

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
7 Judge Althea Violet Alexis-Windsor
8 Status Conference - Courtroom 1
9 Monday, 7 February 2022
10 (The hearing starts in open session at 9.49 a.m.)
11 THE COURT USHER: [9:49:18] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:50:13] Yes. Could you call the case, please.
15 THE COURT OFFICER: [9:50:17] Good morning, Madam President. Good
16 morning, your Honours.
17 The situation in Darfur, Sudan, in the case of The Prosecutor versus Ali Muhammad
18 Ali Abd-Al-Rahman, case reference ICC-02/05/-01/20.
19 And for the record, we are in open session.
20 PRESIDING JUDGE KORNER: [9:50:35] Yes. Before we begin, as everybody in
21 court will have realised, Judge Alexis-Windsor cannot physically be present in court
22 but is, we hope, on screen and can hear and understand everything that's going on.
23 Yes.
24 Could we have then, please, the appearance this morning.
25 First of all, the Prosecution.

1 MR NICHOLLS: [9:51:05] Good morning, your Honours. Good morning,
2 everyone.

3 I'm Julian Nicholls. I'm joined today by Claire Sabatini, our case manager, as well as
4 lawyers Hesham Mourad, Hai Do Duc, and Alison Whitford. Thank you.

5 PRESIDING JUDGE KORNER: [9:51:21] Yes, thank you, Mr Nicholls.
6 Yes, for the Defence, please.

7 MR LAUCCI: [9:51:26](Interpretation) Good morning, Madam. Good morning,
8 your Honours. Madam President, good morning. And I'd like to say good
9 morning to Judge Alexis-Windsor who is listening to us at a distance.
10 So this morning representing the Defence, Madam Paola Pallot, in charge of evidence;
11 Mr Ahmad Issa, who is the case manager; co-counsel, Mr Iain Edwards; and myself,
12 Lead Counsel, Mr Cyril Laucci. Thank you.

13 PRESIDING JUDGE KORNER: [9:51:58] Yes, thank you very much, Mr Laucci.
14 The victims' representatives, please.

15 MS VON WISTINGHAUSEN: [9:52:05] Yes. Good morning, Madam President,
16 your Honours, and dear colleagues. Good morning to everyone inside and outside
17 of the courtroom.

18 My name is Natalie von Wistinghausen. I'm representing the victims. I'm here
19 together with my colleague Nasser Amin Abdalla, who's joining us remotely. I have
20 to my right our newly appointed associate counsel Anand Shah, and behind me our
21 case manager Idriss Anbari. Thank you.

22 PRESIDING JUDGE KORNER: [9:52:34] Yes, thank you very much, Ms von
23 Wistinghausen. Pleasure to see you in the flesh, as it were.
24 Right. And, finally, the Registry, please.

25 MR MAHR: [9:52:42] Good morning Madam President, your Honours.

1 My name is Christian Mahr. I'm the director for External Operations with the
2 Registry. I'm accompanied by five of my colleagues from the Registry.
3 Immediately behind me is Josiane Do Rego, the head of interpretation unit. Behind
4 me as well, Diederick Zanen, field operations interpretation coordinator. At the very
5 back, Isabelle Oseredczuk -- sorry, on the other side, across from me. She's the legal
6 officer from the Victims and Witnesses Section of the Registry. Also across from me,
7 Misa Zgonec-Rozej, legal officer from the Registry Legal Office. And immediately to
8 my left is Vera Wang, the external relations coordinator in my immediate office.
9 Thank you, your Honour.

10 PRESIDING JUDGE KORNER: [9:53:33] Yes. Well, there is a fair few of you here,
11 Mr Mahr. Thank you. Yes. All right.

12 Thank you all very much. As you know, the status conference has been fixed now
13 for some time and is estimated to last until Wednesday.

14 One of the matters that we propose to deal with at the end of this is the question of
15 Mr Al Rahman's detention, Mr Laucci. You said you'd be ready to deal with this on
16 Wednesday. I don't know how long the rest of the items are going to take, but I
17 think you ought to be prepared possibly to deal with it tomorrow afternoon, if
18 necessary.

19 MR LAUCCI: [9:54:25](Interpretation) That won't be an issue at all. In reality, I am
20 at the ready. I was saying Wednesday because I had understood that you wanted to
21 keep it for the very end.

22 PRESIDING JUDGE KORNER: [9:54:33] Yes, I do. But, I mean, as I said, it's quite
23 difficult to estimate, although we're not sitting tomorrow morning, how long matters
24 are going to take. Yes, thank you, Mr Laucci.

25 All right. Everybody's seen the agenda; is that right? And, really, we're going to

1 start with this whole question, which has come up at every status conference of -- on
2 the situation in Sudan and the cooperation.

3 Now, we received from the Registry - just give me one moment - a report on the
4 situation as it now stands, which was dated 31 January. So I think the first question
5 to Mr Mahr, or whoever from the Registry is going to deal with it, is, is there any
6 additional information that you can provide orally since the report dated 31 January?

7 MR MAHR: [9:55:52] Yes, your Honour.

8 As indicated in the most recent submission dated 31 January, the biggest political
9 development in Sudan since our last status conference on 17 December has been the
10 resignation of Prime Minister Abdallah Hamdok, which took place on 2 January.

11 The resignation effectively ended the power-sharing agreement between the civilian
12 and military leaders which was put in place in the immediate aftermath of the coup,
13 which took place on 25 October. Now, this leaves the army at the moment in full
14 control of the government.

15 The UN special political mission UNITAMS has been trying repeatedly to mediate
16 efforts, and this began on 8 January and is continuing as we speak. A mediation
17 effort between the ruling military and the opposition, with the aim of bringing
18 civilians back into the government. But as far as we can tell, the latest information is
19 that significant achievements have yet to be reported through this UN-led mediation
20 effort.

21 In the meantime, protests and clashes between the protesters and security forces have
22 continued across the country, especially in Khartoum, in the neighbouring areas.

23 However, despite these protests, the Sovereign Council chairman, General Al-Burhan,
24 has appointed a new cabinet.

25 Now, on 21 January, General Al-Burhan appointed 15 new ministers, and on

1 31 January appointed an additional three ministers, which includes the acting
2 minister of justice. This is a significant development for us.
3 And also, in the meantime, of keen interest to -- to us at the Court, in mid-January, the
4 Sudanese government designated a focal point for the Court located within the
5 ministry of justice. We have already established contact with this new focal point to
6 follow up on all the pending cooperation requests, and we have transmitted new
7 requests as well.
8 Our exchange to date with this new focal point has been beneficial and very cordial.
9 This new focal point has been helping us with a number of technical matters related
10 to cooperation. The focal point receives -- has received the Court's request, as well as
11 the Defence requests. They've been transmitted by the Registry, and the focal point
12 has on that basis been liaising with relevant authorities within the Sudanese
13 government.
14 During the past two weeks, the focal point has been regularly -- providing us with
15 regular updates on various issues and has, for instance, liaised with the Sudanese
16 ministry of foreign affairs to help facilitate the delivery of visas to the travellers who
17 are scheduled to conduct missions to Sudan.
18 Now, following the recent issuance of visas by the Sudanese authorities, the Registry
19 is -- stands ready to conduct a technical mission to Sudan starting next week, most
20 specifically, starting as of 13 February, whose primary objective is to establish
21 whether we are in a position to restart missions back into Sudan.
22 As the new focal point is responsible for issues related to cooperation with the Court,
23 but not for providing security arrangements for the mission travellers, one objective
24 of this mission taking place next week is to meet with relevant Sudanese authorities to
25 put in place the proper security arrangements or to discuss how they can be put in

1 place.

2 We will be in a better position to provide further observations of the current situation
3 in Sudan in the immediate aftermath of the return of this mission, which will be
4 scheduled to go to Sudan next week.

5 Thank you, your Honour.

6 PRESIDING JUDGE KORNER: [10:00:28] Yes. So you're saying, are you, what date
7 next week? Do you know?

8 MR MAHR: [10:00:34] Yes, your Honour. It's 13 February, is the date in which the
9 mission is scheduled to begin.

10 PRESIDING JUDGE KORNER: [10:00:41] So are you saying that until you've been
11 down there and checked on the security and the like, neither the -- or, certainly, the
12 Defence and the Prosecution shouldn't be going there either? Because, as I
13 understood what Mr Nicholls said, the Prosecution went in December.

14 MR MAHR: [10:01:09] Yes, your Honour.

15 Essentially, the mission going out next week will establish whether the guidance
16 within the Court will be changed. Currently, the guidance within the Court is that
17 missions are not to take place to Sudan. Similar to what -- what happened
18 previously, a few months ago, it was the mission that essentially opened up the
19 possibility for future missions to go into Khartoum or any other parts of Sudan. So
20 this will be the sequence based on a mission of security experts which will establish
21 whether and how, under what circumstances missions can be restarted back into
22 Sudan.

23 PRESIDING JUDGE KORNER: [10:01:53] Yes. All right. As far as the question of
24 visas is concerned, is there any problem getting visas at the moment, fairly quickly?

25 MR MAHR: [10:02:10] Your Honour, the fairly quickly issue is still stands to be an

1 issue. But we feel that -- given that we have been issued a visa for this mission
2 taking place next week, indications are that it is a bureaucratic delay, which we
3 believe is understandable. It has not been quick, so as to say, but it has been
4 received. And particularly, now that we have a focal point in place for the past two
5 to three weeks, this, in our opinion, has greatly facilitated this process of requesting
6 and receiving visas.

7 PRESIDING JUDGE KORNER: [10:02:50] Yes. So one of the issues as you know
8 that's been raised on behalf of the Defendant is that -- the decriminalisation, if that's
9 the right word, of cooperation with the Tribunal is not a proven fact. But as far as
10 the Registry is concerned, does it appear that -- certainly with the focal point, that
11 Sudan is -- is cooperating with the Court?

12 MR MAHR: [10:03:26] The outward appearance, your Honour, of our relationship
13 so far has indicated that we are receiving the cooperation. It is the -- once again, we
14 are restarting this dialogue, but the very fact we do have a focal point in the ministry
15 of justice is for us once again a major development. Not having a focal point makes
16 it very difficult. But now that we are -- we do have a focal point in place, we do have
17 someone who is actively responding to our queries and liaising with other parts of the
18 Sudanese government is clearly a major development in our regard and, at least in
19 our opinion, shows that cooperation is moving along in that regard. Thank you.

20 PRESIDING JUDGE KORNER: [10:04:12] Yes. And, finally, this: You've referred
21 to the ongoing demonstrations and protests. As far as you -- you went there in
22 January; is that right? As far as your -- you can see, does that make Khartoum
23 dangerous for people going there? And, for example, our embassy staff and the likes
24 in Khartoum.

25 MR MAHR: [10:04:41] Your Honour, our indication is that, as far as Khartoum is

1 concerned, we are getting feedback from our UN colleagues and others that we can
2 engage in missions, possibly. But for us to have a certain level of -- to have absolute
3 certainty on the safety of sending in missions to Khartoum, at least, this is where the
4 mission coming up next week will be similar to what we did before.

5 It's one thing to perceive things from a distance, but to actually have our security
6 expert on the ground to establish that in communication with relevant actors, as such,
7 as the UN and various embassies, this will be the -- essentially, the variable that we
8 require in order to indicate that Khartoum certainly is good to go in terms of missions
9 going ahead.

10 So, once again, the mission going forward next week will help us establish with a
11 certain level of certainty that we can proceed once again with missions to Khartoum.

12 PRESIDING JUDGE KORNER: [10:05:49] All right. And the final matter is this:

13 As you also know, the Defence are concerned about the lack of response to their
14 requests for documents and information. Was that raised with the focal point when
15 you went there on mission?

16 MR MAHR: [10:06:12] In terms of the communication we have had with the focal
17 point, we have yet to have a face-to-face interaction. But in the communications, this
18 is a new focal point who has not been made aware of the previous requests
19 previously, so this has been our task to essentially get the new focal point up to speed
20 on all the pending requests. The feedback we have received is that, on the basis of
21 the information we have provided the new focal point, the focal point is in the process
22 now of taking care of all of the pending requests put to our attention and any new
23 requests we received since the appointment of the focal point as well. So that is
24 actively being pursued in line with the appointment of this new focal point.

25 PRESIDING JUDGE KORNER: [10:07:02] Yes, thank you very much, Mr Mahr.

1 All right. Mr Laucci, do you have any questions for the Registry about the -- about
2 this aspect alone?

3 MR LAUCCI: [10:07:15](Interpretation) Yes, Madam President. I would like to
4 thank the director, Christian Mahr, for the additional information that he has
5 provided us with.

6 But there are a number of outstanding questions, despite the fact that he has
7 answered a number of them, but I have a number of questions to put to him with
8 regard to the third report.

9 PRESIDING JUDGE KORNER: [10:07:43] Is that the -- are you talking about the
10 (Overlapping speakers)

11 MR LAUCCI: [10:07:44] *Oui, oui* --

12 PRESIDING JUDGE KORNER: [10:07:44] -- report of 31 January? Yes.

13 MR LAUCCI: [10:07:47](Interpretation) Yes, indeed.

14 PRESIDING JUDGE KORNER: [10:07:47] Very well.

15 MR LAUCCI: [10:07:48](Interpretation) Thank you. And you'll be happy to hear,
16 Madam President, that I will be putting these questions in English.

17 (Speaks English) I hope you will be happy. I'm not sure.

18 PRESIDING JUDGE KORNER: [10:08:05] I may be happy. Judge Alapini may be
19 less happy.

20 MR LAUCCI: [10:08:23](No interpretation)

21 JUDGE ALAPINI-GANSOU: [10:08:25](Microphone not activated)

22 MR LAUCCI: [10:08:27] One point. Mr Mahr, you mentioned that finally there was
23 an acting minister of justice appointed a little bit later than the first set of ministries.

24 When was it exactly? I did not get the date, if you could repeat.

25 MR MAHR: [10:08:48] 31 January.

1 MR LAUCCI: [10:08:51] Thank you very much.

2 And when you say it's an acting minister of justice, concretely, can you explain what
3 it means? What is the difference between an acting minister and a minister?

4 MR MAHR: [10:09:09] If I may, your Honour.

5 This is something -- we are simply operating on the assumption, like in most
6 bureaucratic establishments, when someone is acting, we believe they are -- they have
7 the powers and the authority associated with that. But should there be a request for
8 more specific details, this is something we are happy to put to the focal point.

9 MR LAUCCI: [10:09:31] Is it Mr -- the acting minister you are referring to, is it Mr
10 Ghanem El Tayeb? And sorry for my pronunciation.

11 MR MAHR: [10:09:46] Actually, I do not have the details, but this is something I'm
12 happy to provide, especially we do have a ex parte session scheduled subsequent to
13 this, I'm happy to present it at that time. Thank you.

14 PRESIDING JUDGE KORNER: [10:10:03] Sorry, just for the purposes of the
15 LiveNote, could you spell that name that you've just tried to pronounce.

16 MR LAUCCI: [10:10:10] With pleasure. Ghanem is G like golf, H-A-N-E-M, space,
17 El, E-L, space, Tayeb, T-A-Y-E-B.

18 PRESIDING JUDGE KORNER: [10:10:24] Yes, thank you.

19 MR LAUCCI: [10:10:25] Another clarification that would be helpful. You -- you
20 mentioned that there is a new focal point. What is, for our understanding, the
21 difference between a focal point and a channel of communication with the Court? If
22 there is any, of course.

23 MS WANG: [10:11:07] Yes, your Honour, just let me -- allow me to explain. So the
24 official channel of communication is the minister of justice, according to the
25 Cooperation Agreement. But also if you look at the Cooperation Agreement, there's

1 also indication about focal point. That's the technical focal point that we have to
2 submit -- transmit a court request and transmit a Defence request.

3 So then this focal point will liaise within the Sudanese authorities and to provide us
4 with -- with responses. Of course, that her hierarchy will be the minister of justice
5 also. Thank you.

6 PRESIDING JUDGE KORNER: [10:11:42] So -- sorry, Mr Laucci. So the focal point
7 doesn't actually have any authority to grant requests. He simply trans- - as
8 Mr Laucci puts it - transmitting them to the minister of justice or whoever.

9 MS WANG: [10:11:53] Yes. If you look -- if you look at the Cooperation Agreement,
10 it's at operational level, so then it's more the operational focal point. Thank you.

11 MR LAUCCI: [10:12:01] Would I summarise the situation adequately if I say that the
12 focal point is the Court's entry point to the channel of communication?

13 MS WANG: [10:12:13] Yes, I believe so. But as Mr Mahr said, that we still have to
14 liaise with this focal point, so then we see actually how she functions. Yeah.

15 MR LAUCCI: [10:12:24] I have another question about the focal point and it's
16 actually the -- I would say rather positive news that you are providing, that -- well,
17 you say that he was - I don't know what the word - very, very polite or forthcoming,
18 I don't know.

19 But could you -- could you elaborate a little bit on this. What makes you measure or
20 believe that this focal point is actually really engaging? And how is it different, for
21 instance, in comparison with what you had to deal with before?

22 MR MAHR: [10:13:10] Thank you. Essentially, what we have found is that
23 we -- this is in terms of the communication we have had with the focal point. It's a
24 certain level of receptivity, willingness to engage, contact us back, provide us with
25 updates. This is what we -- this is pretty much what we ask of a good focal point.

1 And we believe so far the indications have been good, that we have received the -- the
2 level of cooperation, support, feedback that we count on from a focal point as well.

3 And just to confirm, we have the name. Mohamed Saeed Al'hillu is the name of the
4 minister -- acting minister of justice.

5 Thank you, your Honour.

6 PRESIDING JUDGE KORNER: [10:14:04] I suppose you'd better spell that one, too.

7 MR MAHR: [10:14:10] Yes. Mohamed, M-O-H-A-M-E-D; Saeed, S-A-E-E-D;

8 Al'hillu, A-L, apostrophe, H-I-L-L-U.

9 Thank you.

10 MR LAUCCI: [10:14:38] And Mr Mahr, there was an element of comparison in my
11 question. Would you say that the situation is -- based on your perception, of course,

12 I take it with this caveat, but would you say that the situation is improving?

13 Improving compared to what you had to deal with before or just resuming as before
14 25 October?

15 MR MAHR: [10:15:03] Your Honour, in response, it's been a relatively short period
16 of time, I think we'll reserve judgment. But all I can say is, it's been a good start, and
17 we'll be able to provide you with a bit more meaningful feedback in the weeks and
18 months to come. Thank you.

19 MR LAUCCI: [10:15:24] Yes. Nevertheless, I read in your report at paragraph 21
20 that the request for judicial assistance from the Defence, the previous ones, have been
21 transmitted in November, December 2020 for the first one. I leave the third one
22 aside for the moment.

23 And you say that with this transmission in November, December 2020, you can still
24 expect that with this new focal point it may take longer than before, which leads me
25 to my question that, when shall we reasonably expect to have a response to our

1 pending requests transmitted in November, December 2020 and the other one?

2 Can we reasonably expect to have a response before, I don't know, 2025?

3 MR MAHR: [10:16:30] Once again, these are relatively early days in terms of our
4 engagement with the new focal point. We found that with engagement with all new
5 focal points, there's a learning curve, especially because this focal point has not dealt
6 with the ICC previously. We believe there is a need for some time for the individual
7 to be made aware of the specific requirements of the Court and also in engaging
8 internally within the Sudanese government.

9 So once again, these are early days.

10 But to be very clear, we have -- we have and will make it known of the importance of
11 getting feedback on these points at the earliest opportunity, but I'm not at liberty right
12 now to.

13 But I certainly hope we are not taking about the kind of timeline you mentioned.

14 Thank you.

15 MR LAUCCI: [10:17:21] Well, I was not suggesting that you had a crystal ball, but,
16 yeah, it was for the sake of reasonable expectation.

17 Since I am at paragraph 21 of the report --

18 MR NICHOLLS: [10:17:37] Apologies, your Honour.

19 No, sorry, I just wanted to alert my friend that in our version, paragraph 21 is
20 redacted when it's being quoted from.

21 PRESIDING JUDGE KORNER: [10:17:45] Yes.

22 MR NICHOLLS: [10:17:46] So I just put it out there.

23 PRESIDING JUDGE KORNER: [10:17:49] Interestingly enough, I was -- I just got a
24 note from the legal officer saying the same.

25 MR NICHOLLS: [10:17:51] Oh, okay.

1 MR LAUCCI: [10:17:58](Overlapping speakers) My apologies for that. Definitely --

2 MR NICHOLLS: [10:17:59](Overlapping speakers) My apologies for interrupting.

3 PRESIDING JUDGE KORNER: [10:17:59] I was wondering, indeed, whether this
4 whole discussion should be in private session.

5 MR LAUCCI: [10:18:09] It could be safer, indeed.

6 PRESIDING JUDGE KORNER: [10:18:11] There is a matter I want to raise which will
7 definitely have to go into private session.

8 So I think, Mr Nicholls, thank you. I think we'd better go into private session just
9 briefly.

10 (Private session at 10.18 a.m.)

11 THE COURT OFFICER: [10:18:28] We are in private session, your Honour.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Page redacted – private session

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Open session at 10.47 a.m.)

6 THE COURT OFFICER: [10:47:53] We're back in open session, Madam President.

7 PRESIDING JUDGE KORNER: [10:47:58] Yes. I think -- could we ask, Mr Mahr,
8 that the Registry files a report. You say it's next week, so that's two weeks. Takes
9 us right to the end of February. By the beginning of March.

10 MR MAHR: [10:48:24] Yes, your Honour, that would be feasible for us.

11 PRESIDING JUDGE KORNER: [10:48:30] I just don't have a calendar in front of me.
12 What's the Friday -- the first Friday in March? Is that the 3rd? Yes, could we have a
13 report by Friday, 3 March -- 4? Thank you.

14 MS WANG: [10:48:56] Sorry, your Honour. Your Honours, so after the mission
15 we'll come back. I think the court expert will take, like, one week to do assessments.
16 So if you allow us a bit more time, maybe 7 March, will be easier for us.

17 PRESIDING JUDGE KORNER: [10:49:12] Yes. All right. 7 March.

18 MS WANG: [10:49:13] Thank you.

19 PRESIDING JUDGE KORNER: [10:49:14] Yes. Right. I think we've dealt with
20 that -- sorry, Mr Laucci, yes, you wanted say something else.

21 MR LAUCCI: [10:49:28] Yes. It's the final word of conclusion of this discussion,
22 which I apologise to the public who was held in closed session. But what I have to
23 say now is public.

24 It's just to say and return back to the fundamentals and the text of the Court, that we
25 are facing a situation where the legal text provides specifically -- and it is, of course,

1 not changed at all, and it's good that it is there, that the Prosecution has its own
2 channel to obtain cooperation from states.

3 On the side of the Defence, we rely on the Registry. And we had this discussion in
4 private session whether the request coming from the Defence equated request for
5 cooperation, according to the legal text of the Court. Without -- I have given my
6 opinion, which is a "yes". But without insisting much on that opinion, I must say
7 that, if the answer was to be "no", then we would be faced -- confronted with a big
8 problem in terms of equality of arms between the Prosecution and the Defence. And
9 that is especially equality of arms regarding the possibility to obtain the attendance
10 and examination of witnesses and evidence on the Defence side, according to
11 Article 67(1)(e) of the Statute.

12 So, one way or the other, it would be appreciated if the request for cooperation, which
13 has made by the Defence, are considered that way. And if they are not, we would
14 have appreciated to be informed of that when we made the initial request for
15 cooperation long time ago and not today. That would have helped in the
16 preparation of the Defence.

17 PRESIDING JUDGE KORNER: [10:51:54] Well, Mr Laucci, I appreciate that you
18 have made various requests, and those requests you've made will have to be
19 discussed, I think, in ex parte session. But without disclosing at the moment to the
20 Office of the Prosecutor or anybody else what those requests are, is there
21 any -- appreciating that, at the moment, anyhow, the Defence strategy doesn't have to
22 be disclosed. However, some of the documents that the -- as you say, the Prosecutor
23 has a different regime for going down there. They could obtain from you, could
24 they not, if you asked for them, or might be able to obtain for them. So -- I mean, at
25 the moment I'm -- I'm wondering why it is that some of the documents, which could

1 be said to be fairly obvious ones, you simply don't ask the OTP to see if they can
2 obtain for you.

3 MR LAUCCI: [10:53:04] Well, that question has been responded by email, Madam
4 President. And the answer was, yes, we did request some of them very directly and
5 in detail. Others -- (Overlapping speakers).

6 PRESIDING JUDGE KORNER: [10:53:19] No, no, you direct -- you asked the
7 Prosecution whether they had them and whether they could disclose them. And the
8 fact is, they didn't -- apparently some you directly said that they didn't have them,
9 others you say they would have disclosed under the normal regime of disclosure.
10 But you haven't actually, as I understand it, asked for some documents directly and to
11 see whether the Prosecution, whether they have them or not now, may be able to use
12 their avenues, if you like, of communication to obtain them for you. Have you
13 thought of that one?

14 MR LAUCCI: [10:54:01] We thought about it. Well, for some of the documents, the
15 request, if they -- the Prosecution did have it. Well, if the answer was no, could have
16 lead to the Prosecutor -- Office of the Prosecutor seeking it, sorry, because we are
17 talking about -- you don't know what exactly we are talking about here. But
18 the -- for the other, it is our conception that the Defence should be allowed to conduct
19 its investigation and collect its evidence in parallel and independently from the Office
20 of the Prosecutor.

21 Some information and documents are of a very general nature. Others are far less of
22 a general nature. And actually, revealing them to the Office of the Prosecutor may
23 reveal some key aspects of the Defence strategy.

24 PRESIDING JUDGE KORNER: [10:55:04] All right. Well, I mean, as I say, we'll
25 discuss this in an ex parte session, but can I say that not quite the end of the questions

1 I have for you about that. I should have asked finally on this, and I think then --

2 What time is the break? No -- yes, there is a break at 11.

3 Ms von Wistinghausen, I'm really sorry. Obviously, no, not Mr Nicholls. As you
4 know, dealing with victims representatives doesn't come as second nature to me, and
5 I forget to ask you whether you had any questions at all or observations on this
6 aspect.

7 MS VON WISTINGHAUSEN: [10:55:40] No. That's all right, Madam President.

8 Thank you very much. I am keeping silent, and I will certainly stand up whenever I
9 have something to say. Thank you.

10 PRESIDING JUDGE KORNER: [10:55:49] Mr Nicholls.

11 MR NICHOLLS: [10:55:50] Just very quickly. If we had a request to seek certain
12 documents, we would very happily respond and work on that.

13 In terms of the Defence filing of January 18, number 557, and the noncompliance
14 issues, those documents are redacted from us, so we don't know what they are, in
15 paragraph 15. So we haven't said whether we have them, or we don't have them.
16 We have been making our general disclosure. If we knew what those documents
17 were precisely, we would look for them.

18 PRESIDING JUDGE KORNER: [10:56:20] Yes. Well, Mr -- as I've just explained to
19 Mr Laucci and Mr Edwards, who I think will be very familiar with this kind of -- it's
20 something I propose to raise, but because of the Defence filing being ex parte in terms
21 of request, I'll deal with it in ex parte session.

22 Yes. All right. Thank you.

23 That brings us to what? Ah, yes. Well, the leave to appeal under the Defence
24 observations.

25 Mr Laucci, I gather you wanted to deal with that orally, which was very helpful. So

1 what I think we'll do now is we'll adjourn now, take the break now - I hope I have got
2 it right it's 11 o'clock, last time I got it all wrong - until 11:30, and then we'll hear from
3 you on that. Yes. Thank you.

4 THE COURT USHER: [10:57:23] All rise.

5 (Recess taken at 10.57 a.m.)

6 (Upon resuming in open session at 11.31 a.m.)

7 THE COURT USHER: [11:31:24] All rise.

8 Please be seated.

9 PRESIDING JUDGE KORNER: [11:31:53] Yes, before we adjourned, I said we'd hear
10 from Mr Laucci orally - or Mr Edwards, whoever it's going to be - on the Defence
11 observations to the Legal Representatives of Victims' response to your request for
12 leave to appeal. Yes.

13 MR LAUCCI: [11:32:15](Interpretation) Thank you, your Honour. I'm going to
14 speak English. The notes have already been distributed to the interpreters in the
15 booth. I must get myself together.

16 (Speaks English) The Defence has the following submissions to make in response to
17 the Legal Representatives for Victims' observations. The Legal Representatives for
18 Victims submit that the Defence application for leave to appeal decision 561 on the
19 legality of the Court's operation in Sudan shall be denied on each and every question
20 identified by the Defence in its application 566. This calls for a reply on each specific
21 question.

22 On question one, which is whether the Trial Chamber complied with its obligation to
23 provide a detailed reasoning in its decision, the Legal Representatives for Victims
24 submits at paragraph 9 of their observations that it is not necessary for a decision to
25 recall or specifically address the entirety of the minutia of a party or a participant's

1 submission.

2 I don't know what the distinguished Legal Representatives for Victims are referring to
3 as "minutia" or secondary details which can be rejected by the Chamber without
4 providing further reasoning. The issues enlisted in footnote 3 of application 566 can
5 hardly be described so. These are various -- these are very serious issues relating to,
6 for instance, the impact of the absence of legal framework for the Court's activities in
7 Sudan on Mr Abd-Al-Rahman's right to a fair trial, the absence of validity of the
8 Cooperation Agreement of 10 May 2021, or the criminalisation of the cooperation
9 with Sudan.

10 Madam President, I suddenly realise we are in open session when the submission
11 from the distinguished Legal Representative is classified confidential.

12 PRESIDING JUDGE KORNER: [11:35:38] Yes, because I think your request for leave
13 to appeal has been classified as confidential as well. That's why it's all confidential.

14 Although, I -- I can't remember, and I'll be guided, did you file a redacted

15 (Overlapping speakers)

16 MR LAUCCI: [11:35:55](Overlapping speakers)

17 PRESIDING JUDGE KORNER: [11:35:57] Exactly.

18 Right, Ms von Wistinghausen, that's right, and I don't think you filed a redacted

19 public version. Do you have any objection to it being referred to in open session? I
20 can't see that it makes any difference.

21 MS VON WISTINGHAUSEN: [11:36:15] No, Madam President. Indeed, we
22 haven't filed a public redacted version yet, but I don't take issue with my colleague
23 addressing this in open session.

24 PRESIDING JUDGE KORNER: [11:36:25] Yes. Thank you very much.

25 MR LAUCCI: [11:36:29] So I can carry on?

1 PRESIDING JUDGE KORNER: [11:36:28] You can. Thank you.

2 MR LAUCCI: [11:36:28] If I spot one aspect that needs to be said confidential, I will
3 stop.

4 So all the issues I was mentioning fully fulfil the standards set by the Appeals
5 Chamber in its judgment OA5, decision number 236, paragraph 1 and 14, which I
6 quote:

7 "Chambers of the Court must indicate with sufficient clarity the grounds on which
8 they base their decisions. This duty is an element of the broader right to a fair trial.
9 The extent to which the duty to provide reasons applies may vary according to the
10 nature of the decision."

11 The Legal Representative of Victims further challenge that the issue of the sufficient
12 level of reasoning of the Trial Chamber's decision is an appealable issue. Their
13 submission on this aspect is devoid of merit, as fully demonstrated by the decision
14 granting leave to appeal the decision that led to Appeal Judgment OA5 on the issue of
15 motivation.

16 On question 2, which relates to the very definition of the right to a fair trial and
17 whether it encompasses the right to be tried in accordance with the provisions of the
18 Rome Statute, the Legal Representative for Victims admit at paragraph 10 that this
19 may be an appealable issue, but challenge the facts that -- the facts that the violations
20 complained about may have imperilled Mr Abd-Al-Rahman's fair trial rights.

21 Well, that is precisely the issue that the Defence is intending to make before the
22 Appeals Chamber and this is related to the specific grounds of appeal, i.e., whether a
23 violation of a provision of the Rome Statute is enough to impact on fair trial rights or
24 whether the Defence shall also provide proof of a concrete and actual impact it had on
25 the trial.

1 The Legal Representative for Victims further question how, if all of the fundamental
2 rights listed in Article 67(1) are adequately respected, an insufficiently fair trial could
3 result. This is an interesting question, which omits that compliance with the
4 provisions of the Rome Statute is a fundamental right listed in Article 67(1). But
5 more fundamentally, and to answer it: No, a trial that would comply with
6 Article 67(1) but would not respect, for instance, the presumption of innocence under
7 Article 66 would not be fair. Otherwise, I imagine that judicial economy would
8 dictate to save time and convict Mr Abd-Al-Rahman at once, without need for a trial.
9 The Legal Representative for Victims eventually submit that there is nothing in the
10 factual record suggesting any concrete violation of Article 64(2) -- 64(2), 64(6)(e) or
11 68(1).

12 Well, it seems that the Legal Representative for Victims have overseen the Defence
13 submissions listed in footnote 3 of the Defence application for leave to appeal,
14 criminalisation of the cooperation with the court in Sudan, privileges and immunities
15 of victims, legal basis for the protection of victims in Sudan, et cetera. But these are
16 issues which the Legal -- well, I move to the next question.

17 On question 3, which challenges that the Cooperation Agreement may constitute a
18 valid special agreement under Article 4(2), the Legal Representative for Victims
19 submit that the Defence does not identify with sufficient specificity the allegation
20 error committed in paragraph 23 of decision 561.

21 The Defence response to that is: Be patient. If the Legal Representative for Victims
22 want to know about the Defence's arguments, they should wait for the filing of the
23 statement of appeal. An application seeking leave to appeal is not the appropriate
24 document where the applicant is expected to develop its grounds of appeal. The
25 application would have to be declined if the applicant did so. The application is

1 limited to demonstrating that Article 82(1)(d) requirements are met, not developing
2 grounds of appeal.

3 And the question 3 is clear and very straightforward: Is the Cooperation Agreement
4 of 10 May 2021 an Article 4(2) convention, or not? That is the issue and it fulfils all
5 criteria under Article 82(1)(d).

6 PRESIDING JUDGE KORNER: [11:43:02] Let's pause there for a moment, would
7 you, Mr Laucci. What the victims are saying, as you read out, sufficient specificity,
8 the alleged error, and you say wait for the filing on the actual grounds of leave is
9 granted. But what is the error? What is the error?
10 I ask you this now so that we can deal with this. What do you say is the error we
11 committed? That's what you're being asked.

12 MR LAUCCI: [11:43:37] Well, this is a question that I would normally have
13 responded in my submissions before the Appeals Chamber, but the error is that, for
14 all the various submissions - and I know that you found them extremely detailed and
15 lengthy - we say that the agreement of 10 May cannot qualify as an Article 4(2) special
16 agreement. And that's what we want to expose and submit to the Appeals Chamber
17 for its determination. With your leave, of course.

18 PRESIDING JUDGE KORNER: [11:44:18] Yes, all right. So you're saying
19 everything that you raised, which we dismissed, as grounds, you should be entitled
20 to re-argue before the Appeals Chamber?

21 MR LAUCCI: [11:44:33] Well, this is our understanding of what an appeal is about,
22 to submit before the Appeals Chamber that the -- with all due respect, the Chamber
23 that issued the decision erred, one way or the other, and explain and justify why the
24 decision should be reversed.

25 PRESIDING JUDGE KORNER: [11:44:57] Meanwhile, Mr Laucci, we don't take it

1 personally. We understand this is a matter of law. But anyhow, I just thought I'd
2 check. Thank you.

3 MR LAUCCI: [11:45:06] You cannot imagine, Madam President, how confident I am
4 about this last point.

5 PRESIDING JUDGE KORNER: [11:45:11] Yes. Thank you.

6 MR LAUCCI: [11:45:15] On question 4, unlike what the Legal Representative for
7 Victims submit, the Defence does not complain against the reliance by the Chamber
8 on legal considerations which were never discussed in the judicial debate. The
9 Chamber has of course full authority to rely on any legal consideration which it
10 deems appropriate. But if these legal arguments have never been tested and
11 discussed in the judicial debate, then the Chamber runs the risk that the parties may
12 find reasons to submit that these untested legal arguments are devoid of merit, as this
13 is the case here about reliance on Article 14 of the United Nations ICC Agreement.
14 The unique issue here is whether the Court and/or Sudan are under an obligation to
15 register their Cooperation Agreement if that is aimed to become a special agreement
16 under Article 4(2). The Defence is seeking leave to appeal on that issue in order to
17 submit before the Appeals Chamber that the way that question was responded fails to
18 draw the legal consequences from Article 102(1) of the UN Charter, as applicable to
19 Sudan and to the Court pursuant to Article 2(2) and (3) of the UN-ICC Agreement
20 and not derogated in consultation between the Court and the UN pursuant to
21 Article 14 of the same agreement. The response further fails to draw the
22 consequences from Article 81(1) of the Vienna Convention on the Law of Treaties
23 between States and International Organisations of 21 March 1986 - 1986, yes - which,
24 though not yet in force, is codifying the existing customary international law
25 governing the law of treaties between States and international organisations.

1 The Defence further recalls its earlier submission, at the third status conference in
2 December 2021, that the non-registration of treaties has its own -- has its known
3 precedent of the secret provisions of the Molotov-Ribbentrop Pact of 23 August 1939
4 between USSR and Nazi Germany, by which they agreed on the invasion of Poland.
5 If what the Legal Representative for Victims are submitting is that the ICC shall
6 follow and take advantage on that kind of grim precedent, I need to emphasise that
7 this is not the Defence's understanding of how the Court shall comply with the core
8 values that are at the heart of its mandate and led to the negotiation and adoption of
9 the Rome Statute.

10 On question 5, which is related to whether the Cooperation Agreement falls within
11 the same category as other technical agreements, like agreements on the protection of
12 witnesses, to justify its confidentiality, the Legal Representative for Victims seem to
13 agree that this may be an appealable issue, but submit that, even if the Appeals
14 Chamber would agree with the Defence on the difference of nature between these
15 agreements, this would not impact on the status of the Cooperation Agreement as an
16 international convention.

17 Well, this is precisely the question that the Defence wishes to submit for determination
18 to the Appeals Chamber: if an Article 4(2) special agreement has to be made public
19 and registered within the United Nations, then the Cooperation Agreement of
20 10 May 2021 cannot be an Article 4(2) special agreement.

21 The Chamber's comparison with witness protection agreement was in any event
22 extremely unfortunate, because there is a valid legal basis in the legal texts of the
23 Court to keep these agreements confidential, and that is the VWU-OTP Joint Protocol
24 on the Mandate, Standards and Procedure for Protection of 21 March 2011 -- and I
25 speak to the interpreters: I will not quote the articles because the content of this

1 protocol, unlike its existence, remains confidential, whereas there is no legal basis
2 whatsoever to keep an Article 4(2) special agreement confidential.

3 Also, this comparison has brought into the light another issue with the Cooperation
4 Agreement of 10 May 2021: technical agreements of the kind used for witness
5 protection are signed by the Registrar or the Prosecutor, as applicable, pursuant to
6 Regulation 107(2) of the Regulations of the Court, whereas agreements setting out a
7 general framework for cooperation on matters within the competency of more than
8 one organ shall be concluded and signed by the President of the Court pursuant to
9 Regulation 107(1) of the Regulations of the Court. The Cooperation Agreement of
10 10 May 2021 was signed by the Registrar, as a technical agreement pursuant to
11 Regulation 107(2) - error in my notes. It's 107(2) - of the Regulations of the Court,
12 which is yet another proof that it cannot fit as an Article 4(2) special agreement, which
13 would require the signature of the President of the Court. But this will be left for the
14 Defence's grounds for appeal, if leave is granted, or for a separate submission which
15 may seek reconsideration of decision 561 by the Chamber on this and other grounds.

16 On question 6, which is related to proof of the criminalisation of cooperation with the
17 Court in Sudan, the Legal Representative for Victims submits that no evidence has
18 been placed before the Chamber calling into question the validity of the Sudanese
19 authority -- of the Sudanese authorities' confirmation of decriminalisation of
20 cooperation with the Court under Sudanese law.

21 Well, the Defence has proven that cooperation with the Court was a criminal offence
22 in Sudan at least until July 2020 and that the bill of law on which Sudan pretended
23 having decriminalised it did not address that aspect whatsoever. The bill of law is
24 available on records. It's the document ICC-02/05-01/20-397-Conf-Exp-AnxII. A
25 mere reading of it confirms that it does not decriminalise cooperation with the Court.

1 That should be sufficient proof of the fact that cooperation with the Court is still
2 today a criminal offence.

3 PRESIDING JUDGE KORNER: [11:54:43] Yes. Well, pause there, Mr Laucci. You
4 asserted this before us. You're reasserting it now without, as I -- as we said, any
5 evidence to support that. And indeed, I want you to deal with this now, although
6 you're dealing with the victims' response.

7 If it was an offence, a criminal offence punishable by death to cooperate with this
8 tribunal, then what, may I ask, is happening to the focal point that we've all been told
9 about this morning and the various missions that have been going down there?
10 Doesn't that in itself militate against your unsupported assertion that it is still a
11 criminal offence?

12 MR LAUCCI: [11:55:38] The answer is no, Madam President, and I will make an
13 important distinction here. The answer is no. Whatever has been said will be said
14 by the focal point, which Mr Mahr clarified that his authority was still unclear to the
15 Court, cannot reverse or replace or overwhelm what is in the legal text of Sudan.
16 The precious focal point submitted that the criminalisation of cooperation with Sudan
17 had been abolished by the miscellaneous amendment acts of July 2020. They
18 submitted this act. We read it. It does not abolish cooperations with the Court
19 whatsoever. A lot of issues, but nothing related to cooperation with the Court.
20 So the focal point is, as Director Mahr said, a very good willing and polite person.
21 But if he is submitting that cooperation with the Court is not an offence in Sudan law,
22 I'm led to conclude that he doesn't know his own domestic law.

23 PRESIDING JUDGE KORNER: [11:57:25] Mr Laucci, let's take this to its logical
24 conclusion, shall we. So the person who is the focal point is acting at his own risk to
25 cooperate with the Court when in actual fact what he is doing is committing a

1 criminal offence. Doesn't that seem somewhat illogical to you, Mr Laucci, if what
2 you're submitting is the case?

3 MR LAUCCI: [11:57:52] What is in the law does not necessarily equate what the
4 authorities of a country will do and the way they will apply that law.

5 Of course, if the authorities of Sudan appoint a focal point to respond to the Court's
6 solicitations, I can very well imagine that this person may not face prosecution for
7 what he or she is doing. I have no such guarantee about persons who cooperate
8 with the Court on their own initiative without prior appointment or leave to do so by
9 the authorities. I think that's a totally different situation.

10 And I come back to the distinction I wanted to make about proof and evidence.

11 While I understand from your decision, the decision of the Chamber, Madam
12 President, is that, what is missing in the Defence demonstration is proof of actual
13 cases of persons who may face prosecution for aiding cooperated with the Court. As
14 I have --

15 PRESIDING JUDGE KORNER: [11:59:12] No, that's not right. What we said - and
16 I'm just turning it up - is that you produced no evidence at all to show that the law
17 that is accepted by the Registry, and everybody else, in fact does not decriminalise
18 cooperation with the Court.

19 MR LAUCCI: [11:59:38] For this aspect in particular, I must say that's very simple.
20 It's a matter of reading. The law does not say so, as simple as this, and there is no
21 provision of Sudan law that is abolished under the miscellaneous amendments act
22 provisions of the criminal code which deals with cooperation with the Court.

23 PRESIDING JUDGE KORNER: [12:00:05] Yes. All right. Well, we've slightly
24 drifted off the topic. And what you're now doing is --

25 MR LAUCCI: [12:00:09] No problem.

1 PRESIDING JUDGE KORNER: [12:00:10] -- you're dealing - and I accept entirely
2 that it's partly my fault - you're dealing with the observations made by the victims.

3 MR LAUCCI: [12:00:17] Yes. I will, though, say a little bit more about proof of
4 actual cases of prosecution in Sudan for cases of cooperation with the Court. It has
5 always been the position of the Defence that we did not have the extra burden of
6 making that proof, and we did not.

7 We have understood from your decision - and my apologies if I -- if we were
8 wrong - that the Chamber was expecting from us this extra burden of proof, and we
9 are working on it.

10 I may have -- no, we are in private -- in public session, so I will not take this specific
11 example, but we are working on it. This is something that has been discussed
12 with -- already with the Office of the Prosecutor, that the Defence is requesting the
13 criminal records of the various witnesses that will be called at trial. That is mundane
14 practice in any court of law. And with this specific background of potential, I will
15 say, likely criminalisation of the cooperation with the Court, this verification is even
16 more so important.

17 PRESIDING JUDGE KORNER: [12:02:02] Mr Laucci, you're now re-arguing the case
18 that you argued before. And that doesn't really come into the question of appeal.

19 MR LAUCCI: [12:02:08] Okay. If that is what your understanding of what I say, it
20 was not mine, but I immediately stop. I finish with the response then.

21 On question seven, finally, the legal representatives submissions misconstrue the
22 Defence position by suggesting that it only aims at obtaining a final stay of
23 proceedings. This is obviously not the case as demonstrated by the constructive
24 approach of the Defence on this matter and the concrete proposals it submitted in
25 preparation of the third status conference in its filing, ICC-02/05-01/20-532, paragraph

1 11.

2 Whether the issue of the ICC legal framework -- sorry -- of the legal framework of ICC
3 operations in Sudan will ultimately lead to imposing a final stay of the proceedings
4 against Mr Abd-Al-Rahman does not form part of the discussion under the present
5 application for leave to appeal and is by far premature. There are still solutions to
6 explore. Some have been discussed this morning, by the way, prior to reaching that
7 conclusion.

8 At paragraph 17 of the observations, the Legal Representative for Victims finally
9 deem appropriate to specify that they do not share the Defence view that the safety
10 and security of victims may be at risk as a result of the issues raised by the Defence.
11 I would say that this is actually calling for a clarification on behalf of the Legal
12 Representative for Victims. Is it really the victims' views and concerns that the
13 potential criminalisation of their cooperation with the Court in Sudan is not a topic
14 that is worth a clarification?

15 And that forms the end of my response to the Legal Representative for Victims'
16 observations. I thank you for your attention.

17 PRESIDING JUDGE KORNER: [12:04:49] Yes, Ms von Wistinghausen, do you want
18 to respond to any of this?

19 MS VON WISTINGHAUSEN: [12:05:02] Well, Madam President, I think that Mr
20 Laucci should be grateful for our observations which gave him a second opportunity
21 to argue his request for leave to appeal. I think that I will just agree with him that
22 we disagree on many of these points, and I don't want to rehash what I've already
23 said in my observation. So I've -- I've got nothing to say at this point.

24 PRESIDING JUDGE KORNER: [12:05:32] He's invited you to explain your last
25 paragraph. Do you want to respond to the invitation or ignore it?

1 MS VON WISTINGHAUSEN: [12:05:42] Well, I think we've made it very clear, and
2 we've said it in paragraph 17, that we advise that while it certainly harbours serious
3 concerns for the safety and security of its clients arising from the present proceedings,
4 we don't share the Defence's view only on the point that such risks arise from the
5 issues and matters identified in the request. So we're not rejecting it in general terms,
6 but we don't share the Defence's view that the risks that of course exist are based on
7 the arguments put forward by the Defence in this very specific request for leave to
8 appeal.

9 PRESIDING JUDGE KORNER: [12:06:32] Thank you, Ms von Wistinghausen.
10 In respect of the application for leave to appeal, we will consider the matters that you
11 have raised, in what I rather agree with von Wistinghausen was yet another attempt
12 to argue the case, Mr Laucci. But we will consider what you raised, and we're going
13 to give an oral ruling this afternoon, because we think this is a matter that you ought
14 to have a fairly swift ruling on.

15 Yes. All right. Can I move then to the next aspect of the agenda, and that is,
16 effectively, trial management and scheduling issues.

17 Really, in respect there is outstanding at the moment before the Pre-Trial Chamber the
18 request by the Prosecution to amend the charges against the accused in this case, to
19 which you have responded, I think, Mr Laucci, already, or the Defence has responded,
20 objecting to those amendments.

21 Yes. We -- obviously, it's a matter of some importance that we know where we are
22 on the indictment, and I imagine the Pre-Trial Chamber will issue its decision in
23 the -- in the very near future. So really this is just to note that, unless either party
24 wants to add anything to what we know about.

25 No. No. Thank you.

1 Yeah. Right. Next, the order of -- and as I say, the -- I'm sorry, before I leave the
2 amendments, there was something I intend to add, which is that the nature of the
3 request is not such, even if the Pre-Trial Chamber takes longer than we might
4 anticipate to affect -- I just make it clear, it wouldn't affect the start of the trial as
5 it -- as it relates to some of the particulars.

6 Right. Witnesses, order of call.

7 I appreciate -- we all appreciate that it's difficult sometimes to make sure that
8 witnesses appear on the dates as expected. Things go wrong. But I do think - and
9 really this is addressed to the Prosecution, firstly, there should be, if at all possible, a
10 backup arrangement, as it were, if a witness for some reason or another cannot
11 appear.

12 Additionally, when we come to the question of timing and hours for presentation of
13 each of the -- presentation of the Prosecution case and cross-examination by the
14 Defence and the victims' representatives, it is not at the moment our intention to say
15 that X witness will have X hours. Each side will be -- each party will be given an
16 overall figure and it is up to them to use it as they see fit.

17 What that means is this, because I know it's arisen in other trial chambers, that if the
18 Prosecution say, well, we anticipate that a viva voce witness in full - as opposed to
19 any other type - will last three hours and, in fact, the witness only lasts two hours, we
20 will then expect, however, the Defence to be ready to start cross-examination
21 straightaway. We are not going to -- unless something goes wrong or the witness
22 comes out with all sorts of matters that you can -- you could not have anticipated, but
23 otherwise we would expect the Defence to start cross-examination immediately.

24 So I hope that's clear.

25 Yes. And if necessary, as I say, backup witnesses are -- it may well be that we -- if

1 they're going to be called under topics, as it were, particular areas, it may well be that
2 you can't get a witness from the same area, well then we'll have to go on to another
3 area. I just want to make that absolutely clear. It's obviously important that we
4 keep the momentum going.

5 Any remarks, requests, comments on that?

6 MR NICHOLLS: [12:12:03] Just very briefly. We understand that, your Honour.
7 We -- Mr Do Duc has been preparing our witness lists and backups. It's too early to
8 say exactly how things will go. We hope they go smoothly, but based on some of the
9 issues we discussed this morning, some witnesses are more or less difficult than
10 others to bring, or even to bring via a video link. So we will definitely have a backup
11 plan and share that as much as possible. And we will, we understand, will
12 endeavour that there should not be breaks between the witness testimony. That
13 that's the message I'm getting and we will do everything to avoid that.

14 PRESIDING JUDGE KORNER: [12:12:47](microphone not activated) one of the
15 problems is going to be that a number of trials have to be accommodated by this
16 Court, which means that we're already going to be boxing and coxing on trials as it is,
17 so losing days is not going to help matters.

18 Yes, thank you.

19 Mr Laucci, Mr Edwards, anything to say?

20 MR EDWARDS: [12:13:08] Just briefly, your Honour, and I don't know if now is in
21 fact the right time to make the point or to raise the issue, but your Honour will
22 remember that in your first decision on the Prosecution's first application to admit a
23 number of witnesses under 68(3), paragraph 14, your Honours remind the parties and
24 participants that - and I'll quote, if I may:

25 "It should be added at this point that introduction of prior recorded testimony under

1 Rule 68(3) of the Rules can in principle be considered an option on the spot for every
2 witness appearing before the Chamber, even if a request under Rule 68 of the Rules
3 had previously not been made."

4 That caused some alarm when we first read paragraph 14, and if I may, I mean, if
5 there were to be a situation where the Prosecution bring a viva voce witness,
6 unexpected viva voce witness for four hours, say, and your Honours say to the
7 Prosecution, "Well, we've read it. No. 68(3), crack on." And then, an hour later,
8 the Defence are going on be expected to cross-examine on evidence that is based
9 exclusively or almost exclusively on the witness statement. I can just envisage a
10 situation where that might catch us a little unaware.

11 So I wonder if we're misunderstanding in any respect at all what was meant by
12 paragraph 14.

13 PRESIDING JUDGE KORNER: [12:15:00] Yes. No, I understand the concern, can I
14 put it that way. I think, basically, we would be -- if we decided that a witness who
15 was up and coming was one that really didn't need to be called in full, it wouldn't be
16 on the day itself. We would consider-- we would give you advance notice. So I
17 think on the spot was simply a way of not making the ruling as we're doing -- the
18 rulings as we're doing at the moment, in advance.

19 Indeed, one of the things - and I'll make it clear - that I want to talk about and discuss
20 with you all tomorrow is, some of the witnesses that the Prosecution proposes to call
21 viva voce which on a reading, it seems to me, are worth a discussion as to whether
22 that needs to be so, but we obviously need to hear from the Defence as well. I say
23 tomorrow, because what we propose to do is after the longer adjournment and before
24 the end, I will give you a list of the witnesses at the moment to be called viva voce
25 who the Trial Chamber at the moment thinks possibly need not be. But in order not

1 to take either side by surprise, we'll deal with that tomorrow morning.

2 But that's -- sorry, going back to your question, "on the spot" does not mean literally
3 on the morning you are told that.

4 All right?

5 MR EDWARDS: [12:16:48] Yes, thank you very much.

6 PRESIDING JUDGE KORNER: [12:16:50] Yes, Mr Nicholls.

7 MR NICHOLLS: [12:16:51] Thank you. Just to foreshadow, we've been looking at
8 our viva voce list and trying to see where we believe, on a second look, there could be
9 conversions to 68(3). So we are working on that. We'll be ready to discuss it
10 tomorrow. And when we literally were working on that over the weekend and up
11 to this morning, and still trying to balance things, so we'll share that by email with the
12 Defence. It won't be an application, but at least the witness numbers and names of
13 the persons we're considering.

14 Just a last point I have to make. You know, I think if you -- if you have to
15 cross-examine a witness on exactly what he said in his statement, that's not catching
16 you unawares. I don't see how that can be prejudicial, because that is what you're
17 expecting when you've got this statement.

18 PRESIDING JUDGE KORNER: [12:17:45] Well, I think, Mr Nicholls, it's more a
19 question of you tend to think as counsel, particularly you've got another -- other -- a
20 number of other matters to do that, well, this is going to take four hours and so we
21 don't really need to get ourselves fully prepared until the end of the day.

22 But no, certainly, I would think it is most improbable - I won't say it will never
23 happen because that's always fatal - I think it's most improbable that we would tell
24 you on the day, "No, the witness can be Rule 68(3)" or whatever it is.

25 Yes, thank you.

1 PRESIDING JUDGE KORNER: [12:18:24] Yes.

2 Oh, sorry. Mr Laucci, yes.

3 MR LAUCCI: [12:18:29](Interpretation) Yes, Madam President, I would like to make
4 the most of this opportunity, the fact that you mentioned a few moments ago, the
5 principle according to which your Chamber had the intention to give a global
6 envelope to the parties for the examination of the witnesses. In order to draw your
7 attention in particular to an aspect of calculation of this envelope, the Office of the
8 Prosecutor has already made a number of requests under Rule 68(3), some of which
9 have already been admitted by your Chamber. So that means, naturally, that the
10 time of the examination-in-chief will be reduced either to nothing or to additional
11 questions that the Office of the Prosecutor has already indicated might want to do or
12 will want to conduct. So the duration of the cross-examination cannot depend on
13 whether there was a cross-examination viva voce or not.

14 Independently of that, I would also say that were we to have to base ourselves on the
15 written statements of the witnesses who sometimes are rather, you know, vast in
16 content, then the cross-examination will be the same duration or even extended.

17 I would specifically draw your attention to this point in the calculation of the global
18 envelopes. The time that the cross-examination needs and the equality of the time
19 given over to the Office of the Prosecutor in examination-in-chief cannot be the same.
20 So 68(3), the OTP is saying that it hopes to save time on examination-in-chief. Very
21 well, but that time must be calculated in the envelope of the Defence independently of
22 your decision as to whether yes or no the witness will be appearing under Rule 68(3)
23 or not.

24 PRESIDING JUDGE KORNER: [12:21:04] Mr Laucci, if I understood you correctly,
25 you say it wouldn't be fair - taking a figure out of the air - if we gave the Prosecution

1 200 hours for its case and then you 200 hours for your case. I agree.

2 The Defence will be given more time than the Prosecution because the Prosecution is
3 able to reduce the length of time by calling its witnesses under Rule 68, whichever it
4 is.

5 So you will get more time. All we're saying is that we're not going to allocate time
6 for each witness. So how -- how long you spend with each witness is for you to
7 decide given the overall - as you put it - envelope that you're going to be given of time.
8 Okay?

9 MR LAUCCI: [12:22:00](Interpretation) That indeed clarifies entirely my concern
10 and I thank you for that.

11 PRESIDING JUDGE KORNER: [12:22:04] Yes. Can I next turn to the expert report,
12 which thank you very much both of you for agreeing to it so that it is a joint
13 submission.

14 I haven't, unfortunately, because it only came in on Friday, had the opportunity to do
15 more than glance at it and we're taking it that it will be submitted. The witness will
16 effectively adopt his report and then be asked further questions. Is that what's going
17 to be intended?

18 Or to go through -- I mean, submitted and to go through or highlight those aspects of
19 the report rather than him being in full viva voce?

20 MR NICHOLLS: [12:23:02] Your Honour, Ms Mazzarella, who's just arrived, is
21 going to talk about the expert witness report. I hadn't anticipated this question,
22 sorry. I'm just trying to read it.

23 PRESIDING JUDGE KORNER: [12:23:18] Rather badly phrased, I'm afraid, but what
24 I meant is that it will be submitted under Rule 68(3) and we would expect the
25 Prosecution and/or the Defence to highlight those parts of the report or to ask

1 additional questions.

2 MR NICHOLLS: [12:23:35] Yes, I think we can -- we can follow that procedure. I
3 see Mr Laucci nodding. It would not be the full presentation, so I think we can work
4 out something like that between us.

5 PRESIDING JUDGE KORNER: [12:23:50] Yes.

6 MR NICHOLLS: [12:23:5 1] We've -- as we discuss it.

7 PRESIDING JUDGE KORNER: [12:23:50] Well, I mean, on the basis that we can all
8 read and would have read the report in advance. I seem to remember saying -- been
9 told that as counsel once, but anyhow.

10 Yes, the only other question I have, and it really arose as a result of observations of
11 trials, not only at this Court but also at other international criminal tribunals, is the
12 question of culture. And by that I don't mean religion and whatever, but the -- the
13 ability of witnesses to deal with questioning. In particular, part of this case, the
14 Prosecution say, is the use of derogatory language and the like.

15 Is the expert witness going to be able to deal in broader terms with the general
16 cultural background of the witnesses?

17 That's what I really want to know.

18 MR NICHOLLS: [12:25:06] I will turn that over to Ms Mazzarella.

19 PRESIDING JUDGE KORNER: [12:25:14] Right.

20 MS MAZZARELLA: [12:25:14] If I may, Madam President.

21 PRESIDING JUDGE KORNER: [12:25:15] Yes.

22 MS MAZZARELLA: [12:25:16] Mr de Waal's report is fairly extensive and it includes
23 information about -- in great detail, about the tribal composition of Darfur, the
24 difference between African and Arab tribes, the role of tribal leaders in the conflict.
25 And we believe that he largely addresses these points, although we can certainly

1 consider calling an additional expert on the specific topic.

2 PRESIDING JUDGE KORNER: [12:25:39] Yes, it's rather difficult, I appreciate, to do
3 this in the abstract. But as I say, my observations, and I'm sure my colleagues'
4 observations of trials like this, is that sometimes it appears there's an insufficient
5 appreciation by lawyers, whether they're counsel or judges, of a witness's demeanour
6 or the language used, or the like. And that's why I raise that at this stage. And as
7 Mr de Waal is going to be the first witness, whether he can deal with all this.
8 Yes, I think what I'll do is I'll leave that. As I say, I haven't had the opportunity to
9 read the report because we didn't get it till late on Friday. I'll read through it and
10 then if I think there's anything else that needs perhaps some -- we need assistance on,
11 we'll let you -- we'll let both sides know.

12 MS MAZZARELLA: [12:26:39] Certainly. Of course, we are -- we can liaise with
13 the Defence as necessary to identify a suitable expert, if you feel that Mr de Waal's
14 report does not cover the relevant points.

15 PRESIDING JUDGE KORNER: [12:26:49] Yes, thank you.

16 Right. Next, can we turn to the question of interpretation and the problems that
17 were raised way back in --

18 Oh, I'm sorry, Mr Laucci, yes?

19 MR LAUCCI: [12:27:04](Interpretation) I do apologise, Madam President, but in the
20 agenda that we received, the Chamber also wanted to call an expert witness on the
21 ethnic groups in Darfur, which we believe to be a question that is different from that
22 of the issue of culture and the cultural manner in which the witnesses can be brought
23 to answer questions.

24 I do not know whether the fact that you have not made mention of this means that the
25 question no longer seems to be topical to you. If that is the case, then I would find

1 that regrettable because I indeed wanted to rise to my feet and applaud this proposal.
2 To be very clear, if this is not an initiative of the Chamber, then probably it will be an
3 initiative on the part of the Defence.

4 PRESIDING JUDGE KORNER: [12:28:10] Yes, this all came up before we got the
5 report, as I say, late on Friday. And I understood that Mr de Waal was going to deal
6 With the -- that's why I didn't mention it now -- with ethnic groups. I mean, this
7 is -- obviously that's important, but I understood Mr de Waal could deal with this.

8 MR LAUCCI: [12:28:35](Interpretation) Indeed, Madam President, but let me be
9 more specific as to the specific subject of interest for the Defence, which is broached
10 by Professor de Waal indeed, but not to the extent that it would deserve to be so to
11 our taste. He might complete this information when he appears, but it is specifically
12 the tribal dimension and how the tribe as an institution positions itself with regard to
13 the authority of the government or any other local authority, how they position
14 themselves and how precisely the authority of the tribe and its chief comes across and
15 how one could analyze the consequences of a member of a tribe not following
16 decisions and instructions, for example. I don't quite know what to call them
17 because we are Westerners and I must say that the tribal element is somewhat
18 difficult for me or for us to understand and that's why I believe that light should be
19 shed on this in particular because, to our mind, it is important in this case.

20 PRESIDING JUDGE KORNER: [12:30:14] This wouldn't be something to do with
21 superior orders, would it?

22 All right. Well, Ms -- Mr -- can Mr de Waal, I'm looking at the index at the moment, I
23 don't see anything really in-depth about tribal matters.

24 MS MAZZARELLA: [12:30:36] There is a section towards the beginning of his report
25 that addresses the -- well, actually towards the middle as well, about tribal leadership,

1 the positions of sheikh, *agid al-ogada*, which is of course a central issue in this case, and
2 also the relationship between tribal leadership, known as native administration, and
3 the central government of Sudan.

4 So he does address these topics, but again we will -- we are open to exploring the
5 possibility of another expert.

6 PRESIDING JUDGE KORNER: [12:31:06] If you just indicate for me where we -- I
7 might just have a quick look at that for tomorrow, where we could find that. I mean,
8 I'll give you time.

9 MS MAZZARELLA: [12:31:22] Thank you.

10 PRESIDING JUDGE KORNER: [12:31:24] I'll move on to --

11 MS MAZZARELLA: [12:31:26] Allow me just a moment. Thank you.

12 PRESIDING JUDGE KORNER: [12:31:31] Yes. Thank you.

13 Yes, all right, we'll come back to that possibly this afternoon.

14 Yes, can we move then to the next item, which is the question for the Registry really,
15 of how we're going to be managing with interpretation. In other words, whether
16 there's going to be sufficient interpreters in the Fur and other local languages or any
17 issues that they can think of.

18 I don't know who's dealing with that from Registry.

19 MR ZANEN: [12:32:17] Yes, your Honour. Sorry.

20 With your permission, I'll start with your -- the point of situation languages first, the
21 most complex and challenging language in which we are requested to provide
22 interpretation services. And after I've explained what the issues are, I'll pass the
23 floor to my colleague, Josiane Do Rego, to talk about English, French and Arabic
24 interpretation.

25 So I'll address the issue of languages other than Arabic, English and French.

1 It's my understanding that Fur will indeed by the main language, the main situation
2 language in which interpretation needs to be provided in court at hearings. When I
3 say a situation language, in particular, Fur, it's not only a language of the situation, it's
4 also a language of lesser diffusion. Meaning a language which is regional, with very
5 few speakers, and spoken within a defined geographical area, and beyond that very
6 little. We find very little speakers. So this may illustrate a little bit also the
7 challenge in finding, not really interpreters, but potential candidates to become
8 interpreters because interpreters, and certainly court interpreters, simply do not exist.
9 They're not there. There are no schools for interpretation Fur-English or into
10 other -- into a language combination with Fur. There are no schools or academies to
11 teach that.

12 So like in other situations when we have a language like this, it befalls on the
13 language services to guide and prepare interpreters to do the best job possible and to
14 provide interpretation also at hearings.

15 Now, there's two ways to do that. Firstly, I must say I will probably mention some
16 issues that may -- that have to do with security and safety. So may I ask if we can
17 continue in public session, it will be very fairly general, but still maybe I should ask
18 you this question first, if we can continue in public session?

19 PRESIDING JUDGE KORNER: [12:34:33] Yes, unless you feel -- I mean, you're the
20 person who's in possession of the information; so I can't really -- we can't answer that.
21 I mean, do you feel this is information that needs to be said in private session? As
22 you know, it's better if we can do everything in public.

23 MR ZANEN: [12:34:46] Yes. Probably not. And I hope -- I hope I'm right in my
24 assessment. And you have to pardon me for my lack of experience of speaking in a
25 courtroom, it's also my daily bread and butter, but I'll do my best to explain the

1 issues.

2 Firstly, when there are no court interpreters, there is the option that -- and it is

3 stipulated in Regulation 68 of the Regulations of the Registry, that field interpreters

4 can provide interpretation in the consecutive mode, instead of court interpreters.

5 This is a solution when there is -- normally when there is relatively few witnesses that

6 would speak or give their testimony in Fur. We could prepare a team of field

7 interpreters, train them in house to facilitate hearings in the courtroom in Fur.

8 However, as I said, the first hurdle needs to be overcome to find the right potential

9 interpreters, the right candidates that can provide this service. Right now - and

10 we've made efforts throughout already from last year from a long time ago, together

11 with language services of the Office of the Prosecutor who have their own language

12 services, who have made similar efforts and we -- we join in these efforts to find

13 interpreters that can facilitate interpretation in the field to service missions, other

14 activities outside of this courtroom in which interpreters are needed. For that we

15 find interpreters and we train them in house, very short training.

16 At this moment, we have a very small pool of those so-called field interpreters ready

17 to provide services in face-to-face meetings in consecutive mode. That doesn't mean

18 they're ready to provide court interpretation services, but they can be prepared under

19 certain circumstances and certain conditions.

20 Now, our main challenge has been to expand this pool to have more interpreters,

21 because we don't have sufficient right now, has been that we have not been able to go

22 on a mission to Sudan.

23 As Director Mahr has explained, there has been restrictions for us to travel to Sudan.

24 Under normal circumstances the language services would have gone or would go on

25 a mission locally to recruit locally based interpreters, because that's where the

1 resource, the main resource are. A language such as Fur is mainly spoken inside the
2 country, and that's where you will find the most fluent speakers of the language that
3 could be trained to become interpreters, logically. We haven't been able to conduct
4 such a recruitment mission, certainly not after October last year.

5 And another consideration is, and I've mentioned it briefly and this is all I will say
6 about it, is the safety and security of interpreters themselves if they are locally based.
7 Interpreters that are based locally in Sudan have to be able to do their work in
8 circumstances that are safe and secure as well. This -- so far we do not have those
9 assurances, so we have not been able to recruit or have not proceeded to recruit or
10 deploy field interpreters locally. So this limits us in our ability to expand our pool.
11 There are also some potential interpreters that are elsewhere that we can find, and
12 we've made consistent efforts to -- to find that pool as well, to address that pool of
13 potential candidates.

14 There are also limitations there, because we're not just looking for speakers of the
15 language, but actually people that are able and have the potential skills to interpret.
16 And there's more to interpreting than just knowing the language, as interpreters will
17 know. They need to be -- they need to have some capacity for that. So what we do
18 is we -- we do conduct interviews, we do conduct a language test, and then there is
19 also, again, the element of a personal security clearance that potential candidates need
20 to -- need to pass.

21 Now, we have been conducting such exercises, recruitment interviews, tests,
22 submitted them to security for vetting. And the vacancy announcement -- actually,
23 the joint vacancy announcement for field interpreters is still up, it's still public. So
24 the conditions are also mentioned on the vacancy announcement, where you
25 can -- where you can see them.

1 Unfortunately, it has not generated at this time sufficient interpreters to conduct a full
2 training to prepare interpreters to provide interpretation in court. When there are
3 many, many Fur-speaking witnesses, and our impression is that there will be more
4 than just a few, then it's necessary to have a longer training. In other cases, what we
5 do is we have a six-month training to prepare a booth of so-called paraprofessional
6 interpreters. But it all starts with the potential, it all starts with interpreters that may
7 be -- may have the aptitude to be trained to interpret eventually simultaneously in
8 court. This is a much longer investment in time, and other resources, and
9 commitment, but if there is many witnesses, if -- if Fur will be a language that will be
10 much use in the Court, this is the only way, I think, to facilitate, to have it facilitated.
11 My last point that I will mention before I'll hand over to my colleague Josiane, who is
12 an expert in court interpretation, as such, is that when interpreters are called to
13 provide interpretation for Fur-speaking witnesses, there's also an issue, potential
14 issue, of scheduling, meaning that we need a -- we would need a minimal of three
15 field interpreters who would then do the consecutive interpretation at the hearing,
16 but it is very likely that the same field interpreters will be asked to provide
17 interpretation in face-to-face meetings before and after hearings, such as -- such as
18 assessments that the -- that the Victims and Witnesses Section need to make. There
19 can be all kind of meetings before and after a hearing. So it should take in -- to be
20 taken into account that when there is one witness for which Fur needs to be
21 interpreted, that I would ask there to be some time in-between two witnesses that
22 speak the same language in this case to make sure that also the -- the other activities
23 outside the courtroom can be facilitated, probably by the -- by the same field
24 interpreters, just because of the lack -- the lack of resource. We -- I'm not confident
25 that we'll -- that we'll end up with a large list of field interpreters in which one can

1 substitute another. We will depend on a limited number of individuals to provide
2 this service.

3 So I hope I have explained the -- the limitations and the challenges, but of course the
4 language services are extremely committed to -- to do the best that we can, also
5 together with the language services of the Office of the Prosecutor, to find more
6 resources, however limited they are.

7 PRESIDING JUDGE KORNER: [12:42:30] Before you sit down, just going back to the
8 question of training. Six months is what you would require for them to be trained to
9 be simultaneous interpreters; is that right?

10 MR ZANEN: [12:42:39] That's right.

11 PRESIDING JUDGE KORNER: [12:42:43] So the training required for them to do
12 consecutive interpretation wouldn't take anything like as long?

13 MR ZANEN: [12:42:51] No. It would take -- it's less long. We still need -- well,
14 we usually ask for a lead-up time of six weeks, but the consecutive, as it is done in
15 other trials, even as -- as trials that are ongoing right now, we work with field
16 interpreters that are -- that are prepared or trained about two to three weeks before, in
17 which they are made familiar also with terminology and how to interpret in -- in a
18 courtroom setting. And this is done consecutively. It does of course add up to the
19 time that their testimony takes. You may need to calculate an additional 30 per cent
20 of the time, so it goes a bit -- a bit slower. It is possible. But as I said, when you
21 have -- this is a bit of an exception to the rule. If there are many witnesses, this may
22 not be the best course of action, because also, since we work with freelance field
23 interpreters unless we have in-house staff, we need to count on their availability.
24 They are not necessarily available throughout the year. The people that we work
25 with as field interpreters usually have other jobs or commitments. They will not

1 wait for the Court to call them unless we have this commitment.

2 So these are some of the issues that we may also come across, that it's a matter of
3 availability. You may find the right person, but the right person might not be
4 available at the right time. So it's -- the scheduling is -- is very complex, I think, in
5 this.

6 PRESIDING JUDGE KORNER: [12:44:26] Well, you said that you need a minimum
7 of three, but do budgetary considerations allow you to employ a lot more?

8 MR ZANEN: [12:44:35] Maybe -- maybe my colleague -- I will pass on to Josiane.

9 PRESIDING JUDGE KORNER: Yes.

10 MS DO REGO: [12:44:42](Interpretation) Thank you, your Honour. The
11 composition is three interpreters each time for the normal standard languages, the
12 situation languages, which is English, French, and Arabic in this particular case, it's
13 three interpreters per booth.

14 But for situation languages you need four, because they have to go back into
15 their -- return -- original language. If they've received the training of six months,
16 after that training they are regarded as interpreters which can be in the booth and
17 there have to be four of them.

18 In the case of consecutive, the ideal number is three because they have to relay and it
19 takes more time and effort and, therefore, they need to have three interpreters at all
20 times. The problem is that when we talk on a budgetary question it's something
21 that's rather tricky, so we'll have to review what we can do to make quite sure that
22 there is training for the interpreters within that framework.

23 As regards English, Arabic and French, the section can provide the services because
24 we have the necessary interpreters to do that.

25 I hope I've answered your questions.

1 PRESIDING JUDGE KORNER: [12:46:08] Yes. Sorry, the question I pose, though,
2 is because of your colleague raising, rightly, that if there are only three Fur
3 interpreters, one of them has got to go off and be used for the Victims and Witnesses
4 Unit to speak to them, or -- I assume the OTP has got it's own interpreters, or even the
5 Defence if they want to interview the witnesses.

6 So what I'm asking is whether, apart from three basic, you can employ -- well, I
7 would say at least double that number.

8 MS DO REGO: [12:46:50] Yes, apart from those three -- apart from those three we
9 can request -- we can hire a language assistant who will be dealing with the request
10 coming from VWS, for instance.

11 PRESIDING JUDGE KORNER: [12:47:08] Right. So they don't need to be
12 interpreters. They're just -- they're just -- well, they do need to be interpreters
13 because they're -- they're going to be interpreting what they're being asked.

14 All right. It doesn't -- it doesn't look like it's a very great situation at the moment.

15 MS DO REGO: [12:47:23](Interpretation) Unfortunately, not.

16 PRESIDING JUDGE KORNER: [12:47:33] Right.

17 Mr Nicholls, have you any idea how many of your witnesses you propose to call are
18 able to speak Arabic, as posed to simply Fur or whatever the other local language is?

19 MR NICHOLLS: [12:47:53] Yes, we do. I'll turn that over to Mr Do Duc. And I
20 think he will explain we -- we haven't been a hundred per cent sure on every witness,
21 of what their -- what their -- even if they speak Arabic and Fur, which one they will
22 want to testify in. But we do have some figures and I'll turn it over to Mr Do Duc.

23 PRESIDING JUDGE KORNER: Thank you.

24 MR DO DUC: [12:48:15] Thank you, Madam President.

25 As of today there are about 102 Prosecution witnesses who will testify before the

1 Chamber. And the Prosecution has confirmed as a preferred languages for 86 of the
2 witnesses and can inform the Chamber that they will testify in one of the three
3 languages, via English, Arabic and Fur. And specifically, five witnesses will testify
4 in English; 54 witnesses will testify in Arabic, and one witness will testify in Arabic
5 Sudanese. I am not a hundred per cent sure what is the difference between Arabic
6 standard and Arabic Sudanese, but I believe there's something to do with the dialect
7 or accent. And 21 witnesses who will testify in Fur.

8 So the Prosecution still in assessing about 16 witnesses the preferred language.
9 However, it is likely that the witnesses will testify in one of the three languages that
10 has been identified.

11 So if the --

12 PRESIDING JUDGE KORNER: [12:49:32](Microphone not activated)

13 MR DO DUC: Thank you.

14 PRESIDING JUDGE KORNER: [12:49:29] All right. Well, then it seems to me,
15 Mr Nicholls, that if at all possible, from what the Registry say, it would help if you
16 can intersperse a witness speaking Fur with one who speaks Arabic. I don't know
17 whether it's possible, but it does look as though it's going to cause problems
18 otherwise.

19 MR NICHOLLS: [12:49:51] Yeah, we will -- I mean we will look at it, Judge, and
20 work with everybody. I mean, I've got to say -- I mean, you know --

21 PRESIDING JUDGE KORNER: [12:50:00] You needn't say it. Thank you,
22 Mr Nicholls.

23 MR NICHOLLS: [12:50:03] I mean, you know, we know where the suspect is from,
24 we know when he surrendered. And anyway, we'll work on it.

25 PRESIDING JUDGE KORNER: [12:50:09] All right. Yes.

1 Mr Laucci, anything you want to say?

2 MR LAUCCI: [12:50:19](Interpretation) We have nothing to add.

3 Perhaps a small question relating to another language, which is Masalit. I don't
4 know if there are provisions that have been made for that other language.

5 PRESIDING JUDGE KORNER: [12:50:35] Masalit hasn't been mentioned as part of
6 the languages. Is it one of the languages that's going to be used?

7 MR DO DUC: [12:50:46] Your Honour, at the moment I can confirm that we don't
8 have any witnesses who will testify in Masalit, so we only have three languages that
9 the witness will testify.

10 PRESIDING JUDGE KORNER: [12:51:00] Well, that's your -- that's your answer so
11 far, Mr Laucci.

12 All right. Is there -- are there any other issues that anybody can see?

13 Oh, yes, Ms von Wistinghausen.

14 MS VON WISTINGHAUSEN: [12:51:14] Yes, just briefly. I'm just using the
15 opportunity because we're talking about interpretation and I would just like to ask the
16 Trial Chamber to reconsider the possibility for my colleague, Mr Abdalla, to receive
17 Arabic interpretation when he is in the courtroom.

18 My understanding is that the accused is provided of course with Arabic interpretation,
19 and I think it should actually only be a technological issue that the Arabic
20 interpretation also arrives in this little device here in front of me and in a headphone,
21 which would make it easier for my colleague to follow, even though his English is
22 very good, but also if he wanted to stand up and make submissions, I think it would
23 only be fair to give him the opportunity to speak in Arabic, given that Arabic
24 interpretation is provided for, in any event, for the accused.

25 So maybe this is more a technical or a logical matter. I just -- and maybe we

1 don't have to resolve this now, but I would like the Trial Chamber to reconsider the
2 position regarding --

3 PRESIDING JUDGE KORNER: [12:52:28] Just so that we're all clear, he's co-counsel;
4 is that right, Ms von Wistinghausen?

5 MS VON WISTINGHAUSEN: [12:52:40] Well, we've been appointed as common
6 legal representatives of victims. This is what your decision says, but you've referred
7 to me as lead counsel several times. Internally -- well, I don't know if that's -- if
8 that's so important. Of course, he has the right to audience and should have the
9 possibility to make submissions whenever he considers it to be appropriate.

10 PRESIDING JUDGE KORNER: [12:53:03] Well, not exactly, no. It does make a
11 difference because it means, in theory, both of you could speak on the same topic,
12 which doesn't happen. I mean, in the sense of making separate submissions. Do
13 you see? Whereas, if he's co-counsel, then, effectively, you as lead counsel lead,
14 unless you're not here or you hand it over to him. But not two of you speaking at
15 once on the same topic, that's what I mean.

16 MS VON WISTINGHAUSEN: [12:53:42] No, no, no. This is not what I mean either.
17 It's just -- you know, I mean, I've been co-counsel before, and, of course, I was allowed
18 to speak in the courtroom whenever lead counsel deferred a witness or whatever
19 topic to me. And I think -- I mean, we're working as a team. So, of course, he
20 should have the possibility to address the Trial Chamber just as I do, and as my
21 associate counsel Mr Shah will do.

22 PRESIDING JUDGE KORNER: [12:54:06] Yes. But what I mean is, you don't -- I
23 want this to be absolutely clear, and it's rather odd that in the victim and
24 witnesses -- victim representation - sorry - there isn't any distinction. What I'm
25 anxious to avoid is duplication of submissions. So it's one or other of you on

1 whatever the topic is, or one or other or the third on whatever the topic is. Not two
2 of you.

3 MS VON WISTINGHAUSEN: [12:54:43] Well, I would suggest that's independent of
4 the language because, I mean, I make submissions mostly in English and Mr Shah will
5 do as well. And, of course, there will be no duplication. It's just a question, really,
6 of interpretation and giving him the opportunity to -- yes, to address you with the
7 same ease as I'm trying to do it.

8 PRESIDING JUDGE KORNER: [12:55:08] Well, I won't -- I mean, so far -- I may as
9 well ask Mr Abdalla directly and then we'll adjourn.

10 Mr Abdalla, is it your intention to appear in court, as it were, physically in The Hague,
11 or is it your intention to do all of this by video link?

12 Did you hear that?

13 MS VON WISTINGHAUSEN: [12:55:44] I think he's muted, Madam President.
14 You need to unmute.

15 PRESIDING JUDGE KORNER: [12:55:46] You're on mute, Mr Abdalla.

16 MR AMIN ABDALLA: [12:55:52] Good afternoon, Madam President. Thank you
17 for let me to talk about my situation. I have a problem for COVID-19. This is a big
18 reason -- the main reason for I can't to participate for this session physically in
19 The Hague, and I prefer to participate by remotely. This is the big reason.

20 PRESIDING JUDGE KORNER: [12:56:30] I'll really sorry. It was very difficult to
21 hear or understand. You're breaking up. I understand at the moment that -- I'm
22 assuming in Egypt, that COVID is still very rife. But once matters, if they have
23 returned to normal, is it your intention to attend in court, to personally be here, or are
24 you going to ask that you do everything via video link?

25 MR AMIN ABDALLA: [12:57:09] I will do it -- in the next session, I will participate

1 in The Hague.

2 PRESIDING JUDGE KORNER: [12:57:31] Yes. Thank you very much.

3 MR AMIN ABDALLA: [12:57:35] Thank you.

4 PRESIDING JUDGE KORNER: [12:57:36] All right. Well, as I say, unless there is
5 anything else, we'll consider what you've said, Ms von Wistinghausen, about -- about
6 Arabic.

7 MS VON WISTINGHAUSEN: [12:57:44] Yes. Actually, I'm just realising, which I
8 hadn't seen before, is that Arabic translation is actually arriving on this little device
9 and into the headphones. So the issue would rather be to interpret what Mr Abdalla
10 would say if he attended the hearing and wanted to make submissions or ask
11 questions. So I think it's probably, really, just a technical matter.

12 PRESIDING JUDGE KORNER: [12:58:11] As I say, we'll -- we'll reconsider that.
13 All right. Yes. Well, a number of other matters. What we'll do is we'll adjourn
14 now until -- oh, we're not sitting this afternoon. Are we sitting? We are sitting this
15 afternoon. 2:30, is it? Thank you.

16 Yes. We'll adjourn now until 2:30 this afternoon. We will use the adjournment to
17 consider the various submissions made to us this morning by Mr Laucci on the
18 application for leave to appeal, and we will, as I say, give an oral ruling this afternoon.
19 We also will leave time for an ex parte application at the end of the afternoon.
20 How long do you think that's going to take?

21 MR LAUCCI: [12:59:22](Interpretation) I'm not sure. Was your question that we
22 will talk about the request for cooperation?

23 PRESIDING JUDGE KORNER: [12:59:36] Well, yes, the actual specifics thereof I
24 want to go through with you. So -- I mean, my best guess, would it be about half an
25 hour or so?

1 MR LAUCCI: [12:59:49](Interpretation) I don't really know what the Chamber
2 intends to ask me by way of clarification for -- as regards my submission, so it's a bit
3 difficult. But we are happy to answer all questions you have.

4 PRESIDING JUDGE KORNER: [13:00:08] I think Mr Edwards may give you some
5 indication of what I mean to ask. My questions this morning to you about matters of
6 principle and what you've asked the Prosecution for.

7 MR LAUCCI: [13:00:21](Interpretation) Oh, yes, fine. Yes, I think half an hour
8 should be in order to solve the questions.

9 PRESIDING JUDGE KORNER: [13:00:31] Well, in that case -- and we have to leave
10 enough time for the -- how long does that normally take, to go into -- in order for the
11 Court to be cleared? Forty minutes? All right.

12 Okay. In which case, we've got about an hour and a quarter -- no. Sorry. We
13 have about an hour or so, an hour and a bit after lunch. All right.

14 MR EDWARDS: [13:01:02] Your Honours were kind enough to indicate that the
15 Defence could orally respond to a number of 68 motions. Can I assume that we'll be
16 dealing with that tomorrow?

17 PRESIDING JUDGE KORNER: [13:01:13] Yes. I think we'll deal with that
18 tomorrow. We'll deal with our ruling on that. I want to deal with -- and the experts,
19 if somebody can give me the pages of the report.

20 MS MAZZARELLA: [13:01:28] If now suits you, I can provide some paragraphs --

21 PRESIDING JUDGE KORNER: [13:01:30] Yes.

22 MS MAZZARELLA: [13:01:31] -- from the report.

23 PRESIDING JUDGE KORNER: [13:01:32] Yes, please.

24 MS MAZZARELLA: [13:01:33] If I could draw your attention in particular to
25 paragraphs 37 to 47 of the report. In paragraph 40, Mr de Waal addresses the

1 question of -- there's a racial epithet that he refers to there. It should give some
2 context. It means in Arabic, standard Arabic, "blue". But in Sudanese, Darfuri
3 Arabic, it means -- it refers to someone with black skin, and he captures that nuance
4 very nicely.

5 He -- in paragraphs 48 to 49, he explains the Defence's --

6 PRESIDING JUDGE KORNER: [13:02:04] You needn't -- what I just wanted to deal
7 with is, firstly, the issues raised by Mr Laucci about tribal hierarchy, I suppose it is.

8 MS MAZZARELLA: [13:02:16] Sure. Certainly.

9 The relevant passage then would be paragraphs 54 to 67. And in particular, he
10 addresses *agid al-ogada* there, but that should cover your primary concerns. Also,
11 paragraphs 68 to 47, about tribal reconciliation mechanisms.

12 PRESIDING JUDGE KORNER: [13:02:38] 68 to what?

13 MS MAZZARELLA: [13:02:39] Sorry. Paragraphs 68 to 74. Sorry.

14 PRESIDING JUDGE KORNER: [13:02:41] I do the same thing, transpose numbers.

15 MS MAZZARELLA: [13:02:45] Reading too quickly.

16 Those -- those are the most relevant passages in his report.

17 PRESIDING JUDGE KORNER: [13:02:50] Yes, thank you very much. Yes. All
18 right. We'll adjourn until 2:30. Thank you.

19 THE COURT USHER: [13:02:54] All rise.

20 (Recess taken at 1.02 p.m.)

21 (Upon resuming in open session at 2.36 p.m.)

22 THE COURT USHER: [14:36:48] All rise.

23 Please be seated.

24 PRESIDING JUDGE KORNER: [14:37:52] We dealt with interpretation as far as we
25 can go with that. Yes.

1 I'm just wondering whether we ought to perhaps move down fairly quickly, as I think
2 it will be quickly, of the stages of victims' applications. Because I see that
3 Mr Ambach is in court. So perhaps you can just tell us.

4 MR AMBACH: [14:38:28] Thank you very much, your Honour. Good afternoon.
5 Very briefly, on the status of victim applications, we are looking at currently 142
6 participating victims as per the Chamber's decision of 14 January. That's decision
7 number 556.

8 Since that last submission, we as Registry have continued our efforts and work with
9 our interlocutors in the field following up on the foundations that we had laid during
10 our -- in particular, our last mission. This has led to the receipt of yet a couple of
11 applications that will be submitted to the Chamber in due course, after legal scrutiny
12 and translation, obviously, from Arabic into English.

13 Similarly, the Registry has been engaging with the legal representatives on the 21
14 remaining applications that still remained, also as per the decision of 14 January, to be
15 further assessed and verified before a decision can be -- a solution can be proposed to
16 the Chamber of these.

17 Progress in the field has been, therefore, made, yet in small steps. We are all aware
18 of the events as they unfolded in particular since September and as has been
19 discussed already this morning. It has been, therefore, very challenging for the
20 Registry to build on the groundwork that it had laid in -- during its last mission, that
21 is, particularly so since follow-up missions have not been able to go through. I
22 understand that this may change soon, which is really my hope and desire.

23 Also, however, other means of communication have been very problematic, that is,
24 Internet access and accessibility. That is, even the possibility to have access to phone
25 or other networks, partly also because interlocutors of ours had to provide for their

1 own security, which may have meant physical change of location which made all the
2 interaction more difficult. As a result, relevant trainings and other, in particular,
3 logistical arrangements have yet to be finalised in order for the system to really yield
4 the successes that we have been hoping.

5 This is compounded by a temporary resource issue that we're facing through the
6 departure at the end of last year of a staff member with specific language capacities,
7 which, however, we are dealing with expedition. This absence has obviously also
8 impacted on our ability to quickly communicate.

9 Now, that being said, the next report to the Chamber will, therefore, be issued in due
10 course with a smaller number of applications. We're hoping that in the meantime
11 we'll be able to ramp up our efforts in the field and with the field so that we will have
12 forthcoming bigger reports and live up to what we had previously suggested, because
13 the victim numbers overall, as we had submitted previously, remain the same.

14 PRESIDING JUDGE KORNER: [14:42:26] Yeah. All right.

15 Ms von Wistinghausen, anything you want to ask about anything, about numbers, or
16 further victims?

17 MS VON WISTINGHAUSEN: [14:42:37] No, Madam President, I don't need to ask
18 anything. We've been communicating before, so I'm -- I'm up to date.

19 PRESIDING JUDGE KORNER: [14:42:44] All right.

20 So it seems as though it doesn't look as though there are many more that are going to
21 be applying to be added, certainly not at this stage.

22 MR AMBACH: [14:42:58] Your Honour, in the immediate future, it's not going to be
23 in the hundreds.

24 PRESIDING JUDGE KORNER: [14:43:03] No.

25 MR AMBACH: [14:43:04] But, obviously, we'll have to see how the future unfolds.

- 1 PRESIDING JUDGE KORNER: [14:43:07] Well, quite all very unhelpful. All right.
2 Which brings me onto, really, a secondary aspect, and this is the cutoff date to submit
3 the victims applications, Ms von Wistinghausen. You suggested the end of the
4 evidence. I think the general rule is, and is likely to become part of the conduct of
5 proceedings, it's really going to be the end of the Prosecution case.
6 What I'm going to say at the moment is -- having discussed this with my fellow
7 Judges, we're going to say that any victims joining or seeking to join will have to be
8 done by the end of the Prosecution evidence. But we are going to leave a loophole, if
9 you like, so that if something or somebody or more than one somebody emerges
10 between the end of the Prosecution case and the end of the evidence in the case, it
11 won't be an automatic denial. Consideration will be given. But by and large, I
12 think the rule is going to be end of the Prosecution evidence.
- 13 MS VON WISTINGHAUSEN: [14:44:31] Well, of course, we were hoping to
14 convince you otherwise.
15 Well, actually, really, given the circumstances of this very specific case and the
16 difficulties that we have given the -- the security situation but also the pandemic, to
17 contact our clients of further victims, we would have hoped to convince you that a
18 final submission deadline could also be or should maybe be the end of the Defence
19 case. But, I mean, I hear what you're saying.
20 Maybe an additional argument that would help you to be very generous in the
21 loophole that you're proposing is that we have adopted -- or you have adopted the
22 A-B-C Approach. So that I think that also the prejudice that would be caused to the
23 Defence would be minimal.
- 24 PRESIDING JUDGE KORNER: [14:45:21] Yes.
- 25 MS VON WISTINGHAUSEN: [14:45:22] So if that could be taken into consideration,

1 yes. And, as I say, a generous approach could be taken if we brought in -- or if we
2 wanted to bring other victims, then we would be grateful.

3 PRESIDING JUDGE KORNER: [14:45:34] Yes. Well, as I say, it's likely this is going
4 to become a standard procedure. But for the moment, because I know there have
5 been differences in Trial Chamber approaches, what we're saying, we prefer the one
6 that's says the end of the Prosecution evidence, but we will not close the loophole.

7 Yes. Thank you.

8 All right. Thank you very much.

9 Oh, sorry. Mr Laucci, yes.

10 MR LAUCCI: [14:46:00](Interpretation) A comment on this approach. We

11 understand, because of the A-B-C Approach, there is maximum prejudice to the

12 Defence, but that's not what I actually wanted to come back to on.

13 Before we talk about the cutoff date, perhaps I could have a small clarification from

14 the Registry. Although I think I know what the reply will be, I would like to have it

15 confirmed. The forms being used for the applications are the common forms for

16 participation and reparation, or are they only for participation?

17 MR AMBACH: [14:46:57] I permit myself to take the floor.

18 Indeed, the forms that we're using are the combined forms as they are accessible on

19 the Internet. So combined participation reparation forms.

20 MR LAUCCI: [14:47:14](Interpretation) Thank you.

21 Well, in that case, the Defence position on this point -- and I would like to express the

22 reserve is much based on the approach that's been taken. The Defence position is

23 that these forms, which are combined, including participation and reparation, must

24 all be communicated to the Defence and to the OTP before the start of the trial on

25 Rule 94(2) of the Rules of Procedure and Evidence. That means that they have to

1 have been received before the trial starts and must be communicated to the parties.

2 And this is set out in Rule 94(2) clearly.

3 As said, the prejudice would have been different and less without the A-B-C

4 Approach, and we could have been more flexible in that case, but that is not the case.

5 So --

6 PRESIDING JUDGE KORNER: [14:48:47] Mr Laucci, I'm so sorry, but just so we

7 have got the right section. You say 94(2).

8 MR LAUCCI: [14:48:52] 94(2), indeed.

9 PRESIDING JUDGE KORNER: [14:48:55] Which says:

10 "At [the] commencement of trial and subject to protective measures, the Court shall
11 ask the Registrar to provide notification of the request to the person or persons named
12 in the request or identified in the charges and, to the extent possible, any interested
13 [parties] or any interested States."

14 Yeah. I see. I see. So any interested parties, obviously, you say, includes the
15 Defence.

16 MR LAUCCI: [14:49:32] Well, even more so, the person identified in the charges,
17 yes.

18 PRESIDING JUDGE KORNER: [14:49:41] Yes, I see. Sorry, my fault. As I already
19 made clear this morning, this is not something which I'm very familiar with.

20 MR LAUCCI: [14:49:51](Interpretation) So -- well, given the situation, this
21 announcement is liable to have a significant impact on the possibilities for
22 participation and reparation by the victims. So there is a small clarification which I'd
23 like to have from the Registry if at all possible.

24 You said that so far 142 victims have participated so far. You said that there will be
25 a couple more applications to work with the LRV on 21 remaining applications.

1 Apologies to the interpreters for mixing languages.

2 So you have a further 21 requests for participation. And the difficulties in the field
3 caused by the coup of 25 October have meant that it'd been difficult to achieve any
4 further progress.

5 So, having said that, I seem to recall that on 12 November, at the second status
6 conference, 12 November, which you will surely agree is after 25 October, you said
7 that there were likely to be 600 and 800 requests in -- at the beginning of 2022.

8 So this was on 12 November 2021, page 18 of the transcript, lines 17 to 20, and this
9 was part of the discussion about the appropriate nature of the A-B-C Approach.

10 And given the arguments chosen by the Appeals Chamber in its judgment on Said
11 (phon) on this case, the number of expected victims was an important element to
12 convince the Chamber to maintain the approach called A-B-C Approach, but we're
13 not at the end of the first quarter of 2002.

14 PRESIDING JUDGE KORNER: [14:52:47] Are you asking -- is what you're leading
15 up to is you want us to reconsider the A-B-C Approach? Because if not, then -- then
16 I'm not sure -- sure where we're going with this.

17 MR LAUCCI: [14:52:59](Interpretation) Madam President, I don't want to put the
18 cart before the horse, but in contrast to the information given to us by the Registry on
19 12 November, the number of victims is not of the level we were expecting and so this
20 might call into question the decision to adopt this approach, the A-B-C Approach and,
21 therefore, it is a factual basis on which it could be reconsidered.

22 PRESIDING JUDGE KORNER: [14:53:47] The simple answer to my question, Mr
23 Laucci, was yes. I don't think you've reached that stage at the moment. As we've
24 already been told, there's a mission going down there and no doubt that will either
25 change things or not change things.

1 MR LAUCCI: [14:54:06](Interpretation) In that case, thank you. I will await the end
2 of the quarter and I, therefore, will give notice of the approach of the Defence for this
3 consideration and in order to be able to base myself on more information.

4 PRESIDING JUDGE KORNER: [14:54:37] Yes, thank you very much. Well, we'll go
5 back. Thank you. I just thought we would deal with that so Mr Ambach doesn't
6 stay, unless he wants to.

7 Right. Agreed facts.

8 Now, some have been filed. Are there more that are going to be agreed between the
9 parties and, if so, when can we expect to receive them?

10 MR NICHOLLS: [14:55:12] I would hand that over to Ms Mazzarella, your Honour.

11 PRESIDING JUDGE KORNER: Right. Ms Mazzarella.

12 MS MAZZARELLA: [14:55:17] Hello. We -- of course the parties have agreed on
13 the selection of an overview expert witness, but in addition to that we're still in the
14 process of agreeing facts that were not agreed prior to the confirmation of charges.
15 These are -- these relate to the contextual elements of war crimes and crimes against
16 humanity. The Defence has kindly provided counter proposals quite some time ago
17 actually, but we're still reviewing those and looking to finalise them. We should be
18 in a position to do so immediately following the status conference.

19 PRESIDING JUDGE KORNER: [14:55:44] Yes. Well, this -- this leads me really to
20 what is, I think, a major question which is really one for Mr Laucci to deal with.

21 Mr Laucci, as we understand it from your various filings, particularly in regard to the
22 Rule 68 witnesses, your Defence is that, as you've indicated right from the start and
23 throughout some of these hearings, that your client, Mr Al-Rahman, Abd-Al-Rahman,
24 is not the man referred to as Ali Kushayb, and that any evidence that purports to
25 identify him as such is mistaken.

1 But if that is your Defence, then why is it that the Prosecution need to call a lot of
2 witnesses dealing with the same incident when effectively your Defence is "not me"?
3 In other words, why can't the crime base, the crimes themselves as opposed to those
4 who say the witnesses who identify you or purport to identify you as the man going
5 by the name Ali Kushayb, why does all that evidence need to be gone into? Why
6 can't it be agreed?

7 MR LAUCCI: [14:57:37](Interpretation) Madam President, I'm pleased to have the
8 opportunity to answer this question, which will be part of the Defence brief in March,
9 in greater detail. I will give you now a brief reply. You are correct when you say
10 that the fact that Mr Abd-Al-Rahman is not and never has been the individual known
11 as Ali Kushayb is a central element of our Defence. Clearly, this is one of the two
12 elements developed during the confirmation of charges hearing, a capital element, but
13 there are others as well. Some were mentioned during the confirmation of charges
14 hearing.

15 During that hearing, we did not go into detail in terms of the facts and crime scenes
16 that were mentioned in the charges, but the fact that we didn't do it during that
17 hearing because we felt that those were not the most appropriate elements to look at
18 given the standard of proof required at that side. Now that we're moving towards
19 the trial and we are looking at the charges to achieve proof beyond all reasonable
20 doubt or not, we are going to contest the charges, the crime scenes, and the facts as
21 the Prosecution claim that they occurred.

22 Mr Abd-Al-Rahman not being Ali Kushayb is a central element of the Defence, but
23 there are other elements and it is a particular element of this case where the accused
24 says "I am not the person covered by the charges." That is most original. But it's a
25 case file like any other and the Defence will present arguments regarding the charges

1 during the trial.

2 PRESIDING JUDGE KORNER: [15:00:26] Yes. All right.

3 So if I understand you correctly, as you point out, the main part of your Defence is
4 you are not -- Mr Al-Rahman is not the same man as Ali Kushayb, but equally you
5 say you want to test the evidence regarding the crimes themselves and -- or based on
6 what the witnesses themselves say, presumably.

7 MR LAUCCI: [15:01:10](Interpretation) My colleague will provide you with a
8 response to that.

9 PRESIDING JUDGE KORNER: [15:01:19] Yes, Mr Edwards.

10 MR EDWARDS: [15:01:21] There's an element of not pointing all one's eggs in one
11 basket, but there certainly will be witnesses, there have been already, in fact, that
12 we've been prepared to agree, pure crime base witnesses who talk nothing -- who talk
13 about nothing but the crime base in -- in the purest terms.

14 In terms of the witnesses that we've been studying for the purposes of
15 these -- specifically for these 68 -- Rule 68 litigation, our experience has been that
16 almost all have been talking about -- have been providing evidence about matters
17 other than, as it were, pure crime base, because they talk about matters which do go
18 to the heart of the case, such as what is -- who were the Janjaweed, what was the
19 relationship between the Janjaweed and the Sudanese Armed Forces, for example.

20 To what extent is this fairly confusing state of affairs about which there is a great deal
21 of debate amongst commentators, to what extent is it confusing, to what extent is it in
22 fact very clear. And we are exploring that as best we can, bearing in mind - and I
23 hate to go back to it, but I think I'm bound to - bearing in mind the very real
24 difficulties we've been having in terms of being able to investigate on the ground in
25 Darfur.

1 Had things been as ideal as they might have been 12 months ago, for example, we
2 may have been in a better position to give a clearer answer to your Honour's question,
3 but I'm afraid we are where we are.

4 PRESIDING JUDGE KORNER: [15:03:44] Well, I think, Mr Edwards, what I'll do
5 now is I raise it simply in the context of agreed facts. We may discuss this a little bit
6 more tomorrow when we deal with your responses to the Rule 68 requests. That
7 will -- that will also give you overnight to think about it.

8 At the moment I simply raise it on the basis that, obviously, anybody who purports to
9 identify your client, or anybody who deals with, if I can put it, the relationship
10 between the Government of Sudan Forces, the Janjaweed, and the rest. I fully
11 appreciate that you would want to test that.

12 I'm simply concerned with whether or not witnesses, viva voce ones who obviously
13 will take longer to call, could be taken a great deal more shortly if their descriptions of
14 what actually happened at the crimes is not in dispute.

15 So I mean I'm -- that's why I'm raising it now, so -- because timing is obviously a
16 matter of some importance.

17 MR EDWARDS: [15:04:43] Yes. Well, two things.

18 Firstly, specifically about the agreed facts, there has been - and I'm sure my learned
19 friends would agree - that there's been a great deal of communication and quite
20 sterling cooperation, if I may say so, between -- between the Prosecution and the
21 Defence about agreed facts. Every time they've proposed something we have looked
22 at it very carefully, and I think we've been fairly sensible in terms of our approach.
23 Similarly, we have proposed agreed facts that have been assessed carefully by -- by
24 the other side. And indeed there were, I think as was raised a moment ago, there
25 were a number of proposed agreed facts from the Prosecution that were -- that

1 couldn't be agreed by the Defence about ten months ago or more, that we've gone
2 back to, to see, well, can we -- can we be more -- of more assistance. And in fact, it
3 is those revisited agreed facts that the Prosecution are now looking at.

4 PRESIDING JUDGE KORNER: [15:05:50] Yes. Well, can I say that all of us are
5 happy to see the proper cooperative spirit that exists between the Prosecution and
6 Defence on this.

7 I think, however, we'd better say at least -- obviously, it's an ever changing, an
8 evolving document, but I think we'd better say that such agreed facts as can now be
9 agreed should be placed before the Chamber, because obviously we've got to decide
10 whether we accept them or not.

11 We start on 4 April. I would have thought the -- what's the date for the -- yes, could
12 we by the next status conference, the Friday -- we haven't actually set up -- sorry, not
13 the next status conference. We set a date in March for something. What was it?
14 Registry report. 7 March, yeah, but I think that's quite early. Can we say -- I tell
15 you what. Let's say 14 March. I shall add, there will be one more status conference
16 before the trial starts, but we haven't yet managed to get a date.

17 Mr Nicholls, any -- or who is dealing with them?

18 MR NICHOLLS: [15:07:35] That's fine, your Honour.

19 PRESIDING JUDGE KORNER: [15:07:37] Yeah. All right.

20 The other question is this: As far as the introduction of documents is concerned, as
21 we said - at least I hope we did in the conduct of the proceedings - the Chamber will
22 take it under what's called the submission procedure. But it would help if at some
23 stage from the trial starts, the Chamber could be informed as to what documents that
24 at the present the Prosecution proposes to submit are not objected to by the Defence,
25 or which are objected to, whichever is the shorter. Because I think that will help all

1 of us. So, effectively, any evidence introduced via the bar table.

2 Right. Now, yes. Because tomorrow morning we're going to deal with the Rule 68
3 applications, plus the witnesses. All parties should be notified by email of the
4 witnesses that the Chamber proposes to raise and query whether they need to be
5 called viva voce.

6 So I'm just going to -- we're going to give our ruling, as I indicated, on the application
7 for leave to appeal.

8 The status of the Prosecution's investigations, now, do we need to go into private
9 session for that, or can it be dealt -- in other words, witnesses not yet disclosed.

10 MR NICHOLLS: [15:09:47] Sorry. That will be Mr Jeremy. I think we can start in
11 open session. And depending on questions, or where it goes, we may need to
12 request private.

13 PRESIDING JUDGE KORNER: [15:10:00] Right.

14 Yes, Mr Jeremy.

15 MR JEREMY: [15:10:04] Thank you, Madam President, your Honours. Yes. As
16 Mr Nicholls said, I think we can -- we can stay in public session. If there's a level of
17 specificity required, then we can go into private session, by all means, but I'll just give
18 you an update on the situation. Should take me a couple of minutes.

19 So, in essence, the Prosecution's investigations are ongoing, as we indicated in our
20 application pursuant to regulation 35 for the regulations of the Court, filing 541. We
21 believe these ongoing investigations are consistent with our duty to establish the truth,
22 and they're justified by the facts in the law.

23 Now, ideally, these investigations would have concluded, and we're doing everything
24 we can to conclude them in the circumstances, despite the volatile, you know,
25 political, security, health situation and the challenges in relation to the cooperation.

1 And these are all well-established facts on the ground.
2 As we're all aware, what was a challenging operating environment was made
3 significantly worse following the events on 25 October, 2021. Nevertheless, as your
4 Honours are aware, we were able to deploy a mission in December. The focus of
5 that mission was for – (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted) And,
11 yeah, it's our belief that we'll be able to establish good cause, but, of course, that will
12 be something that we'll hear from Defence on and which your Honours will decide.
13 I will also mention that we have other interviews that are ongoing. And, of course,
14 we will disclose those statements and make our applications pursuant to regulation
15 35 as expeditiously as we possibly can.
16 I think I can leave it there, but I'm, of course, available for any additional questions.
17 PRESIDING JUDGE KORNER: [15:13:02] It's still up in the air, isn't it, Mr Jeremy.
18 You haven't really given us any kind of anticipated date even. I mean, I suppose it
19 really is a matter for you. You know what the regulation says.
20 MR JEREMY: [15:13:14] Yes.
21 PRESIDING JUDGE KORNER: [15:13:15] And the longer you leave it, the more
22 difficulties you're going to have.
23 MR JEREMY: [15:13:23] Absolutely. Absolutely, your Honour. And, you know,
24 we had a plan at the end of last year that we set out in our Regulation 35 application,
25 and so far we've been able to execute that plan in relation to two witnesses. And

1 we'll be making our application very shortly. I'm confident that for the remainder of
2 the witnesses, we'll be able to make an application also very soon, and your Honours
3 will decide accordingly.

4 PRESIDING JUDGE KORNER: [15:13:46] All right.

5 Mr Laucci, do you want to say anything about this? At the moment, I don't suppose
6 you can because you don't know what they're talking about.

7 MR LAUCCI: [15:13:58](Interpretation) Not exactly. But I have a comment to make
8 of a more general nature with regard to the -- or about the investigations of the OTP,
9 the fact that they are still at the stage that they are, and the fact that they still need to
10 be continued. In a recent filing, while not before your Chamber but before the
11 Pre-Trial Chamber, Pre-Trial Chamber II, I'm talking about the request to amend the
12 charges, number 563. At paragraph 38 thereof, the Office of the Prosecutor explains
13 the reasons why they were not in a position to file a request to amend the charges at
14 an earlier stage and explains to us that the era of President Al-Bashir was not entirely
15 favourable for progress to be made. We know, however, that progress was made
16 because it was in the Al-Bashir era that the second warrant of arrest was requested
17 and obtained. And the Office of the Prosecutor goes on to explain that it was only
18 from February 2021, with the signature of memorandum of understanding, that it was
19 in a position to return to Sudan.

20 In reading that filing, we wondered here on the side of the Defence why it was that
21 you were not able to return to Sudan at an earlier date, why did you have to wait for
22 the signature of an agreement with Sudan in February 2021 to go and investigate in
23 Sudan in the knowledge that the -- if the problem did come from the Al-Bashir regime,
24 he was removed in August 2019. So what happened between August 2019 and
25 February 2021? Had that period been of use, and had it been used, we might not be

1 in this position.

2 PRESIDING JUDGE KORNER: [15:16:46] Mr Laucci, you responded to the
3 application objecting, so presumably you made these points there.

4 MR LAUCCI: [15:16:57](Interpretation) Yes, I did base myself on that in order to
5 respond to the request to amend the charges, yes, indeed. But before your very
6 Chamber, the facts that the OTP investigations are not finished and that they are still
7 ongoing, whilst the jurisprudence of the Appeals Chamber is that at this juncture, that
8 is to say, at the juncture of the confirmation of charges hearing, the investigation
9 should have been completed and should only continue in order to provide additional
10 information for justified reasons, because the OTP had not been able to investigate
11 earlier on. I think we're going far beyond that, beyond that residual opening.
12 When we see that the last witnesses for whom the statements were obtained in the
13 very recent period - I'm talking about 2021 and now - we see witnesses who are
14 talking about, really, essential matters. For example, the identity of Mr
15 Abd-Al-Rahman, and ascertaining whether he was at one point in his life called
16 Ali Kushayb or not. These are essential matters, questions on which the OTP could
17 have and should have investigated from at least August 2019. If it is that they did
18 lie -- if they weren't able to investigate before.

19 So --

20 PRESIDING JUDGE KORNER: [15:18:44] Mr Laucci, I mean, you can say all this
21 when they make their application, if they make their application, but it's too late.
22 And that they should have done all of this before. I mean, all we asked for was an
23 update on whether they were going to be filing anything. And you heard what Mr
24 Jeremy has to say, and you can then -- you'll get the chance to respond then.

25 MR LAUCCI: [15:19:11](Interpretation) Which request are you talking about, your

1 Honour?

2 PRESIDING JUDGE KORNER: [15:19:14] If they want to add new witnesses at this
3 stage, that's what we were asking about.

4 MR LAUCCI: [15:19:24](Interpretation) Very well. That will be done.

5 PRESIDING JUDGE KORNER: [15:19:28] Yes. All right. I think -- sorry.

6 Mr Nicholls, yeah.

7 MR NICHOLLS: [15:19:32] Sorry. Can I -- can I just react quickly to that, your
8 Honour. I mean, the idea that on the day after President Al-Bashir, former president
9 Omar Al-Bashir was deposed, that we suddenly fly into Sudan and begin
10 investigating, this has all been gone over before. And we have been as energetic as
11 possible.

12 The first investigative mission that was possible, that we were able to go to Sudan to
13 investigate, no matter how strenuous our efforts, was a week before we had to file the
14 DCC. That is the first time we could set foot there. We have done other
15 investigations remotely, but this is just not accurate.

16 PRESIDING JUDGE KORNER: [15:20:13] All right. As I said - that's why I stopped
17 Mr Laucci - all of this at the moment is an abstract, academic discussion which we can
18 revisit when and if you file your applications.

19 Right. I think any other matters can be left until tomorrow because we'll need to
20 adjourn in order to deal with the ex parte session. So what we're going to do now, as
21 I indicated this morning is, having considered the extra submissions made by
22 Mr Laucci in response to the Legal Representative of Victims' response to his
23 application for leave to appeal, we have come to a decision and we will give that in an
24 oral ruling now.

25 On 28 January of this year, the Defence requested leave to appeal the Chamber's

1 decision on the Defence's fifth and sixth request relating to cooperation, which is
2 filing number 566. The Defence raised seven issues which it claimed are appealable
3 under Article 82(1)(d) of the Statute.

4 On 2 February, the Prosecution and the Legal Representative of Victims filed their
5 written responses, or written response and observations to the request, which are
6 filings 572 and 575 respectively. Both stated that all of the issues proposed by the
7 Defence's request should be rejected. And this morning, the Defence replied orally
8 to the LRV submissions.

9 Article 82(1)(d) of the Statute states that either party may appeal the Chamber's
10 decisions provided:

11 (a) the decision involves an issue that would significantly affect the fair and
12 expeditious conduct of the proceedings or the outcome of the trial; and - this is a
13 conjunctive test - in the opinion of the Chamber, an immediate resolution of which by
14 the Appeals Chamber would materially advance the proceedings

15 And the Chamber recalls that in its decision of 2 December of 2021, it set out its -- it
16 set out the legal interpretation of the article.

17 Turning, therefore, to the Chamber's analysis of the issues raised by the Defence
18 request,

19 In the first issue, the Defence submitted that the Chamber did not provide adequate
20 reasons for rejecting the Defence's arguments.

21 This issue relates to the Chamber having found on several occasions in the impugned
22 decision that the Defence did not provide a legal or factual basis for its assertions.

23 However, it is plain from the text of the impugned decision that the reasoning was
24 not limited to such findings, but also engaged with the relevant submissions of the

25 Defence. And consequently, the issue of the adequacy of the reasoning as presented

1 by the Defence does not arise out of the impugned decision.

2 In the second proposed issue, the Defence submit that the accused's right to a fair trial
3 under Article 67(1) of the Statute includes the right to respect for provisions of the
4 Statute.

5 In the impugned decision, the Chamber did not make any abstract legal finding on
6 the question of whether the accused's right to a fair trial under Article 67 includes the
7 right to respect for provisions of the Statute. Leave to appeal cannot be granted in
8 respect of abstract legal matters, but only on concrete issues linked to the specific
9 matter under examination. In other words, the second issue proposed by the
10 Defence also does not arise out of the impugned decision.

11 In the third proposed issue, the Defence submits that the Cooperation Agreement of
12 10 May 2021 between the Court and Sudan *does not meet the criterion of Article 4(2)
13 of the Statute. And in the fourth proposed issue, the Defence submits that the
14 Cooperation Agreement has to be registered with the United Nations in order to be
15 valid.

16 The Defence merely is speculating, again in the abstract, that the Chamber's finding in
17 this regard prejudice the rights of the accused, without at any stage establishing any
18 actual rights of Mr Abd-Al-Rahman in the trial which have been affected. And
19 accordingly, the Chamber concludes that the third and fourth issue proposed for
20 appeal would not significantly affect the fair and expeditious conduct of the
21 proceedings or the outcome of the trial.

22 In the fifth proposed issue, the Defence submits that the Cooperation Agreement can
23 validly be compared to other technical agreements concluded by the Court.

24 In its decision, the Chamber noted that as a matter of practicality, the Court often
25 concludes confidential cooperation agreements with States on varied matters. The

1 Chamber was providing a point of comparison, but not, as misconstrued by the
2 Defence, providing the basis for the determination of the issue. And as such, the
3 proposed issue is not one which arises out of the impugned decision.

4 In the sixth proposed issue, the Defence submits that the Chamber's finding that
5 cooperation with the Court has been decriminalised by law in Sudan is compatible
6 with the Chamber's responsibilities under Articles 64(2), 64(6)(c) and 68(1) of the
7 Statute.

8 The Chamber's finding that cooperation with the Court has been decriminalised by
9 law in the Sudan is a factual finding, made on the basis of relevant information before
10 the Chamber. As indeed was touched upon in discussions this morning.

11 In effect, the Defence simply disagrees with the Chamber's factual finding and ignores
12 the information before the Chamber that led to that impugned decision. Thus again,
13 the Chamber finds that the purported issue is not one that arises out of the impugned
14 decision.

15 And the seventh proposed issue, the Defence submits that Rules 64(2) and 64(6)(e) of
16 the Rules empower the Chamber to suspend field activities of the Court in Sudan.

17 Again, the Chamber finds that the Defence only raises an abstract and hypothetical
18 question in the seventh proposed issue. The Defence does not demonstrate how the
19 Chamber's finding negatively affects the procedural position of Mr Al-Rahman and
20 how this position would improve if the Chamber made the opposite finding. In the
21 language of Article 82(1)(d) of the Statute, the Defence does not demonstrate any
22 significant effect of the proposed issue on the fair and expeditious conduct of the
23 proceedings or the outcome of the trial.

24 Accordingly, for these reasons, the Chamber rejects the Defence request for leave to
25 appeal the cooperation decision in its entirety.

1 Yes. Very well, we'll adjourn now so that the court can be reorganised for the
2 purposes of the discussion, the ex parte discussion. Thank you.

3 MR NICHOLLS: [15:29:41] Your Honour, sorry, just I wanted to be clear for the
4 scheduling as we move forward. We had requested a brief ex parte session as well.
5 Yes.

6 PRESIDING JUDGE KORNER: [15:29:52](Microphone not activated).

7 MR NICHOLLS: [15:29:53] Yeah. I mean, I think ours would be about 10 minutes,
8 15 minutes. It's to do with the security situation. Or it could be any time.
9 Tomorrow, this evening. Any time.

10 THE INTERPRETER: Microphone, please, your Honour. Microphone.

11 PRESIDING JUDGE KORNER: [15:30:11] What I suggest is we'll deal with
12 yours -- we'll do the same tomorrow as we've done this afternoon and we'll deal with
13 yours at the end of tomorrow.

14 MR LAUCCI: [15:30:21] Just a remark to say that we have seen the request from the
15 Office of the Prosecutor, and my colleague knows better than anybody else what he
16 wants to speak about to the Chamber, but described as it is, security issues and
17 condition, just make sure that it's -- well, if it's about general security issues, we have
18 an interest in participating in that discussion. Now, if it is related to very -- OTP
19 witness or whatever issues, we fully understand.

20 MR NICHOLLS: [15:30:55] Yeah, I understand the point my friend makes, and it's
21 the latter.

22 PRESIDING JUDGE KORNER: [15:30:59] All right. Yes, thank you. Yes. All
23 right. We'll adjourn then. I think it takes about 40 minutes. So we'll say roughly,
24 what, ten past four.

25 THE COURT USHER: [15:31:11] All rise.

- 1 (The hearing ends in open session at 3.31 p.m.)