

Trial Hearing
WITNESS: DAR-OTP-P-0994

(Private 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 Trial Hearing - Courtroom 2
9 Monday, 3 October 2022
10 (The hearing starts in private session at 9.36 a.m.)
11 THE COURT USHER: [9:36:11] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:36:31] Yes. Can we call the case, please.
15 THE COURT OFFICER: [9:36:34] Good morning, Madam President. Good
16 morning, your Honours.
17 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus
18 Ali Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05-01/20.
19 And for the record, we are in private session.
20 PRESIDING JUDGE KORNER: [9:36:52] Thank you.
21 Yes, appearances, Prosecution.
22 MR NICHOLLS: [9:36:56] Good morning, your Honour. Julian Nicholls with
23 Claire Sabatini, Alison Whitford and Mohanad Elkholy. Thank you very much.
24 Good morning to everybody else in the courtroom as well.
25 PRESIDING JUDGE KORNER: [9:37:09] Thank you.

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1 Defence.

2 MR LAUCCI: [9:37:10] Good morning, your Honours. Good morning, colleagues.

3 As you are aware, Mr Ali Muhammad Ali Abd-Al-Rahman is not present in the

4 courtroom this morning. To represent him on the side of the Defence,

5 Madam Camille Divet, assistant evidence reviewer, Mr Ahmad Issa, case manager,

6 my colleague Iain Edwards and myself Cyril Laucci, counsel.

7 PRESIDING JUDGE KORNER: [9:37:32] Yes, thank you.

8 Victims.

9 MS VON WISTINGHAUSEN: [9:37:35] Yes. Good morning, Madam President,

10 your Honours, dear colleagues. The victims today are represented by my associate

11 counsel, Anand Shah, our intern Nur Mahameed and myself Natalie von

12 Wistinghausen. Thank you.

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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2 (Redacted)

3 PRESIDING JUDGE KORNER: [9:42:10] (Redacted)

4 (Redacted)

5 (Redacted).

6 I suppose the real question is were you able to take instructions from him as to

7 whether he's content for the matter to continue today in his absence?

8 MR LAUCCI: [9:42:27] His instruction is that the proceedings should continue.

9 PRESIDING JUDGE KORNER: [9:42:31] Well, I'm very grateful, Mr Laucci.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted).

16 PRESIDING JUDGE KORNER: [9:43:05] Yeah. We're not of course sitting

17 Wednesday, but we are due to sit tomorrow to start -- I forgot the number of

18 the witness now. Who --

19 MR NICHOLLS: [9:43:13] 905, your Honour.

20 PRESIDING JUDGE KORNER: [9:43:15] -- having ploughed through the 16

21 interviews over the weekend, Mr Nicholls, without the assistance of any kind of

22 indication as to where everything was in the interviews, I can see is -- is a major

23 witness.

24 Now, is it -- is it a witness that your client -- your lay client's going to want to be here

25 for?

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1 MR LAUCCI: [9:43:42] I discussed that. I -- I insisted on the importance of that
2 witness for the case, and his instruction is that, "I fully trust you, so go ahead." I will
3 keep him informed on a daily basis of the developments in the courtroom

4 (Overlapping speakers)

5 PRESIDING JUDGE KORNER: [9:43:55] Well, thank you very much, indeed,
6 Mr Laucci. And we're grateful also to Mr Abd-Al-Rahman for making sure
7 the proceedings don't slow down.

8 Yes. All right. Well, thank you very much.

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 MR NICHOLLS: [9:44:21] We'll just say, your Honour, sorry to slow things down,
14 but 905 is a major witness. I mean, that -- that, again, of course up to my -- my
15 friends, but, you know, that is a -- quite an important one, I would think --

16 PRESIDING JUDGE KORNER: [9:44:36](Overlapping speakers)

17 MR NICHOLLS: [9:44:37](Overlapping speakers) -- to have -- to have the accused
18 present to be able to give feedback to avoid problems down the line, make sure
19 that -- you know, I -- I hear what my friend is saying, but that -- that's a big witness to
20 be out (Redacted).

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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18 (Redacted)

19 (Redacted)

20 PRESIDING JUDGE KORNER: [10:56:55](Microphone not activated)

21 THE INTERPRETER: [10:57:06] Microphone, please, Judge Korner.

22 PRESIDING JUDGE KORNER: [10:57:15](Microphone not activated)

23 THE INTERPRETER: Your microphone, your Honour.

24 MR NICHOLLS: [10:57:16](Microphone not activated)

25 PRESIDING JUDGE KORNER: [10:57:19] Right. No, we'll deal now.

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- 1 MR NICHOLLS: [10:57:20](Microphone not activated)
- 2 PRESIDING JUDGE KORNER: [10:57:25] Microphone. Actually, I wasn't using it,
3 but now you're --
- 4 MR NICHOLLS: [10:57:28] Sorry. Apologies.
- 5 My friend may not know yet, but just wondering about the next witness, 905, whether
6 he needs to come after the lunch break. I'm not sure if VWS has him here. They
7 were expecting him to start tomorrow. He's -- whether -- whether we should try
8 to -- whether we're going to need to bring him today. Sorry, I'm having trouble
9 speaking today.
- 10 MR EDWARDS: [10:57:53] I would think it's unlikely we're going to need him
11 today.
- 12 PRESIDING JUDGE KORNER: [10:57:58] Yeah, and I think -- I think --
- 13 MR EDWARDS: [10:58:00] Especially --
- 14 PRESIDING JUDGE KORNER: [10:58:01] I mean, I have some reservations about
15 a witness like him in the absence of the accused, (Redacted). So
16 I think I'll say, Mr Nicholls, no, not until tomorrow.
- 17 MR NICHOLLS: [10:58:18] Okay. Thank you.
- 18 One other point. You'd said in the beginning about going through the six transcripts
19 over the weekend. We did send a summary, that I hope the Court received on
20 Friday, that did set out --
- 21 PRESIDING JUDGE KORNER: Really?
- 22 MR NICHOLLS: -- summarised the testimony, as well as the location. So I --
- 23 PRESIDING JUDGE KORNER: [10:58:40] Well, it didn't -- I mean it didn't drift my
24 way then, unfortunately. All I had was -- sorry, did you say seven? There were
25 14 -- no, 15 different transcripts.

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- 1 MR NICHOLLS: [10:58:51] I'm thinking six days, I think.
- 2 PRESIDING JUDGE KORNER: [10:58:55] Yes. Unbelievable almost.
- 3 MR NICHOLLS: [10:58:56] We did send a summary Friday --
- 4 PRESIDING JUDGE KORNER: [10:58:58](Overlapping speakers)
- 5 MR NICHOLLS: [10:58:59] (Overlapping speakers) and another one in the evening,
- 6 but I can (Overlapping speakers)
- 7 PRESIDING JUDGE KORNER: [10:59:02](Overlapping speakers) Yeah, I'm sure. It
- 8 may have arrived and it just didn't get to us before we left.
- 9 MR NICHOLLS: [10:59:05] Okay, apologies.
- 10 PRESIDING JUDGE KORNER: [10:59:07] We weren't in on Friday. That's right,
- 11 sorry, you're quite right. I know what it is. It was because it was Thursday that --
- 12 MR NICHOLLS: [10:59:14] We didn't (Overlapping speakers)
- 13 PRESIDING JUDGE KORNER: [10:59:15] And you sent it on Friday.
- 14 MR NICHOLLS: [10:59:17] Yeah, we didn't have court that day, that's right.
- 15 And then the last thing is the two witnesses (inaudible).
- 16 PRESIDING JUDGE KORNER: [10:59:28] That's even more interesting.
- 17 MR NICHOLLS: [10:59:30] It was not me.
- 18 The two witnesses that we were going to try to add to this block to substitute, my
- 19 friends object. I understand the objection. It's not our choice or our -- our desire to
- 20 move these witnesses, we've just really scrambled because we finally -- we found out
- 21 these other witnesses, we simply can't get in touch with, and neither can our -- neither
- 22 can the LRV for the dual witness. We just cannot contact them so we cannot confirm
- 23 they will be here. They will likely not be here. These are the only two we could
- 24 bring up, so it -- it will require either discussion or decision (Overlapping speakers)
- 25 PRESIDING JUDGE KORNER: [11:00:07] Yeah. It will -- it will require discussion.

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1 I'll say we'll do that when -- I mean, when this witness is finished.

2 I mean, Mr Edwards, it's unclear to me why it should take more than lunchtime on
3 this witness. (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

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6 (Redacted)

7 (Redacted)

8 PRESIDING JUDGE KORNER: [13:02:16] (Redacted)

9 (Redacted)

10 (Redacted).

11 I think what we'll do, Mr Edwards, is we'll discuss the replacement witnesses at the
12 end of today. And also I think you -- you asked about something to do with
13 the response to Sudan -- from Sudan that we received. Or Mr Laucci did. Anyhow,
14 we'll deal with those matters at the end of today.

15 MR EDWARDS: [13:02:56] Yes. Your Honour received our emails about
16 the difficulties we're encountering about these replacements?

17 PRESIDING JUDGE KORNER: Yeah.

18 MR EDWARDS: [13:02:59] You did.

19 PRESIDING JUDGE KORNER: [13:03:03] Yes, I did. That's why I want to discuss
20 them.

21 MR EDWARDS: [13:03:06] I was hoping so.

22 PRESIDING JUDGE KORNER: [13:03:10] All right.

23 Yes, all right, 2.30, please.

24 THE COURT USHER: [13:03:14] All rise.

25 (Recess taken at 1.03 p.m.)

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1 (Upon resuming in private session at 2.32 p.m.)

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19 (Redacted)
20 PRESIDING JUDGE KORNER: [15:34:29] Yeah. Okay.
21 All right. Next I want to come to the witnesses that you're objecting to.. (Redacted)
22 (Redacted)
23 (Redacted)
24 (Redacted)
25 (Redacted).

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1 (Redacted)

2 (Redacted)

3 PRESIDING JUDGE KORNER: [15:35:07] (Redacted)

4 (Redacted)

5 (Redacted)

6 Okay, the witnesses.

7 I understand that sudden changes of witnesses are extremely -- well, I was going to

8 say upsetting, but obviously difficult to deal with. But it does seem, and I think

9 everybody accepts, that the witnesses that were intended to come have disappeared

10 off the radar. And I've read -- we've read the statements of the replacement

11 witnesses. So I understand it, 584 is viva voce?

12 MR NICHOLLS: [15:36:04] Is actually 68(3), your Honour, 584.

13 PRESIDING JUDGE KORNER: [15:36:09] He's 68(3), is he?

14 So 879, that's the -- the viva voce.

15 MR NICHOLLS: [15:36:18] Yes, your Honour.

16 PRESIDING JUDGE KORNER: [15:36:19] Right. But we are -- both statements deal

17 with events that we're now beginning to cover in incredible detail, which is Deleig,

18 isn't it? Almost as much detail as Mukjar.

19 On the basis, Mr Laucci and Mr Edwards, that you're not putting a positive case to

20 any of these witnesses, but merely exploring, as you've explored with the witness

21 we've just heard from and other witnesses, either their knowledge of the man they

22 call Ali Kushayb or what they actually saw themselves, is it really going to make such

23 a huge difference? I mean, they're not supposed to come until, when is it?

24 MR LAUCCI: [15:37:21] Next week. Next week. Sorry.

25 PRESIDING JUDGE KORNER: Oh, next week. Yeah.

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1 And you've got this --

2 MR LAUCCI: [15:37:22] The difficulty is that, as you know and measure, we are
3 in -- in court session the full week, so which means that we cannot be both here and
4 preparing for the cross-examination.

5 PRESIDING JUDGE KORNER: [15:37:36] You've got Wednesday.

6 MR LAUCCI: [15:37:39] Thank you.

7 PRESIDING JUDGE KORNER: [15:37:41] Which is better than most weeks,
8 Mr Laucci.

9 MR LAUCCI: [15:37:45] Indeed. But even with that, I mean, with having received
10 the information on -- on -- I don't remember, it was Thursday or Friday - and once
11 again, no blame of the Office of the Prosecutor, we have full sympathy with their
12 difficulty - it's just that we -- we simply have -- we missed the minimum necessary
13 time to have a serious cross-examination prepared.

14 PRESIDING JUDGE KORNER: [15:38:09] Okay. I understand with Rule 68(3) it's
15 more difficult, because it goes through in half an hour or whatever. But with
16 a viva voce you've got the time to listen. If I were to say the viva voce witness, but
17 not the 68(3) ...

18 MR LAUCCI: [15:38:29] The problem is that while we listen to the viva voce,
19 we cannot at the same time draft the cross-examination. So of course it gives us
20 a little bit more time before it's our turn to stand up and cross-examine, but it
21 gives -- it buys no additional time for the preparation of the cross-examination and
22 the analysis of all the documents that are related thereto.

23 PRESIDING JUDGE KORNER: [15:38:51] But I mean, neither -- I mean, neither of
24 these witnesses, as I say, the 68(3) one, (Redacted)
25 (Redacted)

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1 PRESIDING JUDGE KORNER: [15:39:23] Firstly, as I say, if it were a question where,
2 you know, you had direct instructions from your client - Mr Edwards, I don't mind
3 doing, whoever it is - that would be one thing and I would understand that,
4 (Redacted). But this -- that isn't the case really. It's
5 effectively your client says, "Not me, I wasn't there." And the rest is just repetition of
6 what we've now heard on a number of different -- and indeed which we're going to
7 hear at length from the witness that's coming this week.

8 MR LAUCCI: [15:39:56] On the facts, I agree. But, I mean, the evidence of each
9 witness is, by definition, unique and needs to -- we need to fine-tune
10 the cross-examination to that.

11 Now, you mention the possibility of calling the viva voce witness only. I cannot tell
12 you that it is ideal, but that would already be something.

13 PRESIDING JUDGE KORNER: [15:40:17] All right.

14 Well, I think - Judgement of Solomon, if you like - you can -- the Prosecution can
15 substitute, let me get this right, the viva voce one is 879? Right, 879. But not -- you
16 can't put in 584. All right.

17 As I say, I'm doing it on the basis also that you've got the free day on Wednesday,
18 which is unusual.

19 MR LAUCCI: [15:40:42] And don't be surprised if you do not see me much in
20 courtroom this week.

21 PRESIDING JUDGE KORNER: [15:40:49] Right. Okay.

22 Yes. Are there any other matters that anybody needs to raise at this stage?

23 All right. (Redacted)

24 (Redacted)

25 (Redacted).

Trial Hearing
WITNESS: DAR-OTP-P-0994

(Private Session)

ICC-02/05-01/20

- 1 Yes. Thank you.
- 2 THE COURT USHER: [15:41:16] All rise.
- 3 (The hearing ends in private session at 3.41 p.m.)