

Trial Hearing
WITNESS: DAR-OTP-P-0012

(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 ("Ali
5 Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and Judge Althea Violet
7 Alexis-Windsor
8 Trial Hearing - Courtroom 3
9 Friday, 10 June 2022
10 (The hearing starts in open session at 9.46 a.m.)
11 THE COURT USHER: [9:46:01] All rise.
12 The International Criminal Court is now this session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:46:46] Yes. Good morning, all. As usual,
15 nothing runs smoothly.
16 Can we call the case, please.
17 THE COURT OFFICER: [09:46:54] Good morning, Madam President, good morning,
18 your Honours.
19 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
20 Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05/-01/20.
21 And for the record, we are in open session.
22 PRESIDING JUDGE KORNER: [9:47:14] Yes, appearances, please, for the
23 Prosecution first.
24 MR NICHOLLS: [9:47:18] Good morning, Madam President. Good morning, your
25 Honours. Same as yesterday, but with Mohanad Elkholy with us today. Thank

1 you.

2 PRESIDING JUDGE KORNER: [9:47:29] Thank you.

3 The Defence.

4 MR LAUCCI: [9:47:30] Good morning, Madam President. Good morning, your
5 Honours. Same as yesterday, and Mr Abd-Al-Rahman, for the last day, is also not in
6 the courtroom and waives his rights to attend.

7 PRESIDING JUDGE KORNER: [9:47:42] Yes. I think I should say straightaway, as
8 I've already said, this was exceptional.

9 Yes. Sorry. A helpful aside was not a particular helpful one. As I made clear, this
10 was exceptional and it is not something that I expect to happen again unless for some
11 reason Mr Al-Rahman is ill.

12 MR LAUCCI: [9:48:18] Madam President, he's aware this exception corresponds to a
13 very exceptional circumstance.

14 PRESIDING JUDGE KORNER: [9:48:24] All right. Yes, finally -- yes, could we
15 have the victims' representatives, please.

16 MS VON WISTINGHAUSEN: [9:48:31] Yes. Good morning, Madam President,
17 your Honours, dear colleagues. The victims today are represented as yesterday by
18 Mr Shah, Idriss Anbari, and myself, Natalie von Wistinghausen. And I take the
19 opportunity to let you know that the transcript is not working.

20 PRESIDING JUDGE KORNER: [9:48:43] Correct, it isn't. Transcript's not working.

21 MR NICHOLLS: [9:48:50] Ours is, your Honour, if it makes a difference to the
22 technical people.

23 PRESIDING JUDGE KORNER: [9:48:55] (Overlapping speakers) and nor -- is yours
24 working, Ms Von Wistinghausen, or not?

25 MS VON WISTINGHAUSEN: [9:49:00] Not at the moment, but maybe it's my

1 mistake.

2 PRESIDING JUDGE KORNER: [9:49:03] No, ours isn't working either.

3 THE COURT OFFICER: [9:49:06] Your Honours, with apologies the technicians
4 have been informed and they're looking into it.

5 PRESIDING JUDGE KORNER: [9:49:11] All right. Well, we'll just have to live
6 without it in the hopes that we don't have to refer back to anything in what I
7 anticipate will be a shorter session this morning.

8 Can I, first of all, thank both the LiveNote persons and the interpreters for sitting
9 longer yesterday than they would otherwise have done, and also to apologise. I
10 think on behalf of three English practitioners who all spoke over each other, and it
11 was unfortunate, but when you're dealing with legal argument and everybody's
12 speaking the same language, one tends to revert to domestic practice and -- but I want
13 to apologise.

14 Right. Coming back to the matter in hand, Mr Edwards, thank you -- and Mr
15 Laucci, obviously, the Defence, thank you for the skeleton argument which effectively
16 summarises the arguments you made yesterday, unless there's anything else you
17 want to add.

18 MR EDWARDS: [9:50:33] No, there's nothing -- there's nothing we wanted to *add.
19 There was one point that Mr Nicholls made that we just -- that I wanted to address in
20 the skeleton argument, and also to place on record the fact that we -- there's an aspect
21 of the transcript that -- that we take issue with, but that's something that can be sorted
22 out between ourselves and the Prosecution and the language section, as it were.

23 PRESIDING JUDGE KORNER: [9:50:56] Well, that's what I was going to say. If
24 and when this video or if either of the two videos come into evidence, then the
25 transcript can be agreed between both sides.

1 But it would be helpful, I think, if it were possible, as I said yesterday, if the videos
2 could be subtitled, which is actually a cheaper way of doing it, I gather.

3 MR NICHOLLS: [9:51:21] We've requested that as of yesterday, your Honour,
4 during court. And just for the record, we checked the transcript -- excuse me, the
5 audio, with two Arabic speakers this morning and we believe the transcript does
6 reflect that -- that portion. So my friend's laughing at me, but we will -- we can sit
7 down and try to agree to that and if necessary have an expert listen to it.

8 PRESIDING JUDGE KORNER: [9:51:49] Well, as I say, I think that's a different issue
9 from the one.

10 Mr Jeremy, is there anything else you want to say?

11 MR JEREMY: [9:51:59] Madam President, your Honours, I would -- I would only
12 direct my comments to the core of the *Defence submission which we received
13 courtesy copies of this morning to say that it is not or it is the Prosecution's position
14 still that the -- showing the second video would arise directly out of an issue from
15 cross-examination. It is not something that arises out of purely re-examination as
16 I -- as I did say yesterday, just to emphasis that.

17 PRESIDING JUDGE KORNER: [9:52:34] Yes, thank you.

18 Yes, well, we have considered all the matters raised yesterday, as well as Mr
19 Edwards' further skeleton argument produced and sent to us this morning and we are
20 prepared to give a ruling.

21 During the course of cross-examination, Mr Edwards asked the present witness about
22 the changes which had been made to the witness statement made in 2007 during the
23 course of witness preparation with the Prosecution. And his questions begin at
24 page 12 of yesterday's transcript, the uncorrected version. And he said, "What I am
25 interested in knowing" - Mr Edwards this is - "is where did you get the information

1 from that permitted you to say to the investigators *in 2007 that Ali Kushayb
2 was not originally from Wadi Salih, but from Eastern Darfur from Al Deain."
3 And he -- the witness replied: "Following what is happening in the internet, I found
4 a video. He" - and from that we assume it is the man he identifies as Ali
5 Kushayb - "was speaking in Rahad Al-Berdi area. In that video, he said he was born
6 in that area and he grew up there. At the time, I said okay, maybe this is true. Ali
7 Kushayb was born, as he said in his video, and the video is still there on YouTube. I
8 also heard him talking about with a number of teachers in Rahad Al-Berdi and he said
9 that he was from that area, Rahad Al-Berdi, so that is why I changed from the
10 statement that he is from Al Deain to Rahad Al-Berdi. I didn't know him before that,
11 and I have no idea about his background."

12 And there were further questions, a number of them, about his -- the video and
13 his -- the change to his statement. And additionally, because it is relevant, he was
14 asked about whether he had watched the opening of this trial, and in particular the
15 statement made by the accused himself.

16 In our judgment, as I made clear to Mr Edwards and the Defence yesterday, the only
17 purpose of these questions can have been to impugn the creditability of the witness.
18 Indeed, at the end of cross-examination it was suggested properly, and in no
19 uncertain terms, that he was deliberately lying about his interaction with the man he
20 called Ali Kushayb who ran the pharmacy in Garsila and whom he later described as
21 a leader involved in the attacks which form part of this indictment and on other
22 aspects that his evidence was, to put it at its lowest, unreliable in particular as to what
23 he could have seen from where he said he was situated.

24 Accordingly, as a result of this cross-examination, in re-examination, the Prosecution
25 proposed to play a video - and I emphasise a video - which conformed with his

1 description of what he had seen.

2 Mr Edwards, on behalf of the accused, objected on the basis first that the questions
3 that he had asked were not designed to impugn the creditability of the witness and
4 that the exercise of playing the video to the witness was tantamount to a doc
5 identification.

6 We ruled that it was permissible for the Prosecution to re-examining using that one
7 video as described, which has been seen in court before during the application for
8 interim release. We ruled that that could be shown first because the Prosecution was
9 entitled to rebut the suggestion of lack of creditability. And second, and most
10 importantly, even though doc identifications are permissible at this court, this was not
11 tantamount to a doc identification, but was recognition, which is all - the authorities
12 have made it clear - is a very different matter.

13 However, it would first have to be established that this was the video that he saw.

14 Having watched the video, when the witness was asked by Mr Jeffrey -- Mr Jeremy
15 whether this was the one he was talking about, he said it was not and he described a
16 video which contained the accused, as he said it was, in a military uniform.

17 The Prosecution now wish to ask him to show him that video and ask him whether
18 that is the one he saw. And again, the Defence object on the basis that -- effectively
19 that this video bears no relationship to the one described by the witness in answer to
20 Mr Edwards' questions and that re-examination is not permissible unless it arises
21 directly from cross-examination.

22 Mr Jeremy, submits that it does on the basis that the video -- the questions relating to
23 a video entitle them to -- the Prosecution to show the witness effectively, if not any
24 video in their possession, any video describing the sort of scene in general terms that
25 the witness is talking about.

1 It is an accepted rule of procedure that questions put in re-examination must arise
2 from matters and answers given in cross-examination, unless by agreement it is
3 not -- re-examination is not an opportunity for the party seeking to re-examine to
4 attempt to deal with matters it could have dealt with in examination-in-chief, but did
5 not do so either deliberately or accidentally.

6 And accordingly, we are not satisfied that the Prosecution has made out a proper case
7 for showing that second video in re-examination and we decline to allow them so to
8 do.

9 Yes, right. Is there any reason why the witness can't come back into court to
10 complete -- do you have any further questions in re-examination, Mr Jeremy?

11 MR JEREMY: [10:02:01] I don't have any further questions, Madam President.

12 PRESIDING JUDGE KORNER: [10:02:07] All right. Yes.

13 Mr Laucci.

14 MR LAUCCI: [10:02:08] Madam President, a very technical question about the
15 skeleton argument. It was submitted just for the Chamber to have the position of the
16 Defence in a little bit more detail in written manner, but we did not intend to file it
17 until you instruct us, so I don't believe it's necessary.

18 PRESIDING JUDGE KORNER: [10:02:28] Well, I don't think it's necessary either.

19 As you say rightly, it's a skeleton argument which is simply a distillation of the
20 arguments and we've ruled in your favour anyhow.

21 MR LAUCCI: [10:02:39] Exactly. Exactly. Thank you.

22 PRESIDING JUDGE KORNER: [10:02:42] Yes. All right.

23 Well, let's have the witness back, please. I'm sorry. The one thing I should have
24 mentioned is this, and I meant to before we began.

25 Ms Von Wistinghausen, I didn't ask you for any views, but I took the view that this

1 was really a matter of contention between the Prosecution and Defence and not one
2 that involved the victims, so I didn't ask you for your input. If you think I'm wrong,
3 of course you can say so.

4 MS VON WISTINGHAUSEN: [10:03:14] No, I think, then, I would have stood up at
5 the appropriate time. I think if the question had been the admissibility of the video, I
6 think we would have had the right to take position, but given the circumstances here,
7 I -- I kept quiet and I don't think I had anything to say.

8 PRESIDING JUDGE KORNER: [09:44:00] Yes, thank you very much.

9 (The witness enters the courtroom)

10 PRESIDING JUDGE KORNER: [10:04:23] Sir, good morning to you. I'm sorry
11 you've been kept waiting. As you will see, we're in a different court. So we had to
12 reorganise matters, but I don't think you'll be here for very much longer this morning.

13 Mr Jeremy, is there anything else you want to ask in reexamination.

14 MR JEREMY: [10:04:43] Thank you. No, Madam President.

15 PRESIDING JUDGE KORNER: [10:04:44] All right. Well, the Judges, sir, have a
16 few questions for you, and I'll start with Judge Alapini-Gansou.

17 WITNESS: DAR-OTP-P-0012 (On former oath)

18 (The witness speaks Arabic)

19 JUDGE ALAPINI-GANSOU: [10:05:01](Interpretation) Thank you, madam
20 President.

21 I have two or three questions to ask and those are questions of clarification.

22 Mr Witness, good morning.

23 THE WITNESS: [10:05:18] (No interpretation).

24 JUDGE ALAPINI-GANSOU: [10:05:18] I would like to ask you a few questions.

25 The first relates to the fact that you talked to us about customs and the cultures of

1 Sudan. For example, respect due to elderly people.

2 You also said that quite often you would refer to the accused person as "uncle"; is that
3 correct?

4 THE WITNESS: [10:05:52] (No interpretation).

5 JUDGE ALAPINI-GANSOU: Now, does that mean that you were quite used to him,
6 quite familiar with him?

7 THE WITNESS: [10:06:24](Interpretation) Regarding the use of that title, I could use
8 that for anyone based on their age. It was not specifically for him as a person.

9 When dealing with a -- with a senior person, I would always use that title.

10 JUDGE ALAPINI-GANSOU: [10:06:39](Interpretation) So you were not very
11 familiar with him, but you considered him as an older person, someone who was
12 well-known and popular and then you would address him as such; is that correct?

13 THE WITNESS: [10:07:06](Interpretation) Yes.

14 JUDGE ALAPINI-GANSOU: [10:07:06](Interpretation) Now, what I wanted to ask
15 you is linked to the land.

16 You told the Chamber that the lands belonging to the people of that region involved
17 in that situation, that these people left their land and that subsequently other people
18 came and occupied the lands.

19 Who are these people? Are they the same people who came and re-occupied their
20 own land or is it different people?

21 THE WITNESS: [10:07:58](Interpretation) Other people. They are the Janjaweed.

22 JUDGE ALAPINI-GANSOU: [10:08:16](Interpretation) Another question relates to
23 this notion of African and Arab in Sudan.

24 Now, we know that Sudan is an African country. Now, what do you have to say
25 about this perception, this situation in an African country where you still talk about

1 Africans and then Arabs? What is your understanding of that? Can you share your
2 view with us?

3 THE WITNESS: [10:08:51](Interpretation) There are customs and traditions in Sudan
4 that are lands, territories that the inhabitants have owned for centuries. They have
5 been driven away of those lands where they had farms. They were driven out of
6 those lands and newcomers took over those lands. This is what I wish to clarify.

7 JUDGE ALAPINI-GANSOU: [10:09:21](Interpretation) I don't think you had the
8 right interpretation of my last question to you. It relates to the notion of Africanity
9 and Arabism because in Sudan we are talking about African populations and Arab
10 populations in the same country. That's what I'm referring to.

11 Can you explain to us your perception of this, what you understand by that?

12 THE WITNESS: [10:10:07](Interpretation) Arab and African are both national
13 identities and each has a language. The Africans have land as do the Arabs. That's
14 my understanding of it.

15 JUDGE ALAPINI-GANSOU: [10:10:26](Interpretation) Now, could this state of
16 affairs lead to conflicts within the population?

17 THE WITNESS: [10:10:43](Interpretation) If you have a desire to kill someone
18 or -- and to occupy their land, then that would trigger a conflict.

19 JUDGE ALAPINI-GANSOU: [10:10:57](Interpretation) Madam President, I will stop
20 there for now.

21 PRESIDING JUDGE KORNER: [10:11:02] Yes, Judge Alexis-Windsor.

22 JUDGE ALEXIS-WINDSOR: [10:11:08] Thank you.

23 Good morning, sir.

24 THE WITNESS: [10:11:20](Interpretation) Good morning.

25 JUDGE ALEXIS-WINDSOR: [10:11:21] First of all, I should like to ask you a few

Trial Hearing
WITNESS: DAR-OTP-P-0012

(Private Session)

ICC-02/05-01/20

1 questions about the pharmacy in Garsila of Ali Kushayb, a very general question.

2 THE WITNESS: [10:11:37](Interpretation) Certainly.

3 JUDGE ALEXIS-WINDSOR: [10:11:37] I'd like to know, firstly, was it bigger than
4 other pharmacies in Garsila?

5 THE WITNESS: [10:11:51](Interpretation) It wasn't the biggest because shops or
6 pharmacies all have the same size, so it was not the biggest.

7 JUDGE ALEXIS-WINDSOR: [10:12:01] Was it better stocked than other pharmacies
8 in Garsila? Did it have more medicines or better medicines?

9 THE WITNESS: [10:12:22](Interpretation) In some pharmacies, you might find them
10 understocked or overstocked in terms of merchandise, but his pharmacy was good in
11 my opinion.

12 THE INTERPRETER: [10:12:42] Correction: Was of the good type.

13 JUDGE ALEXIS-WINDSOR: [10:12:50] Another question. So I've moved on about
14 the pharmacy now.

15 Another question, are there some tribes in Sudan where -- or in Darfur where the men
16 have ear piercings, ear piercings.

17 THE WITNESS: [10:13:31](Interpretation) That phenomenon was not widespread in
18 Darfur. As far as I could see, only women had their ears pierced, but it was not
19 widespread for men to have their ears pierced.

20 JUDGE ALEXIS-WINDSOR: [10:13:46] Thank you. My last issue must be asked in
21 closed session, please.

22 (Private session at 10.14 a.m.)

23 THE COURT OFFICER: [10:14:09] We're in private session, Madam President.

24 (Redacted)

25 (Redacted)

Trial Hearing
WITNESS: DAR-OTP-P-0012

(Private Session)

ICC-02/05-01/20

1

2

3

4

5

6

7

8

9

10

11

12

13 Page redacted – private session

14

15

16

17

18

19

20

21

22

23

24

25

Trial Hearing
WITNESS: DAR-OTP-P-0012

(Private Session)

ICC-02/05-01/20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page redacted – private session

- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 (Redacted)
- 20 (Open session at 10.20 a.m.)
- 21 THE COURT OFFICER: [10:20:53] We're back in public session, Madam President.
- 22 PRESIDING JUDGE KORNER: [10:20:56] Sir, you were asked the day before
- 23 yesterday by Ms Von Wistinghausen to explain to the Judges about the targeting of
- 24 what I think you described as the elite.
- 25 What you said - and this is at page 37 of the still, I think, uncorrected transcript from

1 the day before yesterday - was this: "If you kill the elite, those who are learned,
2 those who are of high social status, or those who are of means, financial means, then
3 you are destroying the community."

4 Can you give us some examples of what sort of occupations you're talking about in
5 terms of the elite.

6 THE WITNESS: [10:22:05](Interpretation) Yes. They could be local administrative
7 officers, as well as employees in the different governmental authorities, as well as
8 traders, wealthy traders and owners of big farmers and livestock, as well as *oulemas*.
9 This is what I meant by social elite.

10 PRESIDING JUDGE KORNER: [10:22:33] I'm sorry, I didn't catch the last -- as well
11 as what?

12 THE WITNESS: [10:22:41](Interpretation) Yes. The *oulemas*, who are religious
13 leaders, spiritual leaders.

14 PRESIDING JUDGE KORNER: [10:22:53] All right. Yes. Thank you. The second
15 matter goes back to the video that you described watching.

16 When you looked on the internet, how did you find the video? Were you searching
17 for the name or what?

18 THE WITNESS: [10:23:19](Interpretation) No. Of course, I found it on YouTube.
19 It was uploaded on YouTube. I just clicked on the video, and there was a photo of
20 the so-called Ali Kushayb. I just clicked on that video, I watched it, and I found him
21 speaking in the video.

22 PRESIDING JUDGE KORNER: [10:23:39] That's -- that's what I wanted to
23 understand.

24 Did the video have a title? In other words, when you click on something, you say
25 you saw the picture, but did it have a title of what it was before you started to watch?

1 THE WITNESS: [10:24:05](Interpretation) Yes. There was the title of Ali Kushayb
2 talking about prohibited weapons, so this attracted my attention and I watched it.

3 PRESIDING JUDGE KORNER: [10:24:24] When you watched it, were you able to
4 recognise anybody?

5 THE WITNESS: [10:24:33](Interpretation) No, I didn't recognise anyone, but I
6 recognised him. But I didn't recognise anyone else, apart from him.

7 PRESIDING JUDGE KORNER: [10:24:42] Yes, thank you very much, indeed. Sir,
8 that then concludes your evidence. Thank you, as I said before for, for coming to
9 court. You will appreciate that a lot of what you said is not agreed, but it's
10 important that that *evidence is heard by everyone and all disagreements. So I thank
11 you once again and wish you a safe return to your own country. Yes.

12 THE WITNESS: [10:25:24](Interpretation) Thank you so much, and thank you for
13 listening to me, to my opinion.

14 (The witness exits the courtroom)

15 PRESIDING JUDGE KORNER: [10:25:49] I gather that some documents are going to
16 be given ERNs on the record.

17 THE COURT OFFICER: [10:25:59] Thank you, Madam President.

18 The document DAR-REG-0001-0009 marked by P-12 yesterday was assigned ERN
19 DAR-REG-0001-0010 and is classified as confidential.

20 The document DAR-OTP-0224-0633 marked by P-980 on Monday has been assigned
21 ERN DAR-REG-0001-0008 and is classified as public.

22 Thank you.

23 PRESIDING JUDGE KORNER: [10:26:41] Yes. Right. On Monday, I understand
24 that the witness has got to be given a familiarisation tour, if that's the right word, at 9
25 a.m., so we will not be sitting until 10 a.m.

1 Mr Nicholls, we -- we, effectively, had it not been for yesterday's argument, would
2 have ran out of witnesses this week. Are the witnesses lined up for next week going
3 to occupy the whole week?

4 MR NICHOLLS: [10:27:14] I think we will, your Honour. When we first scheduled,
5 we had the pending Rule 68(3) applications, which were granted, which have moved
6 it up, but we did have another witness on standby. So I think we -- we'll be okay,
7 even though it will go faster than we originally anticipated.

8 PRESIDING JUDGE KORNER: [10:27:36] Yes. Right.

9 Well, obviously, you can discuss with the Defence how long each witness is likely to
10 take so that you'll have the next one lined up.

11 Yes. Are there any other matters before we adjourn? No?

12 Well, thank you all very much, and everyone have a good weekend. See you
13 Monday.

14 THE COURT USHER: [10:27:56] All rise.

15 (The hearing ends in open session at 10.27 a.m.)

16 CORRECTIONS REPORT

17 The following corrections, marked with an asterisk and included in the audio-visual
18 recording of the hearing, are brought into the transcript.

19 Page 3 line 18

20 "add?" Is corrected to "add."

21 Page 4 line 12

22 "Defence and submission" Is corrected to "Defence submission"

23 Page 5 line 1

24 "in many 2007" Is corrected to "in 2007"

25 Page 16 line 10

Trial Hearing
WITNESS: DAR-OTP-P-0012

(Open Session)

ICC-02/05-01/20

1 “evidence heard” Is corrected to “evidence is heard”