

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 Wednesday, 8 September 2021
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: [9:31:48] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:32:48] (Microphone not activated)
15 THE COURT OFFICER: [9:32:50] Good morning, Madam President, your Honours.
16 situation in Darfur, Sudan, in the case of The Prosecutor versus Ali Muhammad Ali
17 Abd-Al-Rahman, case reference ICC-02/05-01/20.
18 And for the record, we are in open session.
19 PRESIDING JUDGE KORNER: [9:33:09] (Microphone not activated) Thank you.
20 Sorry.
21 Yes, I'm assuming that the accused is in court. Though nobody, I suppose nobody
22 identifies him here.
23 Can I have the appearances, please, first of all for the Prosecution.
24 MR NICHOLLS: [9:33:39] Good morning, your Honours. Good morning,
25 colleagues.

1 My name is Julian Nicholls, I'm the senior trial lawyer on the case. I am joined today
2 by Mr Hesham Mourad, trial lawyer; Edward Jeremy, trial lawyer; Rachel Mazzarella,
3 associate trial lawyer; and our case manager Claire Sabatini. Thank you.

4 PRESIDING JUDGE KORNER: [9:34:03] Thank you, Mr Nicholls.

5 Yes, and for the accused.

6 MR LAUCCI: [9:34:09](Interpretation) Good morning, your Honour. Good
7 morning, your Honours. From the Defence and for Mr Abd-Al-Rahman himself,
8 you see Mr Iain Edwards, associate counsel; Ms Vanessa Grée, legal assistant;
9 Mr Ahmad Issa, our case manager; and Ms Camille Divet, who is evidence reviewer;
10 and myself, lead counsel Cyril Laucci.

11 PRESIDING JUDGE KORNER: [9:34:45] Thank you, Mr Laucci.

12 Yes, and for the victims legal representatives.

13 MS MASSIDDA: [9:34:53] Good morning, Ms President, your Honours. My name
14 is Paolina Massidda. As you know, in this case victims are represented by two
15 teams of lawyers. I am the lead counsel from the Office of Public Counsel for
16 Victims, and with me today in courtroom Ms Ana Peña, case manager. And
17 the second team is led by Ms Amal Clooney, who I think will take the floor.

18 PRESIDING JUDGE KORNER: [9:35:22] Yes. Thank you very much indeed.

19 Thank you very much indeed, Ms Massidda.

20 MS CLOONEY: [9:35:31] Good morning (Overlapping speakers)

21 PRESIDING JUDGE KORNER: [9:35:36] Before we turn to the agenda for this status
22 conference.

23 MS CLOONEY: [9:35:42] Apologies, your Honours. Apologies. I just wanted to
24 say good morning, your Honours, and it's such a privilege to be addressing you all
25 for the first time today. I hope you can hear me clearly.

1 PRESIDING JUDGE KORNER: [9:35:54] Through the earphones, yes, but not
2 otherwise.

3 MS CLOONEY: [9:35:59] Okay. Apologies for that inconvenience. I am
4 Amal Clooney. As Ms Massidda just said, I am the Legal Representative for Victims.
5 With me in court today is assistant to counsel Vera Padberg, and also joining remotely
6 from my team I have Katharina Lewis and Samarth Patel.

7 PRESIDING JUDGE KORNER: [9:36:21] Yes, thank you very much Ms Clooney.
8 Yes, before we turn to the agenda - which I trust all parties have received - for
9 the status conference, there are just a few preliminary things that we wish to say at
10 this stage.

11 Two of us have recently been elected to this Court. All of us, and I emphasise all of
12 us, appreciate what a privilege and responsibility accompanies the positions which
13 we occupy.

14 The preamble to the Rome Statute clearly states that "the most serious crimes of
15 concern to the international community as a whole must not go unpunished ..." and
16 therefore there must be "an end to impunity for the perpetrators of these crimes and
17 thus to contribute to the prevention of such crimes."

18 Our task as judges in this forthcoming trial - as in every criminal trial whether at this
19 Court or others - will be to decide at the end of the proceedings whether
20 the Prosecution has proved beyond a reasonable doubt that Abd-Al-Rahman is such
21 a perpetrator.

22 Our task also, of course, is to deal with the proceedings and the mechanics of these
23 trials -- of this trial.

24 The election of Judge Alexis-Windsor and myself took place very shortly after
25 the publication of the Independent Expert Review which took place of proceedings at

1 this Court. And the task given to the experts was, and I quote, to enhance - by
2 the making of recommendations - "the performance, efficiency and effectiveness of
3 the Court and the Rome Statute as a whole."

4 This trial is the first to commence since its publication. Those who have an interest
5 in the Court will be waiting to see whether those obvious goals are capable of
6 achievement.

7 Such achievement depends on all parties to a trial, the Prosecution, the Defence,
8 the Victims' Representatives, the Registry, and last but not least, the Judges. It
9 depends on them all cooperating procedurally. Such cooperation, and I emphasise
10 this too, does not in any way affect the fairness of a trial, or the onus on
11 the Prosecution to prove its case, and nor indeed on the rights of an accused.

12 It is a truism, but one which bears repetition, to state that the overriding objectives of
13 a criminal trial for judges in particular are:

14 First, the acquittal of the innocent and the conviction of the guilty.

15 Dealing with the Prosecution and the Defence fairly.

16 Recognising the rights of an accused, particularly those under Article 67, and any
17 other rights which are germane to a trial.

18 And, of course, respecting the interests of witnesses and victims.

19 In order to achieve efficiency and expedition of a trial there must be, *inter alia*, an early
20 identification of the real issues which are in the case and a greater use of agreed facts
21 between the parties.

22 Presentation of evidence, whether disputed or not, must take place in the shortest and
23 clearest way.

24 And there should be avoidance of lengthy and unnecessary legal arguments.

25 We encourage the participants to cooperate in these goals and generally between

1 themselves. To give but one example, any requests for disclosure should be
2 discussed between the parties before rulings are sought from the Judges. It is
3 incumbent upon the Prosecution to give proper reasons if they are going to refuse
4 a request for disclosure.

5 All parties have sufficient to do in trials of this nature without raising potential future
6 issues before the Chamber. Only actual requests for rulings by the Trial Chamber
7 should be made.

8 The principle of open justice is an important one for all trials, but particularly trials
9 before this Court. Accordingly, if confidential submissions are filed, public redacted
10 versions should be filed wherever possible. Contents of such filings may be referred
11 to in public submissions so long as the references do not reveal the confidential
12 information.

13 Finally let me say this, we are delighted to see that all sides are represented by highly
14 experienced counsel and we are heartened by the responses which we have received
15 to the scheduling order for this status conference. Those responses show already
16 that cooperation exists and we are optimistic that it will be unnecessary for us to force
17 compliance with directions made. Such compliance being in the exercise of our
18 considerable powers of case management, which are all to be used to achieve
19 efficiency and a fair trial.

20 So with those opening remarks, can we now turn to the agenda for this status
21 conference.

22 And I think that the first item on that agenda is probably the one that everybody is
23 most anxious to know about, which is the date of the commencement of the actual
24 trial.

25 We noted that, effectively, the Prosecution have asked for commencement to take

1 place in June, and the Defence are talking about February, and the Representatives for
2 the Victims say as soon as possible, for obvious reasons, the events took place a very
3 long time ago.

4 Before I hear any further submissions from the party on the starting date, can we say
5 that we have obviously discussed this and discussed this with the Registry. And we
6 take the view, subject to submissions that may be made particularly by
7 the Office of the Prosecutor, that this trial should start as soon as is reasonably
8 practicable, given the other trials at this Court, and also taking into account
9 the difficulties which both the Office of the Prosecutor and the other parties have in
10 carrying out any investigations in Sudan or elsewhere because of the still existing
11 pandemic.

12 But, as I say, we believe that even with those difficulties six months or so should be an
13 adequate time. And just so that everybody understands it, we have in mind that this
14 trial would start at the beginning of April, 5 April, shortly before the Court break.

15 So, Mr Nicholls, I appreciate what you have said in your filings. Do you want to add
16 to that?

17 MR NICHOLLS: [9:47:27] Yes, just briefly, your Honours. And I will try not to
18 repeat what is in our filings. In general today we stand on our filings and we'll try to
19 answer any questions and not repeat what we have written.

20 And I should like to say at the beginning, I omitted to say when I stood up, that
21 the Prosecutor sends his regrets to all in the courtroom, your Honours, and all
22 the parties, that he was unable to be here today. He is travelling today on official
23 business, but otherwise he would have been eager to attend.

24 Your Honours, we've taken on board what you have just said about the need for
25 efficiency towards a fair and just trial and I can say that is exactly our goal in this case

1 on the side of the Prosecution.

2 We're requested a trial date of 13 June for several reasons, which I'll try to go through
3 very quickly. The first, which will be discussed, I think, in due course as we go
4 through the items of the agenda, primarily by Mr Mourad and Ms Mazzarella, is
5 the amount of disclosure, translation and other preparatory work that needs to be
6 done for a smooth and efficient trial. And I will just say that, having the adequate
7 time now to go through all of those necessary processes which are necessary for a fair
8 trial and for the Defence and the participants, giving us that adequate time now will
9 help the trial be smoother, more efficient and avoid delays if we make mistakes if we
10 don't have enough time.

11 In terms of the ongoing investigations I'll be brief, but we are conducting ongoing
12 investigations, they're ongoing in Sudan as I stand and speak to you today. We've
13 had extreme difficulties in the investigation in the cases in this situation, including
14 this case, and those are at paragraphs 20 to 21 of our submissions. And now, very
15 recently for the first time, we also have new opportunities and those new
16 opportunities are to get important evidence, that was not available before, that we
17 believe will be useful to the Trial Chamber in reaching a just and accurate verdict.
18 And will be useful to the Defence, as we follow Article 54(1)(a) and look for
19 incriminating and exonerating evidence equally.

20 But I'll just go through these very quickly.

21 At the time of his appearance, his initial appearance on 15 June last year, the accused
22 was the longest running fugitive to appear before the Court; 13 years since
23 the warrant was issued.

24 Until very recently, zero cooperation whatsoever from the Government of Sudan in
25 these cases. In fact, active opposition and our inability to even visit the country from

1 2007 until - for investigative purposes - this year.

2 The transfer of Mr Abd-Al-Rahman to the Court last year unfortunately happened
3 during the pandemic, which I won't go into a lot of detail, but it made investigations
4 even outside of Sudan, which was impossible at that time, extremely difficult because
5 there were many places that the investigators could not travel or that the witnesses
6 could not travel to, or when we were able to travel it was extremely slowed down by
7 having to quarantine for sometimes two weeks before beginning our work.

8 Now, it's public that the memorandum of understanding, which took a lot of work on
9 the part of the Prosecution Cooperation Division, that was signed between
10 the Government of Sudan and the Office of the Prosecutor on 14 February of this year,
11 that was when we were able to begin investigations in Sudan, in principle.

12 However, it was not until March, towards the end March, that we were able to
13 investigate on the ground in Sudan. And I'll just say as a reminder, that was
14 the same month that the DCC, the Document Containing the Charges had to be filed.

15 And once we were able to set foot on the ground, doors opened and accesses to
16 witnesses opened that had never been there before. And some of this evidence is
17 significant and some of it we managed at the last minute to transmit in time to be
18 processed, translated, disclosed in order to be used at the confirmation hearing. But
19 much is available now since March of this year and ongoing that was not before.

20 So my plea would be that these additional months to June 13 will allow us to continue
21 to pursue this evidence, which we were not able or permitted to do before in Sudan,
22 and that will be useful for the Court and for the Defence, I believe, and for
23 the participants.

24 I won't go through any of the law on -- or the jurisprudence on continuing
25 investigations, other than to say it's not novel and it's clear that investigations can

1 continue after confirmation.

2 And I would just finish, your Honours, by saying that if you look at -- and I won't
3 repeat our submissions, they're in footnote 3 to our submissions, but the overall time
4 that we're requesting is in line with many of the other trials that have taken place in
5 this Court. If we start on June 13, we'll be almost two years to the day from
6 the initial appearance. Which is not an excessive amount of time between first
7 appearance in the courtroom and opening statements.

8 I'd also say that, if I understood the Defence's submissions correctly, what they are
9 suggesting is that opening statements begin on 15 February but the trial witnesses
10 come on 15 March, that we start hearing the evidence. Unless I understood
11 incorrectly, that's what I heard. So we're really not that far apart, because that's three
12 months, March to June, that we're talking about.

13 The additional prejudice, if any, of those three months between hearing of the first
14 witness is minimal, but again will allow us that extra time we believe we need to
15 search for additional material, based on the charges that have been confirmed, in
16 order to move the trial along.

17 Thank you.

18 PRESIDING JUDGE KORNER: [9:54:59] (Microphone not activated) Thank you,
19 Mr Nicholls.

20 Yes, Mr Laucci.

21 MR LAUCCI: [9:55:11](Interpretation) Thank you, your Honour.

22 If I may, before replying in detail to the question raised of the start of the trial and
23 the comments from my learned colleague Julian Nicholls, I would like to make a few
24 general remarks, three to five minutes of general remarks, if I may?

25 PRESIDING JUDGE KORNER: [9:55:45] Are those general remarks related to

1 the start of the trial?

2 MR LAUCCI: [9:55:50](Interpretation) They lead up to it. It's general context that I
3 would like to present.

4 PRESIDING JUDGE KORNER: [9:55:57] Yes, all right. We'll hear what you say.

5 MR LAUCCI: [9:56:12](Interpretation) Thank you, your Honour.

6 You started this hearing referring to your election. I would first like to congratulate
7 you on this election. No matter how shortly or long ago your elections were,
8 congratulations to all three of you. You have been elected on the basis of your high
9 moral consideration, your impartiality and the integrity that you have in your country
10 from -- of the highest judiciary functions, this is in Article 36(3) of the Court Statute,
11 and it is these qualifications and your respect for the law which is characterised by
12 this that I would like to just mention in my introduction to ask you to maintain
13 the greatest vigilance which is based on your extreme -- on your experience.

14 The Court is an unusual jurisdiction, it's both a judicial institution and an
15 international organisation. For its operation it's based on text which are of very high
16 quality, but are nevertheless very succinct and much less developed than national
17 law.

18 Whatever law system you come from, common law or civil law or a different system,
19 they are all based on older rules, more detailed rules, and more technical rules, on
20 the basis of which the Court operates. So the rarity, the newness and the succinct or
21 general character of law applicable to this Court is based also on the work of its
22 Chambers, that's the case law of the Court, which is increasing every year and
23 clarifies things as we move along and make things clearer.

24 So you have the challenge of working on the corpus of rules which is much more
25 concise, more -- much less detailed than that which is available to national judges.

1 And this is a work that nevertheless requires the same degree of skill and vigilance as
2 in national systems. The imprecise or sometimes -- the imprecise nature or the gaps
3 in the Rules means that you have to apply other characteristics. So you have to work
4 on things other than the written rule alone.

5 The Defence deplores that this is too often the reply given to deviations and violations
6 of the Rules. Under the point 1-H of the order, the Defence listed the questions
7 which have not had a reply during the preliminary phase and where the reply was it's
8 not important that the respect to the rights of the Defence, given the conditions
9 of the Statute, fairly and impartially, that this should be observed to a lesser extent
10 than during other phases of the proceedings and that the trial would look into this
11 later.

12 I'd like to offer one example, which I've chosen for its simplicity. We have noted that
13 the OTP has systematically deviated from the simple written rule with regard to
14 the protection of confidential information, with documents that are identified as
15 confidential, with regard to all the witness statements disclosed thus far. *Not a single
16 one of these statements is marked confidential, whereas this is required under section
17 7 of the Information Protection Policy of the Court, promulgated by Administrative
18 Instruction 2007/001 of 19 June 2007. This is not an anodyne date. This week after
19 the first arrest warrant was issued for Mr Abd-Al-Rahman. *So since the very
20 beginning of this case, since the start of the OTP's investigations, the brand new
21 Information Protection Policy - the ink was not yet dry on this policy - has been
22 ignored, circumvented, flouted and violated. This rule in all minds was fresh, it was
23 new, and so one would have assumed it was fit for the Court's operational
24 requirements as having been identified heretofore the drafting of this text. Yet from
25 the first day it was not respected and indeed never has been. Even after the Court's

1 attention was drawn publicly to this problem *by the International Criminal Court
2 Bar Association, the ICCBA, in February 2018, at the time when it was led by–

3 PRESIDING JUDGE KORNER: [10:03:04] Mr Laucci, Mr Laucci, I'm sorry, I really
4 am sorry to interrupt you, but we have a large number of matters to deal with. We
5 have people appearing on video link and I really think I am going to ask you to turn
6 your attention to the start date of the trial. Complaints about breaches of the Rules
7 are not really for today. We're here to try and get this matter moving.

8 MR LAUCCI: [10:03:34](Interpretation) In that case, I will move immediately to my
9 conclusion, Madam President, which is to say that the Defence would call today, and
10 will throughout the trial phase, call for the most scrupulous respect of the Rules in
11 the Court text or from case law.

12 Then, on the basis of this conclusion, I move to the question that was asked and
13 the discussion.

14 Firstly, I note that the date of April you proposed took into account an element of
15 which the Defence was unaware, which was the requirements of the Registry,
16 particularly with regard to the organisation of other cases. We are aware that we are
17 not the only case and that is of course something that can quite legitimately be taken
18 into consideration.

19 We expressed the most important aspect, which is that the trial should start as soon as
20 possible, and if the Registry cannot start before April, then the Defence's wish would
21 be met, assuming there is no other solution possible.

22 But I come now to what my colleague Mr Nicholls said in his observations. He is
23 still pleading for June, explaining to us that this is necessary in order to be able to
24 continue and complete investigations which could not have been done beforehand
25 and for which the OTP, for the first time, has the opportunity to carry out such

1 investigations.

2 The OTP also told us that investigations are ongoing. Congratulations to
3 the Prosecution on this. And I would very much have liked to be able to say
4 the same on behalf of the Defence. However, our current requests for journeys to
5 Sudan have been unsuccessful and we have a request ongoing and we don't know
6 whether it will be more successful.

7 So I come back to the first time, first opportunity, as mentioned. This is something
8 we've heard before in this case during the preliminary phase, in the pretrial phase.
9 We heard it with regard to the discussion relating to the detention of
10 Mr Abd-Al-Rahman, and the memorandum of understanding of February 2021 was
11 announced by the Prosecution as the first opportunity to do what had not been
12 possible in Sudan thus far.

13 Unfortunately, the Prosecutor had to revise its presentation and say that this MOU
14 actually changed nothing at all with regard to the delicate question of the protection
15 of victims, also the victims and the witnesses, anyone else who may be in danger
16 because of court proceedings in Sudan. And this first opportunity was in fact not an
17 opportunity. It is remarkable that this memorandum of understanding dated
18 February was completed, put aside, replaced by another agreement signed in May of
19 this year with the Court in its first article, paragraph 4.

20 So I would say that speaking of the first time, the first opportunity, I think we can
21 only hear that once. You can't keep repeated this wording again and again.

22 The Court jurisprudence on the question of investigations after the confirmation is
23 clear. We've mentioned that in paragraph *18 of our comments. Investigations can
24 continue, but on an exceptional basis and provided there is justification provided as
25 to why the investigations could not be completed earlier.

1 The Office of the Prosecutor mentioned the pandemic, the problems of travel
2 restrictions, quarantine and so on, problems for their operations in Sudan. We feel
3 that this argument is not admissible because, because of the Court privileges and
4 immunities. If this had been respected by Sudan there would have been no
5 possibility of restrictions on the Court's travel, and the Office of the Prosecutor has
6 used this argument in the pretrial phase, where it was dismissed.

7 So I'm really not sure about this first time about the material difficulties. They may
8 perhaps mean that the legal framework for the Court's operations in Sudan don't exist,
9 and we will come back to this.

10 PRESIDING JUDGE KORNER: [10:10:09] (Overlapping speakers)

11 MR LAUCCI: [10:10:07](Interpretation) But I would like to finish with one last word.
12 Given this inconsistency, and the inconsistency with the Prosecution position every
13 time the question of continuing detention of Mr Abd-Al-Rahman, if the trial cannot
14 start in February as we had requested, either *because of the legitimate and respected
15 concerns of the Registry, or because of the concerns of the Prosecution, Mr
16 Abd-Al-Rahman can do nothing to change this. And this cannot be done at the
17 expense of my client, who would be kept in detention until an indeterminate date,
18 awaiting a trial whose start date is unknown. I'm sorry to have been so lengthy in my
19 statement.

20 PRESIDING JUDGE KORNER: [10:11:04] Thank you, Mr Laucci.

21 Yes, Ms Massidda.

22 MS MASSIDDA: [10:11:09] Thank you, Madam President. I will go straight to
23 the point.

24 PRESIDING JUDGE KORNER: That would be --

25 MS MASSIDDA: [10:11:09] As the Presiding Judge has indicated, victims have

1 a clear interest for this trial proceedings as much as possible, as soon as possible, and
2 with the date of commencement of the trial very early.

3 In recent consultations that we had, both myself - and I think also my learned
4 colleague Ms Clooney - victims indicated that they would hope this trial to start
5 beginning 2022.

6 Now the date suggested by the Chamber, 5 April, sounds to us at this moment very
7 reasonable, also considering the difficulties indicated and reiterated this morning by
8 the Prosecution.

9 Thank you.

10 PRESIDING JUDGE KORNER: [10:11:52] Thank you, Ms Massidda.

11 Yes, Ms Clooney.

12 MS CLOONEY: [10:11:56] Thank you, your Honour.

13 Can I just ask for a short pause just because I see that my colleague, the Legal
14 *Representative for Victims Nasser Amin is visible on your screens but hasn't had
15 a chance to introduce himself as yet. May I just ask that he be given the opportunity
16 to do so?

17 PRESIDING JUDGE KORNER: [10:12:23] Yes, of course.

18 MS CLOONEY: Thank you.

19 PRESIDING JUDGE KORNER: [10:12:21] Where do you see him, as a matter of
20 interest?

21 MS CLOONEY: [10:12:27] When there was a zoomed out view of the courtroom I
22 saw him on the other screen next to where I appear. And I know he's -- he's in Cairo,
23 I believe.

24 PRESIDING JUDGE KORNER: [10:12:38] Oh, I see. Well, he doesn't appear to be.
25 I can see him. I can't -- I can see him, but I'm not sure he's able to -- it looks to me as

1 though he's frozen.

2 MS CLOONEY: [10:12:46] Perhaps we could sort out the technical difficulties and he
3 could introduce himself just after the break, if that's all right.

4 Thank you for that.

5 In terms of the date, your Honours, as we said in our written submissions, of course
6 after waiting 17 years to see justice being done, the victims are anxious for the trial to
7 start as soon as possible. At the same time, you know, of course it's in everybody's
8 interest for the best possible evidence to be before this Court in order to establish
9 the truth.

10 We are also cognisant, as we say in the written submissions, of the difficulties that
11 the Prosecution has faced, including in relation to the ongoing pandemic, in relation
12 to the security situation in many of the camps, the relatively recent deterioration in
13 the security situation in Chad, where many victims and witnesses are located.

14 So I think ultimately of course it's for the Chamber to determine whether as soon as
15 possible means April or June, but those are the interests that we believe are at stake in
16 relation to the victims.

17 PRESIDING JUDGE KORNER: [10:13:54] Yes. Thank you very much, Ms Clooney.
18 Right, there are no other further submissions to be made. We've heard from all
19 the parties. We'll consider the submissions that we've heard and we intend to give
20 oral ruling at the end of this status conference, or that part of it which will be in
21 public.

22 The knock-on aspect to this will be in relation to the Prosecution
23 disclosure -- I'm sorry, I'm just looking at the moment for my list of -- here we are,
24 yes.

25 The disclosure by the Prosecution, Mr Nicholls, of material would be three months in

1 advance of the start date of the trial. So, looking at, let us say for the sake of
2 argument at this moment - as I say, we will make a final decision - the start date is
3 5 April, the disclosure obligations of the Prosecution, what we would be strongly
4 urging the Prosecution to do, and I think you are actually undertaking the exercise at
5 the moment, is to comply with the disclosure obligations as soon as possible without
6 further delay, but final disclosure taking place effectively by 17 December. That
7 would be, give or take, three months, including a Christmas break, obviously.

8 And then there would be the trial brief with your list of witnesses. That would have
9 to be really no later than the beginning of January, 5 January, to allow the three
10 months.

11 Yes, right. And also -- well, I'll come on to that later, there's the question of expert
12 witnesses as well which is referred to in your brief. But all right, so that's item 1 on
13 the agenda, or A.

14 That brings us next to --

15 MR NICHOLLS: [10:17:04] May I just say one thing, your Honour? I apologise.

16 PRESIDING JUDGE KORNER: [10:17:09] Yes.

17 MR NICHOLLS: [10:17:09] The three months for the disclosure, yes, we would have
18 proposed six weeks for the pretrial brief before the start of trial, which would be
19 a little bit more time than our pre-confirmation brief for the DCC. I'm not arguing
20 with your Honour, I'm just saying that that is our proposal, not the three months for
21 the PTB.

22 PRESIDING JUDGE KORNER: [10:17:39] Six weeks before the start of trial?

23 MR NICHOLLS: [10:17:42] That's what we would ask, your Honour.

24 PRESIDING JUDGE KORNER: [10:17:58] We'll come back to that, because we want
25 to discuss the question of a defence pretrial brief as well.

1 Yes. Yes, Mr Laucci.

2 MR LAUCCI: [10:18:15](Interpretation) Thank you, Madam President.

3 I am not going to repeat our defence submissions on this point. Four months prior
4 to commencement of trial in matters of disclosure is what we submitted in our filing,
5 including a full list of witnesses, as well as an order of appearance of at least the first
6 10 witnesses to be disclosed at least three months before, and the pretrial brief to be
7 disclosed at least three months before trial.

8 So I just want to recall these points and point out that these are important pieces of
9 information for the Defence in this trial and we need time to be able to use those
10 materials.

11 Thank you.

12 PRESIDING JUDGE KORNER: [10:19:16] Yes, I have that one in mind, Mr Laucci,
13 you can rest assured.

14 All right. Then the witnesses and the anticipated evidence.

15 As I understand it, Mr Nicholls, you've got 124 witnesses, 54 of them to be called live,
16 and the remainder under Rule 68. And you're asking for 400 hours.

17 MR NICHOLLS: [10:19:53] Your Honour, if I may at this -- excuse me -- at this point
18 I will turn over to Mr Jeremy, who is prepared for agenda item B, the anticipated
19 evidence.

20 PRESIDING JUDGE KORNER: [10:20:07] Yes, Mr Jeremy.

21 MR JEREMY: [10:20:09] Yes, good morning, Madam President, your Honours.

22 Madam President, that's correct, your summary of our submissions in relation to
23 the anticipated evidence is -- is accurate. I would simply add that this is a tentative
24 number, it's our best guess at this point. It is subject to our ongoing focused
25 investigations. The number that we have provided of 400 hours is based on

1 the -- the number and type, the nature of the witnesses that we would intend to call in
2 this case. And that number, as you will have seen from our submissions, is based or
3 is informed by approaches that Trial Chambers have taken in relation to similar cases
4 at this Court.

5 If your Honours feel you would be assisted by greater detail, greater granularity in
6 terms of how that number of 400 hours breaks down in relation to the witnesses that
7 we intend to call, then -- then that's -- we can provide that additional information to
8 you in writing, if that is something that you think would be helpful. But otherwise
9 we -- we stand on our written submissions.

10 PRESIDING JUDGE KORNER: [10:21:38] Yes. Mr Jeremy, at the moment, of
11 course certainly for us, we come fresh to this case and so we haven't had sufficient
12 time to go through each and every one of the witnesses if we've got the statements
13 from them already. It may be at a later stage that we hold another status conference
14 to go through each of the witnesses and discuss really whether they are necessary,
15 how long they're actually going to take within a global figure.

16 What we have in mind is that, rather than allocating -- we'll certainly give you an
17 overall figure, but rather than allocating specific times to each witness, each side will
18 be given a finite - and I underline the word finite - number of hours in which to call
19 its evidence and to cross-examine. And how that time is used will be a matter for
20 the parties. It seems to me that's the most sensible way of dealing with it.

21 But I don't -- at this stage I simply want to hear a little bit of why you ask for what
22 appears to be quite a lot of time for not an overwhelming number of witnesses, but
23 you say it's based on earlier experience.

24 MR JEREMY: [10:23:18] Yes, that's -- that's right, your Honour. So that's based on
25 comparisons for the Ongwen case, for example, the Ntaganda case, and it's based on

1 an assessment of the types of witnesses that we intend to call in this case. So of the
2 54 live witnesses that we're intending to lead, 40 of them are crime-base witnesses and
3 we tentatively allocate to them approximately a full day of court session, four and
4 a half hours; two overview witnesses who we again allocate around four and a half
5 hours, a full day; and then 12 insiders currently. And for those it's difficult to predict,
6 but our estimations range from one to -- one to three days, essentially.

7 So the way that we have arrived at that number of 400 hours is by assessing
8 the -- the types of witnesses, the categories of witnesses rather than an allocation of
9 hours in relation to a specific witness at this point, but rather an allocation of the
10 witnesses and how long we think would be necessary for the parties to adduce or for
11 the Prosecution to adduce the relevant evidence to assist this Chamber.

12 And we will, we will come to it, but we -- you'll note that we are also proposing to
13 make heavy use of the Rule 68 procedure, whereby some witness statements would
14 be tendered in writing without the witness being required. And then others would
15 testify in -- in person pursuant to Rule 68(3), but that would require only a very
16 focused, short examination by the Prosecution of, you know, an hour or so, as an
17 estimate.

18 PRESIDING JUDGE KORNER: [10:25:25] Yes. All right. I think we've got
19 the general idea, Mr Jeremy.

20 Yes, Mr Laucci, really I'm not at this stage asking you what evidence you propose to
21 call, if any.

22 I see, sorry, it's Mr Edwards.

23 MR EDWARDS: [10:25:36] Yes.

24 PRESIDING JUDGE KORNER: [10:25:38] Yes, Mr Edwards. I just simply want to
25 know if you've got any observations to make at this stage. Obviously we'll give you,

1 however it's worked out, an equal amount of time as to the Prosecution.

2 MR EDWARDS: [10:25:57] Thank you, your Honour.

3 It just seems to me relevant to remind the Court that, in the submissions of the
4 Registrar dated 1 September, reference is made to the not inconsiderable matter of
5 interpretation. The Registrar has indicated that they're experiencing difficulties in
6 terms of finding adequately trained Fur interpreters, and if we are going to be forced
7 into a position of having to rely on consecutive interpretation rather than
8 simultaneous interpretation - I see your Honour is nodding - that could well
9 significantly increase the time that's going to be needed.

10 PRESIDING JUDGE KORNER: [10:26:48] Yes, thank you. I noted that and I was
11 going to deal with it under the question of languages and translation, yes.

12 Ms Massidda, anything you want to say as far as the Victims' Representatives.

13 MS MASSIDDA: [10:27:06] Only one small observation. We take note of intention
14 of the Chamber to indicate a finite number of hours per witness, it's retained. Just
15 before the Chamber --

16 PRESIDING JUDGE KORNER: [10:27:22] Sorry. No, no. No, no. You're going
17 to get a finite number of hours not per witness, we're not going to go through each
18 individual witness for the whole of the presentation of the questions you want to ask.

19 MS MASSIDDA: [10:27:31] Apologies. Just inform the Chamber that on occasion
20 legal representatives may not question witnesses. It depends, of course, on the type
21 of evidence that the witness will present in court.

22 PRESIDING JUDGE KORNER: [10:27:47] You raised the possibility of wanting to
23 call victims. I take it at this stage no decision has been made?

24 MS MASSIDDA: [10:27:59] No, your Honour, it's a little bit too early for us to
25 provide this information, because our intention is of course not to duplicate anything

1 which will already be presented by the Prosecution. So we have the intention of
2 focusing on specific matters that eventually are not dealt with by the Prosecution in
3 the presentation of its evidence, or which may be of specific interest for the victims in
4 this case.

5 PRESIDING JUDGE KORNER: [10:28:34] But are you saying at this stage - and I'll
6 come on to Ms Clooney and her colleague in a moment - are you saying at this stage
7 that you haven't got any idea at all about how many you would like to call?

8 MS MASSIDDA: [10:28:48] As far of the group of victims I am representing, I have
9 an idea. I am thinking of one or two expert witnesses.

10 PRESIDING JUDGE KORNER: [10:28:59] Expert?

11 MS MASSIDDA: [10:29:04] Expert, yes. Depending also of course on what
12 the Prosecution will present.

13 PRESIDING JUDGE KORNER: [10:29:07] I want to deal with experts next, but ... so,
14 yeah.

15 MS MASSIDDA: [10:29:12] In -- just for information of the Chamber, in other cases
16 we only presented expert witnesses if the Prosecution has not presented them and on
17 specific matters. I can give an example for the information of the Chamber to
18 understand our intention.

19 In the Ongwen case we were authorised to present an expert on Acholi traditions,
20 which was particularly important also later on for reparation purposes. So we will
21 focus on these kind of issues, mainly dealing, essentially, with the extent of the
22 victimisations of our clients.

23 As far as other type of witnesses are concerned, again for the victims that I represent,
24 we do not have at the moment taken any decision in relation to the possibility for
25 victims to present their story as opposite to be in court as witnesses. We cannot do

1 that at the moment because we want to see which type of crime-base witnesses
2 the Prosecution will present.

3 And if we decide to have victims to come before the Chamber to tell their story, we
4 will probably confine these possibilities to up to two or three maximum persons.

5 PRESIDING JUDGE KORNER: [10:30:39] Yes, that's very helpful. Thank you,
6 Ms Massidda.

7 Ms Clooney, anything you want to add?

8 MS CLOONEY: [10:30:46] Thank you, your Honour.

9 I would just refer the Chamber to paragraph 12 of our written submissions, where we
10 just make clear we are not in a position to say yet exactly who we would wish to call
11 until we know more about the Prosecution case. Because the idea, of course, is to
12 bring forward evidence that can lead to the determination of the truth but also not be
13 duplicative with what the Prosecution is going to present.

14 So while we foreshadowed to the Chamber that we may well wish to call victims to
15 present their views and concerns, and also separately potentially to appear as
16 witnesses, we're not in a position today to say exactly what that will look like, and I
17 think the Chamber can properly appreciate why that would be.

18 But other than that I have nothing to add to our written submissions at this stage.

19 PRESIDING JUDGE KORNER: [10:31:42] Yes, thank you.

20 All right. Again, we'll come back to that in our ruling.

21 As I say, I think it's unlikely today that we're going to specify the exact timings that
22 we're going to allow the parties in this case.

23 So can I come to expert witnesses.

24 We note, as I said -- as we said in our introduction, that there appears to be good
25 cooperation going on between the Defence and the Prosecution on the selection of

1 expert witnesses.
2 We would emphasise that the rules generally suggest that it is better to have agreed
3 experts. If they cannot agree, then the -- the issues between them need to be sorted
4 out in advance by the experts getting together in what is sometimes known as,
5 I believe, hot-tubbing. But they -- what we don't want is experts being called who
6 really don't disagree and without them having in advance, as I say, defined the issues.
7 Can I say this, it seemed to us - and obviously we're not in any way seeking to dictate
8 to the Prosecution how it presents its case - but if the starting date is to be 5 April, and
9 the recess is -- I've forgotten what date it is now, but it allows for a witness to be
10 called, it would be helpful to the Chamber if that witness were to be someone who
11 was going to deal with the background to the conflict.

12 Mr Nicholls, is there anything you want to say? You said it -- it's all set out in your
13 written submissions.

14 MR NICHOLLS: [10:34:20] Thank you, your Honour. Only that we have been
15 cooperating well on many aspects. We will seek to continue to do so and we will
16 seek to try to find agreement where we can on experts, possibly joint experts, and we
17 will follow the path you have set out.

18 PRESIDING JUDGE KORNER: [10:34:39] Mr Edwards, anything to add?

19 MR EDWARDS: [10:34:41] No. We'll approach with a very open mind any
20 propositions made by the Prosecution.

21 PRESIDING JUDGE KORNER: [10:34:46] Thank you.

22 Ms Massidda.

23 MS MASSIDDA: [10:34:50] Just to notify the Prosecution that the legal
24 representative will also be inclined to cooperate in relation to experts. You are
25 indicating certainly point B, sexual and gender-based violence and trauma, this is

1 clearly a topic which is of interest for us so we will be more than willing to also
2 cooperate in joint expert and maybe joint instructions to expert. Thank you very
3 much.

4 PRESIDING JUDGE KORNER: [10:35:20] Yes. Can I also just say this: I mean
5 obviously we don't want experts in every conceivable subject that anybody can think
6 of, let's try and keep them to a limited range.

7 Yes, Ms Clooney.

8 MS CLOONEY: [10:35:35] Thank you, your Honour. Just really briefly I would
9 point the Chamber to paragraph 14 of our written submissions in relation to experts
10 and just state for the record my agreement with what my colleague Ms Massidda just
11 said. We of course will seek to cooperate as much as possible on this issue.

12 PRESIDING JUDGE KORNER: [10:35:55] Yes, thank you.

13 Yes, well thank you. That's very helpful.

14 Then can we come to the use of audio or video link. It doesn't seem to me there's
15 much to be said on that. Everybody, throughout the last 18 months or so, has
16 become used to everything happening on audio or video link. So unless anybody
17 wants to say anything about it.

18 Well, Mr Laucci, I notice that you say you had reservations, but in reality -- in your
19 written brief. But in reality, as I say, everybody now knows this is a way forward
20 when witnesses cannot appear in person for one reason or another. So is there
21 anything you want to add?

22 MR LAUCCI: [10:36:50] Just to emphasise that it's reservation and -- very reasonable
23 reservation with video link whenever necessary. Yes, of course less do so. And
24 very strong reservation and opposition to any audio link without image.

25 PRESIDING JUDGE KORNER: [10:37:06] I don't think that's going to happen at all

1 unless things go really badly wrong. Thank you.

2 Yes, right, the next items. I'm not sure -- well, other evidence and Rule 68. I don't
3 know that there's anything that needs to be said about it, is there, at this stage,
4 Mr Nicholls? Or Mr Jeremy.

5 MR JEREMY: [10:37:41] Yes, Madam President, I agree. Our position is set out
6 clearly in our -- in our submissions. We don't need to add to those.

7 PRESIDING JUDGE KORNER: [10:37:51] Right.

8 Mr Edwards, no? Mr Laucci, no? Ms Massidda, no? Ms Clooney, no? Thank
9 you very much.

10 Right, agreed facts.

11 Now that, as we mentioned in our preliminary remarks, is really important. And it
12 really goes along with identification of the real issues as between the parties.

13 Mr Nicholls, as I understand it, again discussion is going on between the parties.

14 MR NICHOLLS: [10:38:39] Sorry, I keep forgetting to take off the mask before I
15 stand up and then I can't speak.

16 Yes, we do not have an overwhelming number of agreed facts so far in this case.

17 We have seven -- well, 26, so that that is not a huge number, I concede. However,

18 Mr Laucci and I have been discussing this. We were going to meet this week but
19 were not able to, but we will sit down, the message is received, and we will try to
20 come to agreements where we can on issues not really in dispute.

21 And the only other point I would add is that, as -- it's in paragraph 18 of the Legal

22 Representatives of the Victims have asked that these agreed facts be notified to them.

23 I believe we did that before in the pre-confirmation phase and we have no objection to
24 continuing that practice.

25 PRESIDING JUDGE KORNER: [10:39:41] Yes. Thank you, Mr Nicholls.

1 Mr Laucci or Mr Edwards, anything to add?

2 MR LAUCCI: [10:39:48](Interpretation) I can just confirm and I can say that the ball
3 is in our court. I apologise for this. We approached the Prosecution at the end of
4 August saying that we wanted to pick up again certain subjects, but it was up to us to
5 formulate the proposals and this is still ongoing.

6 There's one other point I'd like to mention. *We take the position that these
7 agreements on facts are not set in stone, or necessarily limited to the pre-trial phase.
8 This is an ongoing process that can continue, even once the active phase of the trial
9 begins. That's the way we see it. And the door will remain open as far as we are
10 concerned.

11 PRESIDING JUDGE KORNER: [10:40:44] Well, sorry, Mr Laucci, I accept, of course,
12 that matters do get agreed during the course of the trial. The difficulty with leaving
13 it until then is that an awful lot of time can be wasted because witnesses are organised
14 to come and then the Defence say: Well, actually, we don't dispute anything
15 the witness is about to say.

16 And I think from all our own domestic jurisdictions we know that it is unfortunate if
17 agreement cannot be reached before the trial begins, but I appreciate that it's not
18 always possible.

19 Yes, Ms Massidda, anything you want to say.

20 MS MASSIDDA: (Overlapping speakers)

21 PRESIDING JUDGE KORNER: [10:41:42] It's not really a question.

22 MS MASSIDDA: [10:41:47](Overlapping speakers) Sorry. Apologies, I was
23 overlapping. No submission. Our position is in the written joint submission
24 paragraph 16-18. Thank you for the Prosecution for acknowledging our request.

25 PRESIDING JUDGE KORNER: [10:41:58] Ms Clooney, anything to add?

1 MS CLOONEY: [10:42:02](Overlapping speakers) thank you, your Honour.

2 PRESIDING JUDGE KORNER: [10:42:09] Sorry. That then brings us on to

3 the question of languages and transcripts and translations.

4 Yes, you say, Mr Nicholls -- the Prosecution says in its submissions that the greatest

5 number speak Arabic; is that right?

6 MR NICHOLLS: [10:42:37] Thank you, your Honour. If I may, I will pass this topic

7 to Ms Mazzarella, who has prepared on these issues.

8 PRESIDING JUDGE KORNER: [10:42:45] Okay, yes.

9 Ms Mazzarella, yes.

10 MS MAZZARELLA: [10:42:54] Madam President, your Honours, can you hear me?

11 Oh, I might move this a bit closer.

12 We have largely addressed this matter in our written submissions. However, we

13 would like to note that -- well, you may have observed today that we will

14 be -- the Prosecution will be addressing the Court during proceedings in the working

15 languages of the Court, primarily English, but of our 124 expected witnesses there are

16 71 who speak Arabic and 35 who speak Fur. The remaining witnesses speak either

17 Masalit or Zaghawa, a minority of the witnesses, and 11 witnesses speak English.

18 The --

19 PRESIDING JUDGE KORNER: [10:43:57] I mean that's fairly -- I mean I can see that.

20 I don't think there's any problem with Arabic, obviously not with English and so on,

21 but it seems to be the problem is going to be Fur, Masalit and Zaghawa.

22 MS MAZZARELLA: [10:44:15] Zaghawa. That is correct, Madam President. And

23 that is precisely what I was about to note, is that of the Masalit and Zaghawa

24 speaking witnesses, they speak Arabic as well so they can provide testimony in

25 Arabic.

1 However, we share the same concern as Mr Edwards noted earlier, and the Registry
2 noted in its submissions, that there is a lack of qualified -- or it is, rather, challenging
3 to identify qualified Fur interpreters for the proceedings. We share that concern and
4 we are willing to explore options with the Registry, as they've noted, to potentially
5 pool language resources if it would facilitate fair and efficient proceedings.

6 Then, as the Registry also noted in its submissions, it is our understanding that
7 the retraining -- or, rather, the training of new Fur interpreters could take up to six
8 months, and the Prosecution notes that this would impact not only the length of the
9 proceedings but also the potential commencement date of the trial.

10 PRESIDING JUDGE KORNER: [10:45:21] Well, only if you -- I would hope that you
11 could put the Fur witnesses -- the witnesses who speak Fur back to, as it were, to
12 the back of the list.

13 MS MAZZARELLA: [10:45:38] Well --

14 PRESIDING JUDGE KORNER: [10:45:39] Which would give the Registry more time.

15 MS MAZZARELLA: [10:45:41] -- we're certainly open to exploring those options.
16 However, we have not yet determined the order in which we intend to call witnesses,
17 so that's an assessment that we are not prepared to make at this time I think.

18 PRESIDING JUDGE KORNER: [10:45:54] No, I'm sure that's right. But I'm merely
19 telling you.

20 MS MAZZARELLA: [10:45:58] Certainly. Thank you. Thank you, Madam
21 President.

22 PRESIDING JUDGE KORNER: [10:46:00] Anything else?

23 MS MAZZARELLA: [10:46:02] No, that's it, unless you have any questions for
24 the Prosecution.

25 PRESIDING JUDGE KORNER: [10:46:04] No. Unless my colleagues do. I don't

1 think so.

2 Yes, Mr Laucci or Mr Edwards, I mean ...

3 MR LAUCCI: [10:46:15](Interpretation) President, I would like to add to what my
4 colleague Edwards said earlier. This is a question for which I need clarification from
5 the OTP. *In their filings it seems that statements that were taken originally in Arabic
6 are now listed amongst those that still need to be translated into Arabic. I would like
7 to know why those testimonies taken in Arabic need to be translated into Arabic. If
8 that means that there is going to be the Arabic translation of the original English, then
9 we would much prefer to have the English original and that would be better for
10 everybody. With regard to translating Arabic or another language to -- sorry, of
11 Arabic to the Court's working languages, *the Defence team is fortunate in that we
12 can rely on at least two extremely competent Arabic speakers on our team, and we are
13 ready to initially receive the original Arabic versions, if they are available. Obviously,
14 we would need the translated versions into either English or French once these are
15 also available.

16 PRESIDING JUDGE KORNER: [10:48:03] Yes. Sorry. I just want to make sure I'm
17 following this. What you're asking the OTP to do is disclose to you any statements
18 taken on which they rely which are in Arabic and have not yet been translated. Is
19 that what you're asking?

20 MR LAUCCI: [10:48:24](Interpretation) It was a first question of clarification so that
21 we understand it properly. Why are statements taken in Arabic being translated into
22 Arabic? This is what we read from the filings, and we didn't understand that, so we
23 would like to have that clarified.

24 PRESIDING JUDGE KORNER: [10:48:49] Yes, Mr Nicholls.

25 MR NICHOLLS: [10:48:50] I'm sorry, I don't understand completely what -- you

1 know, most of our -- virtually all of our written statements are taken in English, that
2 that is the language of the written statement, and it is signed. Those need to be
3 translated into -- we don't take -- I don't understand the other portion about Arabic
4 statements being translated into Arabic.

5 For transcripts, we -- that are taken in both languages for suspect interviews and that
6 are recorded, then those of course need to be transcribed.

7 The question may be, which is something that Ms Mazarella could address in-depth,
8 revision of draft transcripts, if that is -- that's not what he -- okay, that's not the issue.
9 Then I'm -- don't know what I can add.

10 PRESIDING JUDGE KORNER: [10:49:40] Okay. But, Mr Nicholls, can I just ask
11 you to clarify something. Are you saying that when witnesses were interviewed by
12 investigators it -- it was the translated version of what the witness said in whatever
13 language they were using, in other words, the investigator asked a question in
14 English, the interpreter interprets, the -- the answer is given in Arabic or Fur or
15 whatever it is, it's translated into English and it's the English that's written down?

16 MR NICHOLLS: [10:50:17] Correct. Because the investigator, most of them taking
17 these statements do not speak Arabic. So as the statement is typed up during
18 the interview, it's typed in English based on what the interpreter has said interpreting
19 the witness's statement.

20 PRESIDING JUDGE KORNER: [10:50:31] Yes, I see.

21 And can I just ask also, the witness then signs the English version of the statement?

22 MR NICHOLLS: [10:50:43] Yes, following a read back. And there is a portion at the
23 end of these -- each written statement where the witness acknowledges that it's been
24 read back to them. And the interpreter -- I can't think of the exact language,
25 your Honour, but the interpreter also signs saying: I have fatefully and to the best of

1 my ability interpreted what the witness said into the language of the interview.

2 PRESIDING JUDGE KORNER: [10:51:11] Yes.

3 MR NICHOLLS: [10:51:11] So that's probably not ideal. In the perfect world we
4 would have enough investigators who could speak the language, including Fur, but --

5 PRESIDING JUDGE KORNER: [10:51:27] But a system with which I think all of us
6 who have been in previous tribunals are familiar.

7 MR NICHOLLS: [10:51:31] Yes. It's -- it's the same, similar system, your Honour.

8 PRESIDING JUDGE KORNER: [10:51:34] All right. Yes.

9 Well, Mr Laucci, I'm sorry, I'm still not clear what it is you're asking for, and I don't
10 think Mr Nicholls is either.

11 MR LAUCCI: [10:51:42](Interpretation) *I think that this is no longer significant,
12 since we have obtained the clarification that we were waiting for from the OTP. So
13 witnesses who speak Arabic are interviewed by the OTP through
14 interpretation, which in this case has usually been English, and then the transcript is
15 only in English, it does not appear -- does not exist in Arabic. So, it would be useful to
16 give us the recording in Arabic and the translated English so that we could have
17 the full translated version and that would enable us to make progress.

18 MR NICHOLLS: [10:52:37] I think I may understand. If my colleague is talking
19 about tape-recorded interviews and is asking for the recording of those audio
20 recordings, that that is something we can talk about. Those are -- those are
21 transcribed and we provide the translation, but that is something I think we can
22 discuss.

23 I understand the point, and it's a fair point to make, so we will try to move forward
24 on that.

25 PRESIDING JUDGE KORNER: [10:53:11] Yes, well, thank you very much,

1 Mr Nicholls. That seems to me, again if I may say so, an example of the cooperation
2 which can produce results between teams.

3 Yes, I take it that this isn't an issue that any of the Victims' Representatives want to
4 comment on? No.

5 MS CLOONEY: [10:53:32] Nothing from me, your Honour.

6 PRESIDING JUDGE KORNER: [10:53:36] As far as the Registry's points are
7 concerned, I don't think there's anything that we can say about it at this stage. We'll
8 have to review this as matters go along. So it seems to me that's nothing else that we
9 can say about that.

10 There was one thing that the Prosecution do, Mr Nicholls, which I think would help
11 everybody, and that's if you can prepare some kind of a glossary of the names and
12 locations which have been translated from the Arabic into English and French. That
13 would help I think everybody.

14 MR NICHOLLS: [10:54:21] We will do that, your Honour. I'm sorry
15 that -- genuinely sorry, for ourselves as well, that we don't always -- that we didn't
16 have that for the DCC and the PCB. And we will certainly create a comprehensive
17 one for the pretrial brief, including, we would suggest, also names of persons who
18 reappear throughout the narrative, places, and as well as acronyms and sayings, so
19 that that is something that we will definitely do.

20 PRESIDING JUDGE KORNER: [10:54:58] Yes. Well, that's very helpful. Thank
21 you.

22 (Microphone not activated)

23 PRESIDING JUDGE KORNER: [10:55:14] I'm going to have to get used to this again.
24 Was -- yeah, investigations.

25 Now, you tell me, Mr Nicholls, there are still investigations going on. I won't say

1 that comes as a stunning surprise to anybody.

2 Really, as far as we're concerned, that's a matter for the Prosecution, but it is not going
3 to delay the start of the trial. And anything that turns up, obviously anything
4 exculpatory must be disclosed as soon as possible. That's all I'm prepared to say at
5 the moment.

6 MR NICHOLLS: [10:56:13] Yes, your Honour. Well, it certainly won't delay
7 the start of the trial, because the trial will start when you say it starts and we will go
8 with what we have at that point.

9 PRESIDING JUDGE KORNER: [10:56:23] Yes.

10 MR NICHOLLS: [10:56:24] My point, and I tried to make it earlier, I won't repeat
11 myself, but because of the changes in circumstances that have occurred really this
12 year, and including since the confirmation decision and our ability to investigate,
13 there is the ability to obtain significant new evidence in the coming months that will,
14 we believe, be important for the Chamber and also may well contain exculpatory
15 information and important evidence to prove the case, and to give greater
16 understanding and detail to the case.

17 And it's not the case that we just think more is more in every instance and we will
18 never stop. And I can't go into too much detail here about the people we are trying
19 to interview now, but these are people we haven't been able to speak to before, that
20 are the types of insiders that have been important in other cases at this and other
21 tribunals.

22 PRESIDING JUDGE KORNER: [10:57:38] Mr Laucci, I saw from your written brief
23 that you want us to stop the Prosecution investigation. Well, I'm afraid there's
24 nothing that the Trial Chamber can do about that.

25 MR LAUCCI: [10:58:02](Interpretation) It's not a question of interrupting

1 the investigations, *but of finally having questions answered which have been put
2 throughout the pretrial phase, and the question which concerns us greatly
3 is the legal framework of the operations both of the OTP and more generally of the
4 Court in Sudan. There is no convention authorising the Court
5 to carry out activities in Sudan, and there is no basis for privileges and immunities of
6 the Court in Sudan.

7 And I hope that the Registry will join with us when we discuss protection of
8 witnesses. There is no means of offering protection to victims, witnesses and
9 anybody else at risk through the Court's activities in Sudan.

10 The Prosecutor is not the only one to have had last minute information that has
11 appeared after the confirmation of charges. *We received confirmation in July that
12 that today, cooperating with the Court constitutes a criminal offence in Sudan and
13 anyone cooperating can be subject to capital punishment. It's a very serious risk
14 which has not yet been dealt with and we have had to date no information allowing
15 us to deal with this aspect. We can only do our part from the Defence with regard to
16 the protection of victims, witnesses and other persons at risk, asking that this be taken
17 very seriously and it shouldn't be sort of swept away of -- in the way of information
18 received in error, as has been done in past.

19 PRESIDING JUDGE KORNER: [11:00:20] Well, Mr Laucci, you can rest assured that
20 we are well aware that protection of witnesses and ability to investigate applies
21 equally to the Defence as to the Prosecution.

22 As I understand the matter, certainly from what Mr Nicholls says, there is now
23 cooperation from the Sudanese government and hopefully that will obviously extend
24 to the Defence as well.

25 MR LAUCCI: [11:00:52](Interpretation) *Allow me to specify that my concern is not

1 at all limited solely to the investigations of the Defence, but to all the investigations,
2 all the activities being carried out by the Court, be it the OTP or the Legal
3 Representative of Victims. Everybody, as of today, is at risk in Sudan. That's
4 the information we have. This has to be clarified.

5 Obviously it has an effect on us because, as you understand, if we want to approach
6 somebody as the Defence whom we see as potential witness and we have to say to
7 them it's likely that, if this person cooperates with us, they could be prosecuted or
8 even be subject to capital punishment. That is very difficult. But we have to be
9 open with the people that we contact. We have asked the OTP how they operated,
10 how they were open with these people, but we've had no clarification from them on
11 this point.

12 PRESIDING JUDGE KORNER: [11:02:09] Yes, Mr Nicholls.

13 MR NICHOLLS: [11:02:12] Yeah, just -- not to sort of hijack this part of the status
14 conference, but Security Council resolution 1593 provides a legal basis, there's a legal
15 basis in that. That Security Council resolution, it's been decided many times in this
16 Court - in the Jordan appeals hearing - obliges Sudan to cooperate with the Court in
17 cases related to the referral. That is in place now, it's recognised by the Government
18 of Sudan. I don't have a cite with me, but they have publicly said they understand
19 their obligation to cooperate.

20 Members of the Registry have -- well, there have been missions to Sudan we have
21 undertaken. We are now. And there is cooperation. There are notes verbale that
22 can be exchanged regarding privileges and immunities. And I don't have
23 the Registry submissions to hand, but they have offered to assist the Defence with
24 these -- with these missions and these issues.

25 I hope that there's a more formal full agreement on all these issues in the future with

1 Sudan and the Court, but at the moment I do not believe it would be impossible for
2 the Defence to visit and I'm happy to talk and assist in any way we can. But
3 the main point I wanted to make is there is a legal basis obliging the Government of
4 Sudan to cooperate and that would include all these issues.

5 PRESIDING JUDGE KORNER: [11:03:57] Yes.

6 Mr Laucci, I think -- I don't think there's much point in pursuing this at this stage.
7 If real difficulties arise, I suggest that you and Mr Nicholls and the Registry get
8 together on this to see what can be achieved. But if real difficulties arise, then of
9 course you can bring it back before the Trial Chamber.

10 MR LAUCCI: [11:04:23](Interpretation) Yes. With regard to the Registry, we have
11 made this request on many occasions, we've asked to meet with them to discuss this,
12 to clarify. But we've not heard much. I would say that perhaps Mr Nicholls could
13 support me and achieve greater success with the Registry.

14 And a point of clarification with regard to the UN treaties and the Statute of Rome,
15 Sudan does not recognise any obligation under the Rome Statute. That still exists.
16 That has not been withdrawn.

17 PRESIDING JUDGE KORNER: [11:05:08] All right. I -- at this stage I don't imagine
18 that either of the representatives of the victims wish to say anything. We've run over
19 slightly, we should be taking a break. So if they do we'll deal -- if you want so say
20 anything we'll listen to it after the break.

21 There will be a break of 30 minutes, I think. And Registry will be attending after
22 the break, so they may be able to assist with some -- on this particular aspect.

23 Yes, thank you very much.

24 So we'll adjourn until 11.35. Thank you.

25 THE COURT USHER: [11:05:49] All rise.

1 (Recess taken at 11.05 a.m.)

2 (Upon resuming in open session at 11.38 a.m.)

3 THE COURT USHER: [11:38:38] All rise.

4 Please be seated.

5 PRESIDING JUDGE KORNER: [11:39:01] Yeah, Mr Nicholls, before we carry on, I'm
6 told that the representatives from the Registry are here now.

7 A Mr Mahr, is that right? And a Mr Henquet? It may be an idea if we just go back
8 over the two matters that were raised that relate to the Registry. Firstly, the question
9 of the interpretation and the difficulties. Does anybody want to say anything about
10 that from the Registry?

11 We dealt with the fact that you're going to have to find interpreters or train
12 interpreters in the Fur language. As far as the Registry is concerned, is that going to
13 be concluded if the trial were to start at the beginning of April?

14 MR MAHR: [11:40:21] Thank you very much, your Honour.

15 My name is Christian Mahr, I'm the Director for External Operations. I'm joined
16 here this morning by Thomas Henquet, who's the chief of our Registry Legal Office.
17 Misa Zgonec-Rozej, also from the Registry Legal Office. And Vera Wang, who's
18 with my immediate office.

19 On this particular point, your Honour, we do not have the specific details, but we'd be
20 happy to check back with our colleagues who specialise in this aspect and we can
21 revert back on this particular issue. Thank you.

22 PRESIDING JUDGE KORNER: [11:40:57] Thank you.

23 The second issue is, effectively, raised by the Defence but is the ability to conduct
24 investigations in Sudan.

25 Oh, you want to say something, do you, Ms Massidda?

1 MS MASSIDDA: [11:41:14] Thank you very much, Madam President. It's because
2 it's linked to this matter, before the Registry take the floor. And this was the discrete
3 issue I would like -- I wanted to raise before the break.

4 The Defence has indicated the difficulties in being able to undertake investigation.
5 Now, you have seen our submissions, I'm referring to paragraph 25 *in fine* in which
6 we are also relating some difficulties in the possibility of undertaking field activities,
7 in particular of course in relation to the issue of contacting our clients, meeting our
8 clients in the places where they reside, and eventually collecting application forms
9 and supplemental information.

10 I'm flagging this because, since the Registry will probably take the floor at your
11 invitation after, I thought it was important for the Chamber to know that there is also
12 these discrete issues for us. Thank you very much.

13 I will be happy to provide more details not in open session. Thank you very much.

14 PRESIDING JUDGE KORNER: [11:42:21] Yes.

15 Ms Clooney, do you want to say anything about it before I ask the Registry?

16 MS CLOONEY: [11:42:25] May I just say one thing that I tried to do earlier, is just to
17 introduce the other Legal Representative for Victims. I'm told that the technical
18 issues are now resolved. So if I may invite the Court to hear from Mr Nasser Amin.

19 PRESIDING JUDGE KORNER: [11:42:40] Yes, Mr Amin, I see that you are now
20 present.

21 Would you like to introduce yourself.

22 MR NASSER: [11:42:53](Interpretation) Thank you very much. Thank you very
23 much, your Honour. Firstly, I would like to apologise.

24 THE ARABIC INTERPRETER: This is a note from the Arabic booth that the line is
25 very bad, we are unable to hear clearly what Mr Amin is saying.

1 PRESIDING JUDGE KORNER: [11:43:16](Overlapping speakers) He's completely
2 gone now. I'm afraid -- I'm afraid I don't think this is capable of resolution.

3 MS CLOONEY: [11:43:25] I appreciate the effort. Thank you very much. Of
4 course understood.

5 I just had one point to add on investigations, if I -- if I may, your Honours, on behalf
6 of the victims, and it's just to say that at the pretrial stage we did make a filing on
7 21 May just to signal the type of additional evidence that we hoped
8 the Office of the Prosecutor would seek to collect. The -- it included evidence of
9 sexual violence by the Janjaweed and also allegedly by the accused himself.
10 The Prosecution indicated during the confirmation hearing that they were willing to
11 investigate these matters, and I can say that steps have been taken since then that are
12 responsive to this. We're obviously all keenly aware that you will be announcing
13 a trial date and will not wish to see any delay to that, but from the perspective of the
14 victims we do believe that these additional investigations are warranted and we are
15 pleased to know that at least some of them are ongoing.

16 PRESIDING JUDGE KORNER: [11:44:36] Yes, thank you, Ms Clooney.
17 Yes, Mr Nicholls?

18 MR NICHOLLS: [11:44:38] Thank you, your Honour. Just to make a correction to
19 the transcript, which actually relates to the point that you are going into now.
20 At page 45, line 16, it reads that I said I do not believe it would be possible for
21 the Defence to visit. That what I said was it not be impossible. But since this is
22 what we're discussing now, I'd make that correction now, thank you.

23 PRESIDING JUDGE KORNER: [11:45:10] I think that is really an important
24 correction to make. Thank you, Mr Nicholls.

25 All right. Can I invite the Registry, just briefly, to say whether they believe it is

1 possible for them to facilitate in particular, obviously, the Defence undertaking
2 investigations in Sudan.

3 MR MAHR: [11:45:37] Thank you very much, your Honour.

4 On the part of the Registry we've expended quite a bit of time and energy over
5 the past few months, starting in last year, to ensure that we have a framework that
6 various actors within the Court can continue and conduct operations on the ground in
7 Sudan.

8 The two pillars for this is really a legal framework that exists in terms of our
9 cooperation with the Sudanese government and a logistical framework that allows
10 the practical operating environment for our partners to operate.

11 On the legal framework, initial discussions at the highest levels began early on this
12 year. By 10 May we were able to have an agreement in place with the Sudanese
13 government which allows us and creates the legal framework necessary for us to
14 operate within Sudan.

15 As far as the logistical framework is concerned, we have been in negotiations with
16 the UN since late last year. The end result is that we now have a partner on the
17 ground who is extremely willing and has shown an ability to provide practical
18 logistical support. We had an expert mission of security experts from the Court visit
19 Khartoum in February. That opened up the door for activities in Khartoum that
20 could be conducted there. We have another mission of security experts going out to
21 both Khartoum and various parts of Darfur. They're leaving later this week. We
22 believe that once this mission is back we will have the parameters and the details
23 regarding our ability to be able to begin supporting missions in Darfur above and
24 beyond Khartoum.

25 Thank you, your Honour.

1 PRESIDING JUDGE KORNER: [11:47:45] Yes. Well, thank you very much. That's
2 very helpful.

3 I think that both sides will have to wait, in particular the Defence, until
4 the -- the mission has been completed by the Registry. And then approach them
5 about how this can work.

6 MR LAUCCI: [11:48:07](Interpretation) Yes, Madam President, we will wait for
7 the additional information, quite naturally, but we want to welcome the Registrar's
8 representative who is in attendance. And this is very useful, their presence is very
9 useful, because then it engages the kind of discussion that we have attempted to
10 engage, if memory doesn't fail me, since August 2020. Therefore, this opens a
11 continuous discussion.

12 But then when it comes to the legal framework, we want to maintain our reservations
13 on the grounds that have already been raised and additional grounds which we have
14 become aware of having read the May agreement.

15 We would like to revisit willingly this matter, but as my learned colleague Nicholls
16 said, maybe we shouldn't spend too much time on today's hearing to deal with this
17 matter. Because some progress has already been made so far and so we will engage
18 discussions with the Registry on this point, whereas this wasn't possible before, so
19 this is a positive point. So I say that nothing, absolutely nothing regarding
20 the questions that we have raised have been -- has been resolved, particularly *not by
21 the May agreement.

22 PRESIDING JUDGE KORNER: [11:49:54] Yes. Well, thank you, Mr Laucci. As I
23 say, it seems to me that we're not going to make much progress on this today, and so I
24 suggest that you liaise with the Registry within a -- I'd say a couple of weeks or so
25 and see what's happening.

1 MR LAUCCI: [11:50:13](Interpretation) We will do so promptly as of today.

2 PRESIDING JUDGE KORNER: [11:50:16] Yes.

3 Can we move to the next item then on the agenda, which is the timing and volume of
4 disclosure of outstanding evidence.

5 The Prosecution in its filing says that about approximately a third of the items in your
6 possession have been disclosed.

7 Anything you want to add to what you said?

8 MR MOURAD: [11:50:46] Thank you, Madam President, your Honours.

9 Indeed, an overview of the process of disclosure so far reveals that the Prosecution
10 was diligent in its review and only disclosed those items that it assessed to be relevant.

11 So it's around one-third of the items in its collection that have been disclosed,
12 the majority of which were disclosed as Rule 70 -- under Rule 77 as material to the
13 preparation of the Defence.

14 The disclosure is, when we try to disclose an item we give an overarching value of the
15 value, be it INCRIM or PEXO or Rule 77, but we also systematically identify
16 the relevant parts in each item that may bear a different classification.

17 This is a brief overview of the process so far.

18 Now turning to the key point that would have a bearing on today's discussion is what
19 need to be done in preparation for disclosure for trial. I am guided by

20 your Honour's indication of 17 December as a cut-off date for disclosure to be able to
21 start trial in April of next year. And I just -- I will put a few steps that we were

22 considering that we need to take in order to meet this deadline for your own
23 consideration. These steps obviously would include reviewing the new items

24 collected, currently in our possession, or as a result of further investigative steps.

25 Reassessing evidence --

1 PRESIDING JUDGE KORNER: [11:52:43] Stop there for a moment. How many
2 items are we talking about? Roughly.

3 MR MOURAD: [11:52:51] The items that currently need to be reviewed, the new
4 items are not much, they're only 78 items.

5 PRESIDING JUDGE KORNER: [11:52:59] This is all in your filing.

6 MR MOURAD: [11:53:02] Yes.

7 PRESIDING JUDGE KORNER: [11:53:03] You needn't go through the filing again.

8 MR MOURAD: [11:53:06] Indeed. I just want to emphasise just with broad strokes
9 the process that we need to undertake, with your leave, just in two minutes. If that's
10 okay.

11 PRESIDING JUDGE KORNER: [11:53:19] Yes. All right, Mr Mourad, do go ahead.

12 MR MOURAD: [11:53:23] So, your Honours, we have approximately 23,000 items
13 that we need to reassess, because those items were reviewed and previously
14 considered as irrelevant for disclosure. But given the process of the case we think
15 that it's -- would be diligent on our part and most prudent to reassess this totality
16 of -- of collection and to identify any new items that need to be disclosed.

17 And in this respect we will try to be efficient, so we'll try to run keyword search, and
18 we definitely invite the Defence to share with us any search terms that they consider
19 relevant to their preparation.

20 Another aspect that would normally take a few months, and it was done in other
21 cases, would be to reassess redaction already applied to evidence disclosed for
22 the purpose of confirmation hearing. For trial, we have to make -- we have to make
23 all our efforts to lift redaction to the extent possible that are no longer required to
24 enable the Defence to prepare for trial.

25 This is a big amount of items that we need to go through and it is a technical process

1 that requires reviewing item by item and redaction by redaction to be able to decide
2 what can be lifted and what cannot and has to remain. This normally, in our
3 assessment, would take around three months.

4 The other key obligation that we have to fulfil is disclosure of translations and
5 transcription, which, as in our written submission, is estimated to take up to maybe
6 five months.

7 Included in this assessment, of course, the time by which we will be able to clear our
8 witnesses for disclosure and the need to file any delayed disclosure, if necessary.

9 This is basically the key points that I'm trying to consider and to raise before
10 the Chamber in its final assessment of the cut-off date for disclosure, your Honours.
11 Thank you.

12 PRESIDING JUDGE KORNER: [11:56:08] Yes, I think what I was trying to say
13 earlier is this, what you should do is disclose as soon as possible matters which don't
14 require, for example, reassessing redactions or written transcripts and translation
15 issues. And I think it would be helpful if you could indicate whether there are
16 categories of material which can be disclosed quicker than the three and five months
17 you're talking about. In other words, documents where you're not going to have to
18 reassess redactions and the like.

19 I mean, are there documents which you can disclose, let's say, within the next month?

20 MR MOURAD: [11:57:07] We -- it's an ongoing process and we try to disclose all
21 the items necessary in the shortest possible delay and we try to disclose almost on
22 weekly or biweekly intervals. So we currently are reviewing the newly collected
23 material and we can prepare them -- prepare them for disclosure with the standard
24 redaction already available.

25 PRESIDING JUDGE KORNER: [11:57:42] Yes, all right.

1 The other thing is this: One of the complaints that the Defence make, and which is
2 a complaint which is not just limited to this Court but nearly all courts, is what's
3 called adopting the keys to the warehouse approach. In other words, dumping on
4 them everything without any indication as to whether it's exculpatory, inculpatory,
5 what it is. And I don't think, if that practice is being followed, it should continue.
6 I think what is -- and, you know, it's not what I think -- what is disclosed by
7 the Prosecution, it must be indicated the nature of the material that's being disclosed,
8 whether it is inculpatory or exculpatory. And that must be done by -- in a, as it were,
9 tabular form. There must be a description of what the material is, first of all. And
10 then to, as I say, into which category it falls.

11 MR MOURAD: [11:58:56] Indeed, your Honours, this is the practice we are
12 following. And pursuant to a decision from the Pre-Trial Chamber on 2 October of
13 last year we've been systematically doing this.

14 So as I explained, we disclose the item based on the overarching value of this item.

15 So this item like a witness statement is incriminatory item that we intend to rely on.

16 But within the same statement there is a mixed value. Some, in some places there is
17 information that may be material or of assistance to the Defence, so we indicate
18 the page or the relevant paragraphs. And we've been systematically doing this since
19 2 October pursuant an instruction of the Pre-Trial Chamber.

20 PRESIDING JUDGE KORNER: [11:59:43] Yes, all right. Thank you very much.

21 Yes, all right. Well, as I say, we will set actual deadlines when we come to the time
22 for trial.

23 So is there anything else you want to say, Mr Mourad?

24 No, thank you.

25 MR MOURAD: [11:59:57] Thank you very much, your Honour.

1 PRESIDING JUDGE KORNER: [11:59:59] Mr Laucci.

2 Mr Edwards.

3 MR EDWARDS: [12:00:02] I'm afraid it's me again, your Honour.

4 We're encouraged to hear that the process is an ongoing one.

5 We do insist, to the extent we can, that disclosure continue on a rolling basis, because
6 that assists us, as much as possible.

7 It may be, and I don't know whether the Prosecution has turned its mind to it, but
8 the Prosecution must have a fairly firm idea of the order in which they propose to
9 present their evidence, whether it be crime base, or what have you, because if these
10 are the witnesses who are going to be coming first, then perhaps they could focus
11 their attention as a matter of priority on those first witnesses and disclose the material
12 to us as a priority.

13 That allows us to be ready for the beginning of trial. We are less concerned about
14 evidence that's going to be called six months or 12 months or 18 months after
15 the beginning of trial. We can get to that when we need to.

16 That's the first --

17 PRESIDING JUDGE KORNER: [12:01:13] I'd forget the 12 to 18 months. This is
18 going to be an efficient trial, Mr Edwards.

19 MR EDWARDS: [12:01:19] I'm sure it will be. I'm being overly pessimistic, I'm
20 sure.

21 The only other point I really have to make it this: We're intrigued by the wording in
22 the Prosecution's submissions at paragraph 26 of their -- of their filing that the -- that
23 the Prosecution are reassessing previously reviewed but undisclosed items reflecting
24 recent developments of the case. We're not too sure what that means, "recent
25 developments of the case", and if the Prosecution is in a position to enlighten us today,

1 such enlightenment will be very much welcomed.

2 That's all we have to say on the matter.

3 PRESIDING JUDGE KORNER: [12:02:05] Yes. One -- can I just ask you this - sorry,
4 Mr Edwards - before I go back to Mr Nicholls. It's pointed out that it assists -- well,
5 there are two matters, that if you provide keywords that you want searched that will
6 help the Prosecution. I take it you're prepared to do that?

7 MR EDWARDS: [12:02:23] Yes. We'll do everything and anything that will assist
8 the process.

9 PRESIDING JUDGE KORNER: [12:02:27] And the other thing, as I say I'm going to
10 come back to this, is of course what will be of most assistance, not just for
11 the purposes of disclosure but to the Court and everybody else, is if we have some
12 idea of what the Defence is at an earlier stage -- at an early stage, rather.

13 MR EDWARDS: [12:02:48] Yes, I -- I see from the agenda that we were going to
14 come on to that (Overlapping speakers).

15 PRESIDING JUDGE KORNER: [12:02:55](Overlapping speakers) We're going to
16 come on to that. But I'm just -- I'm flagging that up --

17 MR EDWARDS: [12:02:54] Yes.

18 PRESIDING JUDGE KORNER: [12:02:54] -- as it relates to this issue of disclosure.

19 MR EDWARDS: [12:03:00] yes, yes. Well, I'll take the opportunity of making
20 the point now, and it's really a reiteration of the point. We are very, very far behind
21 in terms of the investigations that we want to carry out.

22 We haven't stepped foot in Sudan yet. There are investigations that we can carry out
23 in Khartoum which may be less sensitive, or it may be an area of Sudan that is less
24 sensitive and is more amenable to defence investigations.

25 We await the outcome of the mission to Darfur and other parts of Sudan. We await

1 that with great interest. But the current advice that we have from the Registry,
2 the advice from JTAG - I'm afraid I don't know what that acronym means, but it's
3 some sort of unit in the Registry - and their recommendations now are that missions
4 to Darfur are simply not possible.

5 PRESIDING JUDGE KORNER: [12:04:12] Yes. Well, I mean, as you say, this is
6 going to have to await the Registry's mission.

7 MR EDWARDS: [12:04:18] Yes. But all that -- all that to say, if I may, your Honour,
8 we are nowhere near where we would like to be in terms of investigations to produce
9 any kind of meaningful notice of lines of defence, other than perhaps the one which
10 has already been very much flagged which relates to the -- our client's contesting that
11 he is the person that the Prosecution describe as Ali Kushayb.

12 PRESIDING JUDGE KORNER: [12:04:53] Yes. Well, I mean, that of course is
13 the point. What appeared from the -- the earlier hearings in the Pre-Trial Chamber is
14 that the Defence appears to be, as it was put forward, a challenge that your client is
15 the person described by the nickname in the charges.

16 But in the alternative, if it is him, then he did commit these acts but didn't appreciate
17 that there was anything wrong with them. The one of -- if identity, if the Defence is
18 one, not me, somebody completely different, well that's one thing. It's a completely
19 different thing if the defence is I do not contest it is me, but I didn't appreciate that it
20 was a crime.

21 And if it were the second the evidence for the Prosecution would be greatly reduced.
22 So it does really make a difference to know what your defence is.

23 MR EDWARDS: [12:06:15] We appreciate the situation. And to that end can I - he's
24 already on his feet - turn to my learned leader.

25 PRESIDING JUDGE KORNER: [12:06:22] Yes. Mr Laucci.

1 MR LAUCCI: [12:06:25](Interpretation) I would like to thank my colleague Edwards,
2 but we talk about the line of defence used in the preliminary -- the pretrial phase and
3 the charge of -- confirmation of charges where Mr Edwards was not part of our team,
4 I would like to take the floor.

5 As your question sums up, the difficulty of the Defence in this case throughout
6 the pretrial phase, which is to prepare a confirmation of charges hearing without
7 having had any possibility to carry out any form of investigation. And there is
8 the line of defence, the primary line of defence, which will remain the primary line of
9 defence, the fact that Ali Muhammad Ali Abd-Al-Rahman is not the person known as
10 Ali Kushayb.

11 *You may have seen the Defence's submissions on this point in its application to the
12 Pre-Trial-Chamber for leave to appeal. I will not revisit the issue, but just to say that
13 the decision by the Pre-Trial Chamber hung by a threat in relation to this point. The
14 thread in question was a video that was introduced to us as having been produced on
15 Mr. Abd-Al-Rahman's own initiative. But the evidence is on the record that it had
16 been requested by the Office of the Prosecutor, in violation of the texts of the Court,
17 and was not admissible as evidence. This will remain the primary line of defence
18 during the confirmation charges hearing. *During the confirmation of charges
19 hearings, we also raised the possibility that the Pre-Trial Chamber might take the
20 view that there was sufficient proof that Mr. Ali Abd-Al-Rahman was Ali Kushayb.
21 And on the basis of that hypothesis, which did not require any concession on our part,
22 we developed the argument that even if Mr Abd-Al-Rahman had been Ali Kushayb,
23 there was another problem with the Prosecutor's case. Namely, that the psychological
24 element of knowledge had at no point been raised, established or demonstrated. And
25 we said at the confirmation of charges hearing our lines of defence will not be solely

1 these two points, we will discuss the possibility of a partial alibi, for which we have to
2 carry out investigations in order to come up with something sufficiently concrete and
3 establish it in order not to waste the Court's time. And there's another line of defence
4 which will again require investigations which we have not been able to start. So we
5 can't go that far. We have come -- so I will say again, the dispute about the nickname
6 remains our primary line of defence.

7 PRESIDING JUDGE KORNER: [12:10:16] Well, can I say that's very helpful. I'm
8 only at this stage raising this because you raised the question of disclosure. And
9 what the Defence is or may be is an important one when it comes to the Prosecution
10 knowing what it has to disclose as exculpatory.

11 And I'll come on to, as you say, the pretrial briefs in the order in which the agenda is
12 set out.

13 I'm taking it that on the question of disclosure this doesn't -- isn't a matter that
14 the Victims' Representatives wish to be heard on.

15 No, I see Ms Massidda shaking her head.

16 Ms Clooney? No, thank you very much.

17 Transcript and translations.

18 Yes, Mr Nicholls -- or who's dealing with that, this aspect from the Prosecution?

19 MR NICHOLLS: [12:11:10] Thank you, your Honour. That would be

20 Ms Mazzarella.

21 PRESIDING JUDGE KORNER: [12:11:13] All right, Ms Mazzarella.

22 You say in your filing that the Prosecution intends to conduct a number of
23 Article 55(2) interviews. Do you mean these are interviews which have not yet taken
24 place?

25 MS MAZZARELLA: [12:11:36] Apologies, Madam President, I didn't quite catch

1 that last -- the first part of your sentence.

2 PRESIDING JUDGE KORNER: [12:11:43] In your filing you say the Prosecution -- its
3 paragraph 10 of the filing, I think.

4 MR EDWARDS: [12:12:04] It's paragraph 28.

5 PRESIDING JUDGE KORNER: [12:12:08] Sorry, yes, paragraph 28, sorry,
6 page -- that's my fault, I've written down page numbers, which doesn't help.

7 Paragraph 28, you say "intends to conduct". Do I take it this is all in the future?

8 MS MAZZARELLA: [12:12:22] Yes. There are currently some interviews that are
9 planned. They're ongoing interviews at the moment.

10 PRESIDING JUDGE KORNER: [12:12:30] You mean they have started?

11 MS MAZZARELLA: [12:12:32] There are -- so this number or this reference includes
12 some interviews that have begun, but this -- this is meant to also address
13 the possibility of additional Article 55(2) interviews that we have identified as being
14 possible or likely in the immediate term. So this would be the very near future.

15 PRESIDING JUDGE KORNER: [12:12:54] All right. Then you've got audio files.
16 There are still Arabic items that need translation, which is the five months referred to
17 by Mr Mourad, I take it. Yes. All right.

18 Well, you've still got a number of items outstanding then?

19 MS MAZZARELLA: [12:13:34] Yes, there are a number of items that we still have
20 not begun to translate, if that addresses your question, Madam, Madam President.

21 PRESIDING JUDGE KORNER: [12:13:44] Well, I mean, as an overall suggestion
22 again, I think that all of this should be disclosed on a rolling basis. If you run into
23 real difficulties then you can come back about it. But as I say, there's going to be
24 a cut-off deadline for all of this and we'll see how we go.

25 Yes. Right. Thank you.

1 Mr Laucci or Mr Edwards, anything you want to say?

2 MR EDWARDS: [12:14:17] Only I think to reiterate a point I alluded to earlier. We
3 want the transcripts eventually, but in -- in the first place, if the audio files can be
4 disclosed to us, we have Arabophones on our team, we can get started on the work
5 with just the audio files for now.

6 PRESIDING JUDGE KORNER: [12:14:37] Yes, Mr Nicholls.

7 MR NICHOLLS: [12:14:41] Sorry, just one very quick point on that, your Honour.
8 What's time consuming with the audio file disclosure here, and unfortunately is very
9 time consuming, is that redactions still need to be made. There are -- I'm not
10 a redaction expert, but there are certain standard redactions, information which
11 would be redacted from any statement, transcript turned over. And when you need
12 to do that on an audio file it's quite time consuming.
13 So there -- in other jobs I've had there were audio transcripts where there was really
14 nothing that needed to be redacted because of a different category of witness, or
15 something that could just go out, and it would be disclosed right away.
16 Here, very many of these do need redactions. That requires, there's no way to
17 automate it, somebody needs to listen to the audio with the transcript with them and
18 find the parts. So it can be done -- and they need to manually remove, tape over.
19 So I wish I could just hit a button and send them, but it's not that easy, but that -- I just
20 want to make that point.

21 PRESIDING JUDGE KORNER: [12:16:00] Yes, well, I -- we appreciate -- I mean,
22 everybody appreciates the difficulties of this, but, as I say, there's going to have to be
23 a cut-off date for the whole thing. Yeah.
24 Right. And of course, I mean -- I'm told that the Rules and Regulations of the Court
25 don't actually require a translation to be made of every document. It's really

1 the ones on which the Prosecution are going to rely or which contain exculpatory
2 evidence.

3 Right, witness protection.

4 You're -- Mr Nicholls, again, I gather you're going under -- or undertaking, or
5 the Witness and Victim Unit is undertaking various assessments at the moment. I
6 think all of these assessments really need to be expedited. I don't know whether
7 that's you, or it's the Victim and Witnesses Unit I take it.

8 MR NICHOLLS: [12:17:08] It's -- it's actually both, your Honour.

9 PRESIDING JUDGE KORNER: [12:17:11] Right.

10 MR NICHOLLS: [12:17:12] It's both. But I would ask -- this is actually
11 Mr Mourad's section, all of E, if he has another point he'd like to make. But it is
12 the Victim and Witness Unit. And we have our own protective strategies unit which
13 undertakes a review of what the needs are of the different witnesses.

14 PRESIDING JUDGE KORNER: [12:17:34] Yes.

15 Yes, Mr Mourad.

16 MR MOURAD: [12:17:40] Thank you, your Honours.

17 We are working closely with VWS on this issue. We have a unit within
18 the Office of the Prosecutor who contacts the witnesses and conducts risk assessment
19 analysis and then would be able, in consultation sometimes with VWS, to clear their
20 witnesses for disclosure.

21 I don't know if I can go in further details on the situation of witnesses. But it's -- I
22 would refer to the written submission in this respect unless your Honours have
23 specific additional questions on this point.

24 PRESIDING JUDGE KORNER: [12:18:24] Yes, I do have some in relation to your
25 paragraph 34, but these are not matters that I think need to be aired in open session,

1 so we'll deal with that at a later stage.

2 Yes, Mr Laucci, anything you want to say on this aspect?

3 MR LAUCCI: [12:18:44](Interpretation) Thank you, your Honour.

4 I don't want to take up any more of your time at the moment, but I would ask that
5 the Registry representative update us, as I requested, with regard to the real
6 capabilities of the Court in terms of the protection of people in Sudan. This is
7 something we need to have a clarification of, or at least an update, because a year ago
8 we were told that there was no possibility at all.

9 PRESIDING JUDGE KORNER: [12:19:29] Yes. Well, I'm sure that there will be an
10 update provided.

11 Again, I take it this is not a matter that the victims' representatives want to express
12 a view on. I'm wrong.

13 MS MASSIDDA: [12:19:45] No, your Honour, we have no submissions on that.

14 PRESIDING JUDGE KORNER: [12:19:51] No. Right. Thank you.

15 Ms Clooney, I see you shaking your head, so the answer is no.

16 Yes, Rule -- the next item is the Article 54(3)(e) of the Statute, material.

17 I see from the written filings that the Prosecution's got is it one witness that may deal
18 with that and the Defence have asked for the report, so I don't think we can take that
19 matter any further today. Anybody disagree?

20 No, all right.

21 All right, which brings us on to Defence disclosure, and really that goes along with
22 the provision of trial briefs and which we really -- which Mr Edwards has helpfully,
23 and Mr Laucci has also dealt with.

24 As far as the pretrial brief is concerned, Mr Nicholls, we did deal with that at the
25 beginning and I think you asked for six weeks before the trial.

1 However, it seems to me, and particularly in the light of what the Defence have been
2 saying about the nature of their defence, that you should in fact produce your pretrial
3 brief three months in advance, which will take us to the beginning of January, if April
4 is the start date. So that gives the Defence an opportunity to respond and also tell us
5 what its defence is, and tell indeed you what the Defence is, once they've had
6 the chance to investigate.

7 I've heard what you say about six weeks, at the moment, unless you want to add to
8 any of that?

9 MR NICHOLLS: [12:22:18] No, your Honour. Thank you.

10 PRESIDING JUDGE KORNER: [12:22:20] Right, Mr Edwards or Mr Laucci,

11 whichever is going to deal with it. You very helpfully said you were prepared to
12 provide a pretrial brief if the Court required it. I think it would assist everybody in
13 this case for you to provide one so that everybody, before the trial starts, has an idea
14 of what the real issues, which I referred to our opening remarks, are in this case.

15 What we have in mind is to order you to provide a pretrial brief which sets out, first,
16 what matters that you take issue with that the Prosecution are proposing to lead in
17 evidence.

18 And second, sets out what your defence is in general terms.

19 We do not expect you to provide the complete detail of the defence, certainly not at
20 that stage. It does not -- such -- the provision of such a brief does not preclude you
21 from adding other avenues at a later stage if those become evident to you in
22 the course of investigations, but at least everybody starts with a good idea of what is
23 the issue or what are the issues in this case.

24 What we had in mind was to order you to provide a Defence pretrial brief by 5 March,
25 a month before the trial begins, if we order it to begin on 5 April.

1 Is there anything that you want to say about that?

2 MR LAUCCI: [12:24:36](Interpretation) To check with my notes, the 5 March would
3 be two months after the Prosecution brief; is that correct?

4 Yes, well, as we said and as you read in our filings, the Defence is at your disposal to
5 submit a brief. We said that the start of the presentation of the proof of defence
6 would perhaps be a more appropriate moment. However, we take full account of
7 the Chamber's different point of view.

8 I note the elements you'd like to see in this brief, but what I would like to say is,
9 clearly we are prepared to provide a pretrial brief, but if possible we would like to
10 have the option to have a pre-defence brief, to submit that at the appropriate moment.

11 PRESIDING JUDGE KORNER: [12:25:58] What's a pre-defence brief?

12 MR LAUCCI: [12:26:02](Interpretation) Well, that would be once the Prosecution
13 proof has been offered, once the questions relating to the existence of or not of
14 a charge or a case that we should answer, once that has been resolved we would
15 through a brief set out -- and that will no longer be under reservation, that will be
16 a clear indication, a clear breakdown of the Defence presentation.

17 So we have just been asked to have a pretrial brief which would not be exhaustive
18 and obviously would depend on the reservation of our investigations, contacts and so
19 on. Yes, we're perfectly happy to do that, but we could offer something more
20 concrete, more definitive as an introduction to the presentation of the Defence case.
21 That is the suggestion that I'm making.

22 PRESIDING JUDGE KORNER: [12:27:08] Well, can I say that that is exceedingly
23 helpful of you, Mr Laucci. When would you anticipate providing such a pre-defence
24 brief?

25 MR LAUCCI: [12:27:25](Interpretation) Well, that would be after the conclusion of

1 the Prosecution evidence and once we've resolved any questions relating to no case to
2 answer.

3 I must apologise to the interpreters and I will slow down a bit.

4 Once the Prosecution has presented its case, and that is closed, and once we have
5 resolved any questions relating to no case to answer, despite being a French native
6 speaker there is no French for "no case to answer".

7 PRESIDING JUDGE KORNER: [12:28:00] Yes, well, as we all know, it's been
8 a matter of considerable discussion in various cases before this Court.

9 Sorry. So, yes, I see, what you're saying is that when the Prosecution evidence is
10 concluded and any submissions of no case to answer have been dealt with, if
11 the Court is against you on a submission of no case to answer then you would
12 provide a further defence brief?

13 MR LAUCCI: [12:28:38](Interpretation) Yes, that's the proposal I'm making.
14 And I've just been whispered to, that is the case in many of the cases here. So that is
15 the practice which is established and which we would intend following.

16 PRESIDING JUDGE KORNER: [12:28:59] Yes. Well, as I say, that's very helpful,
17 but I'm afraid that the Trial Chamber is going to insist that before the trial actually
18 starts you file a, if you like, a pre-pre-defence brief which sets out, in particular it's
19 important to know, what issue you take with the Prosecution evidence and
20 the outline of your defence as you understand it to be at that stage. All right.

21 MR LAUCCI: [12:29:36](Interpretation) My proposal of the pre-defence brief was
22 based on there being this pre-pre-defence brief.

23 PRESIDING JUDGE KORNER: [12:29:48] Yes.

24 Again -- yes, Ms Massidda, do you want to say anything?

25 MS MASSIDDA: [12:29:53] On this, yes, your Honour, unfortunately. Our position

1 on trial brief is said in paragraph 20 of our joint written submissions.
2 It has been the practice in the Ongwen and the Yekatom, Ngaïssona cases to also
3 allow legal representatives, if they wish, to file a written trial brief. So we would like
4 to enquire with the Chamber about the position on this request.
5 And since I have the floor, I was thinking while the Prosecution was mentioning this,
6 that it could be maybe useful if the Chamber is provided with the trial brief by
7 the legal representatives slightly after the Prosecution, because in this case we could
8 present, let's say, our position on the issues at trial after having read what
9 the Prosecution is including in its trial brief.

10 Thank you.

11 PRESIDING JUDGE KORNER: [12:30:57] Yes.

12 Ms Clooney, I'd forgotten that you said, or it was said at paragraph 20 that you want
13 to do that. You're with that as well, are you?

14 MS CLOONEY: [12:31:10] (Microphone not activated)

15 PRESIDING JUDGE KORNER: [12:31:15] Ms Clooney, you're silent at the moment.

16 MS CLOONEY: [12:31:18] Apologies.

17 Yes, as set out in paragraph 20, we would like the opportunity to submit our own
18 brief. And as Ms Massidda has said, it may be most helpful to the Chamber if we do
19 so in-between the Prosecution and the Defence.

20 PRESIDING JUDGE KORNER: [12:31:35] Yes. Well, that seems sensible to me.

21 Yes, I see no reason to depart from the procedures that were set out in Ongwen and,
22 yes, you can file briefs. Thank you.

23 We'll deal at a later stage with length and so on.

24 Right. Come on to the question of pretrial motions.

25 The Defence have a large number of outstanding motions, but most of which are

1 addressed to the Pre-Trial Chamber and relate to decisions made. And I think I
2 should emphasise this Trial Chamber can't act as a court of appeal from
3 the Pre-Trial Chamber.

4 So as far as that is concerned, the Prosecution have suggested that there's a deadline
5 of 45 days prior to the start of the trial for the filing of motions. I think it has to be
6 a bit earlier than that.

7 Again, we emphasise that really the filing of motions should only take place if
8 agreement cannot be reached and if they relate to issues which need to be decided
9 before the start of the trial.

10 So apart from your - I'll go to Mr Laucci first - apart from your many outstanding
11 motions, do you anticipate filing motions relating to this aspect of this trial?

12 MR LAUCCI: [12:33:47](Interpretation) Madam President, I pray you to please
13 pardon me if our written filings were not clear enough on this point. Defence has
14 never claimed to turn the Trial Chamber into an Appeal Chamber for
15 the Pre-Trial Chamber. That is exactly why in our submissions we dwelled on
16 the decisions of the Pre-Trial Chamber which referred matters that would be dealt
17 with at your Trial Chamber, matters which were not dealt with at that level or which
18 were dealt with only to a limited extent in relation to the purposes of confirmation of
19 charges. So that is why they were referred pending confirmation.
20 So in this context we had no choice but to bring those matters up again,
21 the nonresolved matters to be brought before trial. I agree with you that it is a very
22 long list, but these are essential matters relating to witness protection, to activities on
23 the field in Sudan, and admissions of victims to participate in the process, reparations,
24 and what have you. It's an extremely long list which I don't want to repeat here. So
25 these are all pending issues that have not been resolved.

1 Now, when it comes to timing, I would say there is no problem, we are ready and
2 willing. And we have even already, if I may say, set aside the judicial recess this
3 summer and the composition of your Chamber, we felt that it was timely to wait for
4 this hearing in order to get instructions from you as to how you intend to guide us in
5 this matter.

6 So all of these questions have been attended to and we hope that they will be resolved.

7 We are waiting impatiently for solutions.

8 PRESIDING JUDGE KORNER: [12:36:10] So your argument is, is it, that these are
9 not matters which should be brought before the Appeals Chamber but are matters
10 unresolved by the Pre-Trial Chamber which we the Trial Chamber should deal with?
11 Is that what you're saying?

12 MR LAUCCI: [12:36:34](Interpretation) Given that all these matters, questions, relate
13 to the basic foundation on which this trial can take place, so quite naturally the trial
14 cannot commence, cannot start without us knowing whether yes or no the legal
15 conditions are in place to go to Sudan, to provide protection for witnesses *and to
16 know whether or not we will finally have access to the applications for participation
17 of the victims before they are allowed to participate, and not this ABC approach,
18 which has no legal foundation and which the Appeals Chamber will soon be ruling
19 on in another case.

20 So these are a few examples that I bring to your attention and we do believe that these
21 are essential questions that speak to the very heart of the judicial matter that is before
22 you. And so it is important and completely necessary that they be resolved before
23 we proceed, otherwise we would lack a basis on which to work.

24 PRESIDING JUDGE KORNER: [12:38:25] But, I'm sorry, can -- firstly, Mr Laucci, I'm
25 not sure you're correct. I think some of the issues have already dealt with an appeal.

1 But, for example, one of the matters you filed here is violation of the principle of
2 equality of arms as concerns access to the territory of Sudan. But we've discussed
3 that and this is not something at the moment that we can take any further, until such
4 time as you know that the Registry's mission has returned and you're carrying on.
5 So it seems to me that you ought to take stock again and ask yourself which of these
6 issues actually do require resolution by this Trial Chamber which have not been dealt
7 with either by the Appeals Chamber or are practical matters.
8 So I don't think today is the day where we can give you any indication of how we're
9 going to approach this. I think you've got to rethink this is a bit.

10 MR LAUCCI: [12:39:41](Interpretation) Madam President, perfectly I agree. We
11 will do so pending any specific instructions. But we will do the work and we will
12 submit our motion and observations mindful of the new information we are getting.
13 For example, what the Registry has just mentioned a short while ago, the mission they
14 have referred to is an important element. We shall wait to find out what their results
15 will be and then we will proceed to make our own requests.
16 But once again, regardless of the length of our list, it focused exclusively on
17 the questions that were not addressed by the Pre-Trial Chamber, or
18 the Pre-Trial Chamber dealt with them only in relation to the purposes of
19 confirmation.

20 Now, you've talked about the equality of arms, footnote 41 of our observations relates
21 to the exact paragraph or passage: (Speaks English) "this principle [of equality of arms]
22 must be interpreted with respect to the stage of the proceedings. [...] even if it had
23 truly been impossible for the Defence to investigate in Sudan or to obtain cooperation
24 from it, this would not automatically lead to the conclusion that it would violate
25 Mr Abd-Al-Rahman's rights to proceed with the confirmation of charges hearing.

1 [...]. [The confirmation process] is not designed to be a mini-trial and the Defence is
2 not expected to set out a complete defence. [...] Should the charges be confirmed,
3 the Defence will have ample opportunity to conduct investigations before
4 the presentation of its case before the Trial Chamber."

5 (Speaks French) So, now we are before the Trial Chamber, we will wait for
6 the information that the Registry can provide and then we will make the necessary
7 submissions based on this information and in relation to the trial.

8 PRESIDING JUDGE KORNER: [12:41:57] Yes. Well, that's exactly the point,
9 Mr Laucci. I mean, some of these motions that you're filing or going to file relate to
10 matters which we can't deal with until further investigation has been made.

11 Right. I'm told that Mr Hassan wants to say something if he's back now.

12 MR NASSER: [12:42:33](Interpretation) Thank you very much, your Honour, for -- I
13 only wanted to speak about the item, the previous item, so I do not want to repeat
14 what I'm saying. Thank you very much.

15 THE ARABIC INTERPRETER: [12:42:50] The last part was inaudible.

16 MR NASSER: [12:42:52](Interpretation) Thank you.

17 PRESIDING JUDGE KORNER: [12:42:53] Yes, I'm -- I may say I'm a little confused.
18 I understood that you were co-counsel with Ms Clooney; is that right? Or are you
19 representing a completely separate group?

20 MS MASSIDDA: [12:43:09] If I may clarify, Madam President. In accordance with
21 the decision of the Pre-Trial Chamber appointing Legal Representative for Victims,
22 the Pre-Trial Chamber decided to maintain the choice of victims in this case. As a
23 result, two teams have been composed. One team is led by counsel from the OPCV,
24 who has been appointed by a number of participating victims. And the second team
25 is composed by Ms Clooney and Mr Nasser as both Legal Representative of Victims,

1 in accordance with the choice of the victims themselves.

2 So they actually composed one team of two lead counsel, if I can put that way.

3 PRESIDING JUDGE KORNER: [12:44:04] Well, I'm not -- no, I'm not clear I
4 understand that at all.

5 But, in any event, Mr Nasser, if there's anything you want to say, now is your
6 opportunity.

7 MR NASSER: [12:44:27](Interpretation) I only want to point out that I represent
8 the victims -- that I am the Legal Representative of the Victims and I work to express
9 the concerns of the victims in front of the Court.

10 The following points -- in the following points I will be giving my own opinion on an
11 independent basis.

12 Thank you, your Honour.

13 PRESIDING JUDGE KORNER: [12:45:02] Which points do you want to give your
14 opinion on?

15 MR NASSER: [12:45:13](Interpretation) At the outset, I wanted to speak about
16 the -- the guarantee for the work of the Defence team in order to communicate with
17 the victims within Sudan that require protection and require active cooperation from
18 the Sudanese government to secure the work of the teams.

19 In order to be able to meet the victims we are facing very, very difficult circumstances
20 to reach those victims, especially within Sudan itself, but we are able to resolve these
21 difficulties.

22 Also, the cooperation is not only to provide the secure way of meeting those victims
23 in Sudan, but also to cooperate with the Sudanese government which relates to
24 providing the security and also the papers.

25 We are here talking about victims that are suffering very much and they are living in

1 difficult circumstances. They are living in areas which do not -- are not even covered
2 by any government infrastructure, so we are dealing with victims who it's very
3 difficult for them --

4 THE ARABIC INTERPRETER: [12:46:47] Note from the booth: The voice cuts out.

5 MR NASSER: [12:46:51](Interpretation) So we find there is cooperation from
6 Sudan -- sorry, we require more cooperation from the Sudanese government in order
7 to provide this during the next stage and also to -- in order to establish the evidence
8 and especially to help also the Defence team.

9 Thank you, your Honour.

10 PRESIDING JUDGE KORNER: [12:47:12] Yes, thank you very much, Mr Nasser.

11 All right. That's pretrial motions.

12 Yes, as I say, Mr Nicholls, does anybody want to add anything? I mean, we'll just set
13 a deadline and we'll see where we go.

14 Ms Massidda, yes.

15 MS MASSIDDA: [12:47:34] Your Honour, I was just listening at the list of pending
16 issues in accordance with the Defence. Position of course now, in my humble
17 position there are issues that require eventually to be solved by the Chamber very
18 soon. I'm referring, for instance, to the issue that the Defence is referring to in
19 relation to application by new victims or issues related to victims' participation. I'm
20 afraid this cannot wait 45 days prior to the commencement of trial.

21 So, of course I can touch upon this issue during the J agenda, I meant on application,
22 but we have a very strong position as Legal Representative that the matter of
23 applications and dealing with the procedure of application has been dealt with
24 properly by the Pre-Trial Chamber and there is no need for the Trial Chamber to
25 disturb that procedure.

1 But I will be more than willing to offer my thoughts on that during the next agenda
2 item.

3 Thank you.

4 PRESIDING JUDGE KORNER: [12:48:45] No, sorry, I mean the -- the -- it's not that
5 we're suggesting this is going to wait until 45 days before the trial. In fact we
6 disagree with that anyhow. We're going to set a deadline.

7 Matters such as this will be dealt with earlier. It was simply all I was dealing with
8 where the Prosecution say up to 45 days before trial. No is the answer, it's got to be
9 sooner. So that's in your favour.

10 All right. The length of opening statements.

11 Unless anybody wants to add anything to what they say. Yes, the only thing I do
12 need to clarify is with the Victims' Representatives. What is said in your filing is that
13 you want an hour for each of you, but may request additional time if victims want to
14 intervene in person.

15 Is that what you intend to do? Are you able to say that?

16 First of all, Ms Massidda.

17 MS MASSIDDA: [12:50:09] Your Honour, the opening statements for victims are
18 particularly important. It's their chance to make the Chamber understand the extent
19 of the victimisation and what they suffered from. In this respect, we think that it
20 could be useful for the Chamber to have a portion of the opening statements reserved
21 for the possibility of victims to present themselves, their views and concerns, at the
22 start of the trial.

23 This is a discussion which has been recently engaged with the other legal
24 representatives, so we are not today in a position to provide a clear joint position on
25 the issue.

1 As Madam President has probably noticed, we are trying to present to the Chamber
2 joint position, because we think that this will help not only the Chamber, but also
3 the victims, in presenting their arguments and we are at the moment discussing this
4 opportunity amongst us.

5 Also verifying who amongst the clients that we are representing could eventually be
6 suitable - I'm sorry to use this term but I don't find any other more suitable term in
7 English - for this purpose.

8 In relation to the length of the opening statements, I would say that if victims are
9 coming to present their views and concerns, most probably, at least on my side,
10 the presentation of my opening statements could be easily shortened to 30 minutes, 40,
11 45 minutes maximum. Thank you.

12 PRESIDING JUDGE KORNER: [12:52:01] Yes. Thank you. Yes, all right, I
13 appreciate it's a bit early.

14 Yes, Mr Laucci.

15 MR LAUCCI: [12:52:08](Interpretation) Thank you, Madam President.

16 I simply want to say that if the proposal from the distinguished representative of
17 victims is for victims to participate in the opening statements by making statements
18 which will not account to -- which will not amount to testimonies and therefore not
19 subject to cross-examination, there will be absolutely no objection from the Defence to
20 that suggestion. Which, by the way, is in line -- is in line with the proposal that
21 Mr Abd-Al-Rahman himself should make a very short statement at the beginning,
22 which will be very brief, which will not be a testimony and therefore will not be
23 subjected to cross-examination. Thank you very much.

24 PRESIDING JUDGE KORNER: [12:53:04] Ms Clooney, anything you want to add to
25 what Ms Massidda said?

1 MS CLOONEY: [12:53:08] Thank you, your Honour.

2 No, I -- I agree with the position. We were just saying an hour would be basically
3 the maximum that counsel would need and that, if there were to be a request for
4 victims to speak directly, we would make that request for additional time on that
5 basis and in due course.

6 PRESIDING JUDGE KORNER: [12:53:27] Yes.

7 Mr Nasser.

8 MR NASSER: [12:53:35](Interpretation) I believe that the time that has been
9 suggested by the LRVs, which is one hour, which -- will be sufficient in the next stage.
10 And this shows that this time is actually not a very long time. It's not a long time,
11 because we will be representing many witnesses and many victims. And we will
12 also speak about the general points that combine all of these victims together and all
13 the circumstances, the combined circumstances that join these witnesses
14 together -- sorry, the victims together, in representing their concerns and their views,
15 and I believe that this time allocated will be very suitable. Thank you very much.

16 PRESIDING JUDGE KORNER: [12:54:30] Yes, thank you.

17 That brings us then to the victims' participation. This is clearly a matter that needs,
18 potentially, either a separate hearing or separate -- proper written submissions.
19 I don't think that we can take it much further today, unless anybody wants to say
20 something.

21 Ms Massidda.

22 MS MASSIDDA: [12:54:58] Thank you very much, Madam President.

23 We consider that our submission - paragraphs 24 until I think 28, yes - adequately
24 reflect our position, which I can simply summarise in a few words.

25 One, the participating victims -- the victims already participating in the proceedings

1 are automatically authorised to participate at trial, which is the constant practice.
2 Second, we need some flexibility from the Chamber in allowing victims to present
3 their application throughout the proceedings.
4 Legal representatives have suggested until at least the end of the presentation of
5 evidence by the Prosecution. The Registry went even further in their Annex II,
6 the submission, indicating until the end of the trial. We certainly support that
7 position of the Registry, in light not only of the pandemic situation which is not over,
8 but also in light of the difficulties in reaching victims in the field and in meeting with
9 victims, as already indicated previously.
10 Third observation, we think that the procedure set by the Pre-Trial Chamber in
11 dealing with the system of application forms is very efficient, suitable and should be
12 continued during the trial. Unless of course then the Defence will argue something
13 different, and in that case we will reserve our right to present observations once
14 the Defence will make this issue before the Chamber.
15 Finally, just to inform the Chamber that -- and also because this is an issue dealt with
16 by the Registry again in Annex II, the Registry is indicating in the annex that
17 the current system of legal representation is working. I think that we can confirm
18 that. And all the three legal representatives will be, of course, willing to continue
19 their engagement with victims in this case. So we also think that there is no need at
20 this point in time to change the system of legal representation as it was done by
21 the Pre-Trial Chamber.
22 I'm of course available for any further questions that the Chamber may have and, of
23 course, for attending any other status conference that the Chamber will consider
24 useful to deal with this issue.
25 PRESIDING JUDGE KORNER: [12:57:50] Yes. Well, having said that it should be

1 dealt with on a separate occasion, I do note that really the Defence objection is that
2 the whole system should start again. And I'm going to ask Mr Laucci what benefit
3 he thinks that's going to have so that we can try and deal with this today.

4 So thank you, Mrs Massidda.

5 Before I turn to you, Mr Laucci, do you want to add anything, Ms Clooney, to what's
6 in the written submission?

7 MS CLOONEY: [12:58:29] I think for purposes of what the Trial Chamber is trying
8 to determine today, I certainly stand by our joint written submissions. And if
9 anything further is needed, we can address that through written submissions
10 following this hearing, of course.

11 PRESIDING JUDGE KORNER: [12:58:43] Right.

12 Now, Mr Laucci, very quickly. Well, I think we're going to have to adjourn, so
13 you've got two minutes at the moment.

14 Why should the whole system change? Why should it start again from
15 the beginning?

16 MR LAUCCI: [12:59:06](Interpretation) Madam President, at this juncture, in order
17 to save time, let me simply say that I positively welcome your suggestion to have
18 a status conference on this specific situation. And I suggest that, to be effective, that
19 status conference should come after the judgment of the Appeals Chamber in the Said
20 case, in which the ABC approach was submitted to the Appeals Chamber. It may be
21 validated or invalidated, and at that point we will have a clear view.

22 So the Defence has deployed all its energy during the pretrial phase to challenge
23 the ABC approach, which may be extremely efficient but entirely incompatible with
24 the Defence. So let us wait for the Appeals Chamber decision for things to be
25 clarified.

1 And I agree with you that this is a matter of great priority and so, after we receive
2 the Appeals Chamber's decision, then we can make written submissions on this
3 question and then come to various conclusions.

4 And why must we start afresh?

5 *Because if the ABC approach is invalidated, then the victims who were admitted
6 during the pretrial phase were admitted on the basis of an illegal process. That is, if
7 the Appeals Chamber were to come to such a finding.

8 MS MASSIDDA: [13:01:00] Thirty seconds, just for the record, your Honour. I
9 think I understand you now. Start understanding you.

10 Just for the information of the Chamber, the judgment in the Said case will be
11 delivered on 14 September.

12 PRESIDING JUDGE KORNER: [13:01:15] On which?

13 MS MASSIDDA: [13:01:16] On 14 September, so next week.

14 And in any case, just again for the record, even if the Appeals Chamber will revert the
15 decision, that decision of the Appeals Chamber is not *stare decisis* for this Chamber, so
16 we will argue that at a later stage. Thank you very much.

17 PRESIDING JUDGE KORNER: [13:01:33] Yes. Well, thank you very much.

18 Was that the last on the -- there were other matters.

19 Yes, all right. We'll adjourn then now until -- what time? Anybody?

20 (Trial Chamber confers)

21 PRESIDING JUDGE KORNER: [13:02:20] Yes. All right. I'm told that it's 2.30.

22 So we'll adjourn until 2.30.

23 I think the remaining matters -- well, if we can, we'd like to give a ruling possibly
24 at 2.30.

25 There are other issues I don't -- and, I'm sorry, we're just going to, if the interpreters

1 don't mind, we'll just continue five minutes.

2 The conduct of proceedings document was one and the protocols. Are these matters
3 which really should be resolved today?

4 First of all, Prosecution.

5 It's simply that I'm looking at if we can deal with the rulings on the matters that
6 are -- really have to, and particularly a date of trial at 2.30, because there's going to
7 have to be a break before any matters are raised by the Prosecution *ex parte* I'm told.
8 So, I mean, I'm just asking at this stage, submission on the conduct of proceedings
9 document, is that something that needs to be resolved today?

10 MR NICHOLLS: [13:03:48] I don't think so, your Honour.

11 I mean, I think we will -- we will first try to agree, and speak to each other, and then
12 we will make submissions I think on all aspects on the conduct of the proceedings by
13 a date that you said. I may be --

14 PRESIDING JUDGE KORNER: [13:04:06] Yes. A question that occurred to us is
15 whether we should entertain submissions on the conduct of the proceedings.

16 MR NICHOLLS: [13:04:14] I see. Well, I think, for example, your Honour,
17 one -- one issue that's quite important is whether there will be witness preparation.

18 PRESIDING JUDGE KORNER: [13:04:21] Yes.

19 MR NICHOLLS: [13:04:22] And what the parameters of that will be. And before I
20 would file a demand for it, I would speak to counsel and see. And I won't start
21 advocating for it now, but when we're talking about efficiency, that can be a factor

22 (Overlapping speakers)

23 PRESIDING JUDGE KORNER: [13:04:46] No, no.

24 MR NICHOLLS: [13:04:43] And also the amount of -- sorry.

25 PRESIDING JUDGE KORNER: [13:04:44] It is a matter that will come in

1 the document that relates to the conduct of the proceedings. I simply throw this out
2 because it occurred to me that how proceedings are conducted are a matter for
3 the Judges. And particularly in the hopes that there is now going to be consistency
4 between all Trial Chambers on how proceedings are conducted, do we want to
5 entertain submissions so that we go back to a system whereby each Trial Chamber
6 makes its own decision, which is not desirable?

7 MR NICHOLLS: [13:05:30] I see. In that case, your Honour, I think it's entirely up
8 to the Chamber. And -- and if anything -- if you issue your document on
9 the conduct of the proceedings, if we think anything would be helpful, then we may
10 raise it. Or if you think that some input would be helpful from the parties, then we
11 will provide it. But I agree with you.

12 PRESIDING JUDGE KORNER: [13:05:55] Yes.

13 All right. I think we should -- we'll adjourn now until 2.35.

14 THE COURT USHER: [13:06:04] All rise.

15 (Recess taken at 1.06 p.m.)

16 (Upon resuming in open session at 2.37 p.m.)

17 THE COURT USHER: [14:37:03] All rise.

18 Please be seated.

19 PRESIDING JUDGE KORNER: [14:37:38] Yes, before we go back to the question of
20 the conduct of proceedings, I gather, Mr Hassan, is it? I keep -- Nasser, sorry.

21 Mr Nasser - I am sorry, I just got muddled - wants to clarify something about
22 the position of you and Ms Clooney.

23 Can I put it this way: It is the understanding of the Trial Chamber that you
24 represent the same group of victims. In which case you cannot both be leading
25 counsel. One of you is leading and the other is co-counsel.

- 1 MS CLOONEY: [14:38:26] Your Honour, may I just make a comment?
- 2 PRESIDING JUDGE KORNER: [14:38:31] Yes, Ms Clooney.
- 3 MS CLOONEY: [14:38:34] Thank you. Can I just suggest that rather than take up
4 the Court's time today with this sort of issue, I'd be happy to make some submissions
5 directly on this following the status conference, if that would be convenient.
- 6 PRESIDING JUDGE KORNER: [14:38:48] Can I say I thoroughly approve that of
7 that point of view, but unfortunately I was told that Mr Nasser wanted to say
8 something about this.
- 9 MS CLOONEY: [14:38:57] Okay.
- 10 PRESIDING JUDGE KORNER: [14:38:57] And I don't want, at this stage of the
11 proceedings, to cut him off.
- 12 MS CLOONEY: [14:39:04] Okay. I don't know what's coming.
- 13 PRESIDING JUDGE KORNER: [14:39:05] You don't know what's coming, well, nor
14 do we.
- 15 MS CLOONEY: [14:39:10] (Overlapping speakers)
- 16 PRESIDING JUDGE KORNER: [14:39:11] Can I say, Mr Nasser, would it not be
17 better, as Ms Clooney suggests, if this were to be dealt with by way of further written
18 submissions?
- 19 MR NASSER: [14:39:26](Interpretation) Yes, of course we do that, as Ms Clooney
20 said. Yes, written submissions are welcome. They can be provided for the Court.
- 21 PRESIDING JUDGE KORNER: [14:39:39] Thank you very much. In that case we'll
22 go back to where we were, the conduct of proceedings.
23 Yes, Mr Nicholls, you said you wanted to make submissions on it and I
24 expressed - can I put it this way - a preliminary view. Is there anything else you
25 want to add to that?

1 MR NICHOLLS: [14:39:57] No, your Honour. Thank you. And I didn't mean I
2 wanted to make them now. That's just an example of the type of written submission
3 that might be useful.

4 PRESIDING JUDGE KORNER: [14:40:06] Yes, thank you.

5 Yes, Mr Laucci, do you want to say anything at this stage about that? Mr Edwards.

6 MR EDWARDS: [14:40:12] Yes, it's just a modest proposal really. It has worked
7 well in other jurisdictions when the Trial Chamber produces what's termed a draft
8 order seeking then observations on the part of the parties. Of course the decision is
9 that of the Trial Chamber at the end of the day, but it's not inconceivable that
10 the parties think that there is something that ought to be in the order that has been not
11 before then been drawn to attention of the Trial Chamber.

12 It's not inconceivable that we may have thought of something that your Honours
13 haven't. That's the only point.

14 PRESIDING JUDGE KORNER: [14:40:55] Yes. Thank you, Mr Edwards.

15 I know exactly what you mean. But I think at the moment this is still a topic that's
16 under discussion and we'll come to a decision on that. Either we'll issue an order, as
17 it were, a final order, or we'll issue a draft order and invite parties' submissions on it.

18 MR EDWARDS: [14:41:23] Thank you. The important thing is that there is an order
19 at the end of the day.

20 PRESIDING JUDGE KORNER: [14:41:28] Oh, yes. I think we all appreciate that.

21 Yes, anything that the Victims' Representative want to say on this.

22 MS MASSIDDA: [14:41:35] Thank you, Madam President.

23 Our position is already in the written submission, paragraph 39, so we will refer to
24 that.

25 And in relation to the standardisation that you mention in the previous session, if I

1 look at the recent decisions in the Yekatom, Ngaïssona case, which is decision 631,
2 and in the Al Hassan case which is decision 789, there seems to be indeed
3 a standardisation on the conduct of the proceedings, so maybe could be useful to
4 follow that -- that practice.

5 Thank you very much. Which takes into account, by the way, our suggestions in
6 paragraph 39.

7 PRESIDING JUDGE KORNER: [14:42:16] Yes.

8 Whilst you're on your feet about your submission, there was something I meant to
9 mention. I think it is yours. I think when you quote the cases in your footnotes you
10 simply quote - and this is for all three of you, I think - the case number without saying
11 what the name of the case is. It would help, certainly a new person like myself, if
12 you were to mention the name in future submissions and not just the number.

13 MS MASSIDDA: [14:42:53](Overlapping speakers) the team will be more than
14 happy to comply, your Honour. But we provide the hyperlink, so it's also I think
15 easy. But we will do certainly, certainly. Thank you.

16 PRESIDING JUDGE KORNER: [14:43:05] Yes. It just makes it quick if you can see
17 it was Yekatom or whoever. Thank you very much.

18 All right, the final matter that was raised, I think largely by you, or the victims'
19 submissions - sorry, forgive me, one moment - was the question of the protocols.
20 I propose to defer that, for a number of reasons, unless anybody feels an urgent
21 decision is needed.

22 No. No. All right.

23 Very well, then what I propose to do now is issue an oral decision on perhaps
24 the most important aspects that have been discussed this morning in the status
25 conference.

1 The first, of course, is the commencement date for this trial.

2 There are a number of factors which govern the commencement date. The first is
3 the Prosecution's request that it does not start until June because of the amount of
4 work they say still remains.

5 Against that, the defendant has been in custody since his arrest and it is important
6 that a person, an unconvicted person in custody, has a trial as speedily as possible.

7 And the Defence in this case have made it clear that is what they want, despite
8 the difficulties they have themselves in investigating, and suggested February.

9 The third aspect is that these events are now exceedingly old. A lot of the evidence
10 that the Prosecution anticipate calling comes from witnesses who will be having to
11 give evidence about these events many years ago, and the longer the delay the more
12 likely it is that they will have difficulty in recalling those events.

13 The Prosecution difficulties, which they outlined succinctly, as one would expect,
14 should, in our view, be alleviated to a sufficient extent by the fact that there is proper
15 contact between the Defence and the Prosecution and a proper willingness to narrow
16 the issues. And that should assist the Prosecution.

17 And so taking into account those competing submissions and, which cannot be
18 overlooked, the ability of this Court to accommodate the trial, it is our view, having
19 heard all the submissions, that, as we said earlier, we feel that this trial should
20 commence on 5 April of next year.

21 It will then run on a daily basis until the recess, which is on 14 April. We would
22 expect in that period that opening statements can take place and the calling of at least
23 one witness. Thereafter it will depend on -- the sitting times will depend on, as I say,
24 the availability of the courts.

25 It seems to me that it would help, as regards the progress of this case, if there were to

1 be a further status conference. That will be on 12 November of this year, again
2 which is a date that the Court calendar can accommodate.
3 So that is the first and most important ruling that we make.
4 As far as agreed facts are concerned, which is another matter of major importance for
5 the reasons we've already expressed, we're not going to set a deadline. I think it
6 would be pointless to do so. But we will review the position at the status conference
7 on 12 November and we would very much hope that those agreed facts had reached
8 a rather larger number than at present envisaged.
9 As far as disclosure is concerned, we are going to set a cut-off date for disclosure by
10 the Prosecution of evidence on which it intends to rely of 5 January of next year.
11 Obviously, exculpatory evidence is an ongoing matter.
12 Any disclosure of evidence which is to be used as part of the Prosecution case after
13 that date, which we would discourage strongly, and we add to that discouragement
14 this: It may only be used in evidence with the permission of the Trial Chamber.
15 We would obviously expect that any disclosure after 5 January would be
16 accompanied by a full explanation of the reason for the delay.
17 As far as trial briefs are concerned - please forget the word I've been using of pre-trial
18 briefs, which comes from another tribunal - as far as trial briefs are concerned,
19 the Prosecution trial brief should be filed by 5 January. It should be accompanied by
20 a list of witnesses and a list of the documents which will be used. And by
21 "documents" I include, obviously, any visual documents.
22 It would be helpful to the Defence and to the Court if there were to be a list of
23 the expected order in which they will be called, understanding of course that there
24 may be unforeseen problems which will arise, but that will help the Defence in
25 deciding how to prioritise their investigations.

1 The Defence trial brief should be filed by 4 March.

2 As far as pretrial motions are concerned, there will be a cut-off date of 3 December.

3 The motions referred to in the Defence filing for this status conference are not in fact, I

4 suddenly realised, filed before this Trial Chamber. So any motions which

5 the Defence, after reflecting on whether it helps to file a motion, must be filed by

6 3 December.

7 The Prosecution response should be within -- subject to the nature, but should come

8 within 14 days of the filing by the Defence. We will issue a written direction about

9 the length of these motions if it is intended to depart from what is set out in

10 the Regulations of the Court about length.

11 It is also our intention to have a hearing for all these motions together and dispose of

12 them all, hopefully. However, the length of that hearing and when it will be,

13 obviously it will be sometime after December and probably in early next year, to be

14 decided when we see how many motions there are and so on and so forth.

15 Obviously, motions which require urgent decisions are a different matter.

16 As far as the openings are concerned, the actual opening for each of the parties, we, as

17 already indicated, agree the times suggested. There was a suggestion that

18 the defendant, the accused himself may wish to speak. He may certainly do so, if he

19 wishes, and his counsel are happy with that. But it will be deducted from the time

20 allowed.

21 And I think that concludes all the rulings that we propose to make today.

22 Yes, Mr Laucci.

23 MR LAUCCI: [14:55:15] I'm sorry, Madam President. One difficulty with one of

24 the dates that you announced, that is the date, tentative date for the second status

25 conference on 12 November. We cannot know, but at this time we should be, if our

1 request has been authorised, in Sudan. We plan to be there over the first three weeks
2 of November, actually. It's not confirmed, I don't know whether that will be, but if
3 that is, we will not be available.

4 PRESIDING JUDGE KORNER: [14:55:52] Yes. Mr Laucci, obviously it's most
5 important that you're able to get there. If that is the case and that is your time to be
6 over there, then could you, through the Registry, notify us in advance and we'll try
7 and find another date with is suitable.

8 MR LAUCCI: [14:56:10] Immediately once we know.

9 PRESIDING JUDGE KORNER: [14:56:13] Right. Yes. Well, I perfectly understand
10 that. Thank you.

11 Any other problems with anything else I've mentioned from anybody?

12 MS CLOONEY: [14:56:16] Your Honour (Overlapping speakers)

13 MS MASSIDDA: [14:56:17] Yes, Madam President. Unless I am mistaken, we have
14 not heard any deadline for the Legal Representative of Victims trial brief.

15 PRESIDING JUDGE KORNER: [14:56:31] (Microphone not activated)

16 MS CLOONEY: [14:56:31] Or a response regarding --

17 MS MASSIDDA: [14:56:33] Or -- yes, this is one matter (Overlapping speakers).

18 MS CLOONEY: [14:56:36] (Overlapping speakers) trial motion.

19 MS MASSIDDA: [14:56:39] And the second is the response to the motions. I can't
20 remember now. It was 14 days for the Prosecution. We understand that the same
21 deadline applies to us?

22 PRESIDING JUDGE KORNER: [14:56:49] (Microphone not activated)

23 THE INTERPRETER: Microphone, Judge Korner, please.

24 PRESIDING JUDGE KORNER: [14:56:59] You're quite right, Ms Clooney. I'm sorry.
25 As you will understand it, Victims' Representatives are a new feature for me.

- 1 MS MASSIDDA: [14:57:11] I'm happy to stand up.
- 2 PRESIDING JUDGE KORNER: [14:57:13] Yes.
- 3 No, the same deadline would apply to you. And your brief should, I suppose, be
- 4 filed in-between the two briefs. So what did we say?
- 5 MS CLOONEY: [14:57:28] Early February.
- 6 PRESIDING JUDGE KORNER: [14:57:30] Yes. If you were to say -- yes, if you were
- 7 to say - subject to not being a Saturday or Sunday - 5 February, something like that.
- 8 MS CLOONEY: [14:57:35] So it's Monday the 7th, your Honour.
- 9 PRESIDING JUDGE KORNER: [14:57:45] Right. Monday the 7th, yes.
- 10 MS CLOONEY: [14:57:42] Thank you.
- 11 MS MASSIDDA: [14:57:43] Thank you.
- 12 PRESIDING JUDGE KORNER: [14:57:43] Anything else that I ought to say, haven't
- 13 said?
- 14 No. Well, then that -- that concludes the open part of the status conference.
- 15 As I say, the next status conference, unless the Defence team manage to get to Sudan,
- 16 will be on 12 November, and obviously we'll arrange another date around that time
- 17 which fits in with them.
- 18 Yes. Well, thank you very much. The Chamber will then adjourn so that
- 19 the matters relating to witnesses that the Prosecution want to raise can be done in
- 20 closed session or *ex parte* session.
- 21 Thank you.
- 22 THE COURT USHER: [14:58:36] All rise.
- 23 (The hearing ends in open session at 2.58 p.m.)
- 24 CORRECTIONS REPORT
- 25 The following corrections, marked with an asterisk and included in the audio-visual

1 recording of the hearing, are brought into the transcript.

2 Page 42, lines 20-21

3 "even the pending issues for tomorrow" is corrected to "not by the May agreement"

4 SECOND CORRECTIONS REPORT

5 The following corrections, marked with an asterisk and not included in the

6 audio-visual recording of the hearing, are brought into the transcript.

7 Page 35 lines 1-4

8 "but what we needed to have finally questions answered which have been asked

9 throughout the pretrial phase, questions which concern us greatly from a legal point

10 of view. The OTP and the Court in Sudan, well, on the basis of the information we

11 have, there is no legal framework in Sudan, there is no convention" Is corrected to

12 "but of finally having questions answered which have been put throughout the

13 pretrial phase, and the question which concerns us greatly is the legal framework of

14 the operations both of the OTP and more generally of the Court in Sudan. There is no

15 convention"

16 Page 35 lines 11-12

17 "We are continually hearing that cooperating with the Court is a criminal offence" Is

18 corrected to "We received confirmation in July that that today, cooperating with the

19 Court constitutes a criminal offence"

20 Page 35 line 25 to Page 36 line 1

21 "The witnesses stated that the concerns are not only limited to the investigations of

22 the Defence" Is corrected to "Allow me to specify that my concern is not at all limited

23 solely to the investigations of the Defence"

24 CORRECTIONS REPORT

25 The following correction, marked with an asterisk and included in the audio-visual

1 recording of the hearing, is brought into the transcript.

2 Page 15 line 14

3 "representative" Is corrected to "Representative"

4 The following corrections, marked with an asterisk and not included in the
5 audio-visual recording of the hearing, are brought into the transcript.

6 Page 11 lines 15-18

7 "Not one of these statements is it marked confidential, whereas this is part of
8 the protection policy of the Court in 2007/001 of June 2007." Is corrected to

9 "Not a single one of these statements is marked confidential, whereas this is required
10 under section 7 of the Information Protection Policy of the Court, promulgated by
11 Administrative Instruction 2007/001 of 19 June 2007."

12 Page 11 lines 19-22

13 "So since the origin of this case, since the start of proceedings, the information
14 protection policy - the ink was not yet dry on this policy - has been circumvented and
15 ignored." Is corrected to "So since the very beginning of this case, since the start of
16 the OTP's investigations, the brand new Information Protection Policy - the ink was
17 not yet dry on this policy - has been ignored, circumvented, flouted and violated."

18 Page 12 lines 1-2

19 "from the ICCBA in February 2018 -" Is corrected to "by the International Criminal
20 Court Bar Association, the ICCBA, in February 2018, at the time when it was led by--"

21 Page 13 line 23

22 "8" Is corrected to "18"

23 Page 14 lines 14-18

24 "because of the legitimate concerns of the Registry or the Prosecution,

25 Mr Abd-Al-Rahman can do nothing to change this and therefore he would be in

1 detention to an uncertain date expecting a date for the trial." Is corrected to
2 "because of the legitimate and respected concerns of the Registry, or because of the
3 concerns of the Prosecution, Mr Abd-Al-Rahman can do nothing to change this. And
4 this cannot be done at the expense of my client, who would be kept in detention until
5 an indeterminate date, awaiting a trial whose start date is unknown."

6 Page 27 lines 6-9

7 "Depending on the agreed facts, this is not necessarily a fixed item linked to this
8 phase, it is an ongoing phase, including when the trial itself will have started." Is
9 corrected to "We take the position that these agreements on facts are not set in stone,
10 or necessarily limited to the pre-trial phase. This is an ongoing process that can
11 continue, even once the active phase of the trial begins."

12 Page 30 lines 5-6

13 "In their filings it seems that testimonies in Arab language are now listed as
14 those that need to be translated into Arabic." Is corrected to "In their filings it seems
15 that statements that were taken originally in Arabic are now listed amongst those that
16 still need to be translated into Arabic."

17 Page 30 lines 11-13

18 "the Defence team is able to make use of at least two very competent Arabic speakers
19 in our team and we would be happy to have original Arabic versions." Is corrected to
20 "the Defence team is fortunate in that we can rely on at least two extremely
21 competent Arabic speakers on our team, and we are ready to initially receive the
22 original Arabic versions, if they are available."

23 Page 32 lines 11-12

24 "I think that's important that we have this clarification." Is corrected to "I think that
25 this is no longer significant, since we have obtained the clarification that we were

1 waiting for from the OTP.”

2 Page 50 lines 11-17

3 “You may have seen the Defence filing related to this point and request to appear
4 before the Chamber, but this is -- was a fine line in the previous hearing. There was
5 a video presented by Mr Abd-Al-Rahman, but the proof is that it was requested by
6 the OTP and therefore it was not admissible as evidence.” Is corrected to

7 “You may have seen the Defence's submissions on this point in its application to the
8 Pre-Trial-Chamber for leave to appeal. I will not revisit the issue, but just to say that
9 the decision by the Pre-Trial Chamber hung by a threat in relation to this point. The
10 thread in question was a video that was introduced to us as having been produced on
11 Mr. Abd-Al-Rahman's own initiative. But the evidence is on the record that it had
12 been requested by the Office of the Prosecutor, in violation of the texts of the Court,
13 and was not admissible as evidence.”

14 Page 50 lines 18-24

15 “We also stated that the -- that the Trial Chamber might accept that there is sufficient
16 proof that he is Ali Kushayb, and therefore there would be no, there would be no
17 concession from our part. But we have developed the argument that, even if he had
18 been Ali Kushayb, there is another problem in the Prosecutor's dossier, which is
19 the psychological element of knowledge was not raised, demonstrated or discussed.”

20 Is corrected to

21 “During the confirmation of charges hearings, we also raised the possibility that the
22 Pre-Trial Chamber might take the view that there was sufficient proof that Mr. Ali
23 Abd-Al-Rahman was Ali Kushayb. And on the basis of that hypothesis, which did not
24 require any concession on our part, we developed the argument that even if Mr
25 Abd-Al-Rahman had been Ali Kushayb, there was another problem with the

1 Prosecutor's case. Namely, that the psychological element of knowledge had at no
2 point been raised, established or demonstrated."

3 Page 61 lines 15-19

4 "and to know whether or not we can finally be able to have access to witnesses'
5 applications for participation before they are effectively allowed to participate. So
6 these are legal matters on which I have said we hope there will be a judgment from
7 the Appeals Chamber in another case." Is corrected to "and to know whether or not
8 we will finally have access to the applications for participation of the victims before
9 they are allowed to participate, and not this ABC approach, which has no legal
10 foundation and which the Appeals Chamber will soon be ruling on in another case."

11 Page 71 lines 5-7

12 "It would be because if the approach has been invalid -- or becomes invalidated, then
13 the victims who were admitted in the pretrial phase would have been admitted on an
14 illegal basis, that is if the Appeals Chamber were to come to such a finding." Is
15 corrected to "Because if the ABC approach is invalidated, then the victims who were
16 admitted during the pretrial phase were admitted on the basis of an illegal process.
17 That is, if the Appeals Chamber were to come to such a finding."