

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 Judge Althea
7 Violet Alexis-Windsor
8 Status Conference - Courtroom 3
9 Friday, 17 December 2021
10 (The hearing starts in open session at 9.30 a.m.)
11 THE COURT USHER: [9:30:29] All rise. The International Criminal Court is
12 now in session. Please be seated.
13 PRESIDING JUDGE KORNER: [9:30:49] Yes, good morning, everybody.
14 Could the Registrar call the case, please.
15 THE COURT OFFICER: [9:31:04] Good morning, Madam President,
16 your Honours. This is the situation in Darfur, Sudan, in the case of The
17 Prosecutor versus Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"),
18 situation ICC-02/05-01/20.
19 And we are in open session.
20 PRESIDING JUDGE KORNER: [9:31:18] Yes, thank you.
21 Can we have the appearances, please.
22 First of all, the Prosecution.
23 MR NICHOLLS: [9:31:27] Good morning, your Honours. Good morning
24 colleagues here and remotely. I'm Julian Nicholls, I'm joined today by Claire
25 Sabatini, Mourad Hesham and Edward Jeremy. Thank you.

1 PRESIDING JUDGE KORNER: [9:31:41] Yes. And the Defence.

2 MR LAUCCI: [9:31:44](Interpretation) Good morning, Madam President,
3 good morning, your Honours. Good morning dear colleagues. For the
4 Defence this morning, and also remotely, we have Mr Iain Edwards, remotely;
5 and here in the courtroom, we have Madam Vanessa Grée, legal adviser,
6 Ahmad Issa, our case manager; Madam Eva Kalb, legal assistant in charge of
7 evidence; and Mohammad El Rahi also in charge of analysis of evidence; and
8 myself, lead counsel, Mr Cyril Laucci.

9 PRESIDING JUDGE KORNER: [9:32:22] Thank you, Mr Laucci.

10 The victims' representatives, please.

11 MS VON WISTINGHAUSEN: [9:32:36] Yes, good morning, Madam President,
12 good morning, your Honours, good morning to everyone in and outside the
13 courtroom, I'm Natalie von Wistinghausen, representing the victims together
14 with Mr Abdalla who's also attending remotely. Then we have our case
15 manager, Idriss Anbari sitting in the courtroom. I would like to introduce
16 him to you, he's our case manager since 1 December this year. And I also
17 want to mention a barrister from London who is assisting us on a pro bono
18 basis at the moment as a legal assistant and her name is Diana Constantinide.
19 So that's the composition of the Legal Representatives of Victims at the
20 moment. Thank you very much.

21 PRESIDING JUDGE KORNER: [9:33:10] Yes, thank you very much, Ms von
22 Wistinghausen.

23 And finally, the Registry.

24 MR FUJIWARA: [9:33:17] Good morning, your Honours. My name is
25 Hiroto Fujiwara, Head of Country Analysis Unit, External Operations Support

1 Section. I'm joined by Ms Miša Zgonec-Rožej, legal officer of the Registry's
2 Legal Office; Mr Gerhard van Rooyen, senior manager of the Victims and
3 Witness Support Section; Mr Kiyonobu Futori, Associate Analyst, Country
4 Analysis Unit. Thank you.

5 PRESIDING JUDGE KORNER: [9:33:46] There certainly seems to be a lot of
6 you this morning from the Registry. Thank you.

7 Yes, now I think everybody has received the agenda and there was an
8 amending email sent to all the parties, which was on 13th of December.

9 Does everybody have that -- or did everybody get that, I should say? Yes.

10 All right, in which case we're going to start with the Defence repeated
11 submissions, the last filing being on the 16th of December, which
12 suggests - and has before that suggested - that in the status conference held on
13 the 12th of November, the Chamber made an order saying that there were to be
14 no missions or activity in the Sudan.

15 Mr Laucci -- and you keep referring to the same passage in the French version
16 of the transcript, where you were making in French, and, I was dealing with it
17 in English, the application -- in fact, not even an application. If you look at
18 page 50 of the English transcript and the same page in the French transcript, it
19 appears to be something of a stream of consciousness about having a further
20 discussion about "[...] minimal conditions for resuming or continuing activities
21 in the Sudan. That is a discussion we expected to have today."

22 And that's it.

23 And what you then propose -- what you seem to base this on is me having said
24 in the French version but not in the English, which given that I was speaking
25 English, yes, certainly. But one way or another, Mr Laucci, how can it be said

1 that that exchange in any way is to be taken as any kind of prohibition, even if
2 this Chamber were to have had the power to do that on anybody going to the
3 Sudan?

4 Explain that, would you be kind enough.

5 MR LAUCCI: [9:37:02](Interpretation) Madam President, yes, indeed. This
6 passage that you are referring to of the transcript of the second status
7 conference is towards the end of said status conference, and what I was trying
8 to do at that moment in time in the passage that you've just quoted from, was
9 to summarise, if you like, the discussion that had taken place at an earlier stage
10 in the morning -- I believe it was in the morning anyway -- with regard to the
11 situation and how one was to proceed.

12 We heard from Mr Christian Mahr, the director, and this was just virtually the
13 day after the coup d'état of the 25th of October; we had the recommendations
14 of the JTAG saying that no further mission until further notice. And we had
15 suggested that this status conference, that we discuss the conditions that would
16 enable the Court to return, and you entirely respected that saying that the
17 conditions were far too early and we had to see how the situation would
18 evolve.

19 So I summarised at the end of the status conference to make sure that I had
20 understood what the position of the Chamber was, that, until further
21 notice -- and that's the reason why we requested to have this third status
22 conference today on the subject -- it was impossible to envisage any further
23 missions to Sudan. That was what we understood.

24 PRESIDING JUDGE KORNER: [9:38:42] Where? Sorry, Mr Laucci, where is
25 that said? Where in the transcript do you see anything that suggests the

1 Court - or, in this case, I am saying, "We are ordering that there are no further
2 missions to Sudan."

3 Where do you see that?

4 MR LAUCCI: [9:39:03](Interpretation) I do not believe that I spoke at any
5 moment in time of an order as formal as you are describing. I was talking
6 about a position -- or, the position that was understood by the Defence during
7 this second status conference, a position that in order to be sure that I had
8 understood in pages 50 and 51 of the transcript, you will see that I repeat it in
9 order for it to be confirmed.

10 I was basing myself on the French transcript -- the French version of the
11 transcript, I am in the habit of doing so. I did not know that the English
12 transcript was different in this regard.

13 But the French version of the transcript, whatever the case may be, seemed to
14 be reasonably clear to me.

15 PRESIDING JUDGE KORNER: [9:39:55] Well, Mr Laucci, I don't know
16 whether it's deliberate or not. As regards transcripts, you have
17 an English -- as I know, you also speak fluent English yourself.

18 MR LAUCCI: [9:40:04] *Sans problème.*

19 PRESIDING JUDGE KORNER: [9:40:04] You have an English-speaking
20 counsel as your co-counsel and it is incumbent upon you to
21 check -- particularly as I am speaking in English -- what is said. But either
22 way, Mr Laucci, no one reading either transcript, English or French, could have
23 thought that what the Chamber was saying was giving an instruction to the
24 parties not to undertake any field activities until the Court allowed it, until
25 further notice.

1 MR LAUCCI: [9:40:57](Interpretation) So I shall answer uniquely on that
2 point.

3 As to the question of a suggestion -- a suggestion when you started to address
4 the Court, there was nothing deliberate. It was the understanding -- simply
5 a good-faith understanding of what the Defence had of the discussions held in
6 that second status conference, and, in view of the gravity of the situation,
7 because this was literally the day after the coup d'état in Sudan, and taking into
8 account everything that we had heard from the Registry, everything that we
9 had heard from the Office of the Prosecutor who was saying, "No contact" -- oh,
10 we're in open session, I can't go much deeper into that.

11 But the Office of the Prosecutor had indicated to us that there were
12 serious -- very serious security issues at that moment in time and I believe that
13 it was just common sense, and, maybe it wasn't necessary for the Chamber to
14 order it specifically but -- to say that really the circumstances were not fulfilled
15 for anyone to go to Sudan.

16 But on this side of the *bench, you will find one set of beliefs and that is that of
17 the Chamber, Madam President. You think that I have pushed things a little
18 bit too far, but this was done really in good faith and in the light of the
19 information that had been given to us.

20 PRESIDING JUDGE KORNER: [9:42:32] Well, I don't want to waste too much
21 time on this, but in fact, in your filing number 538, you asked this Chamber to
22 determine that the Prosecution had violated an order, which is a serious matter,
23 Mr Laucci, and, which, as I say, it would have been better if both you and your
24 co-counsel had reflected a little on what was actually said and looked at the
25 English.

1 All that I am going to say about it is that in this matter, we made no such order.
2 If any order is made by this Chamber, it will be absolutely crystal clear that it is
3 an order and not -- even taking it at its highest -- a throw-away remark in the
4 French version of the transcript.

5 Can I, while I'm on that matter, just say this, I appreciate it's not always easy
6 where parties are speaking different languages to get an accurate version, but I
7 am a little dismayed that something that does not appear in the English version
8 of the transcript does appear in the French and I hope that this won't happen
9 again.

10 But as I say, it's incumbent upon the parties to check both versions of the
11 transcript. If there is a discrepancy, it means somebody will have to listen to
12 the tape; so --

13 MR LAUCCI: [9:44:22](Interpretation) I have noted what you've just said,
14 Madam President. I do have two comments on that. With regard to the
15 correction of transcripts, we are in coordination with the Registry because there
16 was something about this process that wasn't very clear and is currently being
17 clarified. We're working on that.

18 Now as to the second aspect, I believe that the linguistic issue also arose with
19 regard to our submission of yesterday, which is the French language. I
20 haven't got the text in front of me, but no reference is made of any violation of
21 any instruction on the part of the Chamber, but rather on the position adopted
22 at the conclusion of the second status conference.

23 So I don't believe that there was a reference to any formal instruction, but
24 rather the position that was reached at the conclusion of said status conference
25 after discussions were held.

1 PRESIDING JUDGE KORNER: [9:45:25] Well, as I say, at the moment I think
2 we've done this topic to death and we've got other matters, possibly more
3 important ones to get through this morning.

4 So unless there's anything else you want to add, Mr Laucci, we'll move to the
5 question -- the second item on the agenda, which is an update on the current
6 situation.

7 MR LAUCCI: [9:45:58](Interpretation) Let's not waste any time. I found the
8 document yesterday. It is indeed a position that was mentioned and nothing
9 more formal than that.

10 PRESIDING JUDGE KORNER: [9:46:07] Yes, all right.

11 Yes, well, let us come then, as I say, to rather more important matters, which is
12 the question of the current situation in Sudan. And from that, I'd like to
13 hear -- about that, I'd like to hear first from the Registry.

14 MR FUJIWARA: [9:46:26] Thank you very much, Madam President. Since
15 the second status conference of 12th November, the Registry has observed
16 positive developments in relation to the current political situation in Sudan.
17 The most important development is the reinstatement of Prime Minister
18 Abdullah Hamdok based on the political agreement he had signed on 21st
19 November with the head of the Sudanese army, General al-Burhan. The
20 reinstated Prime Minister Hamdok has subsequently nominated the
21 undersecretaries to lead the ministries, including the Ministry of Justice and the
22 Ministry of Foreign Affairs, until a new cabinet is formed and new ministers
23 are appointed as such. It is worth noting that the agreement between the
24 Prime Minister and General Burhan also reconfirms the implementation of the
25 Juba Peace Agreement. The Sovereign Council has also provided affirmations

1 of Sudan's commitment to the agreements related to the International Criminal
2 Court and to provide the necessary facilities in accordance with the conditions
3 and laws and protection of witnesses.

4 In light of these positive developments, the Registry hopes to shortly resume
5 dialogue with the Sudanese authorities and to request the authorities
6 to appoint a new focal point for communication with the ICC. As soon as the
7 new focal point is designated by the Sudanese authorities, the Registry will
8 immediately follow-up on their response to all outstanding cooperation
9 requests, including the cooperation request sent by the Defence.

10 The Registry aims to send a delegation at the earliest opportunity in the new
11 year to meet with the Sudanese authorities to reaffirm their commitment to
12 implement the cooperation agreement of 10 May, signed between the Court
13 and the Sudanese authorities.

14 Although the political and security situation remains somewhat unpredictable,
15 the Court's security experts have observed a slight improvement of the security
16 situation in Sudan.

17 The UN is implementing efforts to bring back the civilians, including the
18 Forces of Freedom and Change, FFC, to the negotiation table with the military
19 in the context of the transition process. Khartoum shows slight improvement
20 despite the ongoing protests, while Darfur currently faces a resurgence of
21 intercommunal conflicts.

22 Against this development, a joint forces have recently been deployed to Darfur.
23 The Registry has also received confirmation that those UN entities, which have
24 a permanent footprint in Sudan, have the capacity to continue their activities in
25 Sudan and thus will be able to provide assistance --

1 PRESIDING JUDGE KORNER: [9:50:00] Can you pause, Mr Laucci wants to
2 say something.

3 MR LAUCCI: [9:50:04](Interpretation) I really am sorry to interrupt, but I
4 can -- hear that there is no interpretation in Arabic for Mr Abd-Al-Rahman.

5 THE INTERPRETER: [9:50:16] Message from the English booth: Could
6 Mr Abd-Al-Rahman's headset please be checked.

7 PRESIDING JUDGE KORNER: [9:50:29] We're being asked to check his
8 headset.

9 (Pause in proceedings)

10 MR LAUCCI: [9:50:54](Interpretation) I really apologise for that, and I
11 thank you.

12 PRESIDING JUDGE KORNER: [9:50:59] Yes, if you would like to continue, sir.
13 Thank you.

14 MR FUJIWARA: [9:51:03] So Khartoum shows slight improvement despite
15 the ongoing protests, while Darfur currently faces a resurgence of
16 intercommunal conflicts.

17 Against this development, a joint forces have recently been deployed to Darfur.
18 The Registry has also received confirmation that those UN entities, which have
19 a permanent footprint in Sudan, have the capacity to continue their activities in
20 Sudan and thus will be able to provide assistance to the Court as requested to
21 facilitate its activities.

22 Our court security experts will soon review their recommendations on the
23 current suspension of the missions. The Court's security experts are currently
24 reviewing their recommendation on whether the suspension of missions could
25 soon be lifted.

1 The Registry will also reassess the cooperation of the Sudanese authorities
2 based on the anticipated discussion between the Registry delegation and the
3 Sudanese authorities in early 2022. The Registry hopes to in a position to
4 provide its recommendation on the resumption of the Court's activities in
5 Sudan during the next status conference scheduled on 7 February.

6 Once missions are permitted, should any crisis arise in the middle of a Court's
7 mission, all ICC travelers who receive a UNDSS security clearance and for
8 whom an appropriate notification is given prior to any deployment to
9 Khartoum are automatically incorporated into these arrangements, including
10 opportunities for relocation or evacuation. Thank you.

11 PRESIDING JUDGE KORNER: [9:53:19] Yes, thank you very much, sir.

12 Yes, Mr Laucci, do you want to ask any questions relating purely to that
13 situation?

14 MR LAUCCI: [9:53:28](Interpretation) Yes, I do have a question with regard
15 to the situation and the arrangements that the Court has today -- to date.

16 You made mention -- or the Registry, rather, made mention in its second report
17 on cooperation, which was, I believe, a few days before the coup d'état that
18 there was no evacuation plan in place for the Court.

19 So has an evacuation plan now been put in place for the Court?

20 (Counsel confers)

21 (Pause in proceedings)

22 PRESIDING JUDGE KORNER: [9:54:33](Overlapping speakers) an answer?

23 (Counsel confers)

24 MR FUJIWARA: [9:54:48] This is a matter that we have been working on it
25 and we'll come back to you at -- in reasonable time. Thank you.

1 PRESIDING JUDGE KORNER: [9:54:59] I would have thought that it's an
2 answer that can be given this morning. When you say a reasonable time?
3 What you're being is whether any plan has been devised yet and, if the answer
4 is no, then it's better you say so.

5 (Counsel confers)

6 MS ZGONEC-ROŽEJ: [9:55:40] Madam President, perhaps I can intervene.
7 We've been informed by our security officers that -- that, you know, despite the
8 fact that the ICC at the moment doesn't have a permanent operational footprint
9 in Sudan, the travellers are still included in the security arrangements, which
10 are approved by the UN security plan by the designated officials.
11 So all ICC travelers who receive a UNDSS security clearance and for whom an
12 appropriate identification is given prior to any deployment to Khartoum, then
13 they are automatically taken into those arrangements, including relocation or
14 evacuation should a crisis arise. Thank you.

15 PRESIDING JUDGE KORNER: [9:56:27] All right, well, I'm assuming that
16 Mr Laucci's question is directed to this. If the Defence -- although, he hasn't
17 put it that way, but if the Defence want to carry out a mission and get clearance
18 to do it, does that mean if there's a problem, they will be evacuated under this
19 arrangement?

20 MS ZGONEC-ROŽEJ: [9:56:52] I believe so. I think if the clearance is
21 provided, of course, depending on the circumstances, then they will be covered
22 by so-called "UNDSS." This is the arrangement that applies for the UN and
23 we are covered under that arrangement, if, of course, the prior identification
24 for the traveler is given before the travel.

25 PRESIDING JUDGE KORNER: [9:57:13] Thank you very much.

1 Yes, Mr Laucci any further questions?

2 MR LAUCCI: [9:57:16](Interpretation) Yes, just seeking clarification to be sure
3 that I have understood correctly. In fact, my question wasn't just limited to
4 the Defence, but to the Court in its entirety and its staff. What I have
5 understood from the answer provided is that, whilst we are waiting for an
6 evacuation plan to be devised in its entirety by the Court, the urgent solution, if
7 a serious problem were to arise for people who are out in Sudan, are taken into
8 account in an urgent situation by the UN. And this is, without doubt,
9 a situation that enabled you to evacuate personnel during the coup d'état of the
10 25th of October, and that is still in place and nothing new about that with
11 regard to the report of the 22nd of October (Overlapping speakers)

12 PRESIDING JUDGE KORNER: [9:58:14] What's the question?

13 MR LAUCCI: [9:58:15](Interpretation) Well, it's still the same question, if you
14 like: Is there an evacuation plan in place applicable to all of its staff?
15 I've understood that the answer is no, and, in the absence of said plan, then we
16 will be using the emergency solutions, that is to say, we shall be taken into
17 account by the UN.

18 PRESIDING JUDGE KORNER: [9:58:49] Mr Laucci, I'm sorry. You say that
19 the evacuation plan does not apply to all of its staff. What do you mean by
20 that?

21 MR LAUCCI: [9:58:59](Interpretation) Well, I believe that -- ugh! There are
22 going to be interpretation problems here in this third status conference.
23 No. What I was saying was that there is a simple question: The Court, does
24 it have, as it has in all other situations in which it works, an evacuation plan
25 devised, clear, available in any crisis?

1 And from what I have understood from the answer provided - and which
2 corresponds with the situation of the 20th of October - is that such a plan does
3 not exist and that if a problem does arrive, the only solution that was used
4 during the coup d'état is to have - in an emergency - the UN take those people
5 under its wing for them to be evacuated by the UN.

6 So that was simply clarification that I was seeking, and that would apply to the
7 Defence as to the rest of the staff of the Court.

8 MS ZGONEC-ROŽEJ: [10:00:09] What I might perhaps add, Madam
9 President, is that the International Criminal Court is part of the UNDSS system
10 and this applies not only for this particular situation, but for all
11 particular -- other situations which the International Criminal Court is dealing
12 with. And there, in this UNDSS arrangement, it is provided that the UN is to
13 offer the facility of evacuation if a crisis arises.

14 So it's not that the ICC has its own special separate particular arrangement for
15 evacuation, but we are a part of the UNDSS and that facility is therefore
16 provided.

17 MR LAUCCI: [10:00:51](Interpretation) Thank you very much. Just another
18 question I wanted to put. I understand that the partner of the Court on this
19 question of security is UNDSS, and is not the forces, the new forces in Sudan?
20 The force that replaced -- the peacekeeping force which is currently supporting
21 the transition. I no longer have the acronym in my head.

22 PRESIDING JUDGE KORNER: [10:01:29] Mr Laucci, forgive us, while it may
23 be very noble of you to be concerned for everybody, the only real interest to
24 you can be -- and the only relevance to you can be whether the Defence is able
25 to carry out missions. That's the situation, isn't it? What happens with the

1 rest of the Court is not really your concern.

2 MR LAUCCI: [10:01:57](Interpretation) On this point, if you would allow me,
3 your Honour, to give a slightly differing opinion here.

4 The way -- and the framework -- the legal framework in which the Court, and
5 here, I'm talking about its staff, intervenes in Sudan, from our perspective it has
6 a direct impact on the legality and, I would go beyond that, the validity of its
7 operations. If the staff of the witness protection unit is not able to carry out its
8 operations under good conditions in the Sudanese territory, then it's not able to
9 protect witnesses adequately. It's an ensemble of events, if you like.

10 PRESIDING JUDGE KORNER: [10:03:00](Overlapping speakers) Well, Mr
11 Laucci, I understand if you've got witnesses and you wanted them protected
12 and you're saying that couldn't happen, that's one thing. But what happens
13 to the other organs of the Court, including those of the Prosecution is a matter
14 for them, not for you, surely?

15 MR LAUCCI: [10:03:16](Interpretation) Your Honour, once again, I consider
16 that the entire legal system is an eco-system as it were, a holistic system, and
17 it's necessary for the witnesses of the Office of the Prosecutor to be sufficiently
18 protected so that the proceedings are entirely protected. And this is
19 a submission that we make and we continue to be of that opinion. If there isn't
20 good protection of witnesses, then the witnesses are subject to all possible
21 interference and that has an impact on the integrity of the proceedings.

22 PRESIDING JUDGE KORNER: [10:03:52] Yes, all right. Thank you,
23 Mr Laucci.

24 Mr Nicholls or anybody else from the Prosecution team, any questions?

25 MR NICHOLLS: [10:04:00] No questions. But if I could just say very briefly

1 in this context, thank you, that was very helpful.

2 My understanding of the submissions is that we are under the UNDSS
3 umbrella as it were while we are there.

4 I just returned from a brief mission to Sudan. We left on the 11th of December
5 from Amsterdam, which is the day after we got visas from Sudan in order to
6 enable us to travel. We had three full days there. Returned, Wednesday
7 morning. And based on that, we are going to continue to try to set up
8 resumed activities in January. And --

9 PRESIDING JUDGE KORNER: [10:04:48](Overlapping of speakers)... I think
10 Mr Laucci was complaining about --

11 MR NICHOLLS: [10:04:52] Yes, but I'm just saying that's what we're going to
12 do, and we will, of course, through our protective services unit, our operational
13 risk and support unit, take our obligations to our staff and witnesses seriously
14 and if everything goes well - and we've heard that the situation is
15 improving - then we intend to redeploy in January and that is exactly what we
16 ought to be doing. Thank you.

17 PRESIDING JUDGE KORNER: [10:05:24] Yes, Mr Laucci, which brings us on
18 to your cooperation filings.

19 MR LAUCCI: [10:05:31](Speaks English) Yes, precisely, Madam President.

20 (Interpretation) My learned friend, so you stated that this is what you've done

21 and this is what you're going to do, but nevertheless, we have -- we have

22 a debate provided for today under the control of the Chamber to see together if
23 the conditions for what you envisage to do are met.

24 You are not the only person here. The Court is a holistic body, and, as such, it
25 has to be respected.

1 PRESIDING JUDGE KORNER: [10:06:08] Well, I think that really does bring
2 us back to -- or bring us on to -- unless, there are any more questions, I suppose
3 I should have asked the victims' representatives.

4 Ms von Wistinghausen, do you have any questions for the Registry on this?

5 MS VON WISTINGHAUSEN: [10:06:29] No, thank you, I've got no questions.
6 I can just say that from our side, I mean, of course, the security situation and
7 the concerns are the same for our clients and I can assure Mr Laucci that we'll
8 do our best not to put at risk anybody. This is not in the interests of anyone
9 and I -- well, I think you can just trust that all the parties will, you know, be
10 very cautious and respectful of the current situation, so he shouldn't worry too
11 much.

12 PRESIDING JUDGE KORNER: [10:06:58] Yes, thank you.

13 All right, well, that does bring us on to your filings related to the cooperation
14 agreement. Mr Laucci, I think we've had your filings on this and we've read
15 them and we are going to render a decision in January on this matter, but we
16 do have some questions for you about this.

17 You complain that the cooperation agreement, which is confidential, should be
18 made public. And what we don't understand at the moment, is, how the
19 confidential classification of this agreement affects its validity and authority
20 under international law?

21 And secondly, and possibly more importantly, the rights of your client?

22 MR LAUCCI: [10:08:02](Interpretation) Thank you, Madam President.

23 This is a point which is mentioned in the submissions, but I shall answer here
24 in the most clear way possible.

25 The publicity of international conventions is one of the conditions set by the

1 Vienna Convention on the Law of Treaties and the recording with the
2 Secretariat of the United Nations is required by Article 102 of the Charter.
3 This is an old condition, which was implemented after the First World War. It
4 was one -- it was the first condition on the list of conditions to return to
5 a sustainable peace in the speech of Woodrow Wilson in 1918, and, included in
6 the statute, was that every time this rule of publicity with infringed or
7 violated -- or, at least, when we found out about it, when it concerns that
8 whenever this is known about, it corresponds with the darkest hours of the
9 history of 20th Century. There was the clause of secrecy of the
10 Germano-Soviet agreement on the sharing of the territory of Poland; that's
11 a clear example of the violation of this principle.
12 And so in 1945, in Article 102 of the Charter, it was referred to, and it's still in
13 authority and binding, and the Court has received a mandate which is precious,
14 which is to ensure that the atrocities which took place in the 21st Century - and
15 other centuries, of course, but speaking about the 21st Century, and in
16 particular, by way of consequence of the secret provisions of agreements, such
17 as the Germano-Soviet Pact, the Court therefore received a mandate to ensure
18 that such atrocities would never be reproduced. And, if they were, they
19 would be duly prosecuted and that those responsible would be convicted.
20 And this is a noble mission, but this mission does imply - I fear on the part of
21 the Court - a call for the strictest adherence to this rule; namely, the publicity of
22 international agreements. And the Court furthermore has no choice in this
23 regard really when you look at the Court -- that binds it with the organisation,
24 the United Nations, then the Court has to respect the provisions of the Charter
25 on behalf of which the cooperation takes place.

1 Now, furthermore, we have also formulated several comments, which question
2 the validity of the agreement of the 10th of May, namely, under the
3 international agreement that would bind the parties, namely, the Court, but
4 also the Sudan. And what we say is that this agreement is not an agreement
5 that can bind Sudan and -- on the basis of which there can be an obligation for
6 cooperation under the resolution which refers the Sudan situation to the Court
7 can be implemented. And that's the reason why we have said that this
8 agreement should be replaced by a new agreement, meeting a certain number
9 of characteristics, including those of the publicity and the recording with the
10 Secretariat of the United Nations.

11 Now where it concerns the rights of the Defence, well, this agreement --

12 PRESIDING JUDGE KORNER: [10:12:26] Mr Laucci, I'm sorry, but I mean,
13 this is all -- I am going to stop you. This is all very well, but is there a simple
14 answer to the question: Is your answer, that it is the Vienna convention which
15 prohibits the confidential classification? Is that the simple answer?

16 MR LAUCCI: [10:12:46](Interpretation) The Vienna convention requires that
17 an international treaty be public and, as such, while an agreement or
18 convention as you like, is not public, it does not meet the criteria of an
19 international convention according to the Vienna convention, but also
20 according to the United Nations Charter, Article 102.

21 PRESIDING JUDGE KORNER: [10:13:14] Right. Yes, well, that's the answer
22 to that bit, right.

23 Now the second question is, how does it affect the rights of your client?

24 MR LAUCCI: [10:13:18](Interpretation) Once again, where it concerns the
25 impact on the rights of my client, this convention -- and the way in which the

1 Court shall have powers to carry out its operations in Sudan, determined
2 under Article 4(2) of the Rome Statute, the entire legality of these operations in
3 the field, you have Article 107(1)(sic), which has the right of
4 Mr Abd-Al-Rahman for his case to be heard, taking into account the provisions
5 of the Statute. And this remark is not there for stylistic reasons or by accident.
6 This is the "accident" which ensures that the Statute has to be respected
7 within the framework of judicial proceedings.

8 And I mentioned previously that our only religion here is the Chamber, and I
9 would put it to you that our Bible is the Statute that I see on the bench. So we
10 have -- we have the Rome Statute, which provides in Article 102 (sic) that there
11 has to be, to carry out operations in the field of a non-state party, there has to
12 be a convention, an agreement. The agreement of the 10th of May does not
13 meet the criteria. It has a lot of other faults, which I mention in my written
14 submissions; and furthermore, it weakens or even voids the cooperation
15 obligation under the resolution. I can explain that further --

16 PRESIDING JUDGE KORNER: [10:15:05] No, no, Mr Laucci, for the moment
17 we've been through all that. It's how the rights of your client are affected.
18 Now you've referred us to Article 4(2) of the Rome Statute, which says:
19 "The Court may exercise its functions and powers, as provided in this Statute,
20 on the territory of any State Party and, by special agreement, on the territory of
21 any other State."

22 How does that affect the rights of your client?

23 MR LAUCCI: [10:15:42](Interpretation) This Article comes under the Rome
24 Statute, which refers to Article 67(1), and I shall quote it in French:

25 During the examination of the charges against him, the accused has the right

1 for his case to be heard publicly - and, this is the point about which I
2 insist - taking into account the provisions of this Statute.

3 Article 4(2) is a provision of this Statute and has to be respected.

4 PRESIDING JUDGE KORNER: [10:16:15] I'm sorry, the right of your client to
5 have this trial heard publicly is being exercised at this very moment. How
6 does the agreement -- look, you are asking us to declare this agreement
7 effectively null and void and for a new one to be brought into effect.
8 The question I asked you, is, how this affects the right of your client, the
9 confidentiality? You quoted Article 4(2), which talks about the Court
10 exercising its functions. Then you quoted Article 107, which is to do with the
11 transfer of your client. What has this got to do with the confidentiality of the
12 agreement?

13 MR LAUCCI: [10:17:08](Interpretation) I'm sorry, I didn't mention 107. It
14 was "67".

15 PRESIDING JUDGE KORNER: [10:17:14] "67(1)." Right, okay. All right,
16 which is the right for the trial to be held in public, which it is being heard.

17 MR LAUCCI: [10:17:23](Interpretation) Public, yes, fair, yes, all that's perfect,
18 but above all -- and this is what I would insist on -- in accordance with the
19 provisions of the Rome Statute, in accordance with the Statute of the Court,
20 Article 4(2). But also, and this is another problem, Article 88, on the
21 implementation of cooperation agreements. And all this is part of the Rome
22 Statute, and we do not have in the current circumstances, Article 4(2) isn't
23 respected. There is no convention or agreement worthy of the name, which is
24 open and registered with the Secretariat of the United Nations, which would
25 make it possible for the Court to have activities in the field in Sudan.

1 There is no legislation at national level in Sudan on cooperation with the
2 Court, which, among other things, continues to leave the risk of the
3 incrimination of cooperation with the Court, which up till now, we have had
4 no proof of the contrary thereto.

5 PRESIDING JUDGE KORNER: [10:18:37] I'm sorry, Mr Laucci, can I just stick
6 please to the question on point. I don't want a repetition of what you've
7 already said in your filing.

8 Is your contention that the confidentiality of this agreement impacts on the
9 rights of your client for a fair trial because of -- I still don't think I follow, why
10 are his rights to a fair trial being impacted?

11 MR LAUCCI: [10:19:16](Interpretation) The right which we submit is
12 impacted in the current situation is the right for his case to be heard taking into
13 account the provisions of the Statute. If I had the English version of the
14 Statute with me, then I would quote this Article 67(1) in English.

15 PRESIDING JUDGE KORNER: [10:19:40] We have got 67(1) in front of us,
16 and, it says: "[...] the accused shall be entitled to a public hearing [...]"
17 Do you accept that this is a public hearing?

18 MR LAUCCI: [10:19:55](Overlapping speakers)

19 PRESIDING JUDGE KORNER: [10:19:57] Yes, thank you.

20 "[...] having regard to the provisions of this Statute [...]"

21 MR LAUCCI: [10:20:01](Speaks English) This is the relevant portion --

22 PRESIDING JUDGE KORNER: [10:20:04] "to ..."

23 No, no, it's not something that's self-standing.

24 "[...] to the provisions of this Statute, to a fair hearing conducted impartially,
25 and [to] the following minimum guarantees [...]"

1 Regard to the provisions of the Statute is linked to the fair hearing conducted
2 impartially.

3 MR LAUCCI: [10:20:26](Interpretation) I couldn't be more in agreement with
4 you, your Honour. The respect of the provisions of the Rome Statute
5 constitute the guarantee of the fact that the proceedings against my client are
6 impartial.

7 PRESIDING JUDGE KORNER: [10:20:51] Is it your suggestion that the
8 confidentiality of the agreement in some way reflects on the impartiality of the
9 hearing that your client is being given in this Court?

10 MR LAUCCI: [10:21:04](Interpretation) My precise submission is that the
11 confidentiality, which is one of the problems, the agreement of 10th of May, but
12 confidentiality as -- and the other problems together mean that the entire
13 activities in Sudan of the Court are conducted without a legal basis, and, by
14 way of consequence, they do not ensure fair trial rights of my client because
15 evidence, which is gathered without any legal basis ...

16 PRESIDING JUDGE KORNER: [10:21:44] Yes, all right. So you're saying
17 that because it enables the Prosecution to go to the Sudan and gather evidence
18 through an agreement which is confidential, that's a breach of the fair trial
19 rights of your client. Is that what you're saying?

20 MR LAUCCI: [10:22:02](Interpretation) What I'm saying is that the Prosecutor
21 today is not able to go into Sudan and to carry out its investigations and to
22 gather evidence and to protect witnesses in accordance with the provisions of
23 the Statute. That is the -- the particular submission, the precise submission
24 that we are making and which we are bringing to your attention.

25 PRESIDING JUDGE KORNER: [10:22:27] And so that we all understand

1 exactly what you're saying, is it also your submission that all the evidence
2 already gathered by the Prosecution and the -- in fact, that the entire trial is
3 tainted by the confidentiality of this agreement?

4 Is that effectively your submission?

5 MR LAUCCI: [10:22:52](Interpretation) I would ask you not to just focus on
6 the confidential aspect, which is one of the faults of the agreement of the 10th
7 of May. But I think that my written submissions stress certain others -- and,
8 raise certain others, and the reasons why this agreement cannot meet the
9 criteria of Article 4(2).

10 But I think indeed unfortunately, the totality of the operations of the Office of
11 the Prosecutor -- and more widely the Court, since the resolution of 2005, in
12 Sudan -- have been carried out in the absence of a required legal basis, a legal
13 basis required by the Statute the Court.

14 PRESIDING JUDGE KORNER: [10:23:44] Yes, all right.

15 Well, the second matter that we want to ask you about, please, Mr Laucci,
16 which relates to your filings on this matter is this, you complain about in your
17 response to the Registry's second report that specific -- or that Defence requests
18 have not been processed or transmitted or unduly delayed by the Registry.
19 Which requests haven't been processed or transmitted or have been unduly
20 delayed?

21 MR LAUCCI: [10:24:26](Interpretation) Well, I think that the passage you're
22 referring to speaks about the requests for judicial cooperation and assistance
23 from 9th of November, the 11th of November and the 9th of December 2020.
24 And on the 3rd of December 2021, the Registry confirmed none of the requests
25 for cooperation, which were submitted a year ago, that there'd been any

1 response to them on the part of the Sudanese authorities.

2 *The full history of when each cooperation request was transmitted is in my
3 written submissions, but one of them, from November 2020, was not
4 transmitted. We only got confirmation of its transmission in October 2021.
5 So the problem is not the transmission deadlines and the implementation by
6 the Registry. The principle problem is that none of these requests for
7 cooperation receives a response from Sudan and that, despite that, both the
8 Registry and the OTP find it appropriate to celebrate the Sudanese authorities
9 for their great cooperation with the Court.

10 And that is a problem for us. Because if we admit that 90 per cent of the
11 requests for cooperation addressed to Sudan receive a positive response, then it
12 is unfortunate that only the 10 per cent from the Defence are systematically
13 ignored and left without reply.

14 I would say that these requests for cooperation -- for certain, among
15 them -- were very simple: Just to obtain documents relating to civil status or
16 state of service of Mr Abd-Al-Rahman. We've obtained nothing.

17 PRESIDING JUDGE KORNER: [10:26:36] All right. So do I understand from
18 what you've just said that your complaints relate to 9th of November, the 11th
19 of November and the 9th of December 2020?

20 MR LAUCCI: [10:26:48](Interpretation) That is correct.

21 PRESIDING JUDGE KORNER: [10:26:49](Overlapping speakers) It is
22 those -- all right. Thank you.

23 Have you -- regards missions, have you sent any mission request to the
24 Registry since the beginning of the proceedings?

25 MR LAUCCI: [10:26:57](Interpretation) There have been at least two of them;

1 one, during the preliminary phase, pre-trial phase, I won't go back to that; and
2 one was filed during the summer 2021. And this was on the basis of this
3 mission request that the first -- well, it was initially provided for that this
4 mission would take place in October and it was pushed back for organisational
5 reasons to the month of November. And, the Defence, taking into account the
6 submission on the lack of a legal basis to carry out activities in the field,
7 estimated that the conditions had not been met to carry out field operation for
8 investigations in Darfur.

9 I say "Darfur," the only authorization that we had was limited to Khartoum;
10 whereas, of course, it's not in Khartoum that we are going to be able to obtain
11 and bring to you relevant evidence to this case. You have to go to Darfur.
12 And that was never envisaged, but what we have said a few days before the
13 coup, we had to leave for the 1st of November, and we said that we would not
14 go because the considers -- the conditions were not there, and that was
15 fortunate because whatever the case, our mission would have been canceled
16 after the 25th of October.

17 PRESIDING JUDGE KORNER: [10:28:40] All right. So the only
18 request -- and that's my recollection of the earlier discussions about this -- the
19 only request that you made was for the one that was organised for November,
20 which you decided yourselves not to carry out, whether with foresight or not is
21 another matter.

22 MR LAUCCI: [10:28:58](Interpretation) There was one in the pre-trial phase,
23 but where it concerns the trial phase, that's correct.

24 PRESIDING JUDGE KORNER: [10:29:11] We should take a break in a
25 moment. We haven't quite concluded, but can I just perhaps ask the Registry

1 before we break, whether they want to say anything about Mr Laucci's
2 assertions that requests -- specific requests made by them have been not
3 processed or transmitted or unduly delayed?

4 MR FUJIWARA: [10:29:35] Thank you, Madam President. The Registry
5 submit that in their submission on -- dated 22nd of October, we have submitted
6 details regarding the transmission of the Defence cooperation request in annex
7 2. This annex is currently classified as confidential, ex parte only to the
8 Defence, and thus we cannot disclose the content of this -- of it in this current
9 session.

10 As we submitted earlier, as soon as a new focal point is designated by the
11 Sudanese authorities for communication with the Court, the Registry will
12 immediately follow-up on the response to all outstanding cooperation requests,
13 including the cooperation request sent by the Defence. Once the response is
14 received, the Registry will provide feedback to the Defence.

15 PRESIDING JUDGE KORNER: [10:30:45] Yes, I'm sorry, I said the break, I've
16 slightly lost the plot this morning, I see it's only half past 10 and the break's at
17 11 o'clock.

18 So all right, Mr Laucci, lastly then, please, what exactly is the relief that you
19 want from this Trial Chamber within its powers, and I emphasise that, in
20 relation to the matter of cooperation?

21 MR LAUCCI: [10:31:17](Interpretation) Yes, the point that you are making
22 with regard to the powers and authority of the Chamber, of course, is capital.
23 It's paramount in this issue. The Court does not have the authority to impose
24 upon the Sudanese authorities any specific behaviour. It has tried and
25 non-cooperation observations have been submitted in the past to the Security

1 Council and they remained without a response.

2 The Court used all avenues to try and make Sudan cooperate. What the Court
3 can do, however, and what is part of its remit, is to respect the Rome Statute,
4 which implies that the Court is in a position to determine *proprio motu*
5 whether -- yes or no -- conditions to carry out activities upon protected persons
6 in Sudan are met or not and, this, in the light of the provisions of the Statute.
7 So as you will have understood, the Defence is answering in the negative to
8 this question; that is to say that the conditions under the Statute to carry out
9 activities in Sudan have not been met.

10 PRESIDING JUDGE KORNER: [10:33:19] I'm sorry, Mr Laucci, but you're
11 repeating this, what we've already read.

12 What is it you want us to do? Are you saying we should stop this trial? Is
13 that what you're asking us to do?

14 MR LAUCCI: [10:33:29](Interpretation) We're not there yet. But what
15 it -- what is possible for us to do is to say that, to date, the conditions -- if you
16 accept mentioned in our contribution in the agenda of this third status
17 conference, these conditions must be fulfilled before activities of the Court
18 resume in Sudan.

19 The impact of this decision, which we do not know, some of the conditions -- if
20 there is goodwill on the part of the Sudanese authorities, it's very easy for these
21 conditions to be fulfilled. We can send an official communication to the
22 Secretariat of the UN to withdraw the 2008 (Overlapping speakers)

23 PRESIDING JUDGE KORNER: [10:34:22] Mr Laucci, we can do a lot of things.
24 What we are asking you, is, under the powers that we have, what is it you are
25 asking us to do?

1 MR LAUCCI: [10:34:32](Interpretation) To decide now whether the
2 conditions are fulfilled for activities out in the field in Sudan to be resumed.
3 And, if not, determine which conditions must be fulfilled for these activities to
4 be able to resume.

5 PRESIDING JUDGE KORNER: [10:34:54] Okay, you tell us, Mr Laucci, what
6 power we have to say to you or to the Prosecution, "You are not to carry out
7 investigations in the Sudan."

8 Under what power would we be doing that?

9 MR LAUCCI: [10:35:14](Interpretation) Well, I would say that your question,
10 Madam President, does surprise me somewhat. Maybe I'm being overzealous
11 here, but you are instructing me not to go to Sudan because the conditions of
12 the Statute are not fulfilled and that I would be putting people in danger, I
13 would say that said instruction would be immediately respected.

14 PRESIDING JUDGE KORNER: [10:35:45] Firstly, I don't know whether it's
15 a question of translation but you say I'm instructing you. I'm not instructing
16 you to do anything.

17 MR LAUCCI: [10:35:55](Interpretation) I was saying "if" you were to instruct
18 me.

19 THE INTERPRETER: Counsel did not use the conditional tense, says the
20 interpreter.

21 PRESIDING JUDGE KORNER: [10:36:05] All right. What -- you say that,
22 what power do I have -- what power do we have, rather, to say this, you're not
23 to go?

24 Under what power could we say, You can't go?

25 MR LAUCCI: [10:36:19](Interpretation) I believe that it is within the remit of

1 the authority of this Chamber to have the provisions of the Statute respected
2 within these provisions -- within these proceedings.

3 PRESIDING JUDGE KORNER: [10:36:37] All right. So you're not -- okay,
4 just so we all understand, you're not saying we should bring the trial
5 proceedings to a halt, you've agreed with that. But you are saying that we,
6 the Trial Chamber, under our general powers to regulate, I suppose the
7 proceedings in court, should prevent both you and the Prosecution from
8 pursuing any further investigations?

9 MR LAUCCI: [10:37:10](Interpretation) As the conditions -- whilst the
10 conditions are not fulfilled.

11 PRESIDING JUDGE KORNER: [10:37:17] Yes, and that's it?

12 MR LAUCCI: [10:37:20](Interpretation) You're asking me whether I am going
13 that extra step at this juncture to come to the conclusion that we should bring
14 proceedings to a halt. I cannot exclude this. I remain hopeful that the
15 conditions that have been determined, which are minimal and reasonable
16 to -- that have been detailed in the status conference agenda will be fulfilled,
17 and then it will be a time to say -- for us to say that we shall resume our
18 activities and we can continue with these proceedings.

19 But I do not have a crystal ball. And all that I can say is that these are minimal
20 reasonable conditions and, if, only if there is goodwill on the part of the
21 Sudanese authorities in terms of cooperation, which remains to be shown,
22 unfortunately.

23 PRESIDING JUDGE KORNER: [10:38:20] Yes, I just want to return for
24 a moment, Mr Laucci, because this is obviously important, to under what
25 Article of the Statute or indeed the Rules of Procedure and Evidence you say

1 that we, the judges, have the power to prevent either you or the Prosecution
2 from carrying out further investigations?

3 MR LAUCCI: [10:38:51](Interpretation) The first provision that I would like to
4 refer to in order to answer this specific question is Article 64(2) of the Statute,
5 which refers naturally to the right of the accused to a fair trial with the full
6 respect of the rights of the accused.

7 PRESIDING JUDGE KORNER: [10:39:21] Yes, well, I think we've been down
8 the road of where you say the rights of the accused --

9 MR LAUCCI: [10:39:29](Speaks English) Yes.

10 PRESIDING JUDGE KORNER: [10:39:30] -- are being interfered with and
11 regard for the protection of victim and witnesses.

12 So you say it's under that general power; that we have that?

13 I see.

14 MR LAUCCI: [10:39:40](Interpretation) I have a maximal concept of the
15 powers of the Chamber.

16 PRESIDING JUDGE KORNER: [10:39:59] Right. Yes, thank you.

17 Prosecution, do you want to reply to this?

18 MR NICHOLLS: [10:40:02] Yes, just very briefly, your Honour. There's no
19 question that Sudan is under an obligation to cooperate with the Court. That's
20 made clear in the 2019 Jordan appeals decision in the Bashir case, which was
21 unambiguous that Security Council Resolution 1593 requires Sudan to
22 cooperate fully with the Court; in addition, the Juba Peace Agreement requires
23 and commits Sudan to cooperate with the Court; we have two MOUs that we
24 have signed regarding our cooperation; and, there is the agreement with the
25 Court.

1 And I'm still frankly at a bit of a loss to try to understand how we are
2 arguably -- or doing something against the Statute by working in Sudan on
3 a Security Council referral situation.

4 PRESIDING JUDGE KORNER: [10:41:04] I'm assuming that the victims'
5 representatives don't want to add anything, but if they do?

6 MS VON WISTINGHAUSEN: [10:41:23] Thank you, Madam President, I've
7 got nothing to add.

8 PRESIDING JUDGE KORNER: [10:41:26] Registry? Anything you want to
9 say?

10 MS ZGONEC-ROZEJ: [10:41:28] Thank you very much. I mean, if you
11 wanted us to just quickly address the argument about the invalidity of the
12 cooperation agreement. The Vienna Convention, on which the counsel relies,
13 does not say that registration or publication is an element which is required for
14 the agreement to be valid and to enter into force. It merely provides that,
15 "[...]'treaty' - which this cooperation agreement is - is "an international
16 agreement concluded [...] in written form and governed by international law".
17 And this is what we believe that our agreement is.

18 With regard to the reference to Article 102 in the UN Charter -- this, of course,
19 is the UN Charter and applies with regard to the organs of the United
20 Nations -- the only consequence one could see is that the agreement could not
21 potentially be relied before the organs of the United Nations.

22 But as it has been discussed also in the leading commentaries, that hasn't
23 actually been properly strictly followed. Not even by the UN organs.

24 Actually it's been breached more often than respected.

25 So in our opinion, any failure -- alleged failure, which has been argued to

1 register the agreement, does not affect the binding nature of the treaty in force
2 for a party, including Sudan, of course. And non-registration is not evidence
3 that the instrument in this particular case, the cooperation agreement, is not
4 a treaty and it does not have a binding effect under international law. Thank
5 you.

6 PRESIDING JUDGE KORNER: [10:42:57] Yes, thank you very much indeed.
7 All right, Mr Laucci, a final word on this.

8 MR LAUCCI: [10:43:05](Interpretation) With your authorization, uniquely,
9 Madam President, I have two points in response. The obligation of
10 cooperation has been in existence since 2005. I do not believe that
11 Mr Al-Bashir, Mr Haroun, Mr Hussein are under the control of the Court
12 today.

13 Now with regard to the respect of Article 102 of the Charter by the Court, not
14 only is it an obligation in -- pursuant to the agreement between the United
15 Nations and the Court, Article 2 or 3, I no longer remember, but I believe that it
16 is, I believe, a fundamental element of the respect on the part of the Court of
17 the principles underlying its creation.

18 How could the Court validly take liberties with a rule whose aim is to avoid
19 the horrors that preceded its creation? It is to renege upon its mandate to
20 believe that one can take liberties with the principle of publication and
21 publicity of conventions, and I thank you.

22 PRESIDING JUDGE KORNER: [10:44:21] Yes, thank you, Mr Laucci. I think
23 we have now done this topic thoroughly and, as I say, we will render
24 a decision in January.

25 Yes, can we move then next -- I think on the agenda is the victims'

1 representatives observations on the protocol.

2 Ms Von Wistinghausen, I thank you very much for your written submissions
3 on that.

4 It doesn't seem to be a very complicated matter and it's one on which we do
5 propose to rule at the end of this hearing orally, but do either of the parties
6 want to say anything about that?

7 First of all, Mr Laucci?

8 MR LAUCCI: [10:45:09](Interpretation) I thank you, Madam President.

9 Where we have reached the position of being able to formulate
10 propositions -- proposals with regard to something that could be adopted by
11 the Chamber, we would be in a position to do so. There is no objection to the
12 remarks formulated by the distinguished legal representative for victims, but
13 we do have other proposals to put forward indeed.

14 (Counsel confers)

15 In fact, I don't want to take too much of your time.

16 The suggestions or proposals that we are making are inspired from the
17 protocol in the Al Hassan case, where there are a number of provisions in
18 which -- additions that we believe are interesting were made. I believe that it
19 would be too lengthy and detailed to do this orally, but we are at the ready to
20 provide you with a rapid written submission to this point that we
21 believe -- and the matters, and to underline those matters that we believe
22 should be worthy of your attention.

23 PRESIDING JUDGE KORNER: [10:46:44] Yes. Just give me a moment,
24 would you, I just want to look.

25 (Pause in proceedings)

1 PRESIDING JUDGE KORNER: [10:46:55] Yes, all right, so you say you want
2 to make some proposal based on what took place in the Al Hassan trial?

3 MR LAUCCI: [10:47:05](Interpretation) Yes, inspired by the Al Hassan case
4 protocol, yes.

5 PRESIDING JUDGE KORNER: [10:47:10] Yes, I should say that we are
6 hoping to -- the judges as a whole are hoping to produce a standard protocol
7 which will apply to all cases.

8 So Mr Nicholls, have you got anything you want to say about the proposals?
9 Oh, sorry, Mr --

10 MR MOURAD: [10:47:40] Your Honour, with your leave, the Prosecution
11 supports the proposals for the adoption of protocol on dual-status witnesses
12 and a witness familiarisation protocol. As to the protocol on contact with
13 participating victims, the Prosecution defers to the Chamber's discretion on this
14 specific protocol and would like to refer your Honours to a relatively recent
15 decision by Trial Chamber X in the Al Hassan case, decision number 674 in that
16 case, specifically paragraph 61, where the Chamber took into consideration two
17 factors and rejected such proposal.

18 These factors are similar to our case; namely, that it is a prerequisite for the
19 implementation of such a protocol that the parties would need to be made
20 aware of the identities of the participating victims. And in light of the regime
21 adopted in the Al Hassan case and similarly in this case, the parties have
22 limited knowledge of such identities.

23 Now the common legal representative's proposal suggests that maybe it's up to
24 the parties to seek to obtain the knowledge of the victim's status directly
25 through the individual whom they seek to interview or contact.

1 This aspect might trigger some confidentiality and security issues, but
2 similar -- like when the Prosecution deals with a witness, we don't recommend
3 witnesses to reveal any indication of their interaction with the Court to an
4 opposing party or participant.

5 I assumed that this similarly applies to the situation of victims participating in
6 the proceedings, and if the Chamber deems that this is an issue that may raise
7 security or confidentiality matters with the victims, then we -- we think that the
8 Chamber may suggest some caveats to it or in any event, since we are not very
9 privy to what the instructions are given to victims, then we suggest that maybe
10 the common legal representative could inform us on this aspect. But in any
11 event, this is just a general concern from our own practice that we raise for the
12 consideration of the Chamber.

13 PRESIDING JUDGE KORNER: [10:50:29] Yes, thank you very much.

14 Right, is there anything else the victims' representatives want to say?

15 MS VON WISTINGHAUSEN: [10:50:42] Yes, thank you, Madam President.

16 Well, for me actually I thought it was quite a straightforward matter. I'm
17 aware that the proposal I made to use the protocol that's already put in place in
18 the Katanga and Ngudjolo case, indeed is based on the assumption that the
19 parties know who the participating victims are, and, this is obviously different
20 in this case.

21 However, I don't -- I mean, I raised it in the last status conference, for me, the
22 only way around this is of course for a party who is doing investigations in this
23 case, whenever they need a person they would like to interview, they would
24 have to ask the question whether that person is a participating victim, because
25 in that case it would just be, I think, you know, the duty of the counsel of the

1 other party to inform us just for us to be able to advise actually our clients.
2 It's nothing about giving instructions. And I want to make it very clear that
3 for us, it's important that our clients, you know, make their own choices of who
4 they want to talk to. But I just think that it's very important -- yes, just to
5 explain to them what the possibilities are, what their rights are, if they accept to
6 speak to a party, that they may ask for one of us to be present. That they may
7 also say, No, I would like to do this alone -- and all of the rest of it.
8 So I think it would be good, you know, to regulate this so that we're all on the
9 same page. I know that in the Katanga case, there has been a lot of back and
10 forward -- of back and forth between the parties because the views were very
11 different on how this contact should be regulated, and, at least I had the
12 impression that the protocol that the Trial Chamber then finally, after many
13 weeks of filings, put in place was actually quite -- quite reasonable.
14 If the Defence and the Prosecution requires more discussion about this,
15 I'm -- you know, I'm the first one very open to have a discussion on this and to
16 see how, you know, we can find a common agreement because I think that this
17 is what it should be. It should be a common agreement between all of us.

18 PRESIDING JUDGE KORNER: [10:53:17] Yes, I mean, I take it, Ms von
19 Wistinghausen that you're aware of the dual-status witness protocol, and
20 particularly that which was adopted in the Yekatom and Ngaïssona case?

21 MS VON WISTINGHAUSEN: [10:53:40] Yes.

22 PRESIDING JUDGE KORNER: [10:53:43] You're aware of that?

23 MS VON WISTINGHAUSEN: [10:53:45] Yes.

24 PRESIDING JUDGE KORNER: [10:53:47] Yes, fine. All right, I just wanted
25 to check that, yes, thank you.

1 Yes, all right, well, we'll consider this matter.

2 The last -- really, the last matter, I think is one for which we need to go into
3 private session. So I think what we'll do is take the break at this stage and
4 resume again at 11.30.

5 THE COURT USHER: [10:54:12] All rise.

6 (Recess taken at 10.54 a.m.)

7 (Upon resuming in private session at 11.35 a.m.)

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8 (Open session at 12.03 p.m.)

9 THE COURT OFFICER: [12:03:35] We are in open session, Madam
10 President and the audio is enabled.

11 PRESIDING JUDGE KORNER: [12:03:46] Yes, are there any other -- I'm going
12 to adjourn -- we're going to adjourn in a moment just to consider whether we're
13 going to give a ruling today on Mr Laucci's last application or give him leave to
14 respond.

15 And also we are going to give a ruling, as I say, on the application the
16 Prosecution made, which I suppose ought to be in private session as well
17 actually, yes.

18 All right, any other matters then? Otherwise we'll adjourn for a short period?

19 All right, very well, we'll adjourn to consider these matters.

20 THE COURT USHER: [12:04:36] All rise.

21 (Recess taken at 12.04 p.m.)

22 (Upon resuming in open session at 12.21 p.m.)

23 THE COURT USHER: [12:21:02] All rise. Please be seated.

24 PRESIDING JUDGE KORNER: [12:21:17](Microphone not activated)

25 THE INTERPRETER: [12:21:19] Microphone, please, your Honour.

1 PRESIDING JUDGE KORNER: [12:21:44] As I indicated, we are going to give
2 some rulings on matters raised before and during this status conference.
3 First of all, although in the end it appears Mr Laucci accepted that he made
4 a mistake in his understanding of what was said during the status conference
5 in November, for the avoidance of any doubt, the submission made by the
6 Defence that during the second status conference, the Chamber instructed the
7 parties and participants not to undertake until further notice any field activity
8 in the Sudan until the conditions for the resumption of such activities are
9 re-established, the Chamber again wishes to make it clear, it gave no such
10 instruction at all.
11 The excerpt from the status conference transcripts in French and in English do
12 not contain any such instruction as we have already indicated, we consider it to
13 be plain. Accordingly, the Defence request in relation to that is completely
14 moot, not to say irrelevant and immaterial and is therefore dismissed.
15 We turn next to the question of the protocol in this case.
16 We were going to deal with it today, but in the light of the fact that Mr Laucci
17 says he would wish to make submissions on behalf of the defendant - and any
18 other submissions that may be forthcoming - we order that any further
19 submissions should be made by Friday the 7th of January. We will then issue
20 a written order and until such time as there is a further order, the pretrial
21 protocols in place will continue to apply.
22 So that is that matter.
23 For the remainder of the rulings, we need to go into private session.
24 (Private session at 12.24 p.m.)
25 THE COURT OFFICER: [12:24:47] We are in private session,

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14 (Open session at 12.41 p.m.)

15 THE COURT OFFICER: [12:41:21] We are in open session, Madam President,
16 your Honours, and the audio is enabled.

17 PRESIDING JUDGE KORNER: [12:41:41] I have forgotten when I -- Ms Von
18 Wistinghausen, that you were cut off when I was saying if you wanted to
19 respond or any of the legal representatives of victims wanted to respond to the
20 Prosecution's latest motion? But if you do, then by next Wednesday, please.

21 MS VON WISTINGHAUSEN: [12:42:11] Yes, I have followed the transcript
22 and it's duly noted. Thank you.

23 PRESIDING JUDGE KORNER: [12:42:30] Still not hearing.
24 Sorry, I didn't hear that.

25 MS VON WISTINGHAUSEN: [12:42:32] Do you hear me now?

1 PRESIDING JUDGE KORNER: [12:42:35] Yes, sorry, it was my fault.

2 MS VON WISTINGHAUSEN: [12:42:36] Yes, no, it's all right. I had followed
3 the transcript, so I know we've got time until 22nd of December if at all we
4 want to say something.

5 PRESIDING JUDGE KORNER: [12:42:41] Yes, right, thank you very much.
6 Sorry about the fact that I couldn't hear you earlier. Are there any other
7 matters that anybody wishes to raise before we end the session? No?

8 MS VON WISTINGHAUSEN: [12:42:54] Just one thing, Madam President, if I
9 may?

10 PRESIDING JUDGE KORNER: [12:42:57] Yes.

11 MS VON WISTINGHAUSEN: [12:42:58] As you know, we received the first
12 Registry's assessment report on victims' applications on 6th of December, and
13 as indicated by the Registry, there are 21 applications that require additional
14 information and for these reasons, the Registry asked actually the
15 Trial Chamber, that's in paragraph 16 of the report, to wait before you
16 give it -- before you give the application a definite classification so that, you
17 know, we have the possibility to go back to our clients and review the matter.
18 For all the reasons that have been extensively discussed today, of course,
19 contact with our clients is also not (Technical problem) ... But I suggest that I
20 will just update you on a regular (Technical problem) ... on these applications.
21 That's all I wanted to say.

22 PRESIDING JUDGE KORNER: [12:44:04] I'm sorry, yes, you broke up there,
23 and I don't think it caught what you said.

24 If you look at the transcript, you said, "[...] contact with our clients is ..."

25 MS VON WISTINGHAUSEN: [12:44:15] Oh, I don't know where I was cut

1 off.

2 PRESIDING JUDGE KORNER: [12:44:19] If you look at the transcript, "...
3 contact with our client is also not ... " something. But anyhow I think we got
4 the general idea. You're going to update us on the progress.

5 MS VON WISTINGHAUSEN: [12:44:32] Exactly. This is what I'm going to
6 do, to cut it very short. Yes, thank you.

7 PRESIDING JUDGE KORNER: [12:44:37] Yes, thank you very much.
8 There is one other matter -- yes, thank you very much, Judge Alexis-Windsor.
9 The deadline for the filing of motions was the 3rd of December, any pretrial
10 motions. I just want confirmation, if I may have from, please, both sides that
11 they understand that the deadline has passed and there will be no filing of
12 further motions.

13 MR LAUCCI: [12:45:14](Interpretation) Your Honour, I see that you are
14 looking by way of priority in my direction, I can answer that the Defence has
15 done everything it had to do for the 3rd of December, and I would thank you
16 for having verified that.

17 PRESIDING JUDGE KORNER: [12:45:31] Good. Prosecution?

18 MR NICHOLLS: [12:45:33] Understood, your Honour, thank you.

19 PRESIDING JUDGE KORNER: [12:45:35] And I take it that the Legal
20 Representatives of Victims understood that as well. Yes. Thank you.

21 MS VON WISTINGHAUSEN: [12:45:42] Yes, thank you.

22 PRESIDING JUDGE KORNER: [12:45:43] Yes. Well, if there's nothing
23 further, then all that remains is for me to wish all parties, all those present in
24 the courtroom, Happy Christmas, those of you who can get home for
25 Christmas, good luck. For some of us, it's going to be more difficult, thanks to

1 the French, Mr Laucci.

2 MR LAUCCI: [12:46:11](Speaks English) Always. Always blame the French.

3 PRESIDING JUDGE KORNER: [12:46:14] Yes. So we wish all parties

4 a Happy Christmas and obviously, eventually, a new year, and a reminder that

5 the next -- unless anything urgent comes up, the next status conference will be

6 in February.

7 Yes, thank you all very much.

8 THE COURT USHER: [12:46:29] All rise.

9 (The hearing ends in open session at 12.46 p.m.)