

Status Conference

(Open Session)

ICC-02/05-01/20

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Status Conference - Courtroom 3
9 Wednesday, 5 July 2023
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: [9:31:39] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:32:02] Yes.
15 Can we call the case, please.
16 THE COURT OFFICER: [9:32:05] Good morning, Madam President. Good
17 morning, your Honours.
18 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
19 Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05-01/20.
20 And for the record, we are in open session.
21 PRESIDING JUDGE KORNER: [9:32:26] Right.
22 Well, we'll start with the Defence, because I see Mr Laucci is online and Mr Edwards
23 is online.
24 I thought, Mr Laucci, you weren't going to be here at all?
25 MR LAUCCI: [9:32:39] Oh, no, Madam President, I managed to (Overlapping

1 speakers)

2 PRESIDING JUDGE KORNER: [9:32:42] Sorry, you have to wait, I've forgotten to
3 put my ...

4 MR LAUCCI: [9:32:47] Do you hear me?

5 PRESIDING JUDGE KORNER: [9:32:48] Just hang on a moment, I haven't got my
6 earphones on.

7 (Pause in proceedings)

8 PRESIDING JUDGE KORNER: [9:33:50] Yes. I'm sorry.

9 Mr Laucci, can you say what you were saying again.

10 MR LAUCCI: [9:33:55] Yes. Thank you, Madam President.

11 As announced at the last status conference on 24 May, I was not able to be present in
12 the courtroom physically, but I am -- I am able to attend remotely, and thank you for
13 authorising my colleague Counsel Iain Edwards and myself for doing so.

14 PRESIDING JUDGE KORNER: [9:34:16] Well, actually I never intended to do that.

15 Had I known that -- I mean, I understand Mr Edwards' problem, I wasn't -- I never
16 asked you what yours was on the basis that Mr Edwards was going to be here.

17 However, I mean, we are where we are, so, but in future I really do expect one or
18 other of you to be in court. It's just not --

19 MR LAUCCI: [9:34:43] Yeah, we --

20 PRESIDING JUDGE KORNER: [9:34:44] -- that simple. All right --

21 MR LAUCCI: [9:34:44](Indiscernible) -- Madam President, but the -- unexpected
22 events decided unfortunately otherwise.

23 So the presence of the Defence today in the courtroom, in addition to Counsel

24 Iain Edwards and myself attending remotely, Mr Abd-Al-Rahman is in the courtroom,

25 together with Madam Audrey Mateo, legal adviser; Mr Ahmad Issa, our case

1 manager; Madam Nina Guilloux and Mr Mohammad El Rahi, assistant in charge of
2 the review of evidence; and our intern, Nour Ouardani.

3 PRESIDING JUDGE KORNER: [9:35:24] Right. Thank you very much.

4 Yes, Prosecution.

5 MR NICHOLLS: [9:35:29] Good morning, Madam President. Good morning,
6 your Honours.

7 Julian Nicholls with Ed Jeremy, Claire Sabatini, Diana Saba, Rachel Mazzarella and
8 Alison Whitford. Thank you.

9 PRESIDING JUDGE KORNER: [9:35:40] Yes, thank you.

10 Representatives of the victims.

11 MS VON WISTINGHAUSEN: [9:35:43] Yes. Good morning, Madam President.

12 Good morning, your Honours. Good morning, colleagues in and outside of
13 the courtroom. The victims today are represented by associate counsel Anand Shah;
14 our case manager, Saif Kassis; and our intern, Saskia Adjowa Afande; and myself,
15 Natalie von Wistinghausen. Thank you.

16 PRESIDING JUDGE KORNER: [9:35:59] Yes, thank you, Ms von Wistinghausen.

17 And finally, yes, we have got the Registry here this morning.

18 MS VUKASINOVIC: [9:36:06] Good morning, your Honours. With me today is
19 Vera Wang, external relations coordinator; Pieter Vanaverbeke, counsel support;
20 Natalie Wagner, judicial cooperation; and my name is Jelena Vukasinovic, chief of
21 external relations and cooperation.

22 PRESIDING JUDGE KORNER: [9:36:28] Yes, thank you.

23 All right, well, I think you were all sent the agenda yesterday. So can we start, then,
24 with the Rule 68(2)(b) declarations.

25 Mr Laucci, you challenged the new information, then some agreement was reached

1 with the OTP, but you want to make further oral submissions. I'm not clear why, if
2 you've reached an agreement.

3 MR LAUCCI: [9:37:04] With your permission, Madam President, Counsel
4 Iain Edwards will answer on that topic.

5 PRESIDING JUDGE KORNER: [9:37:09] All right.

6 Mr Edwards, why do you want to make any submissions if you reached an
7 agreement?

8 MR EDWARDS: [9:37:18] Yes, it's right that we have reached agreement. The only
9 point I wanted to raise is that -- arises out of certain -- a certain point made at
10 paragraph 12 of the Prosecution's response, where they -- they make a point about
11 timeliness of the -- of the request. And I have to admit, it's a -- it's a -- it's a technical
12 point, but that the reliance on Regulation 34(b) of the Regulations of the Court is, in
13 our submission, misplaced.

14 In short, our submission in response to the Registry's transmission of the declarations
15 were not formally a response, they were a stand-alone -- that they amounted to
16 a stand-alone request. Our submission is that the Registry is -- is not a participant.
17 The Regulation 24(1) is inapplicable. The document filed by
18 the Registry -- the -- nothing filed by way of a response can be caught by the 10-day
19 time limit.

20 That that's really the only point I wanted to make. It was -- I appreciate it's
21 a technical point and it's not going to have an impact on your Honours' ultimate
22 disposal of the matter, but we thought it would be wrong to let that misplaced
23 submission go uncommented upon.

24 PRESIDING JUDGE KORNER: [9:38:51] Yes. Well, as you say, it's hardly the most
25 important matter that faces us today.

1 All right. Well, you've made your point.

2 Right, so is this right then -- I think we'd just better get this on the record. First of all,
3 the Defence confirms that it doesn't oppose the submission of the declarations of
4 the other Rule 68(2)(b) witnesses who are not referred to in the filing; is that correct?

5 Yes.

6 MR EDWARDS: [9:39:17] Correct.

7 PRESIDING JUDGE KORNER: [09:39:18] Well, you're nodding, but you've got to
8 say yes.

9 MR EDWARDS: [9:39:26] That's correct, your Honour.

10 PRESIDING JUDGE KORNER: [9:39:28] Yes. Right.

11 And you don't challenge the reliability of the statements in the light of the new
12 information contained in the declarations?

13 MR EDWARDS: [9:39:42] We -- no, the -- let me put it this way: We reserve our
14 right to in due course make submissions on reliability and relevance of certain 68(2)(b)
15 witnesses in due course. But what we have reached an agreement on is that the new
16 information contained in the declarations of truth were not -- where not challenged by
17 us can be taken into consideration by your Honours in due course. But we certainly,
18 by -- these are 68(2)(b) witnesses. Some of them, we objected to their admission
19 under 68(2)(b), but in any event our position is not one whereby we -- we certainly
20 don't undertake not to make submissions on reliability in due course, if that makes
21 sense.

22 PRESIDING JUDGE KORNER: [9:40:48] Yes, well, on the basis of what's contained
23 in their statements as -- and as in -- as compared with other evidence that's been
24 called; is that what you're saying?

25 MR EDWARDS: [9:41:01] Exactly so, yes.

1 PRESIDING JUDGE KORNER: [9:41:02] Right. All right. Thank you for that.

2 Well, in that case, we'll rule now on the matter.

3 There is agreement amongst the parties as to what is to be considered as new
4 information which goes beyond the scope of what is allowed in a Rule 68(2)
5 declaration.

6 The Defence, although it reserves its position to make future representations on
7 reliability, otherwise does not challenge for these purposes the reliability and they
8 don't challenge the declarations for the other 68(2)(b) witnesses not referred to in their
9 motion.

10 All Rule 68(2)(b) declarations are already submitted on the record in their entirety, as
11 the Prosecution case has now concluded, hence the declarations as made shall remain
12 unchanged in eCourt. However, for the purposes of the Article 74 judgment,
13 the Chamber will only rely on the amendments contained in the declarations which
14 are uncontested or otherwise agreed by the parties. All other new information
15 challenged by the Defence will not be relied upon by the Chamber for the purposes of
16 the judgment.

17 Right, next can we move to the -- the representative of the victims' request to submit
18 material from the bar table. There's a request to submit 11 items: Three maps, one
19 UN report, one World Bank and one NGO report, as well as a briefing -- an NGO
20 briefing paper, and four press articles.

21 And in respect of the UN report -- in respect of the reports mentioned - that is, the UN,
22 NGO and World Bank - they rely on limited excerpts. And it is said that the parties
23 agree.

24 Can I confirm, first of all with the Defence: Is that right, Mr Edwards?

25 MR EDWARDS: [9:43:39] That's right, we don't object.

1 PRESIDING JUDGE KORNER: [9:43:41] Mr Nicholls, Prosecution?

2 MR NICHOLLS: [9:43:45] Yes, your Honour, no objection.

3 PRESIDING JUDGE KORNER: [9:43:45] All right. Very well, then we'll deal with
4 that ruling.

5 In the light of the fact that the parties agree or have no objection to the CLRV request,
6 the Chamber authorises the submissions of the 11 items identified in the annex of
7 the filing which relates to this, 975. The items will be submitted in their entirety, but
8 the Chamber will only rely on the excerpts identified by the CLRV in respect of
9 the UN, NGO, World Bank reports for the purposes of the Article 74 judgment. And
10 the Registry is instructed to reflect this ruling in eCourt.

11 Right, and this brings us on then to the matters of more substance.

12 I'm actually going to start with the postponement request.

13 No, actually, I think what I'm going to do is start with the -- in fact, the application to
14 have witnesses recalled because of what's said to be new information that's emerged.
15 Now, I'm not sure whether we need to go into private session for this.

16 MR NICHOLLS: [9:45:26] It depends how it goes, your Honour. I think some of it
17 may well need to be, depending on the question.

18 PRESIDING JUDGE KORNER: [9:45:32] Right.

19 We are not going to make a ruling on it today, but what I want to know, Mr Laucci, is
20 what further questions you think you could put to the witnesses based on that
21 the information from 874 which is particular to 874?

22 MR LAUCCI: [9:46:02] The question that would be asked to all witnesses,

23 Madam President, is the following: Did you seek and/or obtain authorisation from
24 the Sudanese authorities to appear before this Court?

25 And if the answer to that question is positive, then the next question will be: What

1 are the conditions of this authorisation?

2 PRESIDING JUDGE KORNER: [9:46:29] The relevance being what to the issues in
3 the case?

4 MR LAUCCI: [9:46:35] The relevance being -- the relevance being that if
5 the witnesses have had to obtain the authorisation from the Sudanese authorities to
6 appear before this Court, this has -- and depending on the conditions of that
7 authorisation, this has a direct impact on the assessment of the reliability of these
8 witnesses, because if the Sudanese authorities were in a position to provide -- to -- to
9 impose conditions to what the witnesses would say or not say before this Court, of
10 course it means that their testimony and their evidence was not free and was
11 provided under compulsion, to say the least.

12 PRESIDING JUDGE KORNER: [9:47:30] But -- yes, well, I can see that.

13 My understanding is that none of the witnesses actually
14 physically-- physically -- actually sought the authorisations of the Sudanese
15 government to testify.

16 MR LAUCCI: [9:47:53] The information that it is cooperation with the Court without
17 authorisation that is criminalised and may incur death penalty in Sudan is new.
18 That is information that we received in this incident report.

19 So this is a totally new information. You -- your Honour will remember that our
20 request for reconsideration on the issue of incrimination of cooperation with
21 the Court in Sudan was rejected on the essential grounds that what was mentioned in
22 previous incident reports, including related to P-874, was nothing more than
23 the all-too-common fears of witnesses. No longer the case here. It's not only fears,
24 it's actual threat.

25 PRESIDING JUDGE KORNER: [9:49:02] Yes. Okay. Let's take this in stages.

1 First of all, you said the only question that you wanted to ask on was whether they'd
2 received authorisation. And if so, if the answer was yes, what conditions, if any, had
3 been made.

4 But you're now saying, are you, that if the answer is no, then you want to go on to ask
5 them what? Whether they were -- that they fear recriminations? I don't follow that.

6 MR LAUCCI: [9:49:29] Well, if the witnesses -- if the witnesses appear, yes, we may
7 also use that opportunity to ask them if they know about that incrimination and risk
8 of death penalty. But the essential question is the one that I mentioned already,
9 did they have to seek and obtain authorisation and what was the condition of that
10 authorisation.

11 PRESIDING JUDGE KORNER: [9:49:54] All right.

12 Mr Nicholls, am I right in my understanding that, as I gathered it, nobody had
13 thought authorisation from the authorities? Was that --

14 MR NICHOLLS: [9:50:10] Yes, your Honour. Could we go into private session for
15 one second.

16 PRESIDING JUDGE KORNER: [9:50:14] Yes.

17 Private session, please.

18 (Private session at 9.50 a.m.)

19 THE COURT OFFICER: [9:50:34] We're in private session, Madam President.

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9 (Open session at 10.12 a.m.)

10 THE COURT OFFICER: [10:12:08] We're back in open session, Madam President.

11 PRESIDING JUDGE KORNER: [10:12:13] Right.

12 Mr Laucci, the Prosecution have responded to your alibi notification and

13 although -- and it's one of the issues that arises -- although in the status conference I

14 effectively said that for the moment you were to give such details as were possible,

15 the Prosecution firstly has taken the point that you've made quite a lot of references to

16 what was said in the filing to what was said in the *ex parte* status conference.

17 Now, you can't really have it both ways and the Prosecution say: "Well, you know,

18 we'd really like to see what was said." And, as you've referred to it, we're entitled to

19 see what's said. There's some justification in that.

20 So, first of all, what do you want to say about that?

21 MR LAUCCI: [10:13:20] Well, we are currently, Madam President, in the difficult

22 situation where indeed the Office of the Prosecutor and the Common Legal

23 Representative of Victims are not in possession of all relevant information because

24 that information was exchanged between the Defence and the Chamber and

25 the Registry in an *ex parte* session. That's obvious, we are fully aware of it.

1 The reason why this was *ex parte*, we note them, had to be because we have discussed
2 in very in-depth details various aspects of our investigation since the beginning of
3 this case and this is not something that is afforded the Prosecution. That may be
4 frustrating, I fully measure that, but the Office of the Prosecutor has no right to
5 protection against frustration in the Rome Statute. It is the role of the Chamber to
6 decide and to rule whether to conduct the proceedings and to make sure that
7 the proceedings remain fair. That's the reason why this was done *ex parte*.
8 Now, obviously there is -- during that *ex parte* session there were things that were said
9 which have -- or may have a direct impact on the unfolding of the proceedings,
10 the unfolding of the trial, and especially the time frame of the Defence case. We
11 have referred to some of this information in the request in order to give at least this
12 minimal background to the Office of the Prosecutor and the Common Legal
13 Representative of Victims, that is that after a very lengthy status conference that you
14 will certainly remember, well, we -- I hope I'm not misinterpreting in saying that we
15 have been able to provide evidence and to reassure the Chamber that this Defence has
16 done whatever it could since the beginning of the case in June 2020 to advance in
17 the preparation of its case and in its investigations but has faced such barriers
18 and -- and impediments that the result is what it is today.
19 I think that information definitely needs to be conveyed to
20 the Office of the Prosecutor. We tried to convey it in the requests, but I understand
21 this is -- I do not understand, but I -- I read from the OTP response that this quote that
22 we are making from the transcript is not enough for them to be satisfied that we have
23 done whatever we could do throughout the duration of this case. So we
24 need -- definitely need to find a way to reassure them that this issue has been
25 explored fully and has been concluded now so that the OTP understands that it's no

1 longer the point of repeating again and again that the Defence did not do this or did
2 not do that or did not go on mission on that or that date. All this has been explored,
3 the reasons have been clarified, and this is now something that
4 the Office of the Prosecutor should know in order to be reassured. I regret a little bit
5 that what was put in the request, the information that was put in the request was not
6 enough for the Office of the Prosecutor, but this is the maximum we thought we were
7 authorised to do.

8 PRESIDING JUDGE KORNER: [10:17:31] First thing I should make clear to you,
9 Mr Laucci, is you can't pick and choose what you choose to disclose from an *ex parte*
10 conference, and once -- effectively, you are waiving the confidentiality once you refer
11 to it in a filing which the Prosecution gets.

12 And the second thing that I ought to say, as you quote me on this, is you quote me as
13 saying, and this was in the status conference at page -- it's your footnote - just a
14 moment - footnote 6, page 36 to 39. Yes, what I said was: "I appreciate all of this and
15 I now fully - and I think I speak for all my colleagues - fully understand what it is
16 you've been engaging in over the last two years."

17 Mr Laucci, the one thing - it was couched in the most neutral terms that I could think
18 of at the time - the one thing that you should not be -- should not take from that is that
19 we think you've been doing everything you should have been. We don't. We can
20 see what you've been doing, that's what I was saying, which is engaging in endless
21 discussions and arguments, with the Registry largely, and we did not by -- and I did
22 not by that remark intend to indicate that we were satisfied you had done everything
23 that you could. We are not.

24 So I think you, as I said, it was said in a neutral stage as possible -- a neutral way as
25 possible, sorry, and the reality is that we're faced with the situation as it presently

1 exists. But, as I say, you cannot quote selectively from a status conference without
2 waiving in some form its confidentiality. I'm going to work on the basis that you
3 didn't appreciate that that was an outcome that was possible and, therefore, at this
4 stage I'm not going to order that the Prosecution get a copy of the transcript of
5 the *ex parte* status conference. But, for future reference, you really can't do that
6 without opening the door to the Prosecution getting a copy.

7 However, more to the point, there are some matters that the Prosecution raise which I
8 think you could deal with and which are relevant. They say in paragraph 9 of their
9 filing that even if you can't produce the documents, why can you not give
10 a less -- a more restricted time (Redacted)

11 (Redacted)

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14 MR LAUCCI: [10:21:35] (Redacted)

15 (Redacted)

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21 Excuse me, but I realise, are we still in open session?

22 PRESIDING JUDGE KORNER: [10:22:33] Yes.

23 MR LAUCCI: [10:22:36] Well, I would like the substance of what we are

24 saying -- sorry, I had not imagined that we would go in that direction and I think this
25 is something for private session. And I will ask my team to send a request for

1 (Overlapping speakers)

2 PRESIDING JUDGE KORNER: [10:22:53] All right, we'll go back. I did wonder
3 slightly, but you didn't object. I said we're going to discuss the alibi.

4 All right. We're going to --

5 MR LAUCCI: [10:23:03] I didn't think we would talk about the substance right now.

6 PRESIDING JUDGE KORNER: [10:23:08] All right.

7 Well, we go back into private session then.

8 (Private session at 10.23 a.m.)

9 THE COURT OFFICER: [10:23:29] We're in private session, Madam President.

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Status Conference

(Private Session)

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Status Conference

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Status Conference

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Status Conference

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ICC-02/05-01/20

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- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 (The hearing ends in private session at 11.05 a.m.)