

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Status Conference - Courtroom 1
9 Wednesday, 23 March 2022
10 (The hearing starts in open session at 9.31 a.m.)
11 THE COURT USHER: [9:31:47] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:32:16] Could we call the case, please.
15 THE COURT OFFICER: [9:32:22] 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 open session.
20 PRESIDING JUDGE KORNER: [9:32:43] Yes. Thank you.
21 Appearances for the Prosecution, please.
22 MR NICHOLLS: [9:32:50] Good morning, your Honours. I'm Julian Nicholls, I'm
23 joined by Claire Sabatini, Hesham Mourad, Hai Do Duc and Edward Jeremy.
24 Thank you.
25 PRESIDING JUDGE KORNER: [9:32:58] Thank you very much.

1 For the Defence.

2 MR LAUCCI: [9:33:03] Good morning, Madam President, your Honours. On
3 the side of the Defence, in addition to Ali Muhammad Ali Abd-Al-Rahman, who is
4 present in the courtroom, my colleague Iain Edwards, associate counsel; Madam
5 Vanessa Grée, legal adviser; Mr Ahmad Issa, case manager, and Madam Eva Kalb and
6 Mr Muhammad El Rahi, assistant evidence reviewer, in addition to me, Cyril Laucci,
7 lead counsel.

8 PRESIDING JUDGE KORNER: [9:33:37] Thank you very much, Mr Laucci.
9 For the victims.

10 MS VON WISTINGHAUSEN: [9:33:40] Yes, good morning, Madam President,
11 your Honours. Good morning to everyone in and around the courtroom.
12 I'm here with my colleague Nasser Amin Abdalla, attending remotely, as you can see.
13 Associate counsel Anand Shah. Behind me our case manager, Idriss Anbari.
14 Myself Natalie von Wistinghausen. We are all representing the victims. Thank you
15 very much.

16 PRESIDING JUDGE KORNER: [9:34:03] Yes, thank you, Ms von Wistinghausen.
17 And finally, the Registry please.

18 MR MAHR: [9:34:09] Good morning, Madam President. Good morning, your
19 Honours. My name is Christian Mahr, I'm the Director for External Operations.
20 I'm joined by a number of my colleagues this morning. Right across from me is
21 Olivier Randon, who's the associate legal officer with the VPRS, Victims Participation
22 and Reparations Section. To his right, Asmaa Yacoubi, the head of the French
23 translation unit of the Language Services Section, LSS. Right behind me is
24 Thomas Henquet, the head of our Registry Legal Office. Bogdan Alexe, behind me,
25 who is our field security coordinator. And to my left is Vera Wang, who is

1 the external relations coordinator within my office.

2 Thank you, your Honour.

3 PRESIDING JUDGE KORNER: [9:34:54] Yes, thank you very much, indeed.

4 Yes, well, we're here for the final status conference before the trial begins on 5 April.

5 And I trust that all parties had the slightly revised agenda which was sent around last
6 night.

7 Yes, thank you very much.

8 Then we'll start with the first item, which is the update on the collection of victims'
9 applications for participation and transmission of applications for reparation to
10 the Defence.

11 I'm not at all sure who's going to deal with this, but I think the Registry first of all.

12 MR MAHR: [9:35:34] Thank you, your Honour. I will ask Olivier Randon from
13 VPRS to take this question. Thank you.

14 PRESIDING JUDGE KORNER: [9:35:39] Thank you.

15 MR RANDON: [9:35:42] Thank you, your Honour for giving me the floor. I will be
16 brief.

17 During the second status conference, on 12 November 2021, the Registry estimated
18 that it will be able to collect and receive between 600 to 800 applications for
19 participation in the course of the first semester of 2022. The Registry here wishes to
20 clarify to the Defence that, during the 12 November conference, it did not mention
21 first trimester of 2022, but first -- first semester of 2022.

22 Since the Registry's first transmission of victims' applications for participation in trial
23 proceedings on 6 December 2021 it has received 29 additional applications.

24 All of these applications are currently being translated from Arabic to English and are
25 being assessed by the Registry for transmission to the Chamber.

1 We expect to receive 11 application forms in the coming days and 40 to 50 additional
2 forms by the end of April.

3 As explained during the last status conference, the Registry makes progress in small
4 steps, owing in particular to the security situation of its interlocutors on the ground.

5 It is scaling up progressively its capacity to conduct field-related activities, including
6 preparing missions in different locations, all depending on the environment; and
7 recruiting a specific support capacity that will reinforce its operations on the ground.

8 In conclusion, your Honours, the Registry has not been able to proceed with
9 the collection of victim applications as fast as expected, yet further interactions with
10 our interlocutors on the ground have confirmed the Registry assumptions of
11 the numbers of future victim applications as previously submitted. We are trying to
12 counter any delays in increasing our field engagement as soon as it is permissible.

13 Coming to the second point, the transmission of applications for reparations to
14 the parties:

15 The Registry notes the Defence submissions during the last conference. As
16 a clarification at the outset, the standard application forms we are using contains
17 a participation and reparations component, and victims are free to choose either or
18 both. In the present case, all applications for participation accepted at pretrial stage
19 and at trial stage contain reparation requests. The VPRS anticipate that the vast
20 majority of the victim applicants will apply for participation in the proceedings as
21 well as reparations.

22 In keeping with the A-B-C Approach, the Registry has not transmitted any
23 applications for reparations to the parties, apart from 12 Group C applications
24 transmitted at pretrial stage; but such transmission followed the logic of the A-B-C
25 Approach and not the fact that there were a reparations component to the relevant

1 forms.

2 More specifically, as far as Rule 94(2) of the Rules of Procedure and Evidence is
3 concerned, the VPRS considers that the wording "notification" of the receipt of
4 relevant applications does not equate to the requirement of transmission of any such
5 forms. The A-B-C Approach alongside the use of the combined form - with
6 a participation and a reparation component - also hinges on this reading.

7 The admission system as applied in the Al Hassan and in the Yekatom and Ngaïssona
8 cases follow a similar logic.

9 Should the Chamber find it suitable, the Registry stands ready to make more
10 elaborated written observations on the matter.

11 I thank you, your Honour.

12 PRESIDING JUDGE KORNER: [9:40:19] Well, firstly on -- on the numbers, are you
13 saying that you expect far higher numbers to come forward during the -- the course
14 of -- of the proceedings?

15 MR RANDON: [9:40:31] Yes, your Honour, this is exact.

16 PRESIDING JUDGE KORNER: [9:40:35] And if I may ask, what leads you to believe
17 that? I mean, 29 at the moment, 11 pending, and possibly 40 to 50 by the end of
18 April.

19 MR RANDON: [9:40:52] Your Honour, based on experience, setting up the system
20 of applications for participation requires time and it -- it is scaling up progressively.
21 The first months we had were also impacted by the operational constraints we had,
22 but we've been able to set up a system in place. We are still dependent on what is
23 going to happen in Sudan and the environments in which we operate, but we trust
24 that we have elaborated sufficient foundations for allowing a scaling up of
25 the applications in the coming months.

1 PRESIDING JUDGE KORNER: [9:41:43] Yes. All right. I think I'll see if

2 the parties have any questions on this.

3 We'll start with you, Ms von Wistinghausen.

4 MS VON WISTINGHAUSEN: [9:42:00] Yes, thank you, your Honour.

5 The update I can give from our side on the collection of victims' application is as
6 follows:

7 I don't know if you remember your decision, and that's filing 556 of 14 January 2022,
8 and at paragraph 6 you said that 21 victims' applications needed to be reevaluated,
9 which is being done in the -- as we are speaking. We're liaising with our clients and
10 also with VPRS on this. But this is still ongoing. So here we are talking about 21
11 victims' applications.

12 And then there are some more incomplete applications that we have not yet
13 transmitted to VPRS. We are talking about 28 victims' applications; 17 have been
14 considered incomplete by VPRS before, so we need additional information. And 11
15 applications are out of the scope, but additional info -- information may change
16 the assessment of the application.

17 So all this is an ongoing and indeed very slow process that is just due to
18 the communication means that we have. I'm not saying that we are not making
19 progress, we are making progress on a daily basis, but it's slow.

20 So a total of 49 applications may eventually be admitted by the Trial Chamber to
21 participate, but we don't know yet and we haven't submitted them yet, so we are
22 talking about 49 applications from our side.

23 Regarding the transmission of applications for reparations to the Defence, well I agree
24 with what Mr Randon said, at the end of the day, for me, it's a question of
25 the interpretation of Rule 94(2).

1 PRESIDING JUDGE KORNER: [9:43:57] (Microphone not activated) Just give me
2 a moment, I just want a copy of the Rules, which I think they're down there.

3 Did you say 94(2)?

4 MS VON WISTINGHAUSEN: [9:44:15] Yes, 94(2), Rule 94(2). Which is the rule
5 about transmission of applications for reparations to the Defence at the beginning of
6 the trial.

7 So, in our view, the purpose of Rule 94(2), and in line with the Court's obligations
8 under Article 75(3) of the Statute, can only be limited to informing the accused by
9 the start of the trial that there are claims for reparations associated with the charges
10 confirmed against him, as opposed to notifying him of the details of all the reparation
11 requests as set out under Rule 94(1). So the emphasis, we suggest, appears to be on
12 the notification of the existence of the claim, as opposed to its contents.

13 And I think that this also only makes sense to be seen in the context of the A-B-C
14 Approach that the Trial Chamber, and many other Chambers of this Court have
15 adopted, because, otherwise, at the latest at the beginning of the trial the A-B-C
16 Approach would, in a sense, be jeopardised by -- by Rule 94(2). So this is our
17 submission.

18 PRESIDING JUDGE KORNER: [9:45:49] Yes, thank you very much,
19 Ms von Wistinghausen.

20 Yes, Mr Laucci, do you want to ask any questions before you get on to any
21 submissions you want to make?

22 MR LAUCCI: [9:45:59] Thank you, your Honour.

23 Yes, I have a question to Mr Randon. And the question is, can you identify what are
24 the factors that were not expected on 12 November 2021 which prevented so far - take
25 your point, the quote - the Registry to collect a number of applications that is at the

1 level that was announced on that day? What was unexpected?

2 PRESIDING JUDGE KORNER: [9:46:52] Mr Randon.

3 MR RANDON: [9:46:55] Thank you, your Honour.

4 If I recall correctly, one element that VPRS provided during the last status conference
5 was an impact that he had on his own internal resources in terms of language-specific
6 skills. It was one of the important elements. Then again what the Registry I think
7 witnessed and the security situations which was reported by our interlocutors,
8 specifically in Darfur, prevented us from going full speed, as we expected.

9 Now that being said, we anticipated that this will happen during --

10 MR LAUCCI: [9:47:51] Excuse me, apparently there is no interpretation in Arabic.

11 (Pause in proceedings)

12 MR LAUCCI: Thank you. Apologies.

13 PRESIDING JUDGE KORNER: [9:48:54] Yes, you were saying, Mr Randon.

14 MR RANDON: [9:48:58] So, yes, I was saying that we also anticipated that it will
15 take about six months for us to be able to really see the results of our processes.
16 We also consider that in the beginning it will require more times to set up the system,
17 and it's only like since February that we're receiving more and more applications. I
18 hope this answered the questions.

19 PRESIDING JUDGE KORNER: [9:49:27] And by language, the language situation,
20 you mean you didn't have any interpreters in the Fur language?

21 MR RANDON: [9:49:34] Exactly. And not with Fur languages, with Arabic
22 (Overlapping speakers).

23 PRESIDING JUDGE KORNER: [9:49:38] Oh, with Arabic.

24 MR RANDON: [9:49:40] Yes.

25 PRESIDING JUDGE KORNER: [9:49:41] Sudanese Arabic, you mean?

1 MR RANDON: [9:49:44] Yes.

2 PRESIDING JUDGE KORNER: [9:49:45] And are you saying that --

3 MR RANDON: [9:49:46] To be exact, your Honour, not only somebody who has like
4 specific language sets, but also that has experience interacting with victims. We had
5 one resources at that time that we had like to separate with, because various reasons,
6 and so we are now recruiting someone else to fill in this gap. I hope this clarifies.

7 PRESIDING JUDGE KORNER: [9:50:12] Sorry, are you saying you only had one
8 interpreter and that person proved to be unsuitable?

9 MR RANDON: [9:50:20] Your Honour, it was not an interpreter, it was someone
10 that has, like, at the same time language skills and also a profile to interact with
11 victims and conduct, like, field-related activities.

12 PRESIDING JUDGE KORNER: [9:50:37] I see.

13 MR RANDON: [9:50:40] Thank you.

14 PRESIDING JUDGE KORNER: [9:50:41] Yes. Mr Laucci, any further questions?

15 MR LAUCCI: [9:50:44] Questions, not really. I think I will move to the -- the
16 submissions. I just want to say that I'm a little bit surprised that the language issue
17 is described by our colleague as "unexpected". I think that is something that may
18 and should have been anticipated.

19 Now coming to the submissions, two aspects. The first one is I take the point that
20 the prediction was running over the first semester 2022. But what we have today is
21 no more than another prediction, anticipation, that they will come because that will
22 move, the situation will improve and that will come to full speed.

23 I want to be clear, I'm not at all criticising the Registry for being extra careful in its
24 interaction with the victims. Quite the opposite. I want to -- to say that this is
25 something that is extremely positive and I'm happy to hear that the security situation

1 of the victims is taken seriously into account. Not at all my point.
2 My point is, because of that security situation which has to be taken into account, we
3 keep hearing that victims will come one day, which is speculative, whereas
4 the non-transmission of the victims' applications to the Defence, actually to the parties,
5 is a reality. It is not speculative, that's the situation now. And this
6 non-transmission on the basis of the judgment of the Appeals Chamber in the Said
7 case relies, essentially, on the number of victims.
8 So we have a speculative number of victims which is used as a justification for an
9 ongoing violation of an actual right under Rule 89, and now apparently with the wish
10 to extend, to stretch that exception to Rule 94(2). So speculation, in my view, cannot
11 justify an actual limitation of a right under the Rules of Procedure and Evidence.
12 And coming to the reparation aspect, Rule 94(2), same remark, it's based on -- still
13 based on speculation, and the A-B-C Approach is specific to the participation process.
14 I never heard that the A-B-C Approach was transposable and applied to
15 the Rule 94(2). Rule 94(2) serves a very specific purpose, which is to put
16 the party - in this case it's not the Prosecution, it's the Defence - in a position to
17 make -- to know what is the situation and to prepare for eventually some submissions
18 under Article 75(3). How can we do that with only a notification that, "Oh, yes, by
19 the way, there are some applications for reparations. It's not serious"? And it goes
20 far beyond the very specific scope of the appeals judgment.
21 The Appeals Chamber said in the Said case that the A-B-C Approach was -- could be
22 a justified exception to the principle of Rule 89. Okay. Exception based on security
23 requirements. Totally -- I'm totally in agreement with that. But this exception has
24 to remain within the scope of the exception. If it is limited to participation, well,
25 then it does not apply to reparations. And nobody is responsible if the Registry is

1 using the same form for both participation and reparations, that may be the source of
2 the problem. And in the end, there is a right to receive notification of these
3 applications for reparations and there is no legal ground, no legal authority
4 whatsoever to depart from that right.

5 So yes, Madam President, your Honours, the Defence will insist to have Rule 94(2)
6 complied with.

7 I'm fully aware once again that that's my last point about the protective measures
8 aspect, but it's very easy to take that into account. We are talking of a low number of
9 applications and the Registry, together I think with the legal representatives, has full
10 capacity to proceed to every necessary redactions so that the name and identity of
11 the victims remain protected without exposing them. So it's a very legitimate, very
12 reasonable request that is made. I cannot see any reason to deny that request, which
13 is really limited and -- and respect -- respectful of the protection of victims. So,
14 I'm sorry, I cannot accept what the Registry is proposing to extend the A-B-C
15 Approach to Rule 94(2).

16 PRESIDING JUDGE KORNER: [9:57:07] I think, Mr Laucci, are you asking us to
17 make some kind of a ruling about this?

18 MR LAUCCI: [9:57:12] Not at all at this stage.

19 PRESIDING JUDGE KORNER: [9:57:13] All right. All right. Thank you.

20 Yes, Mr Nicholls, or whoever, anybody want to say anything on behalf of the
21 Prosecution?

22 MR NICHOLLS: [9:57:26] No, your Honour.

23 PRESIDING JUDGE KORNER: [9:57:27] All right. Well, I think you've made,

24 Mr Laucci, you've made your position clear. I mean, reparations don't really come
25 into it until -- unless and until your client is convicted. So I understand, however,

1 that as Rule 89 states, you are entitled to know so that you can raise any matters you
2 want to.

3 And I -- all I think I'll say is that the Trial Chamber will urge both the Registry and
4 the Victims to give you the information to which you are entitled as soon as possible.
5 All right.

6 MR LAUCCI: [9:58:08] Thank you, Madam President.

7 PRESIDING JUDGE KORNER: [9:58:11] Yes. All right. Well that deals with item
8 number 1.

9 Second item, again for the Registry. The Registry produced, as it were, an updated
10 report -- 21 March, day before yesterday, which were your, effectively,
11 the observations on the Defence request for reconsideration. But you said in that at
12 paragraph 21 that further information would be provided today.

13 So if you could provide any further information.

14 MR MAHR: [9:58:59] Thank you very much, your Honour.

15 I had the opportunity to go on mission to Khartoum two weeks ago, from 6 to
16 10 March. We had the opportunity during that mission, I had the opportunity to
17 engage in in-depth meetings with our primary focal point at the Ministry of Justice, as
18 well as the undersecretary of the Ministry of Foreign Affairs. Both the focal point
19 and the representative of the MFA confirmed their cooperation with the ICC and will
20 provide support to facilitate the present trial. I also had the opportunity to speak
21 with senior representatives of the UN, as well as members of the diplomatic
22 community while I was there.

23 I want to touch upon, initially, the perception we felt the security situation on the
24 ground when we were there.

25 Firstly, as far as the general situation of security in Khartoum is concerned, we

1 experienced demonstrations during two out of the three days when we moved
2 around the city for our meetings. In each instance we were provided with regular
3 and automatic updates from the UN family, the UN security apparatus on the ground,
4 regarding when and where these demonstrations were taking place. And likewise,
5 our UN driver was well acquainted with this information, so we were able to avoid
6 any of these demonstrations.

7 All this to say that the -- the primary and principal impact that these demonstrations
8 had on us on the ground was that we -- we experienced traffic congestion while we
9 were there, but nothing more than that.

10 We also, while on the ground, received confirmation from our UN colleagues that
11 the UN considers and continues to consider Khartoum as a family duty station, which
12 means that UN personnel assigned to Khartoum are able to bring their spouse, their
13 children with them. It is of that security level. In fact, given that the majority of
14 the duty stations of the ICC are non-family duty using the UN criteria, Khartoum
15 would fall as one of the more safer duty stations in that regard.

16 Now, in terms of the main messages and the conversations we had with the Sudanese
17 government, given that it touches upon some of the sensitive exchange that we had
18 with the Sudanese authorities, we were -- we would very much appreciate this part of
19 the discussion to be held in private, if that's acceptable, your Honour.

20 PRESIDING JUDGE KORNER: [10:01:39] Yes, it seems to me that's sensible.

21 Yes, can we go into private session, please.

22 (Private session at 10.01 a.m.)

23 THE COURT OFFICER: [10:01:56] We're in private session, Madam President.

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15 (Open session at 10.24 a.m.)
16 THE COURT OFFICER: [10:24:52] We're back in open session, Madam President.
17 PRESIDING JUDGE KORNER: [10:24:56] Yes. Well, thank you very much.
18 Mr Laucci, is there anything you want to say at this stage in respect of the actual topic
19 that we've been dealing with, which is namely what the Registry's achieved or not
20 achieved in Sudan?
21 MR LAUCCI: [10:25:16] Yes. I'm still referring to the submission of 21 March. I
22 have one or two points that I would like to -- on which I would like to receive some
23 clarification, if that's possible.
24 The first one is about the -- ah, I think this one is not public. Let me go to the public
25 ones and, if necessary, we will go again to closed session. My apologies.

1 You mention in paragraph 23, and you repeated that this morning, that Khartoum is
2 a UN family duty station. This, actually, submission comes into your part B, which
3 is the update on the security situation in Sudan observed by recent Registry
4 delegation on mission to Khartoum.

5 So let us be clear, even though this paragraph is related to Sudan, the family -- family
6 duty station is Khartoum, not Sudan, right?

7 PRESIDING JUDGE KORNER: [10:26:29] I think that's clear, Mr Laucci. I don't
8 think they mean anywhere else in Sudan, it's Khartoum where the embassies are
9 based.

10 MR LAUCCI: [10:26:38] Then I will repeat my question differently. What about
11 the other locations in Sudan, and especially locations like those in Darfur, Nyala,
12 Garsila, Al Fasher.

13 PRESIDING JUDGE KORNER: [10:26:56] Yes.

14 MR MAHR: [10:26:57] Thank you, your Honour. This is to confirm that indeed
15 Khartoum is a family duty station. All the other duty stations that Defence counsel
16 just mentioned have their own classifications depending on the UN system. But
17 Khartoum is a family duty station is what I wanted to confirm. Thank you.

18 PRESIDING JUDGE KORNER: [10:27:20] Do you know what the classification is for
19 any of the other stations? I imagine it doesn't involve the embassies, but for UN
20 agencies. Do you know what they classify them as?

21 MR MAHR: [10:27:31] Yes, I received confirmation that the other duty stations
22 outside of Khartoum, particularly in Darfur that you mentioned, would be considered
23 non-family duty stations.

24 PRESIDING JUDGE KORNER: [10:27:43] Yes, thank you.

25 Mr Laucci, anything else.

1 MR LAUCCI: [10:27:54] Madam President, unfortunately the other aspect I would
2 like to -- to mention is related to the paragraph 16 of the submission, and I think that's
3 a topic that the Registry would like to keep for closed session. I speak under their
4 control. The four letters.

5 PRESIDING JUDGE KORNER: [10:28:21] (Microphone not activated) Oh, Sorry.
6 Thanks. I know what you're referring to, referring to that paragraph, but it's got
7 nothing to do with the Registry.

8 MR LAUCCI: [10:28:36] I would have some question to ask, difficult to explain why
9 in closed session -- in public session.

10 PRESIDING JUDGE KORNER: [10:28:48] All right. But really briefly.
11 I'm sorry. We'd better go back into private session, then.

12 MR LAUCCI: [10:28:54] And my apologies for that.

13 (Private session at 10.29 a.m.)

14 THE COURT OFFICER: [10:29:03] We're in private session, Madam President.

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- 25 (Open session at 10.40 a.m.)

1 THE COURT OFFICER: [10:40:52] We're back in open session, Madam President.

2 PRESIDING JUDGE KORNER: [10:40:56] Right.

3 Now, Mr Laucci, can we bring this part of the agenda to a close. You've
4 heard -- we've heard what the Registry has to say, both in public and in open session.
5 Are there any submissions you want to make on which you want a ruling from us,
6 because that is the purpose of submissions?

7 MR LAUCCI: [10:41:21] Thank you, Madam President.

8 I was announcing in -- in closed session that I will tell a very short story, and this
9 story is public so we could move to -- to public -- to public session.

10 The story starts sometime in February 2012. Ten years ago, exactly 10 years ago.

11 And it's in relation to the situation in Libya. And there --

12 PRESIDING JUDGE KORNER: [10:41:54] No, no, no, Mr Laucci, I think most of us
13 are aware what happened in 2012 and the situation in Libya and the arrest of
14 a defence lawyer.

15 MR LAUCCI: [10:42:08] A staff member.

16 PRESIDING JUDGE KORNER: [10:42:09] A staff member.

17 That has really got nothing whatsoever to do with what the situation is at the moment
18 when you haven't actually been out there at all. The situation in Sudan and/or in
19 Libya may well be the same, but they may be entirely different.

20 And equally, the circumstances of the arrest of the staff member are ones which are
21 a great deal more complicated than can be dealt with in the couple of minutes that I'm
22 going to give you.

23 MR LAUCCI: [10:42:54] Okay. So I go directly to the conclusion. The conclusion
24 is the decision number ICC-01/11-01/11-129, which is dated 27 April 2012 and which
25 is public, in which the Pre-Trial Chamber orders, in spite of all red lights, orders

1 the Registry to facilitate a second mission to Libya to visit Mr Saif Al-Islam Gaddafi.
2 This came -- in terms of red light, this came immediately after filing 01/11-01/11-128,
3 which is a submission by the Government of Libya saying that they would facilitate
4 access to Mr Gaddafi by any other lawyer - "other" is the important word - than
5 the Office of the Public Counsel for the Defence.

6 On the basis of that submission, and the red light that it represents, together with
7 everything that had been reported from the first mission in Libya,
8 the Pre-Trial Chamber 10 years ago - it's almost an anniversary - ordered the mission
9 to take place.

10 My conclusion, Madam President, is that in that case you have, with the investigators'
11 notes from the Office of the Prosecution, with our demonstration that people get
12 arrested, and sometimes worse in Sudan, on the ground of that they are suspected to
13 cooperate with the Court. I believe, Madam President, with all due respect, that you
14 have sufficient red lights here not to repeat the same mistake that was committed by
15 the Pre-Trial Chamber I 10 years ago.

16 PRESIDING JUDGE KORNER: [10:44:57] I think what you're doing, Mr Laucci, is
17 having another go at your motion for reconsideration. And we've got your
18 arguments, we've heard the responses and we are going to consider everything that
19 you say.

20 MR LAUCCI: [10:45:10] And that will include the absence of response to the simple
21 question that I just read about what would happen in case the Defence encounters a
22 security problem while on mission in Sudan.

23 PRESIDING JUDGE KORNER: [10:45:27] Yes, well the letter that you wrote,
24 Mr Laucci, to the Registry, and any response you've got, do not form part of any filing
25 at all.

1 MR LAUCCI: [10:45:33] I promise you will have it tonight.

2 PRESIDING JUDGE KORNER: [10:45:36] All right.

3 Yes, anything else that anyone wants to raise on this issue? No.

4 I'll just check whether my colleagues have any questions for the Registry.

5 No, all right.

6 Right. And finally, really, as far as the Registry is concerned, we'd really like to
7 know where we've got to on interpretation. Have we got any further since last,
8 whatever it was, a fortnight ago?

9 MR MAHR: [10:46:07] Thank you, your Honour. I've been instructed to inform
10 you that we are -- preparations are in place and that by 1 July we should be ready to
11 provide interpretation.

12 PRESIDING JUDGE KORNER: [10:46:18] By that do you mean simultaneous
13 interpretation?

14 MR MAHR: [10:46:23] Yes, simultaneous interpretation.

15 PRESIDING JUDGE KORNER: [10:46:26] All right. Yes.

16 Anybody got any questions or notes on that?

17 JUDGE ALEXIS-WINDSOR: [10:46:37] Yes, good day. This is a question for
18 Registry. When you say you will be able to provide simultaneous interpretation,
19 you mean with regard to Fur and also Sudanese Arabic?

20 MR MAHR: [10:46:59] Yes, it would be for both Sudanese Arabic as well as Fur.

21 PRESIDING JUDGE KORNER: [10:47:07] Right. Well, I think that deals with
22 everything that we need to retain the Registry for, but we'll deal with a couple of
23 other points before we break.

24 Opening statements is next on the list.

25 We've had a request in writing from the Legal Representatives for the Victims to be

1 allowed -- just a moment, let me just turn it up, that page.

2 Yes, filed again the day before yesterday, 21 March, to make short introductory
3 comments of no more than 10 minutes, which is paragraph 3.

4 Mr Laucci, I don't think we've had a written request, but is that going to be your
5 request as well?

6 MR LAUCCI: [10:48:09] No, Madam President, we do not intend to make an
7 opening statement. The only thing that we will request on behalf of
8 Mr Abd-Al-Rahman is for him to make a very short, would be two to three minutes,
9 unsworn statement at the beginning of the trial. And that will include as well
10 a request that he has made previously in these proceedings, to observe, if possible in
11 public, a minute of silence in the memory of the victims in -- the victims of armed
12 violence in Sudan.

13 PRESIDING JUDGE KORNER: [10:48:49] I don't recall any such request. Are you
14 saying that was something --

15 MR LAUCCI: [10:48:53] No, it was not before your Chamber. It has been done
16 before the Pre-Trial -- this request has been made and denied by
17 the Pre-Trial Chamber and by the Appeals Chamber.

18 PRESIDING JUDGE KORNER: [10:49:06] What, so you've already appealed that?

19 MR LAUCCI: [10:49:10] No, we made the same request to observe a minute of
20 silence at the Appeals Chamber hearing.

21 PRESIDING JUDGE KORNER: [10:49:17] And that was denied as well?

22 MR LAUCCI: [10:49:18] That was denied as well.

23 PRESIDING JUDGE KORNER: [10:49:21] Yes. Well, obviously I'll very have to
24 consult with my colleagues, and we'll do that over the break.

25 I see. So he wants to make a personal statement, you don't propose to say anything.

1 And how long does he want to make a personal statement?

2 MR LAUCCI: [10:49:39] As I mentioned, I do not expect it to last more than two to
3 three minutes, maximum.

4 PRESIDING JUDGE KORNER: [10:49:48] Yes. All right. As I say, I think I'll
5 discuss that with my colleagues over the break.

6 Ms von Wistinghausen, we've seen your request and I think -- my understanding was
7 the Defence wanted to do the same thing, but slightly different if it's the accused.

8 Yes. All right. As I say, we'll give you a decision immediately after the break.

9 The update on expert witness on cultural aspects. Anything further with that that
10 anybody can tell us?

11 MR NICHOLLS: [10:50:31] Thank you. Excuse me. Thank you, your Honours.

12 Just very briefly, we've been liaising with our colleagues on the Defence. We came
13 up with a list of three top candidates. We have narrowed that down to one to two.

14 One of those witnesses should be available, we hope, in July, if it turns out that
15 everything goes well. And we have a conference call with that potential expert

16 witness tomorrow, between us and the Defence.

17 I don't know if Mr Laucci wants to add anything.

18 MR LAUCCI: [10:51:10] Well, my recollection was even more optimistic, I was
19 targeting June, but ...

20 MR NICHOLLS: [10:51:16] Well, I read that, but then I thought I'd say July.

21 PRESIDING JUDGE KORNER: [10:51:21] No doubt you'll inform us when and if we
22 can expect that. I mean, obviously, it makes more sense to have such a witness
23 called before we hear any victim testimony.

24 MR NICHOLLS: [10:51:40] Even if we can get the witness here in June, if -- if he's
25 able to do his report, I don't think there's any way we can do that before we call

1 any -- I mean, I'll take another look, but I --

2 PRESIDING JUDGE KORNER: [10:51:54] It actually isn't -- I mean, we're not asking
3 for, you know, the Bible on cultural -- we're simply asking for a fairly
4 straightforward ...

5 MR NICHOLLS: [10:52:05] We will raise that tomorrow when we speak with
6 the -- the potential expert.

7 PRESIDING JUDGE KORNER: [10:52:08] All right. Well, I mean one of the things
8 that I was going to come to, in any event, was the Defence clarification of
9 paragraph 27, which I think I'll deal with -- of its pretrial brief. Because -- or, I'll give
10 notice now, because I don't think it's on our list. I was considering this and I think
11 this is a matter that should be dealt with discretely as a topic and should probably
12 take place before we get into the evidence of the victims and witnesses to the actual
13 events. So that may give a little bit of time.

14 But I'll, as I say, it's not on -- it wasn't on our agenda because it only occurred to me
15 overnight.

16 All right. Yes. And then finally before, and then we'll take -- we will take
17 the break -- well, actually, no, we've got two matters and then we'll come to
18 the Defence responses.

19 The calling order of witnesses in order to try and get over the problem of
20 interpretation, has that been decided finally, Mr Nicholls, yet?

21 MR NICHOLLS: [10:53:39] Yes, your Honour. We have put together -- I won't go
22 into it, but it was not easy, the first 10 witnesses we intend to call, who are available
23 and who will be able to testify in an available interpretation language, neither Fur nor
24 Sudanese Arabic. So -- and we communicated those I think on 17 March to
25 the Defence. I need to give them to -- to my colleagues as well.

1 That takes us on our -- on the basis of our calculations, through around 12 May, and
2 then we have another order of witnesses which takes us to 22 July. These are
3 witnesses we've contacted and just at the last status conference I think we'd said there
4 were 17 more to contact. We'd contacted in-between 15 of them, two we have still
5 not been able to. So we do have an order until 22 July of witnesses who can meet
6 the language requirements.

7 However, for them we have not yet been able to confirm each witness's availability
8 and travel. So they -- I may be able to give you more information on that. So there
9 may be some shifts in that, but we have the first 10 set that will get us, we believe, as I
10 said, to 11 or 12 May.

11 PRESIDING JUDGE KORNER: [10:55:19] Yes, well if you could provide that to
12 the Chamber, that would be --

13 MR NICHOLLS: [10:55:22] We can do that today, your Honour.

14 PRESIDING JUDGE KORNER: [10:55:24] -- reasonably helpful.

15 These are all witnesses who will be coming to the Court, as opposed to attempting to
16 set up any kind of video links?

17 MR NICHOLLS: [10:55:36] That is the plan. It may be necessary and ...

18 Sorry, Mr -- Mr Edward -- Mr Jeremy has just reminded me, yeah, there -- there may
19 be required to be -- we may apply for one or two to have video link, but our goal
20 would be to bring them all.

21 PRESIDING JUDGE KORNER: [10:56:06] Well, yes. Well, I mean, I was going to
22 say, I mean, at the moment it doesn't appear that there's anywhere decided from
23 which a video link can -- can be held, from what the Registry said this morning.

24 MR NICHOLLS: [10:56:19] Yes, but under these circumstances we -- we don't see
25 that as necessarily a problem. We still may need to set it up, but it's a -- it's a

1 different situation we're taking about for those two witnesses.

2 PRESIDING JUDGE KORNER: [10:56:32] Right. Yes.

3 And finally, and then we will take the break, any likelihood of any further agreed
4 facts coming?

5 Mr Laucci?

6 MR LAUCCI: [10:56:53] I was -- no, I would answer this one, because actually
7 the last proposal that is not really on the table but that is discussed between
8 the Prosecution and the Defence comes from us. Actually, we need to formalise
9 the exact proposal, but we have identified the -- the topic, and that's something that,
10 yes, we will -- we will really -- we -- the actual proposal will be sent definitely this
11 week, and I hope we can conclude something.

12 MR NICHOLLS: [10:57:25] Yeah. I had honestly felt, your Honour, that even
13 working in good faith we'd come pretty close to the end of where we were going to be
14 able to make agreements, but we are again making one more effort on a -- on a new
15 step.

16 PRESIDING JUDGE KORNER: [10:57:39] Yes. All right. I think it will probably
17 become clearer what could or could not be agreed as once the evidence starts.

18 MR NICHOLLS: [10:57:51] Well, I'm -- I'm -- this is not made in any accusatorial or
19 critical way, but the last status conference there was some discussion about what was
20 being challenged, you know, which was --

21 PRESIDING JUDGE KORNER: [10:58:01] Well that's what I was --

22 MR NICHOLLS: [10:58:02] -- close to everything in some -- in one way of looking at
23 it, so.

24 PRESIDING JUDGE KORNER: [10:58:09] Well I think, as I say, this is something,
25 certainly which I raised, on -- on -- exactly on the basis of the outline of the Defence as

1 to whether there were certain matters that really couldn't be challenged on the basis
2 of any instructions. But we'll see how we go. And I appreciate at the moment
3 you're being put to proof of everything.

4 Yes. All right. Very well, in that case thank you very much. We'll take the break
5 now until 11.30. Then we'll deal with the Defence oral response to the ninth request
6 for -- under Rule 68(3). And, as I say, I'm going to raise for the purposes of both the
7 Prosecution and Defence, and obviously the victims representation as well,
8 the clarification of the 18 March, of paragraph 27 of the pretrial brief, and what we
9 foresee as the way of dealing with this. Yes. Thank you very much.

10 Oh, sorry, Mr Edwards, yes.

11 MR EDWARDS: [10:59:30] Well, I wonder if your Honour could provide any more
12 information about the sort of clarifications that you're -- you're going to want to hear
13 from us, because we can then spend the break preparing for that.

14 PRESIDING JUDGE KORNER: [10:59:42] Yeah. It's not -- I mean, I understand
15 exactly what you're saying. What -- what I'm going to say is this, that you say this is
16 matters that you are going to raise when the evidence is sought to be admitted.
17 Just a moment. Let me just turn this up again.

18 You give very -- and very helpful, may I say, Mr Laucci, because I think it was written
19 by you as it's in French, clarification. Then at the end, on the conclusion at
20 paragraph 35, you say that clarification does not call for a particular ruling.
21 However, in the event the Chamber sees fit to rule at this time on the issues raised in
22 this clarification, it would be appropriate for it to determine in the light of
23 the foregoing submissions.
24 Obviously not today, I'm not going to do that, but what I do think is going to be of
25 assistance is for this matter to be fully ventilated on both sides before we get to

1 the witnesses who are going to come from the witnesses who are, if I can put it that
2 way, the result of investigations that you submit should never have taken place at all.
3 And rather than that being raised on each and every occasion that such a witness is
4 called, I think it should be dealt with, because it is a -- really a matter of principle.
5 You will get then a ruling, as will the Prosecution, and then, subject to any rights of
6 appeal that either side may have on this, as in line with what I have already indicated,
7 you needn't go on raising it even if either side doesn't agree with the ruling.

8 MR LAUCCI: [11:01:57] Yes. Thank you, Madam President. In any case, almost
9 the same, the substance of almost the same submissions was also in the response on
10 the Regulation 35 application. So, yeah, I understand that your Chamber may have
11 a preference for issuing a ruling on these issues so that they -- they get sorted out.
12 Regarding the first 10 witnesses, I think, if I'm correct, that we have identified only
13 one who may be impacted by -- by these submissions.

14 PRESIDING JUDGE KORNER: [11:02:34] Well this is the whole point. What I was
15 going to say, I'm not going -- we're not going to deal with it in writing. I think it is
16 right it's raised in the section 35, but I think this is something that -- on which we'll
17 hear further or any oral additions to it. I mean, you refer to quite a lot of authorities
18 as well. And hear the answer. But we'll do it at a time after the first -- the expert
19 witness on the history of Sudan or the conflict and before we get to any of
20 the witnesses to the events.

21 But I mean, if there's any argument about you can always raise that. As I say, I'm
22 just giving you an indication of the way my mind's working. All right.
23 Yes, thank you very much.

24 Yes, Ms von Wistinghausen.

25 MS VON WISTINGHAUSEN: [11:03:20] Madam President, I'm sorry, I'm -- I'm a bit

1 slow. I just want to jump back for just a moment to this request for an opening
2 statement that we've made, just to make it very clear. We don't want to make a big
3 opening statement. It's really about 10 minutes. And the reason for that is that,
4 whereas the role of the Defence and the Prosecution is always very clear, and also to
5 the outside world, if I may say, we've encountered, when having contact with clients,
6 with civil society, that sometimes there is some confusion about the role of the Legal
7 Representatives of Victims, and this would really be the reason for making this
8 opening statement, explaining our role and mandate, and also why we're making
9 a real opening statement at a later stage.

10 That would just be the frame we would talk about. So I hope independently of
11 the facts if the Defence makes an opening statement or not.

12 PRESIDING JUDGE KORNER: [11:04:11] Yes. Well, I understood that quite clearly,
13 Ms von Wistinghausen. As I say, we're just going to make a general ruling, that's
14 why we're adjourning now. All right. Thank you.

15 THE COURT USHER: [11:04:21] All rise.

16 (Recess taken at 11.04 a.m.)

17 (Upon resuming in open session at 11.35 a.m.)

18 THE COURT USHER: [11:35:50] All rise.

19 Please be seated.

20 PRESIDING JUDGE KORNER: [11:36:27] Yes, we said we'd give the ruling in
21 respect of opening statements by the Legal Representatives for Victims and by
22 the accused.

23 The conduct of proceedings which we issued, which are now standard, do of course
24 say that the -- under the section headed "Opening statements" that "The LRV and
25 Defence may make their opening statements either at the commencement of the trial

1 or just prior to the presentation of their evidence, if any."

2 However, on the basis that has rightly been pointed out by the Legal Representatives
3 for Victims, that the opening by the Prosecution and the opening of the trial will be or
4 potentially will be attended by the press and being able to see by the public, that it is
5 right that there's an exception to that rule, and we want to emphasise it is an
6 exception, and particularly in the light of the fact also that the Prosecution case is
7 likely to take a little time, we will agree that the Legal Representative of Victims may
8 have 10 minutes in order to set out, as it were, their role and the basis of their case,
9 and that the accused, Mr Al-Rahman, will be given the same leeway, that is to say, an
10 opening statement by him of no more than 10 minutes.

11 As I say, I do want to make it clear, though, that the general rule is that there must be
12 an election by the Defence and the Legal Representative for Victims.

13 As regards the request made for two minutes' silence in respect of the victims of
14 the conflict, for the same reasons as expressed by the Pre-Trial Chamber and
15 the Appeals Chamber, we refuse that request.

16 Yes, all right, can we turn then to the Defence response to the ninth application in
17 respect of Rule 68(3).

18 Mr Edwards, you're going to deal with that, I take it.

19 MR EDWARDS: [11:39:34] Thank you, your Honour. Yes.

20 Well, with your Honour's leave, what I propose to do is to follow the same sort of
21 process as was undertaken in respect of earlier oral submissions on these matters, and
22 really, if there's a brief summary, a brief summary will be made, but otherwise just
23 cite the paragraph numbers that we draw to the Trial Chamber's attention in
24 particular.

25 Your Honours have over the course now, I think, of at least seven decisions indicated

1 your thinking in terms of where the Prosecution will succeed and where
2 the Prosecution might fail in requests under Rule 68(3). And we take those on board,
3 so I don't propose to go over old ground, especially old ground where -- well, as it
4 were, old ground that has proven stony for the Defence.

5 In -- in the most recent decision of 18 March, it's public, your Honours indicated that
6 the Defence claims that there are no means by which these risks can realistically be
7 explored in cross-examination. Of course your Honour will recall the sort of
8 practical difficulties that one can, on the basis of some experience, expect, but that that
9 wasn't accepted by your Honours. Your Honours say that the Defence provided no
10 support for such a claim. But there it is.

11 So we won't go back over old ground.

12 PRESIDING JUDGE KORNER: [11:41:34] All right. Mr Edwards, as I've said I can't
13 think how many times now, if and when the Appeals Chamber says we're wrong,
14 well, that's then something we'll have to consider and you can raise again. Up till
15 then, our ruling applies throughout.

16 MR EDWARDS: [11:42:00] Absolutely. Right.

17 So these submissions, your Honour, they'll be brief, they're in respect of a total of five
18 witnesses and I think that the way I can deal with it can permit us to remain in open
19 session. Although I note we've scared everyone away.

20 P-0041, your Honours, that's dealt with at paragraphs 9 to 14 of the Prosecution's
21 application, and we'd invite your Honours to consider in particular the following
22 paragraphs: 13, 23 to 26, and 52.

23 PRESIDING JUDGE KORNER: [11:42:51] (Microphone not activated)

24 THE INTERPRETER: [11:42:59] Microphone, your Honour, microphone.

25 MR EDWARDS: [11:43:02] Well, it's the -- it's the second statement in fact. There is

1 also in the first statement, the ERN being 0096-0002. Your Honours may consider it
2 of relevance to consider paragraph 13 of that statement.

3 PRESIDING JUDGE KORNER: [11:43:33] Just a moment. Sorry, this is the first
4 statement which is -- was it -- yes, sorry, I've got them back to front, yeah.

5 Paragraph 13, yeah. Because I was looking at the second one.

6 Yes, but -- all right, the main point is that the photographs, which are really the nub of
7 the statement, he's not in it.

8 MR EDWARDS: [11:44:10] Yeah.

9 PRESIDING JUDGE KORNER: [11:44:11] Well, I mean, I appreciate that. But I
10 mean, do you actually genuinely have any real objection to this one? I mean
11 (Overlapping speakers)

12 MR EDWARDS: [11:44:21] (Overlapping speakers)

13 PRESIDING JUDGE KORNER: [11:44:22] Don't forget this is Rule 68(3). You'll get
14 a chance to cross-examine him.

15 MR EDWARDS: [11:44:29] Your Honour, of the five this is the one that we may be
16 the most relaxed about.

17 PRESIDING JUDGE KORNER: [11:44:36] Yes, quite. That's what I rather thought,
18 I've read -- because I read the --

19 MR EDWARDS: [11:44:42] Yeah. Yes. Can I move on to 675 then?

20 PRESIDING JUDGE KORNER: [11:44:46] Yeah.

21 MR EDWARDS: [11:44:47] Paragraphs 15 to 20 I think in the Prosecution's
22 application. And there, again it's a single statement, and the paragraphs that we'd
23 ask you to consider in particular are the following: 46 to 47, 100 to 105, 121, 124
24 and 136.

25 PRESIDING JUDGE KORNER: [11:45:17] Sorry, a hundred -- I've got, sorry, 100 to

1 105, 121, 124. Yeah.

2 MR EDWARDS: [11:45:32] If I may then, Prosecution Witness 720.

3 PRESIDING JUDGE KORNER: [11:45:41] Yeah.

4 MR EDWARDS: [11:45:42] 60 to 61 of the single statement, 82 to 85, 97 to 98, and 103
5 to 110.

6 PRESIDING JUDGE KORNER: [11:46:03] Yes.

7 MR EDWARDS: [11:46:03] Witness 892, dealt with at paragraphs 27 to 32 of
8 the Prosecution's motion, there's a feature of this witness's evidence which is found at
9 paragraph 54 which refers to --

10 PRESIDING JUDGE KORNER: [11:46:30] Yes.

11 MR EDWARDS: [11:46:31] -- the linkage being made with our client's name, his real
12 name, and that, even if not unique, it's a matter which we would submit should
13 require that the evidence is given entirely viva voce, for reasons that we've outlined in
14 previous submissions. There's also reference at paragraph 80 to a location which, for
15 the sake of -- out of an abundance of caution I'm not going to mention (Overlapping
16 speakers)

17 PRESIDING JUDGE KORNER: [11:47:09] Page 80 -- paragraph 80.

18 MR EDWARDS: [11:47:13] Paragraph 80, yes. A particular creek. It's identifying
19 in some respects and we've identified there is one other witness that makes reference
20 to this location with the name that this witness gives it. That's Witness P-932. So,
21 yes, strictly speaking, not unique in that respect if there's one other witness that talks
22 about it. But I hesitate to say "almost unique" evidence in respect of this location and
23 its incriminating nature, we would submit, speaks for itself.

24 PRESIDING JUDGE KORNER: [11:48:00] Yes.

25 MR EDWARDS: [11:48:01] Otherwise we draw your attention to paragraphs 22 to 23,

1 34 to 36, 53 to 60, paragraph 70, I've already indicated paragraph 80, and then
2 paragraphs 85 to 88.

3 This is a witness who refers to seeing a person who he purports to identify as being
4 Ali Kushayb on television in 2013. And in paragraph 88 refers to a rumour heard of
5 the Government of Sudan wanting to get rid of Ali Kushayb. And these are features
6 that we suggest properly ought to be dealt with by way of exclusive viva voce
7 evidence-in-chief.

8 PRESIDING JUDGE KORNER: [11:49:13] He says it was a rumour.

9 MR EDWARDS: [11:49:17] Yeah. Yes.

10 PRESIDING JUDGE KORNER: [11:49:24] Yes, all right.

11 MR EDWARDS: [11:49:25] And then the final of the five witnesses is 916, dealt with
12 in paragraphs 33 to 38 of the Prosecution's motion. A bit of a long list this one,
13 paragraph 22 --

14 PRESIDING JUDGE KORNER: [11:49:41] Yeah, well, there's quite a lot about it.

15 MR EDWARDS: [11:49:44] Yeah. Paragraphs 36 to 39, 41 to 50, 56 to 60, 64 to 67, 74
16 to 76, 81 and 101. Those are the paragraphs of greatest relevance for the purposes of
17 your determination of the issue.

18 PRESIDING JUDGE KORNER: [11:50:12] Yeah.

19 Yes, I'm reminded, going back for a moment to -- just a minute. Yeah, P-3 -- sorry,
20 going back to P-892 -- 0892 that P-932 is actually going to testify viva voce.

21 MR EDWARDS: [11:50:49] That's our understanding as well, yes.

22 PRESIDING JUDGE KORNER: [11:50:53] Yeah. Yes.

23 MR EDWARDS: [11:50:52] But I think our argument is that notwithstanding if this
24 very particular piece of evidence comes from only two witnesses - that there may be
25 others, but we think that there are two - then whilst it may not strictly fall within

1 the test of uniqueness, it comes very close to falling within the test of uniqueness.

2 PRESIDING JUDGE KORNER: [11:51:24] Almost unique.

3 MR EDWARDS: [11:51:26] Almost unique.

4 PRESIDING JUDGE KORNER: [11:51:29] Yes. All right, yes, thank you.

5 MR EDWARDS: [11:51:30] Can I assist any further?

6 PRESIDING JUDGE KORNER: No.

7 MR EDWARDS: [11:51:32] I'm sorry that this has just been a list of paragraphs and

8 numbers but ...

9 PRESIDING JUDGE KORNER: [11:51:36] Mr Edwards, no, that's -- I mean that's

10 effectively what is happening in any event. We are looking at the relevant

11 paragraphs to see whether we feel that this is -- who should testify viva voce. All

12 right.

13 MR EDWARDS: [11:51:55] There's one other matter.

14 Well, I suspect we're going to come to it then, the clarification to paragraph 27. Over

15 the break we reminded ourselves that there is one witness that falls within

16 the post-confirmation of charges category with which we take exception. That's

17 Witness 903. And that is a witness who comes very early on in the Prosecution case.

18 I think it's a witness who's third on the list.

19 PRESIDING JUDGE KORNER: [11:52:36] Yes.

20 I was -- we were trying to work out when the best opportunity to deal with this

21 would be. And that is -- I mean the other alternative is that we can deal with it by

22 written submissions with a ruling in writing. I was merely considering whether this

23 is something you'd want to expand on orally. And we haven't actually -- I mean you

24 make submissions and you've made submissions throughout, so I mean if that's

25 the upshot of your submissions, we could simply get the Prosecution to respond to

1 that particular aspect, although they have responded on a number of occasions. But
2 it does seem to me, and I haven't asked the Prosecution about this, and I perhaps
3 ought to, that this is -- we really ought to deal with this as a discrete matter of legal
4 argument before any of the witnesses whom it affects are called.

5 MR EDWARDS: [11:54:00] I think, if I can just limit my comments to the following:

6 The gravamen of the jurisprudence relating to post-confirmation of charges evidence
7 is essentially that really the Trial Chamber is going to consider each witness or each
8 piece of evidence on a case-by-case basis. So whilst overarching submissions of
9 principle can be made, that doesn't necessarily take us as far as we need to go because
10 the particularities of each witness or each piece of evidence need to be considered, as I
11 say, on their own merits. Certainly that's our reading of (Overlapping speakers)

12 PRESIDING JUDGE KORNER: [11:54:52] Yes and no.

13 MR EDWARDS: [11:54:53] That's the reading of our -- of the case law, as we see it.

14 PRESIDING JUDGE KORNER: [11:54:58] But I understand that, you know, why has
15 the Prosecution only seen X witness, taken a statement from X witness, you know,
16 after confirmation? But the general principle, that's really what you're arguing, is
17 that the Prosecution should be prevented from calling any evidence obtained after
18 you announced at the beginning -- effectively at the first appearance or your client
19 announced, I think it was, at the first appearance that he was not and never had been
20 Ali Kushayb. And you're saying the Prosecution, after that, were not entitled to
21 call -- to seek further evidence about the connection between the man who appears
22 before us as Mr Al-Rahman and Ali Kushayb.

23 MR LAUCCI: [11:56:13] That's actually the exact opposite, Madam President.

24 The submission is as follows: Even assuming, and I think it's a difficult assumption,
25 that the Prosecution had not identified before that he would be put to proof of

1 the alias Ali Kushayb and the link to Mr Abd-Al-Rahman, as of 15 June, he was put
2 on notice clearly and that should be the time, if he had not done that verification and
3 investigation before, that should have been the time when he should have
4 investigated that aspect. Nothing happened.

5 PRESIDING JUDGE KORNER: [11:57:02] Yeah, I've seen all that.

6 MR LAUCCI: [11:57:03] Nothing -- nothing visible until Pre-Trial Chamber, I would
7 say very kindly for the Prosecution, said on 2 November: Hum, hum, we do not see
8 anything in the disclosure so you should better know that we are expecting
9 something from you on that, so provide your evidence by December.

10 PRESIDING JUDGE KORNER: [11:57:25] I've understood that. That's clear.

11 MR LAUCCI: [11:57:29] So it's not that -- the 15 June was not the cutoff date, far
12 from it. We say the cutoff date was the confirmation hearing.

13 PRESIDING JUDGE KORNER: [11:57:37] But I don't -- what at the moment I'm at
14 a loss to understand is why you say there's any cutoff date.

15 MR LAUCCI: [11:57:45] The cutoff date is just a result of the case law that we have
16 identified in the submission and that even though there is a possibility to continue
17 investigations after the confirmation hearing, this is not an open-ended possibility,
18 and where -- especially where it is clear that there has been negligence on the side of
19 the party who wants to -- to submit further evidence collected after the confirmation
20 of charges from the Prosecution, then it -- it's not something that is acceptable.

21 And I think -- well, we have four grounds of -- as you have seen, we have four
22 grounds of negligence, some -- the first one coming back to 2005, and I think this is a
23 scenario where -- and colleague on the other side, please, I doubt you were there in
24 2005, so when I say there was negligence, that's not absolutely something that you
25 should take personally. Of course you cannot be responsible for everything

1 the Office of the Prosecutor has done in the past in relation to this case, or
2 the situation in Darfur, but this is exactly the situation.

3 PRESIDING JUDGE KORNER: [11:59:08] Yeah, all right, but I mean we're drifting
4 slightly from the point, Mr Laucci, I appreciate what you say and I did understand
5 that, is whether or not this issue -- that the general principles of whether
6 the Prosecution should be stopped from leading evidence obtained, if you like, after
7 the -- your suggested cutoff point, namely November of 2019, is it? Or '20? '19.

8 MR LAUCCI: [11:59:44] No, it would not be November. The cut -- if any, and
9 according to the case law, our understanding is that the cutoff date is the confirmation
10 hearing, that is May 2021.

11 PRESIDING JUDGE KORNER: [11:59:53] Right. Okay. After May 2021.
12 We can -- I would suggest, and I'll hear what the Prosecution say, deal with that as an
13 issue -- as a discrete issue so that we don't have to rehash it each time a witness is
14 going to be called.

15 MR LAUCCI: [12:00:14] We understand, Madam President, and that is entirely your
16 discretion of course. Nothing to say.

17 PRESIDING JUDGE KORNER: [12:00:19] No, the only question, as I say, is whether
18 we simply -- if you wanted to expand that any further in writing and then we ask
19 the Prosecution to respond to it and deal with it in writing as opposed to setting aside
20 a day for oral argument, let's say a day, half a day, whatever it requires.

21 MR LAUCCI: [12:00:40] Well, I think the submission is pretty complete as it is. If
22 you -- if you want to consider the clarification as the request, I think everything is
23 there. Maybe the last aspect would be the discussion of case-by-case determination
24 under --

25 PRESIDING JUDGE KORNER: [12:01:02] We can look at -- I mean you've cited,

1 you've cited the cases so we can look at those ourselves.

2 MR LAUCCI: [12:01:08] Yeah, exactly.

3 PRESIDING JUDGE KORNER: [12:01:09] Yes.

4 Mr Nicholls, any observations?

5 MR NICHOLLS: [12:01:14] Yes, just very quickly, your Honour, if I could come back
6 to one point you made right at the beginning - I couldn't scroll the transcript back to
7 see it - about Mr Abd-Al-Rahman saying at his initial appearance, "I have not been,
8 that has never been my nickname." That is actually not what happened. What
9 Mr Abd-Al-Rahman actually said when addressed as Mr Ali Kushayb by
10 the Presiding Judge was, "Ali Kushayb is not my name, my name is Abd-Al-Rahman,"
11 which is, you know, really saying please address me this way. So there was no
12 denial that he had ever gone by that nickname at that initial appearance and that's --

13 PRESIDING JUDGE KORNER: [12:01:57] Well, when do you say is the first time
14 that it became clear?

15 MR NICHOLLS: [12:02:01] I didn't -- I can't give you the exact date, but when
16 the -- when the Defence clearly brought it up at some point and I think it was in
17 removing the name from the filings might have been the issue and saying that
18 Ali Kushayb should not appear.

19 MR LAUCCI: [12:02:16] This was exactly on the same day. Actually, I'm a bit
20 surprised, colleague, but if you did not understand on 15 June that the alias would be
21 challenged, I think you are the only one in the room who did not understand it,
22 because the Presiding Judge -- Single Judge, sorry, Judge Aitala, I think fully got
23 the point and this is the reason why he on the same day ordered that submission to
24 explain why the name should be removed, and this was filed in the -- in the days
25 after -- I do not have the exact date, but 25 June 2020.

1 PRESIDING JUDGE KORNER: [12:02:57] 18 June you say in your filing -- in your
2 submissions.

3 MR LAUCCI: [12:03:01] Yeah, sorry, even (Overlapping speakers)

4 PRESIDING JUDGE KORNER: [12:03:04] You lodged your request (Overlapping
5 speakers)

6 MR LAUCCI: [12:03:05] Yeah, even -- even earlier, yeah.

7 MR NICHOLLS: [12:03:06] And we prevailed on that litigation by showing that
8 this -- it was common for an alias to also appear in different systems on court
9 proceedings and that that was not (Overlapping speakers)

10 PRESIDING JUDGE KORNER: [12:03:19] Well, that's not the point, Mr Nicholls. I
11 mean that's a separate point.

12 MR NICHOLLS: [12:03:23] No, that's a separate point.

13 PRESIDING JUDGE KORNER: [12:03:25] It's a question of when you were put
14 on -- I say "you", the --

15 MR NICHOLLS: [12:03:32] In any event, as I say, I would like -- I think written
16 submissions might be helpful to really clarify what they are saying and what the issue
17 is here. But what does not make any sense is that at some point before confirmation
18 hearing we are then -- we are then put on notice that this is the issue in the case and
19 that that means we can't investigate it. That is --

20 PRESIDING JUDGE KORNER: [12:03:54] Well, no, that's -- I mean, sorry,
21 Mr Nicholls, that's the whole point. I think that issue as a general principle that
22 the Prosecution has some kind of a cutoff date after which it cannot seek to call or to
23 investigate or to -- not so much investigate, but to call the fruits of its investigations
24 before the Court. And that's the only thing that I do not want to have, to have that
25 repeated every single time you produce a witness after whatever the cutoff point is

1 said to be.

2 So I do think what I'm going to do then, rather than dealing with it orally, as was my
3 intention, I will give the Defence leave, if they want to expand any further on that, to
4 do so -- this is not an urgent matter in the sense that we're not going to get to
5 witnesses until April, so I'll say that the Defence have 14 days to expand on it further,
6 which takes us to what date? Anybody? 14 days from today.

7 MR LAUCCI: [12:05:14] Should be something like 6 April.

8 PRESIDING JUDGE KORNER: [12:05:17] 6 April. Well, that's the date, yeah, in
9 that case, the opening of the trial. Very appropriate. And then the Prosecution can
10 respond to that again within 14 days. And then, if we want any further oral
11 submissions, we can ask for them after that.

12 MR NICHOLLS: [12:05:32] Thank you.

13 PRESIDING JUDGE KORNER: [12:05:32] So that's the 6th, so it will be the 20th. It's
14 Easter, isn't it, the 20? I can't remember. 20 April. All right.

15 And I think we just dispose of that particular issue I think.

16 And the only other matter that occurs to me is that we are fully aware that we haven't
17 given you the hours that -- and the reason we haven't is we're just waiting to complete
18 all the Rule 68(3). Do I gather the ninth was the last?

19 (Trial Chamber confers)

20 PRESIDING JUDGE KORNER: [12:06:35] I gather you've served the tenth today?

21 MR NICHOLLS: [12:06:39] Yes. And I believe that depending on the Reg 35
22 applications, that there could be another (Overlapping speakers)

23 PRESIDING JUDGE KORNER: [12:06:44] The Regulation 35, yeah. But there's no
24 more 62 -- 68(2)(c)s -- (b)s, rather?

25 MR MOURAD: [12:06:58] Your Honour, we have one 68(2)(c) application that we

1 aim to file by the end of the month and another 68(3) application for a witness that
2 passed away, and we mentioned it in an email to -- my apologies, my apologies, it's
3 my mistake, another new Rule 68(3) application for a second statement taken from
4 a witness that we intend to file Reg 35 application for together with Rule 68(3)
5 application. It's -- the reason because it's a supplementary application to a previous
6 one. But this is -- that's the end of it, sorry.

7 PRESIDING JUDGE KORNER: [12:07:48] All right. At the rate we're going, then
8 you're going to start off this case without knowing how many hours you've actually
9 got.

10 All right. So they're going to be coming in effectively until the start of the case. I
11 think we're just going to do the best we can then. We'll give you the hours either on
12 the -- on the day of opening or, if we can, before by email.

13 Right. Are there any -- yes, Mr Edwards.

14 MR EDWARDS: [12:08:21] Well, just on that point, would your Honour be in
15 a position to indicate that, as a matter of principle, the Defence would have an
16 equivalent amount -- at least an equivalent amount of time as the Prosecution would
17 have for evidence-in-chief in respect of viva voce witnesses, and in respect of
18 Rule 68(3) witnesses, the amount of time that they would use if those witnesses were
19 to be called viva voce?

20 I understand that that's -- that that's -- I hesitate to say that I understand that that's
21 the practice, but it would seem to us that that is fair, because the -- the saving of time
22 by the Prosecution when a witness is called 68(3) as opposed to viva voce should not
23 impact on the amount of time that the Defence needs to test that evidence, the totality
24 of that evidence.

25 PRESIDING JUDGE KORNER: [12:09:27] Yes, I mean we've already made it clear

1 it's not going to be -- it's not going to be a question of, you know, if the Prosecution
2 takes two hours, let's say, or an hour extra -- so let's take a viva voce witness. If the
3 Prosecution says it will take three hours to call him and then we'll say you
4 the Defence can have three hours to cross-examine, we're simply going to give you an
5 overall. How you use it is up to you.

6 MR EDWARDS: [12:09:58] Yes, I -- we understand that.

7 PRESIDING JUDGE KORNER: [12:09:59] What you're looking at is the overall total
8 and how are we going to work that one out.

9 MR EDWARDS: [12:10:00] Yes, the calculation of that overall total. And that
10 calculation can, we submit, be made, should be made on the basis of a principle,
11 the principle which I've just outlined.

12 PRESIDING JUDGE KORNER: [12:10:13] Yeah. As I say, this has been the subject
13 of, as you understand, some discussion between us already, but we decided at least
14 we'd try and wait for all of the Rule 68 applications to be dealt with. Because
15 obviously that has an impact. But it may not, by the sound of it, that may not be
16 possible, not to mention the, as you say, the Rule 35 -- Regulation 35.

17 Yes, any other matters?

18 No. Well, then thank you all very much. That concludes the status conference and
19 we reconvene ...

20 MR LAUCCI: [12:10:55] Maybe just a very last. I think it's better just to announce it,
21 it will come in writing, but the Legal Representative of Victims,
22 the Office of the Prosecution and the Defence have consulted each other, especially
23 yesterday, and we are preparing a joint submission, the three of us, with respect to
24 some issues that we have detected with the -- on the aspect of the transcripts of
25 the Court session and some -- and verification of the transcripts and how this should

1 be dealt with.

2 In your decision on the conduct of the proceedings this was -- it's written that this

3 should be dealt with with the Registry and that we would follow the procedure.

4 This is what -- this is what we have done so far, but we have some joint submissions

5 to make because that procedure is, by experience, appearing problematic. But that is

6 just coming. It's a -- it's a notice.

7 PRESIDING JUDGE KORNER: [12:12:07] Yes, all right. Well, we'll wait and see

8 what it says. I won't say we're gripped to know what you're going to say, but we'll

9 wait and see.

10 All right, if that's it, then again thank you all very much and we reconvene, subject to

11 any dramatic developments, on 5 April. Thank you.

12 THE COURT USHER: [12:12:29] All rise.

13 (The hearing ends in open session at 12.12 p.m.)