, please, with the victims' case and the  
17 various -- well, the two witnesses that at the moment we have scheduled to appear on  
18 2 to 4 October.

19 What is the situation, Ms von Wistinghausen?

20 MS VON WISTINGHAUSEN: [9:37:01] The situation, as you can imagine, is not  
21 straightforward, but we are making steps, small steps. There hasn't been any  
22 communication with both of the victims within the last -- well, past three weeks, but  
23 before that, there has been communication, and again, their clear statement is they  
24 wish to undertake the journey to come here and to appear before you.

25 We have a very trusted interlocutor who we are in touch with. It depends on the

1 days and the times. Yesterday, it was possible to have a very long chat  
2 communication with him, and the information we have is that there is a possibility for  
3 V-5 to collect her passport, which was a problem before because of the events, she  
4 wasn't able to do that. So we know where the passport is, and the information we  
5 have is that she would be able to collect it. And the information we have from our  
6 interlocutor is that he is willing to accompany V-4 and V-5 and has figured out a route  
7 together with them, obviously.

8 As you can imagine, all of this depends on a risk assessment that we all must make  
9 and which depends on the information we have. So obviously we or our team can  
10 only base ourselves on what we hear from the victims themselves, from the  
11 interlocutor I mentioned, from colleagues, you know, seeing what the Defence can do,  
12 what OTP is doing, also by communicating with VPRS and the feedback that they  
13 have.

14 So obviously any kind of travelling within Sudan -- Darfur is a risk at the moment,  
15 but after balancing the pros and cons, and especially respecting the decision of V-4  
16 and V-5, we are trying to move forward with their appearance here and we hope that  
17 it will be possible within the time frame that the Trial Chamber has suggested.

18 It seems a realistic undertaking. We have representatives of the VWS here. We  
19 know -- because we have been in communication with them several times, we know  
20 and we are very open about it that there is -- there are different views on the risk  
21 assessment and that certainly has an impact on the willingness or preparedness of  
22 VWS to assist us. But I will -- I will let Ms Schauder speak about it.

23 Well, this is where we stand. We continue to -- to -- yes, to request the time for V-4  
24 and V-5 to appear before you and we continue to request to get VWS's assistance. If,  
25 at the end of the day, it really works out how we think as of today, you know, looking

1 at the information that we have, if it really works out like this, this is, of course, an  
2 answer I can't give to you today.

3 PRESIDING JUDGE KORNER: [9:40:44] Well, I know that, Ms von Wistinghausen.  
4 The difficulty is this, it's a month away -- or less -- slightly less than a month, actually,  
5 and obviously the Court has got to be informed if we can't sit. And I appreciate that  
6 you say they actually want to come here to give evidence, but it does strike me,  
7 would it not be simpler - and it would still have the same effect - if they were to  
8 testify remotely in some form or another?

9 MS VON WISTINGHAUSEN: [9:41:16] If you explain to me how this is supposed to  
10 work, then I'm happy to discuss it with them, but for -- there are two reasons why we  
11 didn't -- well, we looked further into this option, but why we ruled it out. It's  
12 because this security firm or whatever it's called that was supposedly going to be able  
13 to organise such an interview or recording is located in (Redacted), or close to  
14 (Redacted), and this is an area that's more dangerous - at least that's my  
15 understanding - than many other areas. So V-4 and V-5 straightaway said, "This is  
16 not an option for us. We would rather travel to The Hague than -- than to record  
17 a statement in (Redacted)." The latest information I have about this -- this video  
18 recording possibility is that actually it's not an option anymore, at least not at the time,  
19 but -- but VWS will know more exactly about it. So --

20 PRESIDING JUDGE KORNER: [9:42:26] Well, I -- sorry, go on.

21 MS VON WISTINGHAUSEN: [9:42:29] I don't really know how to approach this  
22 option because we have no way of facilitating this.

23 PRESIDING JUDGE KORNER: [9:42:39] Well, what I -- maybe the Victim and  
24 Witnesses Unit can assist, but why can't the security firm go elsewhere? Does it  
25 mean it can't get out of (Redacted) or what? Does anybody know?

1 MS SCHAUDER: [9:42:57] (Interpretation) Good morning, your Honour. May I  
2 make a request to go into private session, your Honour?

3 PRESIDING JUDGE KORNER: [9:43:04] Yes, we'll go into private session, briefly.  
4 (Private session at 9.43 a.m.)

5 THE COURT OFFICER: [9:43:23] We are in private session, Madam President.

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6 (Open session at 9.50 a.m.)

7 THE COURT OFFICER: [9:50:50] We are back in open session, Madam President.

8 PRESIDING JUDGE KORNER: [9:51:02] Yes, thank you.

9 All right. Ms von Wistinghausen, as I say, I don't think we can take this any further  
10 today. Obviously, I know that you will endeavour to give assistance to VWU to try  
11 and contact your witnesses to make the required assessment, and I think you had  
12 better let us know -- or the Court know within the next 14 days, two weeks today,  
13 whether there is any real -- realistic prospect that they are going to be giving evidence  
14 on those -- on the dates --

15 MS VON WISTINGHAUSEN: [9:51:46] Yes, of course.

16 PRESIDING JUDGE KORNER: [9:51:46] On those --

17 MS VON WISTINGHAUSEN: [9:51:47] On the dates, yes, yes. Well, yes, of course,  
18 what we will do -- I mean, I don't -- probably I'm not -- maybe it's not an issue yet or  
19 I'm not addressing you yet on the question of what do we do if -- if they can't make it  
20 for the -- what is it? Second and 3 October --

21 PRESIDING JUDGE KORNER: [9:52:03] Second and -- yes, I think we said second --

22 MS VON WISTINGHAUSEN: [9:52:05] But let's -- I mean, let's take it step by step,  
23 we will update you. I mean, once they've -- you know, they have started the trip,  
24 then we can have a much better estimation of how it goes.

25 PRESIDING JUDGE KORNER: [9:52:15] Yes. All right, thank you very much.

1 All right, the next topic is back to Mr Al-Rahman and his music, or his non-music.

2 This comes about because the Registry seeks instructions.

3 Now, Mr Laucci, you presumably are asking -- I think you have asked for the return  
4 of whatever this flashlight/music player is to your client.

5 MR LAUCCI: [9:52:52] (Interpretation) Actually, it's even simpler than that,  
6 your Honour, since my client is interested in obtaining the music that is recorded on it.  
7 Fundamentally, he just wants the content, the music. It may seem to be a trivial  
8 request, but what I can say is that this is a request that was made as soon as he arrived  
9 in the year 2020, and several times we, the Defence team, were of the view that there  
10 was no solution, that the music was lost; it hadn't been found.

11 But Mr Abd-Al-Rahman asked once again, and we, once again, made another request,  
12 and the object was found in July. We have received filings from the Registry and the  
13 OTP can do what they need to do and all I'm asking for is for -- is for my client to get  
14 his music as quickly as possible.

15 PRESIDING JUDGE KORNER: [9:54:10] All right. Can we -- whoever from the  
16 Registry is dealing with this, has anybody examined this thing?

17 MR VANAVERBEKE: [9:54:24] Madam President, to my information, no one has  
18 ever examined it.

19 PRESIDING JUDGE KORNER: [9:54:29] But wouldn't it be an idea to examine it?

20 MR VANAVERBEKE: [9:54:32] Yes, it would be good, but that's why the Registry  
21 has asked your instruction to do -- for your guidance as to --

22 PRESIDING JUDGE KORNER: [9:54:35] It has got nothing to do with us, has it? I  
23 mean, the regulations leave it up to you. As I understand it, Regulation 192 says you  
24 have to make an inventory of a detained person's money et cetera, et cetera, and then  
25 194 says that after he is searched, and obviously all his belongings:

1 "... items that may constitute a danger to:

2 (a) The maintenance of the security and good order of the detention centre ..."

3 Or anybody who comes to see him.

4 So, I mean, it's up to you guys.

5 MR VANAVERBEKE: [9:55:18] Okay. With your permission then, or with the  
6 Chamber's permission, then we will -- I will speak to my colleagues of the Detention  
7 Section and then we can see whether an inventory can be made of the items that are  
8 on the memory card. That's my understanding, that there's -- and then we'll propose  
9 that to you and see whether we can go ahead with the transmission of --

10 PRESIDING JUDGE KORNER: [9:55:39] But I don't know why you say it's anything  
11 to do with us, quite honestly. These are regulations of the prison which come under  
12 the Registry, and I don't think the Judges have any power to do anything about it.

13 MR VANAVERBEKE: [9:55:52] But if it were to -- if it were to be discovered that  
14 other items than music are to be found on the memory card, then I think it needs to be  
15 reported through an inventory and to be reported to you, because then it might --

16 PRESIDING JUDGE KORNER: [9:56:05] Yes, well, I mean, that's an obvious thing,  
17 yes. But, I mean, the actual power to -- anyway, okay, if you do require an order,  
18 then I suggest we order that somebody has a look at this machine, somebody looks at  
19 what's on the memory card and lists whatever is on it. And if it really is just  
20 music -- right, Mr Nicholls.

21 MR NICHOLLS: [9:56:30] (Microphone not activated)

22 THE INTERPRETER: [9:56:30] Microphone, please.

23 MR NICHOLLS: [9:56:31] Sorry. I would say that somebody should be the OTP.  
24 In the pre-trial phase on August 20, 2020, the Presiding Judge of the Pre-Trial  
25 Chamber granted an order for us to examine all data storage, devices and material.

1 Based on that, we examined several telephones and SIM cards. The only reason the  
2 memory card that is in this flashlight/MP3 player was not examined by us forensically  
3 was because nobody knew it existed, and it wasn't found. I have spoken to  
4 Mr Laucci about this, he'd sent an email years ago.

5 So, with no objection, we would request that the items be provided to us, they're  
6 already in an evidence bag, we would carry out a forensic analysis. It's likely just  
7 music on there, fine, we'd have no objection to that then being -- well, it's up to the  
8 Registry and their regulations as you said, but we have no position, no objection to  
9 the accused having his music.

10 But we want to see what is on that memory card in case there is other material. So I  
11 think there is no dispute. We would examine it, delivered by the Registry, and that  
12 would be in line with the previous order of all the other materials and devices that  
13 contain data.

14 PRESIDING JUDGE KORNER: [9:57:58] All right. Well, that's very helpful. I'm  
15 assuming that the only thing that should prevent it, other than what -- unless there's  
16 other information on this card, is if it's got Internet access which would allow him  
17 Internet access to the outside world.

18 MR NICHOLLS: [9:58:19] Well, I think then -- again, not my business, but he could  
19 have the card and play it on a different player, or, you know, could be provided to  
20 him. He wants the music and we have no objection to that.

21 PRESIDING JUDGE KORNER: [9:58:29] Yes. Mr Laucci, is that right, then?

22 MR LAUCCI: [9:58:31](Interpretation) Entirely so. Perhaps the music could be  
23 copied on to another media. I think that would be the most practical thing, because  
24 in the Detention Centre I don't think they are in a position to use that particular  
25 device; so some kind of media that would be suitable would be much easier.

1 No objection to the OTP doing what they have asked to do -- their analysis -- but on  
2 the day of the extraction of the files, as long as a member of the Defence team is  
3 present, I think that would be appropriate under the circumstances.

4 PRESIDING JUDGE KORNER: [9:59:10] Mr Nicholls.

5 MR NICHOLLS: [9:59:14] We haven't done that before, but I don't really see  
6 a problem with that.

7 PRESIDING JUDGE KORNER: [9:59:21] I think -- well, to make life much simpler,  
8 you would have to disclose whatever there was anyhow. So, yes, all right. All  
9 right. Well, that solves that particular problem.

10 Can we move next then, please, to the Defence request for an order prohibiting  
11 disclosure of the Defence witnesses to the Government of Sudan and armed forces,  
12 which you responded to, thank you very much, Mr Nicholls, yesterday.  
13 Mr Laucci, I take it you saw the response. The Prosecution is objecting to just one  
14 part of the order. What do you say about that? They say -- and it seems to make  
15 sense -- that it may well be that they -- if they want to seek information to help them  
16 to cross-examine, they're going to have to disclose the identities.

17 MR LAUCCI: [10:00:22] (Interpretation) Thank you, your Honour. In response, I  
18 would make a number of points. Well, first of all, I think that the principle  
19 here -- the basic principle that we need to work on is that the concerns having to do  
20 with protection and security of witnesses must be central and must prevail over any  
21 other consideration, including the conduct of investigations.

22 I would add further that in this case, things are not unfolding as they unfold in other  
23 cases, in particular, on the Defence side, and our disclosure requirements are different  
24 to the practices of other teams and other cases. We have prepared, and we shall  
25 disclose, complete written disclosures, namely, documents that fully comply with the

1 standards of written statements that we received for -- from the OTP, for their  
2 witnesses.  
3 They won't just be notes, but we will be providing full statements with the assistance  
4 of the interpreters from the Court -- and I would like to take this opportunity to thank  
5 the court interpreters for their assistance -- allowing the OTP, the LRVs and the  
6 Chamber to have as much information as possible upon which they can rely.

7 The clarification I would like to ask for from the OTP (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 The second clarification that I would like to ask for --

13 Oh, I beg your pardon --

14 MR NICHOLLS: [10:02:54] Sorry, your Honour, I just wonder if we should be in  
15 open session. The motion was confidential and the way this is going --

16 PRESIDING JUDGE KORNER: [10:03:02] Yes, all right. Thank you, Mr Nicholls,  
17 you're probably right.

18 Can we go into private session?

19 (Private session at 10.03 a.m.)

20 THE COURT OFFICER: [10:03:19] We are in private session, Madam President.

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10 (Open session at 10.29 a.m.)

11 THE COURT OFFICER: [10:29:24] We are back in open session, Madam President.

12 PRESIDING JUDGE KORNER: [10:29:27] Yes, thank you very much.

13 I want to deal specifically with the expert report, Mr Laucci, that you have served.

14 Before I come to asking the Prosecution for preliminary observations - I understand

15 that you've got time - neither in French nor in English, may I say, Mr Laucci, can I, at

16 the moment, see the relevance of some parts of this report, in particular, the part, it

17 begins: General considerations, paragraph 2.1, and we get quite a lot about the

18 intercommunal codification of customary criminal law, not international criminal law,

19 we get a lot of tables about what you're going to be -- I won't say fined, but punished

20 with if you obviously injure or kill somebody, 30 cows and so on and so forth. I'm

21 putting examples. And one of the sentences alone in that paragraph 66 -- as I say, I

22 read it in both French and English was -- which begins:

23 Quite often polarization around identity in Darfur is more the idiomatic translation of

24 identity-based reconfiguration which can arise in the course of conflict.

25 Do you understand what that means in either French or English, Mr Laucci?

1 Because if you do, you're a better person than I am.

2 MR LAUCCI: [10:31:45](Interpretation) Madam President, I am not going to attempt  
3 to be an expert -- the one whom I intend to call -- and it is for this reason that we are  
4 actually calling the expert. We issued a letter of instructions to the expert in which  
5 we outlined the topics that were of interest to us.

6 Now, whatever comes of it will be the work of the expert witness. I, therefore, do  
7 not know whether I can provide a specific answer as to the relevance or even the  
8 meaning of that sentence. I would need to read the paragraph you have just quoted.  
9 But when it comes to the overall relevance of the report, I would say that the report is  
10 submitted to you because it is essential in several ways to the Defence case. As  
11 you --

12 PRESIDING JUDGE KORNER: [10:32:50] Mr Laucci -- sorry, Mr Laucci, I'm going to  
13 stop you, I'm not saying the report in itself --

14 MR LAUCCI: [10:32:53] *Oui*.

15 PRESIDING JUDGE KORNER: [10:32:54] I'm sorry, you misunderstand me. What  
16 I'm saying is really this, is when you come to call him -- and is he going to be your  
17 first witness? That's the other question I want to know.

18 MR LAUCCI: [10:33:06] (Interpretation) That decision has not yet been made, but it  
19 might be a good idea.

20 PRESIDING JUDGE KORNER: [10:33:12] All right, well, there are two things: firstly,  
21 you are going to have to try and exclude when you fully understood yourself what  
22 Mr Gout -- is his name -- "Gout", thank you, Mr Gout is talking about; and, secondly,  
23 if you -- to convince us, we have got to understand what he's saying. So you are  
24 going to have to, in some way or other, translate all of this into, if I can put it that way,  
25 ordinary English.

1 That's merely -- I merely wanted to make that point now so that you understand -- or  
2 ordinary French, I should say, so that you understand when you come to call him that  
3 you, you know, you try and limit it to issues that are really relevant to the case and,  
4 secondly, we are going to have to understand what he is saying.

5 MR LAUCCI: [10:34:11] (Interpretation) What I can suggest, therefore, is that this  
6 subject matter should be dealt with when he's before you - that is, the choice of subject  
7 matter - and then on the other aspect, I think it would be up to you to guide him  
8 because I cannot -- of course, I have full respect for university lecturers, but they have  
9 their style and that is not the language that the Court necessarily needs.

10 PRESIDING JUDGE KORNER: [10:34:52] Well, I rather think, Mr Laucci, you'll have  
11 to guide him, not us.

12 MR LAUCCI: [10:34:54](Interpretation) Well, I will insist on the point during the  
13 preparatory phase, yes, I will.

14 PRESIDING JUDGE KORNER: [10:35:00] All right. Well, that was our preliminary  
15 reaction.

16 Right, Mr Nicholls, first of all, do you accept that he is an expert in the topic? Are  
17 you able to tell us that?

18 MR NICHOLLS: [10:35:07] No, in brief, and just to nuance that, some of the areas he  
19 comments on, yes, some no. For example, he appears to have no expertise  
20 whatsoever in Islamic law, although he talks about that. So, in our submission we  
21 would say that for parts of the report, he does not appear to be qualified.

22 Our view is -- really what I was going to say was actually what you said at the  
23 beginning. We feel that parts of the report are not relevant, parts are duplicative to  
24 the report and testimony of de Waal, who was a joint expert.

25 Some of the topics and parts of the report go into legal issues that we believe you do

1 not need assistance on and it's ultimately within your purview. And there is case  
2 law from Al Hassan, and the Popović case in the ICTY; that the Nikolić defence  
3 wanted to call Professor Schabas to talk about genocide and the court in that case, the  
4 chamber rightly said that's within our function to determine the law.

5 This report goes there as well. Parts of the report still, quite a fair amount, are  
6 unsourced and I will say there, though, that the Defence are working with us and  
7 very helpfully providing that, so that may not be a problem in the end, but at the  
8 moment we don't have all of the sources that we would need.

9 So really, in summary, we're still going through it, but we believe parts of the report  
10 he does not have expertise on, parts of the report are irrelevant or duplicative or not  
11 necessary, not useful or within your purview. And unfortunately, this sort of sphere  
12 of expertise and the sphere of relevance don't overlap in many cases. That's a very  
13 short answer.

14 PRESIDING JUDGE KORNER: [10:37:22] Yes, well, that's very helpful, Mr Nicholls.  
15 I'm sorry, how much time have you got before you need to file a response?

16 MR NICHOLLS: [10:37:34] Well, that's up to you, but it's -- under the protocol -- or,  
17 sorry, the conduct of the proceedings it's 30 days before his expected date of  
18 testimony, which we don't have yet.

19 PRESIDING JUDGE KORNER: [10:37:41] Yes. Well, that's why it was, in fact, one  
20 of the reasons I was asking, because Mr Laucci, I think you need to decide certainly  
21 by the end of this week, is he going to be your first witness or not.

22 MR LAUCCI: [10:38:00](Interpretation) Well, there are two things that we don't  
23 know about that make it difficult to respond. First of all, we asked for the report so  
24 we need to know exactly when we shall receive the report. Then we have to check  
25 his schedule. If we get answers to those two questions between now and the end of

1 the week, we will be in a position to answer the question that you have just put to us.

2 But I think it would be a good idea. No doubt, that would be our preference.

3 PRESIDING JUDGE KORNER: [10:38:38] Well, you see, the Prosecution has got to  
4 respond within 30 days, it only gives them about another -- what is it, October 15 we  
5 are starting, so that's --

6 MR NICHOLLS: [10:38:49] About 10 days, a couple of weeks, but --

7 PRESIDING JUDGE KORNER: [10:38:52] Can you do -- I think, Mr Nicholls, if you  
8 can, because it seems to me that given the difficulties that the Defence, not  
9 surprisingly, are having with witnesses, at least we know this fellow is in a civilised  
10 country which is not in a state of war.

11 MR NICHOLLS: [10:39:08] Yeah, I guess, your Honour, it ultimately depends really  
12 on the last issue for today of whether -- when the case will start.

13 PRESIDING JUDGE KORNER: [10:39:20] Yes. Well, I mean -- well, there is no  
14 issue about that, the case is going to start from October 15. The application is not to  
15 delay the start of the case. The application is to delay disclosure, and I am going to  
16 come on to that in a moment, I just wanted to deal with the expert.

17 So, all right, if he is to be your --

18 MR NICHOLLS: [10:39:45] Sorry, then, if the Defence opening and first witnesses  
19 are starting as scheduled next month, then we will do it in the two weeks. If not,  
20 then we would ask -- it wouldn't be as urgent.

21 PRESIDING JUDGE KORNER: [10:40:01] All right. Now, I think I'll say anyhow,  
22 one way or another, that your response to this - and it may well be that you will come  
23 to some agreement, by the sound of it - must be delivered by the -- is 15 September  
24 a week day?

25 MR LAUCCI: [10:40:26] It's a Friday.

1 PRESIDING JUDGE KORNER: [10:40:28] It's a Friday. Well, that sounds all right,  
2 15 September, please, Mr Nicholls. Right. However, didn't we order you to serve  
3 all your experts some time ago and, according to your list, you have got a  
4 whole -- you've got another three experts. When are those reports going to be  
5 produced? I saw your update, but --

6 MR LAUCCI: [10:40:49](Interpretation) Indeed, the answer is to be found in our  
7 fourth regular report. The current date that we have asked for a -- to present, is 18  
8 September.

9 Now, that date regarding expert D-27 -- I am not hopeful for D-24 and D-31. That is  
10 why we have made a request for the date to be pushed back.

11 PRESIDING JUDGE KORNER: [10:41:56] As I understand it, your application is to  
12 postpone the deadline from 18 September to 13 October?

13 MR LAUCCI: [10:42:05] (Interpretation) Yes. For presentation of the entire case  
14 and provision of the Defence brief.

15 PRESIDING JUDGE KORNER: [10:42:17] Oh, I see. I'm sorry, I didn't follow that.  
16 I thought it was simply -- it was the witnesses. You're saying you want to adjourn  
17 the Defence brief?

18 MR LAUCCI: [10:42:30](Interpretation) Yes, your Honour, it would be very  
19 difficult for us to submit a brief without providing all the evidence; that would be  
20 more than a dangerous endeavour. And I don't think you would really set any  
21 particular store by any said brief.

22 PRESIDING JUDGE KORNER: [10:42:54] Well, I understand that you're still getting  
23 statements from the various witnesses but, as I understood it also, you have  
24 conducted screening interviews with most of these witnesses.

25 MR LAUCCI: [10:43:10] (Interpretation) Not all, unfortunately. I will give you an

1 example. We have one particular witness who (Overlapping speakers)

2 PRESIDING JUDGE KORNER: [10:43:16] You realise we are in open session?

3 MR LAUCCI: [10:43:17] *Oui, oui, oui.*

4 (Interpretation) Yes. Not for all, to give you a short answer.

5 PRESIDING JUDGE KORNER: [10:43:28] All right. I really -- I'm afraid, Mr Laucci,  
6 this case has got to start on 15 October. We have been adjourned now since the  
7 beginning of February, apart from the odd hearing, and you have got a witness  
8 available and I'm afraid I -- you're going to have to produce some kind of a pretrial  
9 brief, in the same way -- and I'm going to come back to that, is that the alibi notice that  
10 you have given doesn't require -- comply with the rules, but you're going to have to  
11 produce by 18 September .

12 Well, all right, Mr Nicholls, I appreciate you're not getting proper notice as required  
13 by the rules, but if we put this back -- I'm not going to put it back until 13 October, but  
14 if we give Mr Laucci or the Defence an extra week, is that going to cause you  
15 problems?

16 MR NICHOLLS: [10:44:47] I mean, if it's a week, it's a week, it's not great. I mean,  
17 my understanding is the current deadlines are 18 September for the brief and  
18 disclosure, and the opening statement and first block to start on 16 October. And my  
19 understanding is he is -- what has been requested - although not in a motion making  
20 a request, but in their report - is to disclose the brief and other materials on 13 October  
21 and start the opening and witness statements on 13 November.

22 PRESIDING JUDGE KORNER: [10:45:24] I suddenly realised, of course, you won't  
23 have seen the -- because the report is ex parte to us, isn't it?

24 MR NICHOLLS: [10:45:30] No, we have this report.

25 PRESIDING JUDGE KORNER: [10:45:32] Oh, you've got this one.

1 MR NICHOLLS: [10:45:33] And it actually, as an aside, you know, in the future -- it's  
2 helpful in the future if we could have redacted reports. That would be useful, but I  
3 just make that as an aside.

4 So, you know, our position is that they've clearly made progress, which is good. Our  
5 position is that - I won't rehash it - it could have been sooner for the experts who are --

6 PRESIDING JUDGE KORNER: [10:46:00](Microphone not activated)

7 MR NICHOLLS: [10:45:55] No. No, but the experts who are all in -- outside of  
8 Sudan, you know, those aren't ready. So it could have been sooner. There's no  
9 reason why the opening at least can't be on 16 October.

10 I would obviously prefer that we stick to the schedule that you issued some time ago  
11 that is clear, and that we receive the materials on 18 September. If it's impossible,  
12 then we will work with it one week later. But it's not ideal and I think we -- I would  
13 also say that -- yeah, I would also say that whatever your decision, whatever they  
14 have on the 18th should still come to us. That will help because, one, we can -- once  
15 we have the names and the materials, we can run searches and see if there's any Rule  
16 77 or anything triggered by that that we ought to disclose. We'll get that to them  
17 sooner and it will help them.

18 But -- so there should be a rolling disclosure that as soon as these materials are ready,  
19 we get them, if everything isn't ready on the 18th. Sorry for going on so long. Yeah,  
20 we would prefer that just to stick to your schedule, but if you give another week, then  
21 we will work with that.

22 PRESIDING JUDGE KORNER: [10:47:27] Yes. Mr Laucci, appreciating all the  
23 difficulties, but we simply have got to get started with the Defence case however  
24 inefficiently, as it were, because of what's been happening. So we will give you an  
25 extra week, which takes us to the 25th -- is that right -- 26 September. But you must



1 by then serve your brief and make disclosure of what you've got, as we've made it  
2 clear. Because of the particular circumstances, we will allow rolling disclosure, but  
3 you have certainly got some evidence available, as you told us in your -- and can I  
4 commend you very much for your helpful filings. I mean, at least they've kept us  
5 abreast of what's going on. But that's the latest, and the case will start with your  
6 opening on 16 October.

7 MR LAUCCI: [10:48:43] (Interpretation) Your Honour, I have heard what you have  
8 said. That is your decision. I wish to specify that with those dates, we will not be  
9 in a position to present the following witnesses: D-1; D-2; D-3; D-4; D-5; D-7; D-13,  
10 \*who is an alibi witness; D-16; D-24, expert witness; D-26; D-31, expert witness.  
11 That's about it.

12 So I did, indeed, hear that it is not possible to shift the date on which the Defence case  
13 shall begin beyond 16 October. If you don't mind, I would like to ask why, in light  
14 of the progress that has been made, the considerable progress made - and I am  
15 weighing my words carefully - during the summer, and you have been kept aware of  
16 our progress during -- by way of our regular reports, and I specify that we are in  
17 a position to present.

18 Now, since this is not possible before late September or early October, the date of 16  
19 October is a reasonable postponement and a limited one that would allow us to have  
20 an opportunity to complete our investigations. So I must acknowledge that I am  
21 having considerable difficulty understanding why you have not granted a greater  
22 postponement.

23 In response to comments made by the OTP, who said that things could have been  
24 done earlier, my colleague is not aware of those particular circumstances that allowed  
25 us to do what we were able to do during the summer. But I would refer you to the

1 first regular report, paragraphs 5 to 10, that informed you of the circumstances, the  
2 entire saga, if I could put it that way, that allowed us to get things going and begin  
3 the investigations. That was on 5 July this year; and, once again, I think you will  
4 realise the extent of this feat once -- well, if you look at everything that has been done  
5 between 5 July and 5 September.

6 If we are compelled to begin our Defence case without the evidence, without the  
7 witnesses I mentioned, the only possibility is that we will -- we can say is that the  
8 Defence has been deprived of its opportunity to present the Defence case on behalf of  
9 our client. And it is really a pity to have reached such a state for such a short  
10 postponement or pushing back of the date.

11 PRESIDING JUDGE KORNER: [10:52:53] Yes, but, I'm sorry, when are you  
12 suggesting that the case should actually start? You say you want to postpone the  
13 disclosure deadline from 18 September to 13 October, which is two days before you're  
14 due to start presenting your case; ergo, you can't then start -- I'm assuming, although  
15 you haven't said it, you can't start your case on the 15th or 16th.

16 MR LAUCCI: [10:53:26] (Interpretation) I'm sorry, your Honour, if I wasn't clear  
17 enough, but with disclosure of evidence and a brief by 13 October, I didn't mention  
18 that this will also mean a postponement of the presentation of the Defence case. I  
19 think 13 November would be the date, but that is the intent that we have.

20 PRESIDING JUDGE KORNER: [10:53:53] I see. So, I'm sorry. So you are saying  
21 that you want to -- I take it the 13th is the Friday if the 16th is the Monday?

22 MR LAUCCI: [10:54:06] (Interpretation) Yes, the 13th is a Friday and then the 16th is  
23 a Monday.

24 PRESIDING JUDGE KORNER: [10:54:12] So your suggestion is: No pre-trial brief,  
25 no disclosure until the 13th. The case then starts on the 16th with your first -- with

1 your opening, plus your first witness. You're saying no?

2 MR LAUCCI: [10:54:29] (Interpretation) We've misunderstood one another. I  
3 thought it was implicit. If the brief and the evidence are finished by 16 October, the  
4 presentation of the case will naturally mechanically begin in November, on 13  
5 November.

6 PRESIDING JUDGE KORNER: [10:54:56] Why mechanically?

7 MR LAUCCI: [10:54:59] (Interpretation) It's the 30-day deadline between disclosure  
8 of evidence and beginning of the case before the Chamber.

9 PRESIDING JUDGE KORNER: [10:55:08] Yes. As you know, we've already made  
10 various arrangements with the Court to sit. This case has been delayed and delayed  
11 and delayed, and I'm not going to rehash the reasons why it's been delayed. It  
12 should have started in May. I appreciate that the events in Sudan then supervened,  
13 but there have been months and months gone by. Your client, as I'm sure he's aware  
14 and you're aware, is in custody, and this case has got to start on the 15th, and you do  
15 have some witnesses you can call.

16 As I have already said, although the Rules require that you disclose all your witnesses,  
17 plus what you want to say, we are willing to make an exception, and so that you can  
18 disclose on a rolling basis. But by 26 September, we anticipate that you will be able,  
19 at least, to give some idea of what these witnesses are going to say. And, as I said,  
20 this has gone on long enough and case has got to -- the Defence case has got to start.

21 MR LAUCCI: [10:56:42] (Interpretation) Very well, your Honour. We take that as  
22 your decision and we will take action accordingly.

23 PRESIDING JUDGE KORNER: [10:56:51] All right. Yes. The other question, and  
24 it goes along with it, is the question of the alibi, Mr Laucci. As you yourself  
25 acknowledged and the Prosecution have pointed out, the details were not sufficient.

1 Now, we notice that one of your witnesses that you talk about is said to be an alibi  
2 witness. If you can give further details of the alibi, then you must do so.

3 MR LAUCCI: [10:57:26] (Interpretation) Yes, I think we'll certainly have to go into  
4 private session to discuss that.

5 PRESIDING JUDGE KORNER: [10:57:35] All right. Yes, we'll go into private  
6 session.

7 (Private session at 10.57 a.m.)

8 THE COURT OFFICER: [10:57:43] We're in private session, Madam President.

9 (Redacted)

10 (Redacted)

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25 (Open session at 11.06 a.m.)

1 THE COURT OFFICER: [11:06:44] We are back in open session, Madam President.

2 PRESIDING JUDGE KORNER: [11:06:57] Yes. Mr Nicholls.

3 MR NICHOLLS: [11:06:59] The only point I'd make is, I would request that  
4 whatever disclosure they have, there are some witness statements that can be  
5 disclosed on 18 September, that we stick to that date, although there's been given an  
6 extra week for the brief -- (Overlapping speakers)

7 PRESIDING JUDGE KORNER: Oh, I see.

8 MR NICHOLLS: [11:07:14] But whatever the -- whatever could be disclosed, we  
9 would hope to receive that on the 18th --

10 MR LAUCCI: [11:07:22] Accepted.

11 MR NICHOLLS: Thank you.

12 PRESIDING JUDGE KORNER: [11:07:24] Thank you very much, Mr Laucci.

13 Yes, all right, as I say, the brief plus any disclosure -- well, sorry, I will start that again.

14 Disclosure of statements which are already available should be made on 18

15 September. The provision of the pretrial brief, however, will be moved back to 26

16 September.

17 And for the reasons that I've already expressed in -- but I repeat, namely, this case has

18 been delayed for so long that the Defence are in a position to call some evidence and

19 give a general picture of what their case is about. The defendant, the accused has

20 been in custody now for a number of years, and this case must begin. So 15

21 October -- 16 October to start matters.

22 Yes, well, if there's nothing else then, that brings this hearing --

23 Mr Laucci.

24 MR LAUCCI: [11:08:39] (Interpretation) Madam President, thank you for giving me

25 the opportunity to make a statement which I intended to make at the beginning, but I



1 will conclude on it. It is simply a word of thanks.

2 I want to thank the Prosecution, the OTP, to start with. As you may have seen in our  
3 last periodic report, you must have noticed that between the OTP and the Defence  
4 there has been excellent cooperation in the exchange of information and establishing  
5 contacts with several former OTP witnesses; although, all that did not necessarily  
6 bear fruit, but in some cases, it was and could still be because of the ongoing  
7 interviews that we are still having. So I want to formally extend my gratitude to the  
8 OTP for this excellent cooperation.

9 My second word of thanks would go to my colleagues from the Registry, beginning  
10 with the witness support section, the VWS, and the DEO, external relations division.

11 And given that we are in open session, I want to thank all the field offices that are  
12 concerned by what I am saying and I will leave it at that. During this summer, we  
13 benefited from their assistance and support, which calls for our respect and thanks.  
14 There was flexibility, but there was also friction, and, in all that, a lot was achieved,  
15 thanks to them.

16 I want to avail myself of this opportunity to mention to the Court that there are some  
17 budget issues that are figured -- that figure at paragraph 12 in our periodic report and  
18 that those issues have been resolved.

19 PRESIDING JUDGE KORNER: [11:10:58] I'm happy to hear that. Yes, thank you  
20 very much, Mr Laucci. It's very good of you. And you reminded me that also the  
21 Court would like to commend the Victim and Witnesses Unit for the work it's done in  
22 assisting you as best they can to get hold of witnesses and the like. We know it's  
23 been a very difficult task, indeed, and so we are very grateful.

24 Yes, well, if there's nothing else, then we will adjourn potentially to hear the victims  
25 in the beginning of October, but if not, until 16 October. And we'll give our decision,

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- 1 as I say, by the end of this week on the protocol.
- 2 Yes, thank you all very much.
- 3 THE COURT USHER: [11:11:56] All rise.
- 4 (The hearing ends in open session at 11.12 a.m.)