

Trial Hearing

(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 (absent pursuant to Rule 140 *bis* of
8 the Rules of Procedure and Evidence)
9 Trial Hearing - Courtroom 2
10 Friday, 20 October 2023
11 (The hearing starts in open session at 9.36 a.m.)
12 THE COURT USHER: [9:36:04] All rise.
13 The International Criminal Court is now in session.
14 Please be seated.
15 PRESIDING JUDGE KORNER: [9:36:23] Yes, good morning, all.
16 As was discussed and agreed yesterday, the Bench is sitting as a Bench of two, owing
17 to the unavoidable absence of Judge Alexis-Windsor. And, as I say, which was
18 agreed very helpfully by all parties yesterday.
19 Yes, could we have the appearances.
20 Defence, please.
21 MR LAUCCI: [9:36:54] Good morning, Madam President. Good morning,
22 your Honour. Good morning, colleagues. Good morning to the public in
23 the gallery.
24 Together with Mr Ali Muhammad Ali Abd-Al-Rahman, present in the courtroom this
25 morning, we have Thomas Chatelet, who is our intern in the Defence team;

1 Madam Marcela Velarde; Mr Mohammad El Rahi, Madam Eva Kalb, who are
2 assistant evidence reviewer; Mr Ahmad Issa, our case manager; Audrey Mateo, our
3 legal adviser; my co- -- the co-counsel, Iain Edwards; and myself, Cyril Laucci.

4 PRESIDING JUDGE KORNER: [9:37:40] Yes, thank you.

5 Prosecution.

6 MR NICHOLLS: [9:37:43] Good morning, Madam President. Good morning,
7 your Honours. Good morning, everyone.

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

10 PRESIDING JUDGE KORNER: [9:37:54] Yes, thank you.

11 And the representatives of the victims.

12 MS VON WISTINGHAUSEN: [9:37:57] Yes, good morning, Madam President,
13 your Honours, dear colleagues. Good morning to everyone in and outside of
14 the courtroom.

15 The participating victims this morning are represented by my associate counsel
16 Anand Shah; behind me my case manager, Saif Kassis; and also behind me our
17 visiting professional, Charlotte Imhof; and myself, Natalie von Wistinghausen.
18 Thank you.

19 PRESIDING JUDGE KORNER: [9:38:17] Thank you very much.

20 Yeah, now, Mr Laucci, before you carry on with your opening, I gather you want to
21 raise a matter. Is it a matter that should be raised in private session?

22 MR LAUCCI: [9:38:27] Yes, I think it's -- it's better to go in private session to discuss
23 it.

24 PRESIDING JUDGE KORNER: [9:38:32] Yes, well, we'll do that briefly.

25 Yes, private session, please.

Trial Hearing

(Private Session)

ICC-02/05-01/20

1 (Private session at 9.38 a.m.)

2 THE COURT OFFICER: [9:38:50] We're in private session, Madam President.

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Trial Hearing

(Private Session)

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1 (Open session at 9.43 a.m.)

2 THE COURT OFFICER: [9:43:32] We're back in open session, Madam President.

3 PRESIDING JUDGE KORNER: Thank you.

4 MR LAUCCI: [9:43:35](Interpretation) Thank you, your Honour.

5 I shall continue with my submissions in the place where I stopped yesterday
6 afternoon.

7 Having hoodwinked the Office of the Prosecutor and its teams in directing their
8 investigations towards a complete unknown, a pharmacist by trade, the Sudanese
9 authorities have thus managed to accomplish the second feat of obstructing with
10 impunity all the investigations of the Defence of Mr Abd-Al-Rahman. If
11 Mr Abd-Al-Rahman's fundamental rights in this trial were not at stake, I would take
12 my hat off to them.

13 It has to be said that the Defence has been very isolated in this case.

14 The Office of the Prosecutor is not likely to complain about a trial without
15 the possibility of an investigation by the Defence, putting the safeguarding of its good
16 relations with the Sudanese authorities for the purposes of investigations in other
17 cases above respect of Mr Abd-Al-Rahman's rights. That is its role, that is
18 undoubtedly hardly compatible with a fair trial. But if the Prosecutor were
19 concerned, we would know about it.

20 As for the Registry, it has still not recovered from the revelation on 14 December 2020
21 in the public submission 231 of the Defence of its failure since 2005 to negotiate an
22 agreement under Article 4(2) of the Statute, defining the legal framework for
23 the Court's activities in Sudan.

24 I can only imagine the electric shock that reading submission 231 of the Defence in
25 the office must have caused. The proof is that more than 15 years after resolution

1 1593, the Office of the Prosecutor rushed to Khartoum to negotiate a first agreement
2 signed in January 2021, hardly one month afterwards. And the Registry, for its part,
3 negotiated another agreement on 10 May 2021.

4 I can welcome the efficiency, one month on one side, five months on the other, to
5 negotiate and sign these two agreements with regards to the 15 years that preceded it.

6 Now, the Registry has certainly not recovered from the Defence's submissions of
7 the completely null and void nature of the agreement that was agreed in urgency on
8 10 May 2021 and all the efforts of the Registry since have consisted of repeating that
9 everything was fine with regards to Sudan with the Court, even if, at the same time,
10 the requests for visas from the Defence were systematically ignored and these
11 requests for cooperation were without response.

12 The Registry, and in particular its external relations division -- external operations
13 division, has demonstrated a guilty complacency with regards to the Sudanese
14 authorities. The purpose of this complacency was to maintain the illusion that
15 everything was going well and that the conditions were right for conducting a trial in
16 a Sudanese case.

17 They clearly were not.

18 The Defence noted this as early as 5 October 2020 in its submission 174 and it has been
19 repeating it without cease ever since. Breaking with its neutrality, the Registry - and
20 I'm speaking about the external operations division - in response did nothing but
21 maintain the opposite in order to allow this trial to continue against all odds.

22 However, the facts are stubborn. They cannot be denied indefinitely. The facts on
23 which the Defence relies to demonstrate the deficiency of the legal environment in
24 the present case and the lack of cooperation by Sudan are indisputable. Where we
25 diverge with the Office of the Prosecutor, and which remains a debate and which one

1 day may have to be decided by the Appeals Chamber, is the question of
2 the consequence thereof with regards to the fairness of the trial. But the facts for
3 themselves are established, and I will mention seven of them such that the public may
4 take into account whether there's anyone who can challenge them.

5 The first fact, Sudan is not a State Party.

6 Second fact, Sudan has not entered into a regularly ratified and published agreement
7 relating to the Court's activities on its territory under Article 4(2) of the Statute.

8 Third fact, Sudan has not enacted a national law on cooperation with the Court as
9 required under Articles 87(5)(a) and Article 88 of the Statute.

10 Fourthly, contrary to Sudan's assertions, its July 2020 law makes no mention of
11 the repeal of an offence of cooperation with the Court in its national legislation.

12 The fifth fact, Sudan's declaration registered with the Secretariat of
13 the United Nations on 26 August 2008 that it does not consider itself bound by any
14 obligation under the Rome Statute has never been withdrawn, it has never been
15 contested, it has never been objected to by any other State, for example, the States
16 who voted on the resolution. It remains, therefore, in force to this day and it's very
17 easy to consult it on the sight of the Secretariat of the United Nations.

18 The sixth fact, the Sudanese authorities did the Defence the great honour in
19 the communication of 12 January 2003 in its response to its request to transcript
20 documents to escalate them and thereby definitively compromising for the Defence
21 any possibility of investigating in its territory.

22 And the seventh fact, the same authorities have plunged Sudan, since 15 April 2023,
23 into a bloody, non-international armed conflict which prohibits any court missions
24 has caused an almost complete breakdown in telephone or internet communications,
25 making it impossible to implement the slightest witness protection measure on its

1 territory, to which the Court's Victims and Witnesses Unit no longer has any access in
2 any case.

3 The finding of these seven facts is sufficient to demonstrate that the conditions for
4 prosecution and the conduct of a trial in the present case were not and still are not
5 met. It is this consequence that we are in disagreement on. And it is on this
6 consequence that the Appeals Chamber will eventually be called upon to rule. But I
7 insist, we may disagree about the consequences, but the materiality of these eight
8 facts is not in dispute.

9 However, denying these realities was not enough to maintain the illusion of
10 procedural fairness. An explanation had to be found for the fact the Defence was
11 unable to make progress in its investigations, since neither the deficient legal
12 environment of this case, nor the non-cooperation of Sudan could explain it,
13 something else had to be found, blaming the Defence for the conduct of its
14 investigations, *voilà* that was the solution. Where visas were not issued by Sudan,
15 the Defence was blamed for its refusal to go on mission and its inability to seek
16 alternative solutions, such as conducting its investigations from third countries.

17 The Office of the Prosecutor did it well. Why not us? Blaming the Defence as
18 the sole explanation for the lack of progress in its investigations compared to the
19 investigations of the Office of the Prosecutor is unjustified for at least three reasons:
20 Firstly, the Office of the Prosecutor carried out multiple missions to Sudan from 2005
21 to 2023. Visas were regularly issued to its teams to travel to Sudan and to carry out
22 investigations. The Defence, for its part, was only issued with visas for a period of
23 30 days, during which it was able to organise one sole mission, and that was limited
24 to Khartoum in June 2022.

25 Secondly, while the majority of Prosecution witnesses are persons from the Sudanese

1 diaspora who have taken refuge outside Sudan or groups of internally displaced
2 persons gathered in IDP camps, supervised by nongovernmental organisations,
3 the witnesses of the Defence continue to live their simple lives as Sudanese citizens in
4 Darfur and are not accessible from the outside.

5 Pharmacy customers, regimental friends, childhood friends, members of the tribe, this
6 is the population that forms the pool of potential Defence witnesses for
7 Mr Abd-Al-Rahman. Like him, they are completely anonymous. Most have never
8 set foot outside Sudan and have no telephone. No governmental organisation is
9 looking after them and -- nor is able to act as an intermediary for the Defence.

10 The only way to identify and contact them, other than through the limited
11 recollections of Mr Abd-Al-Rahman and his personal contacts, is to go and find them
12 where they live. And the Defence has not been able to do that, ever. It has never
13 been able to do that. The Sudanese authorities have prevented it.

14 Thirdly, the Office of the Prosecutor had no less than 16 years to conduct its
15 investigations and prepare its evidence before the start of the trial. There were ups
16 and downs, but this is the amount of time from the start to the finish. Some of its
17 requests for cooperation were met by the Sudanese authorities and according to
18 the interest and the strategy, in particular where it concerned giving or providing
19 the Prosecutor with evidence to accuse the scapegoat Abd-Al-Rahman, the Office of
20 the Prosecutor furthermore obtained a six-month postponement for the confirmation
21 of charges hearing in the pretrial phase in order to complete its investigations, and it
22 did so after the confirmation of charge hearing.

23 And here I'm not talking about the astronomical sum of €39 million in the budget
24 spent by the Office of the Prosecutor in the situation of Sudan alone since 2005 to 2022
25 or 2023. In 2023 it must certainly be above that. This sum is mentioned in

1 paragraph 6 of the report ICC/ASP/21/6.

2 Now, the Defence, for its part, has never obtained more than a single 30-day visa, has
3 only had an initial budget of €75,000 once extended for its investigations, has received
4 no response to any of its requests for cooperation, and has only obtained very limited
5 extensions of time to conduct its investigations and prepare its evidence, even though
6 its investigations were to take place since 15 April in Sudan in which it no longer had
7 access.

8 The situation -- is the situation in Sudan comparable to all the other situations in
9 which international criminal justice is applied?

10 Are the risks that we see in Sudan and the difficulties investigating there, are they
11 the same as the risks and the difficulties as those previously encountered in
12 the former Yugoslavia, Rwanda, Sierra Leone or in other situation countries of
13 the Court?

14 Well, it would seem that, with the sole exception of the first years of the tribunal for
15 the former Yugoslavia and the NATO bombings in Serbia in 1999, international
16 criminal justice has only had to investigate post-conflict situations.

17 Admittedly, these were not ideal. They were unstructured. My personal
18 experience means that I know -- knew Rwanda in 1995, Sierra Leone in 2005, Kosovo
19 in 2008. But we were not in a situation of open conflict, as is the case today in Sudan.
20 Until the opening of the situation in Ukraine, where no defence is at work, no
21 situation before the Court, not even Mali, not even Libya, is taking place in a situation
22 of open warfare comparable to what Sudan has been undergoing since 15 April 2023.
23 The Court itself no longer has access thereto and we would like the Defence to
24 investigate when it does not even benefit from any duty of care towards them, which
25 I mentioned yesterday.

1 So faced with this simple and true presentation of this sad reality, this comparison
2 between, on the one hand, the time, the facilities and the means given to the Office of
3 the Prosecutor with, on the other hand, the blame reserved for the Defence and
4 the inflexibility in granting it the little time it has requested to continue its
5 investigations, would that situation stand up for a single second to an examination of
6 the fairness of this trial by a reasonable observer? The answer is clearly no.
7 In this case, the fairness of the trial has been definitively ruined by all, or tarnished by
8 all the reasons that I have mentioned. The Chamber will of course not be in
9 agreement with my analysis and it is up to another chamber to note this obvious fact
10 hereafter. It is a question of patience. The evidence cannot always be denied. It is
11 too obvious. It will come.
12 I shall move on to the presentation of Defence evidence.
13 Despite the difficulties that I have mentioned, the Defence has conducted its
14 investigations, or it has conducted the investigations that it could. What the Defence
15 has been able to achieve in these conditions - and I weigh my words - is nothing short
16 of miraculous.
17 Firstly, it required an extraordinary combination of circumstances coming together
18 early July 2023 which enabled limited communication, but communication
19 nevertheless, to be established with one of the sites of interest for the Defence
20 investigation. Then afterwards it took the relentless efforts of every -- each and
21 every member of the Defence team, who I would like to thank and compliment
22 individually for their continued dedication.
23 And afterwards it took the incredible dedication of the Defence witnesses themselves,
24 who were prepared to take incalculable risks to meet the Defence outside Sudan,
25 wherein any other case before the Court, which is normal, witnesses are contacted

1 and met and looked after, taken care of in situ, where they are. None of this is part
2 of the normal conditions of investigation before the Court. Whatever the results that
3 will be presented at the trial, they cannot suffice for the exercise of
4 Mr Abd-Al-Rahman's right to benefit from the time and facilities necessary to prepare
5 his defence and to call witnesses on behalf of before the Court under Article 67(1)(b)
6 and (e) of the Statute.

7 The fact that the Defence was able to carry out miracles, perform miracles, does not
8 change this. The Defence submits that miracles cannot serve as a standard
9 applicable to respecting the rights to a fair trial before the Court.

10 And the result of these investigations is that the brief registered and
11 the submissions -- the brief registered on 2 October 2023 and the submissions that
12 the Chamber have ordered be made today have been prepared at least somewhat
13 blindly, in that the Defence does not know even all of the evidence that it will be
14 finally able, we hope, to present at trial.

15 We have mentioned this in our brief of 2 October 2023 and the consequences of
16 the fact that we have to present the Defence evidence without having all of it will be
17 addressed in a more -- with an overview in the final brief of the Defence.

18 The ambition of the Defence in presenting its evidence is to draw the Chamber's
19 attention to the fact that the case before you is far from being as simple as
20 the Office of the Prosecutor would have you believe.

21 The Office of the Prosecutor has presented you with a disarmingly simple scenario
22 that can be summed up in one sentence: A group of wicked Arab militiamen known
23 by the magic term "Janjaweed", allegedly gathered together under the supreme
24 command of an *agid al-ogada*, another magic term, called Ali Kushayb to attack,
25 pillage and persecute the Fur population of Wadi Salih and Mukjar in response to

1 a call for counterinsurgency issued by President al-Bashir.

2 The Defence will endeavour to shed some light on the grey areas of this simplistic
3 scenario, which will reveal that the reality is somewhat more complicated than
4 the Office of the Prosecutor would have you believe.

5 The Defence will demonstrate that the Arab militias, confusingly labelled "Janjaweed"
6 by their detractors, actually belonged to perfectly defined paramilitary formations,
7 the Popular Defence Forces, Popular Police Forces and border guards. Those
8 persons recruited into these formations joined the reserve forces, governed by a law
9 of 1982, the Reserve Forces Services Act, and they were then assigned to these
10 different formations. In return, therefore, they -- in return for their mobilisation they
11 received clearly defined compensation or pay, which included compensation for
12 possible injuries sustained in operations - wounds, for example - or, in the case of
13 death, compensation going to members of the family.

14 We spoke a lot about the confiscation of land and its reallocation. The allocation of
15 land confiscated from the Fur population was one element of the remuneration
16 offered to members of these paramilitary formations and it was coordinated and
17 legally recorded within their administration by the Sudanese Armed Forces.

18 These paramilitary formations were governed by a clear and perfectly organised
19 hierarchy with a command structure articulated at federal, regional and local level.

20 And in this hierarchy, the title of *agid al-ogada* had absolutely no place whatsoever.

21 The title of *agid al-ogada* corresponds, for its part, in a tribal function. In certain Arab
22 tribes, a group of people are given the title of *agids*, and they elect from among them
23 to coordinate their actions an *agid al-ogada*. Now, this customary hierarchy is
24 nothing to do with the hierarchies in force with the Popular Defence Forces,
25 Popular Police Forces and border guards.

1 Furthermore, the title *agid al-ogada* implies only limited, very limited authority within
2 the tribe to which the *agid al-ogada* belongs. And it does not allow it -- this title does
3 not allow it to be -- exercise any command outside the tribe and even less within
4 paramilitary formations within a well-defined hierarchy similar to those I mentioned.
5 The Office of the Prosecutor's case has made a simple character -- caricature of this
6 complex reality. Bringing it to light will be the first objective of the Defence's
7 presentation. Neither the materiality of the attacks, nor the suffering of the victims
8 will be addressed in the presentation of the Defence's evidence. And there's a good
9 and simple reason therefor, that is because they are outside the scope of
10 Mr Abd-Al-Rahman's defence. The pharmacist in Garsila had no information, no
11 evidence about what happened or what did not happen in Kodoom, Bindisi, Mukjar
12 and Deleig.
13 He was either in his pharmacy, selling medicines, or, alternatively, he was hundreds
14 of kilometres away in a training camp. He's therefore not in a position to talk about
15 the events described in the charges. All he can talk about, and what he can provide
16 evidence about, is about himself and his lack of connection with the crimes charged.
17 The Defence therefore began by investigating what Mr Abd-Al-Rahman was in
18 position to tell us about himself, the pharmacist from Garsila who was not involved in
19 any armed operations in Darfur in 2003. He had to find evidence of an uneventful
20 life, some would say a *petite vie bourgeoise*, if this very French expression could have
21 any meaning in Sudan.
22 This is evidence that is far less dramatic than the accounts of combat and atrocities
23 that litter the Office of the Prosecutor's evidence, evidence that is much more difficult
24 to gather 20 years after the event because it's so insignificant.
25 The evidence that the Defence had to seek was that of non-events from 20 years ago.

1 In the Sudanese version of the Grimm fairy tale that I mentioned yesterday,
2 the Defence has to give the account of life without the Sudanese version of Mr Bovary,
3 of Gustave Flaubert. Another register, another challenge, Mr Bovary is not the hero
4 of the novel in which he appears.

5 So who in this room can remember the non-events of their daily lives 20 years ago?

6 We remember, or do we remember how many times we went to the pharmacy in 2003
7 and 2004 and what -- what dates? Was the pharmacy open or not? Who worked
8 there? This is the kind of evidence the Defence needed in this case. Undoubtedly,
9 the nature of this evidence posed an additional difficulty for its investigations. Even
10 if we concentrated on this subject, access to the evidence was prevented by
11 the impossibility of going to the places where Mr Abd-Al-Rahman had lived,
12 primarily Garsila and Rahad Al-Berdi where, of course, the people who had known
13 him and who could testify to these harmless non-events would be found.

14 Witnesses D-02, D-03, D-04, D-05, D-06, D-07, D-08, D-11, D-28, D-29 and D-32 are
15 witnesses in this category that the Defence hopes to call to the trial.

16 The Defence also sought to clarify the general context of the events covered by
17 the charges which is, as said, more complex than the OTP would have us believe.

18 Who were these mysterious Janjaweed, these devils on horseback defined nowhere by
19 the Office of the Prosecutor? Witnesses D-16 and D-17 will bring their first-hand
20 knowledge to bear on this question.

21 What is this no less mysterious title of *agid al-ogada* which the Office of the Prosecutor
22 defines only very succinctly and imperfectly? How is it designated? What was
23 the authority of its bearer? If the Defence succeeds in calling them to appear,
24 Witnesses D-01 and D-03 will give their personal knowledge of what this title actually
25 means.

1 Since the title -- tribal title *agid al-ogada*, because the title *agid al-ogada* is a tribal title
2 and the Janjaweed/militias were, according to the Office of the Prosecutor, recruited
3 on a tribal basis, what was the case of Mr Abd-Al-Rahman's tribe? Did this tribe
4 participate in the counterinsurgency of 2003 to 2004? Could a member of this tribe
5 have played a role as eminent and prominent as that attributed to
6 Mr Abd-Al-Rahman in relation to the operations of the counterinsurgency?
7 The expert witness called jointly by the Office of the Prosecutor and the Defence at the
8 start of this trial - I am talking about Professor Alex de Waal - has already answered
9 this question in the negative.
10 If the Defence succeeds in calling them, Witnesses D-01, D-02 and D-03 will
11 corroborate his answer by -- with direct evidence from their personal experience.
12 Were the crimes referred to in the charge criminal acts under the law applicable in
13 Sudan at the time? Was there an obligation to obey an order to commit them? And
14 what were the consequences of any offenders?
15 Witnesses D-16 and D-23 will answer these two questions on the basis, firstly, of
16 the direct personal experience, and, secondly, on the basis of their academic expertise.
17 Finally, a word about the partial alibi of which the Defence gave notice on 22
18 June 2023. As the Defence states in paragraph 24 of its brief of 2 October 2023,
19 the limits encountered in conducting its investigations, exacerbated by the ongoing
20 armed conflict in Sudan, mean that we have not been able to re-establish contact with
21 Witness D-13, who is identified as the first and main witness in Mr Abd-Al-Rahman's
22 partial alibi. The continuation of this partial alibi is therefore continual upon
23 the future ability of the Defence to re-establish contact with Witness D-13, to bring
24 him to trial to testify, or to identify other potential witnesses who could corroborate
25 this alibi.

1 The Defence will, of course, keep the Chamber and the parties informed of further
2 developments in relation to the partial alibi defence of Mr Abd-Al-Rahman. You see
3 no issue therewith. I propose that we now take a break. That will make it possible
4 for my colleague, Iain Edwards, to start immediately after the break to present
5 the first line of defence.

6 Oh, no, please excuse me, an error with regards to the time. We have until 11 o'clock,
7 so my colleague Iain Edwards, with your permission, shall take over.

8 PRESIDING JUDGE KORNER: [10:23:00] Yes.

9 I think it is a bit early to take a break, Mr Laucci, so we'll prepare for Mr Edwards.

10 MR LAUCCI: [10:23:10] Confusion.

11 MR EDWARDS: [10:23:46] Good morning, Madam President. Good morning,
12 Judge Alapini-Gansou. Good morning, Judge Alexis-Windsor, who I know will be
13 following us from afar. Good morning to everyone in and around the courtroom
14 and to those in the public gallery.

15 Most importantly, good morning to the people of Sudan who are watching from
16 within or beyond the borders of that beautiful country. *Salaam alaikum.*

17 Your Honours, lead counsel has addressed you in some detail now about
18 the difficulties encountered by the Defence in carrying out its investigations.

19 The fruits of our investigations, however, are much, much more meagre than we
20 would like.

21 At this stage in the proceedings, and in an ideal world, we would have wanted to be
22 able to tell you about the many scores of witnesses that we had met with in Garsila, in
23 Nyala, in Rahad Al-Berdi, in El-Obeid and in El-Obeid and in Khartoum.

24 In an ideal world, we would have wanted to be able to tell you today that we
25 interviewed and took statements from many dozens of witnesses and that we had

1 then carefully and strategically sifted through those statements before making a final
2 selection, a final selection of the best 30 or 50 or a hundred witnesses whose
3 individual accounts - mutually coherent, complementary, consistent,
4 corroborative - would be weaved together to create a rich and detailed tapestry on
5 which the truth would be writ large.

6 But we don't live in an ideal world. We have not been able to do what we wanted to
7 do. Circumstances have not permitted us to place before you the evidence that this
8 case requires and that our client deserves. We have had to do our best with the hand
9 that we've been dealt, and you've heard already about the difficulties relating to
10 non-cooperation from Sudan, save for one mission in Khartoum. The inability to go
11 to Sudan. Certainly the inability to access Darfur. And, more recently, since
12 15 April of this year, a country on fire, essentially a failed state that is being torn apart
13 by psychopaths who could not care less about the Sudanese people.

14 We have not been able to get into Sudan, let alone Darfur. Meanwhile, there's been
15 a mass exodus of those who are able to leave Sudan, both Sudanese nationals and
16 foreigners. The embassies of the Netherlands, the United States,
17 the United Kingdom, France, Canada, Switzerland, Sweden, the EU, I could go on, are
18 all closed. There is not a single country whose travel advice is anything other than "do
19 not go to Sudan."

20 And your Honours heard on Wednesday, and again yesterday, from victims sharing
21 their views and concerns. Your Honours heard about the dreadful security and
22 humanitarian situation in Darfur from before the war, but certainly the situation has
23 gotten worse since the outbreak of the war.

24 Those victims' accounts very much chime with what our witnesses have told us.

25 What is going on is nothing less than a catastrophe, a catastrophe that the world's

1 attention already appears to be turning away from.

2 Now, against that background, of course, the impact the war has had on our
3 investigations pales into insignificance when compared to the impact the war has had
4 on people's day-to-day lives more broadly in Darfur.

5 Nonetheless, it has undeniably made our work so much harder. But, through hard
6 work, tenacity, creativity and not some small sacrifice, we have been able to meet
7 with some witnesses and that is what I now intend to address your Honours on now.

8 Almost all of the Defence witnesses we propose to call knew Mr Abd-Al-Rahman in
9 Darfur. Taken together, their testimony covers a substantial period of his life from
10 the 1970s until the moment he surrendered to the custody of this Court. These
11 witnesses all know Mr Abd-Al-Rahman well enough to be able to speak about him
12 with considerable authority, including about any nicknames by which he was known.

13 These witnesses are all important because they support Mr Abd-Al-Rahman's case
14 that he is not and never has been Ali Kushayb.

15 This is what we describe in our trial brief as the first line of defence. It is, in some
16 respects, factually the most straightforward aspect of our defence.

17 A reminder, the Prosecution's case is that the Janjaweed commander subject to these
18 31 counts in the Document Containing the Charges is called Ali Kushayb, that
19 Ali Kushayb is a nickname and that Ali Kushayb's real name is Ali Muhammad Ali
20 Abd-Al-Rahman.

21 But from his first hearing before this Court, his initial appearance on 15 June 2020,
22 a couple of days after his surrender, our client made it clear that he is not Ali Kushayb.

23 When asked by the Single Judge on 15 June, his Honour Judge Aitala, to introduce
24 himself, our client said this, and I quote: "I can hear you. My name is not Kushayb.

25 My name is Ali Muhammad Ali Abd-Al-Rahman. I repeat Ali Muhammad Ali

1 Abd-Al-Rahman. My name is not Ali Kushayb."

2 His unambiguous denial that he is Ali Kushayb could not have been made clearer and

3 could not have been raised earlier.

4 Throughout the Prosecution's case, the Defence has challenged any and all testimony

5 suggesting that Mr Abd-Al-Rahman is Ali Kushayb. Now, and in the weeks and

6 months to follow, the Chamber will hear positive evidence from as many witnesses as

7 we have been able to marshal, all saying that Mr Abd-Al-Rahman is not and never

8 has been known by the nickname Ali Kushayb, that he is not and never has been

9 Ali Kushayb. Witness after witness will testify that the only nickname by which he

10 is known, by which he has ever been known is Abu Nasser. A nickname arising out

11 of the fact that his firstborn son is called Nasser.

12 D-1 is a high-profile witness from Rahad Al-Berdi. His family has known

13 Mr Abd-Al-Rahman for very many years. We expect D-1 will say that he has never

14 heard Mr Abd-Al-Rahman refer to himself as Ali Kushayb, nor has he ever heard

15 anyone call or refer to Mr Abd-Al-Rahman as Ali Kushayb. The only time, he will

16 tell you, that he heard the name Ali Kushayb associated with Abd-Al-Rahman was in

17 the media and in the context of the Prosecution's interest in arresting him.

18 D-2 similarly has known Mr Abd-Al-Rahman as a family friend for many years, since

19 childhood. He too will say Mr Abd-Al-Rahman was never known as Ali Kushayb,

20 only ever as Abu Nasser.

21 D-2, and others, will come to court and will tell your Honours that

22 Mr Abd-Al-Rahman was a simple man, not a rich man, who worked as a pharmacist

23 in Rahad Al-Berdi and before that in Garsila, that he was known as an honest man

24 who could be trusted to mediate in local disputes, that he was often called upon by

25 the community to do just that.

1 D-3 too holds a position of some prominence in Rahad Al-Berdi. He also has known
2 Mr Abd-Al-Rahman for many years, in fact since their days in the Sudanese Armed
3 Forces in the '90s. He has never heard Mr Abd-Al-Rahman refer to himself as
4 Ali Kushayb. He will testify that no one has ever called or referred to
5 Mr Abd-Al-Rahman as Ali Kushayb.

6 We will call D-5, he will testify that he has known Mr Abd-Al-Rahman for not fewer
7 than 25 years, well before, therefore, the events of 2003 and 2004. He knows and will
8 tell you that Mr Abd-Al-Rahman had a pharmacy, a pharmacy for humans in Garsila,
9 and that before then he had been in the army. He knows that Mr Abd-Al-Rahman
10 later joined the Central Reserve Forces. D-5 will say, on oath, that he has never
11 heard Mr Abd-Al-Rahman refer to himself as Ali Kushayb, nor has anyone ever called
12 or referred to Mr Abd-Al-Rahman as Ali Kushayb. The only nickname by which he
13 is known is Abu Nasser.

14 Witness D-4 gives evidence from a rather different perspective. He did not know
15 Mr Abd-Al-Rahman in 2003 or 2004. They only met in 2008. He worked with
16 Mr Abd-Al-Rahman in the CRF and they spent many years together. D-4 will testify
17 that he never heard Mr Abd-Al-Rahman refer to himself as Ali Kushayb. He will
18 testify that no one ever called Mr Abd-Al-Rahman Ali Kushayb or referred to him as
19 Ali Kushayb. His nickname was only ever Abu Nasser. D-4 will tell you that he
20 only learned of any connection between the nickname Ali Kushayb and
21 Mr Abd-Al-Rahman through what he heard emanating from the Court.

22 Witnesses D-6, D-8 and D-11 all share similar profiles, which I won't mention in open
23 court due to concerns for their and their family's safety. Suffice it to say that two of
24 these witnesses knew Mr Abd-Al-Rahman from about 2004 until the time of his
25 surrender to the Court. But for his part, D-8 has known Mr Abd-Al-Rahman since

1 the 1980s. Each of these three witnesses will appear before you and testify that no
2 one has ever called Mr Abd-Al-Rahman Ali Kushayb or referred to him as
3 Ali Kushayb. They will say, on oath, that Mr Abd-Al-Rahman is not Ali Kushayb.
4 There's another witness who knew Mr Abd-Al-Rahman from the 1980s and that is D-7.
5 D-7 is a retired military man who spent many, many years in close proximity to
6 Mr Abd-Al-Rahman. It's right to say that he will tell you that his dealings with
7 Mr Abd-Al-Rahman were less intense and less regular in the period 2003 to 2004, but
8 nevertheless he's able to say that in the years that he did know Mr Abd-Al-Rahman,
9 he never once called him Ali Kushayb, nor did he ever hear anyone call
10 Mr Abd-Al-Rahman Ali Kushayb. He too will swear, on oath, that
11 Mr Abd-Al-Rahman is not Ali Kushayb.
12 D-32 is a rare witness for us. He will testify that he knew Mr Abd-Al-Rahman from
13 Garsila, including during the period 2003 to 2004. He'll tell you that he knew
14 Mr Abd-Al-Rahman for almost his whole life. We say that this gentleman, D-32, is
15 one of the best placed witnesses, if not the best placed witnesses, from whom this
16 Trial Chamber will hear in this case in terms of who Mr Abd-Al-Rahman is, in terms
17 of his ability to tell you accurately and in detail about Mr Abd-Al-Rahman's
18 day-to-day activities in Garsila in 2003 and 2004.
19 Mr Abd-Al-Rahman -- sorry, if Mr Abd-Al-Rahman had ever been known by
20 the nickname Ali Kushayb before 2003, D-32 would know about it.
21 If Mr Abd-Al-Rahman had been known by the nickname Ali Kushayb in 2003-2004,
22 D-32 would know about it.
23 And this important witness will tell you, on oath, that Mr Abd-Al-Rahman had not
24 been.
25 D-32's knowledge of Mr Abd-Al-Rahman extends well beyond 2004 by virtue of his

1 employment. That employment granted him access to Mr Abd-Al-Rahman on
2 a regular basis and for a lengthy period of time. Your Honours will in due course
3 hear about this in detail, but, as with other witnesses, I simply can't go into those
4 details in public for reasons of that witness's safety and that of his family.
5 But if Mr Abd-Al-Rahman had been known by the nickname Ali Kushayb after 2004,
6 D-32 would know about it.
7 He will testify that never once in the entire time that he knew Mr Abd-Al-Rahman,
8 over many years, never once did he call Mr Abd-Al-Rahman Ali Kushayb, never once
9 did he hear someone else call Mr Abd-Al-Rahman Ali Kushayb or hear
10 Mr Abd-Al-Rahman being referred to as Ali Kushayb.
11 He too will say that the only nickname he ever heard anyone calling
12 Mr Abd-Al-Rahman was Abu Nasser. Abu Nasser, and nothing else.
13 The first time D-32, in common with many other witnesses, in fact, heard the name
14 Ali Kushayb was in connection with the defendant in the context of his surrender to
15 the custody of the Court.
16 D-32 will tell you that he did not know how he could go about alerting
17 the Prosecution that they had targeted and charged the wrong man on, hearing of his
18 arrest.
19 D-32 will describe himself as a simple man of some modest education. He doesn't
20 know how this court works. The machinations of an international court in
21 The Netherlands some 8,000 kilometres away from his home in Darfur is, he will tell
22 you, something that he does not really understand and something that he cannot
23 relate to.
24 What he can relate to, though, as a Muslim of profound faith, is prayer. And D-32
25 will tell you that all he thought he could do is pray for Mr Abd-Al-Rahman and that,

1 as an innocent man, God would protect him.

2 Now, I refer to D-32 as a rare witness. We would -- I call him a rare witness because
3 he was and is, to date, the only witness we have been able to access in Garsila. We
4 would dearly have loved to call more witnesses from Garsila, but it has, however,
5 proved to be quite impossible.

6 A number of the witnesses I have mentioned will also testify to say that during and
7 after the attacks on villages in the Wadi Salih locality, large numbers of Fur villagers
8 left to seek refuge in safe areas elsewhere in Darfur, including in Rahad Al-Berdi.

9 A number of witnesses will testify that Mr Abd-Al-Rahman and his family welcomed
10 some of these displaced Fur into their own home in Rahad Al-Berdi, providing them
11 shelter, food and human kindness.

12 Now, at this point I'd like to move into private session, please, your Honour, just for
13 a few short moments. I apologise to those into the public gallery. It can't be
14 avoided, I'm afraid.

15 PRESIDING JUDGE KORNER: [10:44:49] Yes.

16 Private session.

17 (Private session at 10.45 a.m.)

18 THE COURT OFFICER: [10:45:06] We're in private session, Madam President.

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

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25 (Redacted)

Trial Hearing

(Private Session)

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1 (Redacted)

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3 (Open session at 10.48 a.m.)

4 THE COURT OFFICER: [10:48:46] We're back in open session, Madam President.

5 MR EDWARDS: [10:48:50] Finally, your Honours will hear from a different kind of

6 witness whose evidence will further undermine the Prosecution's attempt to create

7 a link between Mr Abd-Al-Rahman and Ali Kushayb.

8 Fiona Marsh is one of the UK's pre-eminent experts in the field of forensic

9 examination of documents, an area of scientific study in which she has worked and

10 excelled for more than 40 years. She's been doing the job longer than most of our

11 Defence team members have been alive. Of most relevance to this case, she is an

12 expert in the analysis of handwriting. She was instructed by the Defence to examine

13 what are purported to be two signatures written by Mr Abd-Al-Rahman on two

14 different documents.

15 The first document, according to the Prosecution, is a kind of a laissez-passer dated,

16 or that dates back to 2003, and the first questioned signature is on that laissez-passer.

17 It's ERN, for the record, is DAR-OTP-0220-3921. And your Honours may recall that

18 it was mentioned or referred to in the evidence of Witnesses P-922 and P-913. The

19 Defence's position is that Mr Abd-Al-Rahman did not sign that laissez-passer.

20 The second questioned signature is found at the end of what purports to be

21 a handwritten note of an interview with Mr Abd-Al-Rahman, an interview by

22 Sudanese national investigators from November 2006.

23 The ERN of that document is DAR-OTP-0218-0231.

24 The Defence's position is that Mr Abd-Al-Rahman was not interviewed by Sudanese

25 investigators at any point. He did not write his signature at the foot of that note.

1 We say that the signature was written by someone else and is a forgery.

2 Ms Marsh compared these two signatures firstly to each other, and secondly to

3 a number of known signatures written by Mr Abd-Al-Rahman.

4 Fiona Marsh will come to court and she will tell you what her conclusions were.

5 And I quote that, firstly, "there is very little, if any, similarity between the two

6 questioned signatures [and] there is no evidence to indicate that the two questioned

7 signatures were written by the same person"; secondly, "there is no evidence that

8 the questioned signature on the laissez-passer document was written by

9 Mr Abd-Al-Rahman"; and, thirdly, that "the November 2006 signature ... lies outside

10 the range of natural variation [that she] found in the limited sample of known

11 signatures examined and [that she is] unable to determine with any degree of

12 certainty whether Mr Abd-Al-Rahman wrote the signature on the November 2006

13 document."

14 Ms Marsh considered the following three possibilities for these findings, these

15 hypotheses were as follows:

16 That the similarities found between the known and questioned signature are purely

17 coincidence and the questioned signature on the November 2006 document was

18 written by someone other than Abd-Al-Rahman.

19 The questioned signature is a poor copy of the normal signature of Abd-Al-Rahman

20 by someone familiar with his signature.

21 Thirdly, that Abd-Al-Rahman wrote the questioned signature, that this signature lies

22 outside the range of natural variation found in the limited sample of his known

23 signatures that she examined.

24 Ms Marsh, the Court may feel, fairly states that she is unable to determine which of

25 these alternatives is the most likely. But we would say that another way of putting it

1 is each alternative is as likely as the others.

2 So, to conclude on this first line of defence, your Honours heard evidence from
3 witnesses over the course of the Prosecution's case that Mr Abd-Al-Rahman and
4 Ali Kushayb are one and the same person. Over the course of the Defence case now,
5 you will hear from a number of other witnesses saying precisely the opposite. And
6 those witnesses who will testify that Mr Abd-Al-Rahman has never been known as
7 Ali Kushayb, is not Ali Kushayb, say so from a far better vantage point than
8 the Prosecution witnesses. The Defence witnesses, taken together, have known
9 Mr Abd-Al-Rahman longer. The Defence witnesses know Mr Abd-Al-Rahman
10 better.

11 And we say that the evidence of the Defence witnesses, once you have heard it, no
12 doubt, once it has been tested by my learned friends, we say that that evidence is to
13 be preferred over any contradicting evidence called by the Prosecution.

14 The Defence witnesses are, for the most part, in a perfect position to know if
15 Mr Abd-Al-Rahman is or was ever called Ali Kushayb. If he truly were Ali Kushayb,
16 the Defence witnesses we will call would know that he is, but they will tell you that
17 he is not.

18 And after hearing from the Defence witnesses, even though - I repeat - nowhere near
19 as many as we would have liked to call and nowhere near as many as
20 Mr Abd-Al-Rahman deserves, you will place those witnesses' evidence in the balance
21 and weigh them against the evidence of Prosecution witnesses, who for their part say
22 they believe Mr Abd-Al-Rahman and Ali Kushayb are the same person. But we're
23 confident that, after finishing your careful analysis, you will conclude that
24 the Prosecution has not satisfied you to the high criminal standard that beyond
25 reasonable doubt Mr Abd-Al-Rahman and Ali Kushayb are the same person.

1 And once you arrive at that determine, as we say you must, there will be no need to
2 go any further. You will acquit, and you will be perfectly entitled to acquit,
3 Abd-Al-Rahman of all the counts in the Document Containing the Charges.
4 If however, you find beyond reasonable doubt that Mr Abd-Al-Rahman and
5 Ali Kushayb are the same person, that would not be the end of the matter, we say.
6 There would then be what we have called the second line of defence to deal with. It
7 is to that second line of defence I now turn, although I see the hour and this is -- this is
8 a natural point to pause.

9 PRESIDING JUDGE KORNER: [10:57:06] I think it probably is, Mr Edwards, even
10 though it's slightly early.

11 Yes. All right, we'll adjourn now until 11.30.

12 THE COURT USHER: [10:57:16] All rise.

13 (Recess taken at 10.57 a.m.)

14 (Upon resuming in open session at 11.30 a.m.)

15 THE COURT USHER: [11:30:44] All rise.

16 Please be seated.

17 PRESIDING JUDGE KORNER: [11:31:06] Yes.

18 MR EDWARDS: [11:31:08] Thank you, and I can tell your Honours that we are
19 making good progress. Mr Laucci and I will certainly finish before the end of this
20 next session.

21 Just before the break, I was about to embark upon a discourse on what we call our
22 second line of defence. Some aspects of this have already been briefly touched upon
23 by Mr Laucci, but I make no apologies for repeating these points, they are important
24 and they merit underscoring.

25 In short, we say Mr Abd-Al-Rahman was not and could not have been the local

1 Janjaweed leader as alleged in the document containing the charges. The
2 Prosecution simply has failed to establish a logical, reasonable or compelling
3 narrative to explain how Mr Abd-Al-Rahman could have played the criminal role he
4 is alleged to have played in the counterinsurgency of 2003 and 2004.
5 The thread that runs through the Prosecution's charges against him is that he was in
6 a position of great power and authority in Garsila, in Wadi Salih and in Mukjar, and it
7 was only by wielding this great power and authority that he was able to commit the
8 crimes of which he's accused under the alleged modes of responsibility.
9 And here, I refer to Article 25(3)(b) ordering, which requires proof of some kind of
10 superior-subordinate relationship -- in other words, that the accused is, in fact, in
11 a position of authority -- and also Article 25(3)(b) inducing, which, whilst it doesn't
12 require formal or proof of a formal relationship of superior-subordinate, it requires
13 proof that the defendant was in a position to exert influence over direct perpetrators.
14 Similarly, and logically, so say the Prosecution, it was only by virtue of his alleged
15 position of power and authority that Mr Abd-Al-Rahman was able to commit
16 a number of the charged crimes through the modes of liability under 25(3)(a) direct
17 perpetration -- direct perpetration and co-perpetration, and under aiding and abetting
18 liability, under Article 25(3)(c) and common purpose liability, under 25(3)(d). The
19 Prosecution have thrown everything in. But what is clear is that the Prosecution do
20 not suggest -- they can't suggest -- that he's guilty of the crimes with which he's
21 charged under these forms of liability, because he was in fact merely a foot soldier.
22 No, the Prosecution have made it very clear that their position is that he was a leader,
23 and was only able to do what he is alleged to have done because he was a leader.
24 The Defence will call evidence to dismantle the Prosecution's sand-constructed theory
25 of the defendant's power and authority.

1 And in so doing, we will show just how insubstantial is the edifice of the
2 Prosecution's entire case. We will show that the Prosecution simply does not make
3 any sense, that its case does not hold water.

4 Let us recall what the Prosecution say Mr Abd-Al-Rahman was able to do as a leader
5 of the Janjaweed. He was able to cooperate and coordinate with the highest ranks of
6 the Sudanese government and the Sudanese army at a national level. He was able to
7 cooperate and coordinate with the Sudanese government and armed forces at a local
8 level. He was able to give orders, they say, to government officials and even military
9 personnel of high rank.

10 Let's remind ourselves who are we talking about. A simple pharmacist from a small
11 town in a rather forgotten part of one of the poorest regions of the country.

12 Okay, well, perhaps a simple pharmacist. Back in the day, maybe he had been
13 a high ranking and experienced soldier, an expert in military strategy, combat tactics,
14 logistics, field weaponry, military command. That might make sense.

15 In the government's hour of need, faced with a serious and dangerous rebellion in
16 a remote part of the country, far from the centre of power in Khartoum, perhaps this
17 simple pharmacist with an illustrious and accomplished past, was plucked out of
18 quiet retirement to save the day, to paraphrase Kitchener, because his country needed
19 him.

20 And yet, not a bit of it. That is not who Ali Muhammad Ali Abd-Al-Rahman was, it
21 is not who he is. A simple pharmacist? Yes. Retired from the army? Yes.

22 What did he do in the army? Quite apart from the admitted facts about
23 Mr Abd-Al-Rahman's background, the Defence will call evidence from witnesses,
24 such as D-07, who will testify that Mr Abd-Al-Rahman was a medical assistant in the
25 Sudanese army. He saved lives, yes, patched up wounded combatants, of course,

1 but he wasn't a combatant himself.

2 You will hear that he was only ever issued with a sidearm, and even then he wouldn't
3 carry it all the time. He wasn't a master strategist or tactician. He wasn't a leader of
4 fighting men in the army. He wasn't even of high rank. He retired as a *musaid*,
5 a warrant officer, as a medical assistant.

6 Yet, the Prosecution would have you accept that this is the man that the powers that
7 be in Khartoum chose in 2003 to command the Janjaweed in Garsila, in Wadi Salih, in
8 Mukjar. It's laughable. The Defence will also call evidence from witnesses D-1, D-2,
9 D-3 to speak about the role of the *agid*, usually translated as a "colonel", in the Ta'aisha
10 tribe and, by extension, the role of the colonel of colonels, the *agid al-ogada*, briefly
11 touched on by Mr Laucci a little earlier.

12 We expect Defence evidence to demystify the term *agid al-ogada*, bringing the concept
13 back down to earth a little, shedding it of some of the Prosecution's more extravagant
14 claims.

15 Defence witnesses will define for your Honours for the first time what an *agid al-ogada*
16 is in the Ta'aisha context, because that's what is important. We will do it, seeing as
17 the Prosecution didn't take the trouble to do so themselves.

18 The Defence witnesses will explain that the role is not some kind of senior Arab
19 military position but, rather, a much more modest, more local, almost administrative
20 position, as much to do with ceremony as anything else, essentially a civil role limited
21 to functions within the tribe, conferring no advantage and no claim to authority
22 beyond the tribe itself.

23 Be that as it may, most fundamentally, and of most relevance to the case involving
24 Mr Abd-Al-Rahman, your Chamber will hear from witnesses who are extremely well
25 placed to tell you that Abd-Al-Rahman simply never was an *agid al-ogada*. He just

1 wasn't.

2 So, having knocked some of the magic dust off the term and role of *agid al-ogada*, we
3 will call evidence - evidence that isn't actually disputed between the Prosecution and
4 the Defence - that Mr Abd-Al-Rahman is a member of the Ta'aisha tribe. More
5 importantly, you will hear the testimony again of well placed witnesses that the
6 Ta'aisha was a tribe that did not take part in the counterinsurgency; that the *nazir* who
7 led the Ta'aisha at the time in question in 2003-2004, expressly forbade members of
8 that tribe from picking up arms and engaging in the armed conflict, in the
9 counterinsurgency.

10 And the Court will hear evidence from D-1, D-2, D-3, D-5 of the serious consequences
11 that would flow from a member of the Ta'aisha who chose to defy such an injunction
12 from the *nazir*.

13 From witnesses D-16 and D-17, the Defence will call evidence of the link between the
14 Janjaweed, on the one hand, and the other armed groups that composed the Sudanese
15 Armed Forces as a whole.

16 Your Honours will hear that members of the Janjaweed were not recruited and did
17 not operate in a chaotic way, but were necessarily part of and subordinated within the
18 PDF and the PPF, the Popular Defence Forces and the Popular Police Forces.

19 Whereas the Prosecution in its document containing the charges and other
20 foundational documents in this case assert that the Janjaweed were merely allied to
21 the more regular Government of Sudan forces, such as the army, the PDF, the PPF
22 and so on, you will hear evidence from Defence witnesses that the Janjaweed was, in
23 reality, subsumed within, was part and parcel of, the PDF and PPF.

24 And so why is this important? Well, it's important because the Prosecution have
25 produced no reliable evidence from adequately informed sources that

1 Mr Abd-Al-Rahman was ever a member of the PDF or PPF, or even affiliated with the
2 PDF or PPF.

3 Sure, the Central Reserve Forces from 2004-2005, but not the PDF or the PPF, and
4 that's what's important. So the Defence will not merely rely on the absence of any
5 evidence of a relationship, institutional or otherwise, between the defendant and the
6 PDF and the PPF, we will call positive evidence that Mr Abd-Al-Rahman decidedly
7 and demonstrably did not have any relationship, institutional or otherwise, with
8 either of these forces.

9 Since I've touched on the subject of the CRF, I will finish with it, your Honours.

10 The Prosecution would have you believe that Mr Abd-Al-Rahman, having
11 commanded the Janjaweed in 2003 and 2004, on a number of brutal, yet successful
12 campaigns, glorious campaigns, I suspect the Government of Sudan would describe
13 them, in Sindu, in Kodoom, in Bindisi, in Mukjar, Deleig - all of the locations with
14 which the Chamber is very familiar - the Prosecution will have you believe that this
15 powerful, this mighty *agid al-ogada* then dismounts from his horse, removes his turban,
16 lays down his machine gun and wanders off to join the reserves as a lowly recruit to
17 graduate in summer 2005 as what has been translated in French as a *débutant*,
18 essentially a private.

19 We say that doesn't make any logical sense whatsoever. It does not survive contact
20 with a proper forensic analysis of the facts. And in the fullness of time, we will make
21 our submissions about the extent to which this Defence evidence contributes to
22 undermining the foundations of the entire Prosecution case against Mr Ali
23 Muhammad Ali Abd-Al-Rahman.

24 I end now by turning back to Mr Laucci who will complete the Defence's opening by
25 speaking about the third line of defence, but not before thanking your Honours for

1 your attention.

2 Thank you.

3 PRESIDING JUDGE KORNER: [11:46:47] Yes, thank you, Mr Edwards.

4 Yes, Mr Laucci.

5 MR LAUCCI: [11:47:02](Interpretation) Thank you very much, your Honour.

6 I would like to conclude my arguments with a presentation of our third line of
7 defence, and this is about the lack of proof of mental -- the mental element,
8 knowledge, that is required under Article 30(3) and Article 32(2) of the Statute of the
9 Court.

10 Pursuant to Article 66(2), the onus to prove the charged crimes falls to the Office of
11 the Prosecutor. Amongst these various elements, we find the mental element of
12 knowledge, which is required under Article 30(3) of the Statute, and this is common
13 to all the crimes charged.

14 It requires awareness that a circumstance exists or a consequence will occur in the
15 ordinary course of events.

16 Under Article 32(2) of the Statute, a mistake of law may be a ground for excluding
17 criminal responsibility if it negates the mental element required by such crime.

18 I now turn to another document, the Elements of Crimes and the general introduction;
19 namely, paragraph 3. Quote:

20 "[The] Existence of intent and knowledge can be inferred from relevant facts and
21 circumstances."

22 Necessarily, it emerges from this provision that review of the relevant facts and
23 circumstances of a case can lead to the opposite conclusion; namely, that there is no
24 intent, no knowledge.

25 The pretrial brief written by the OTP includes 551 paragraphs and we find that the

1 OTP devotes only four paragraphs to demonstrating the mental element; namely,
2 paragraphs 84 to 87. The only knowledge that the OTP mentions in their
3 submissions in these four paragraphs is knowledge of the fact that the actions
4 allegedly taken by Mr Abd-Al-Rahman were part of a widespread and systematic
5 attack upon the civilian population of Wadi Salih and Mukjar.
6 Knowledge of the fact that the actions by an accused who are part of a widespread
7 and systematic attack upon the civil population is different to the mental element
8 specific to only crimes against humanity set out -- or, rather, defined in Article 7 of the
9 Statute.

10 This is different to the mental element of knowledge defined in Article 30(3) of the
11 Statute, which is common to all crimes within the jurisdiction of the Court.

12 This final knowledge under Article 30(3) of the Statute is not pleaded anywhere in the
13 OTP's pretrial brief. At no time did the OTP bother themselves to report evidence in
14 this regard.

15 The Defence intends to adduce evidence showing that the particular circumstances
16 that prevailed in Sudan in '23 --

17 THE INTERPRETER: [11:52:22] Correction --

18 MR LAUCCI: [11:52:23](Interpretation) -- 2003-2004 show that Mr Abd-Al-Rahman
19 retired from the army, at the very latest, by the mid-1990s. This man who was
20 a pharmacist in Garsila could not have had knowledge of the criminal nature of the
21 actions -- or the crimes, rather, that had been -- that he has been charged with.

22 The Defence shall actually demonstrate that, on the contrary, on the basis of
23 information and knowledge that Mr Abd-Al-Rahman could have reasonably had in
24 2003 and 2004, he could only be persuaded that not carrying out orders to carry out
25 these actions would be a serious crime under Sudanese law that would require the

1 death sentence.

2 Thus, the Defence shall submit that Mr Abd-Al-Rahman could not have awareness
3 that the circumstance of the reprehensible nature of the actions that he has been
4 charged with existed. The mental element that is required under Article 30(3) of the
5 Statute is, thus, absent when it comes to his specific knowledge of the double
6 circumstance -- first of all, of the character and nature of the actions and, secondly, the
7 lack, or absence, rather, of positive obligation once the orders had been issued by the
8 authorities.

9 This second aspect will also -- will be considered from the vantage point of an error of
10 law, which does away with the mental element of knowledge as defined in
11 Article 32(2) of the Statute.

12 I shall pause for a moment to specify immediately that this third line of defence does
13 not represent any kind of admission of Mr Abd-Al-Rahman participating in the
14 charged crimes; that he might have committed them - which is challenged - or not;
15 that he may have been a militia leader, which is challenged, or a simple pharmacist.
16 Mr Abd-Al-Rahman could not have had the knowledge -- the relevant knowledge
17 required under Article 30(3) and Article 32(2) of Statute in 2003-2004.

18 The third line of defence does not constitute a ground for excluding criminal
19 responsibility under Article 31 of the Statute, nor is it an excuse under Article 33 of
20 the Statute.

21 I reiterate, the third line of defence is founded only on Articles 30(3) and Article 32(2)
22 of the Statute and should be considered by the Chamber as part -- during their
23 deliberations.

24 What are the relevant circumstances that should be considered?

25 The relevant circumstances that the Defence would ask the Chamber to consider,

1 include the following elements.

2 First element: In 2003-2004, Sudanese law contained no definition of crimes coming
3 under the jurisdiction of the Court. Witness D-16 shall confirm that the first time the
4 concept was introduced into Sudanese domestic legislation was in 2007 when the
5 Armed Forces Act was passed. These behaviours were not the topic of any specific
6 incrimination at the time of the events in Sudanese domestic law.

7 Secondly, the international definitions of the crimes - definitions that stem from
8 international conventions, international customary law or United Nations
9 Security Council resolutions - were not applicable in Sudanese domestic law.

10 Witnesses D-16 and D-23 shall provide a comprehensive and detailed presentation,
11 showing that there was no direct applicability in Sudanese law of the sources of
12 international law, which had not been implemented by way of domestic legislation.

13 Third element: In the absence of specific incrimination of violations of international
14 humanitarian law in Sudanese law, applicable in 2003-2004, the only incriminations
15 that such behaviours could have been followed with, were infractions of common law
16 set out in the criminal code. But the lack of specificity is such that the repression of
17 crimes under military law and the jurisdiction of military courts clashed with the
18 excuse of military necessity, as applied and interpreted by Sudanese courts.

19 Witness D-16 shall give evidence about how Sudanese courts would interpret and
20 apply the doctrine of military necessity and impunity that would result for those
21 responsible for violations of international humanitarian law at that time.

22 Fourth: Sudanese military law, which applied to the militia that Mr Abd-Al-Rahman
23 has been accused of being associated with, set out an absolute requirement to obey
24 orders issued or, otherwise, people would face the death penalty, with no distinction
25 between the lawfulness of the order issued.

1 This distinction between a lawful order and illegal orders appeared in Sudanese law
2 only later, in 2007, when the Armed Forces Act was passed. This distinction did not
3 exist in 2003-2004. The only criteria of a lawful order given at the time of the events
4 was in the absence of such a distinction, the position of authority of the perpetrator of
5 the order -- the person issuing the order.

6 And these orders had to be obeyed, otherwise the person would face the death
7 penalty.

8 Fifth: Only higher ranking officers, commissioned officers, those who had a command,
9 received training in international humanitarian law within the armed forces at that
10 time -- at the time of the events.

11 This situation changed only later, once again, in 2007 when the Armed Forces Act
12 came into effect, which provided that the training would be given to all military staff.

13 Once again, D-16 will give direct, detailed evidence about the expanded training in
14 international humanitarian law within the Sudanese Armed Forces.

15 The last two circumstances that I have mentioned, namely, the lack of a definition of
16 crimes coming under the jurisdiction of the Court in Sudanese law at the time of the
17 events and the non-applicability -- the direct non-applicability of international sources,
18 were also identified in the brief of October 2, 2023, relating to the respect of the

19 principle of legality *nullum crimen sine lege*. The lack of incrimination of the acts

20 charged in applicable law in Sudan at the time of the events is such that the criteria

21 set out by the Appeals Chamber in their ruling OA8 of 1 November 2021 for the

22 verification of the respect of the principle of legality *nullum crimen sine lege* has not

23 been satisfied, thus the Appeals Chamber prescribed in paragraph 91 of their decision

24 OA8, your Chamber will have to determine whether the criteria has been satisfied or

25 not in advance and before deliberating on the substance of the case, and will have to

1 declare itself to be not having jurisdiction in order to come to a decision regarding the
2 substance.

3 Independent of the satisfaction or not of the criteria set by the Appeals Chamber,
4 there are five circumstances previously mentioned that the mental element of
5 knowledge required under Article 30(3) of the Statute has not been established in this
6 case. The parties agree that Mr Abd-Al-Rahman did leave the army for once and for
7 all between sometime in the 1990s, between the beginning of the decade and the
8 middle of the decade. This is fact number 10, agreed fact in the joint submission by
9 the OTP and the Defence, ICC-02/05-01/20-504-AnxA.

10 There is no evidence that Mr Abd-Al-Rahman ever reached any rank higher than
11 warrant officer, *musaid*. Mr Abd-Al-Rahman was not made aware of or was not
12 given any basic training about the principles of international humanitarian law, for
13 example, the principle of distinguishing between combatants and noncombatants,
14 protection of civilians and people deprived of liberty.

15 The only knowledge that he may have gleaned during his military career on these
16 issues was the absolute lawfulness of orders given by military superiors, and the
17 requirement to obey these orders or face the death penalty and the justification of
18 behaviours during operations and in accordance with orders received because of
19 military necessity. The only diploma that we know about that Mr Abd-Al-Rahman
20 earned was an authorisation to work as a medical assistant. He obtained this
21 diploma in 1984 when he was serving within the medical services of the Sudanese
22 Armed Forces. The OTP has never claimed that Mr Abd-Al-Rahman had reached
23 any kind of level of education, no higher levels of education, no legal training during
24 his life. The only deduction that can be reasonably made from the relevant
25 circumstances in this case is that Mr Abd-Al-Rahman could not know -- could not

1 have known that the crimes with which he has been charged were reprehensible and
2 the only knowledge that he could have reasonably had would have led him to the
3 opposite conclusion, namely, that resisting an order or an instruction given by a
4 superior would be a military crime, an extremely serious military crime and such
5 a crime would be punished with the death penalty under domestic law.

6 The mental element of knowledge of the reprehensible nature of the act and the lack
7 of obligation to obey the order to carry them out under Article 30(3) of the Statute is
8 thus absent. If the acts had been committed - which is challenged - they would have
9 been committed on the basis of an error of law, as set out in Article 32(2) of the Statute,
10 which would negate the -- the mental element of knowledge and the knowledge that
11 obeying the order was a legal requirement, and if the order was not complied with,
12 the person would face death.

13 Insofar as the mental element of knowledge is common to all the crimes charged and
14 the lack of an error of law applies also to all the crimes, the lack of knowledge and the
15 existence of this mistake shall naturally lead to the complete and utter acquittal of
16 Mr Abd-Al-Rahman of all the charges standing in his name.

17 This brings me to the end of my presentation regarding the third line of defence. I
18 shall now turn to our conclusions.

19 During these three sessions, we have summarised the evidence that the Defence
20 intends to adduce during the trial. This evidence is not completely available as we
21 begin our presentation before your Chamber, but that is because of matters beyond
22 our control. It is your Chamber's task to make a choice, a choice between a fast-track
23 trial and a fair trial, a fair trial conducted with respect of the fundamental rights of
24 Mr Abd-Al-Rahman, particularly his right to have sufficient time and facilities to
25 present his evidence and his right to call exonerating witnesses.

1 Exercising these final rights, we are -- have been compromised in our view. It is up
2 to your Chamber to make a decision to -- namely to offset the prejudice that has
3 already been caused to Mr Abd-Al-Rahman by granting the Defence more time. The
4 opportunity to make such a decision will be provided to you when the first
5 application to postpone presentation of the evidence of the Defence, once that
6 application is filed. And this should be rather soon.

7 We are attentive to the interests that your Chamber shall devote to the rights of the
8 Defence and we will be able to draw all necessary conclusions.

9 This brings our presentation to an end, and I thank you all for your attention.

10 PRESIDING JUDGE KORNER: [12:10:51](Microphone not activated) ... Mr Laucci.

11 As I said yesterday, you made a number of complaints and you now say that you're
12 going to be filing another application to adjourn at some stage. I'm afraid you're
13 going -- if that's what you want to do, you've got to file it sooner rather than later
14 because the Court will be making arrangements to sit.

15 MR LAUCCI: [12:11:20](Interpretation) Your Honour, the announcement of such an
16 application is based naturally on decisions by your Chamber to authorise the Defence
17 to continue disclosure of its evidence on a rolling basis and this is something that lies
18 at the very heart of your decision to stick with the start date for presentation of the
19 case in October, this block in October. We continue our investigations and as of next
20 Friday, I will be travelling elsewhere to continue investigations. There are a number
21 of witnesses, as my colleague has said, and I shall reiterate this point, there are
22 a number of witnesses for whom we have not been able to collect written statements.
23 We are doing all we can to make this happen.
24 Once we have exhausted the number of witnesses available at present, and this could
25 perhaps take us as far as the first week of December, but no further than that, and

1 then we will run out of witnesses to call. Thus we will have to go off again and
2 conduct further investigations and then add to the list of witnesses. That will mean
3 a suspension or you may rule that the presentation of the evidence of the Defence has
4 concluded and that is when the decision shall be made.

5 At present, I am not in a position to predict exactly when that will end. We have
6 a meeting with the Victims and Witnesses Section to discuss the matter this afternoon.
7 The best I can say is that once the meeting is over, I shall forward the schedule of
8 witnesses who are currently available and that will naturally determine the date at
9 which the Defence will find itself without additional evidence to bring before the
10 Court, unless the Defence continues its investigations at that time.

11 PRESIDING JUDGE KORNER: [12:14:08] Right, well, Mr Laucci, we have, we feel,
12 given you exceptional leeway already because of the circumstances of what is taking
13 place in Sudan to disclose your evidence on a rolling basis, which could be said to put
14 you at a far greater advantage than the Prosecution had during the course of its case.
15 But what I am concerned about is that if you are -- if you come to the conclusion you
16 are going to run out of witnesses by the first week in December, then you should let
17 the Court know as soon as possible.

18 We have in fact been discussing the date for a restart in -- after the Christmas break
19 and its likely that we will give you at least until mid-January, something like the 15th.
20 So -- but it is important that you give advance notice with enough information for us
21 to make an informed decision, if you actually are asking for any kind of adjournment.

22 MR LAUCCI: [12:15:26](Interpretation) Entirely noted, your Honour. And as I was
23 saying, I would suggest that we provide that information once we've had that
24 meeting late afternoon today with the VWS. So we shall be writing to the Chamber
25 and the parties over the course of the weekend or at the latest by Monday.

1 PRESIDING JUDGE KORNER: [12:15:46] Yes. All right. Yes, thank you very
2 much.
3 Is there anything further that anybody else wants to raise before we adjourn? No.
4 Well, then we will adjourn now until Monday at 9.30, when you say it will be Witness
5 D-16; is that right, Mr Laucci? Witness D-16, Monday morning?
6 MR LAUCCI: [12:16:13](Interpretation) Yes, indeed, as my colleagues were
7 suggesting, I will take this opportunity to say that during the hearing we received
8 information -- positive information and thus we are in a position to say that ...
9 THE INTERPRETER: [12:16:30] Inaudible.
10 PRESIDING JUDGE KORNER: [12:16:34] Positive information about the matter we
11 discussed earlier? All right. Okay.
12 MR LAUCCI: [12:16:38](Interpretation) Yes. Yes, indeed, exactly.
13 PRESIDING JUDGE KORNER: [12:16:40] Well, I'm glad to hear that, Mr Laucci.
14 All right. Thank you very much.
15 Yes, Monday at 9.30.
16 THE COURT USHER: [12:16:49] All rise.
17 (The hearing ends in open session at 12.16 p.m.)