

Trial Hearing
WITNESS: DAR-D31-P-0027

(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 2
9 Friday, 17 November 2023
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: [9:36:41] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:37:03] Yes, good morning, all. Appearances.
15 Defence, please?
16 MR EDWARDS: [9:37:12] Good morning, your Honours.
17 For Mr Abd-Al-Rahman, to my left is Marcela Velarde; Ahmad Issa, case manager
18 behind me; and Audrey Matheo.
19 Mr Laucci will be joining us at some point today.
20 PRESIDING JUDGE KORNER: [9:37:28] Yes. I gather that Mr Abd-Al-Rahman's
21 not feeling well.
22 MR EDWARDS: [9:37:35] That's right, your Honour. We received a phone call at
23 about 7.30 this morning from the detention centre explaining that he had a migraine,
24 or a very bad headache, in any event, and it was something that gave him
25 discomfort overnight.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 In fact, overnight, I understand, he called for a doctor or a nurse to give him some
2 medication.

3 So, of course, in the circumstances, I don't have a written waiver from him, but I put
4 on record that he's not here and -- well, can I put it this way: Having been in this
5 sort of situation in the past, we, the Defence, are very confident that he would not
6 wish to prevent matters from proceeding today, especially given the rather technical
7 nature of today's witness.

8 PRESIDING JUDGE KORNER: [9:38:27] Well, thank you, Mr Edwards. I was
9 about to say that, it's technical evidence and getting an expert back is always difficult;
10 so I think we will accept that this is not something that your client would particularly
11 mind missing, as it were. Yes, thank you.

12 Yes, Prosecution?

13 MR NICHOLLS: [9:38:50] Morning, Madam President. Morning, your Honours.
14 Myself, Julian Nicholls, with Alison Whitford, Rachel Mazarella, Claire Sabatini and
15 Edward Jeremy.

16 PRESIDING JUDGE KORNER: [9:39:02] Thank you.

17 Victims representatives?

18 MR SHAH: [9:39:04] Good morning, Madam President. Good morning, your
19 Honours.

20 Anand Shah, associate counsel on behalf of the participating victims, with Saif Kassis,
21 case manager and Charlotte Imhof, our visiting professional. Thank you.

22 PRESIDING JUDGE KORNER: [9:39:18] Right. Thank you.

23 I have had a quick read through what appears to be a disagreement between the
24 Prosecution and the Defence, copied to the Trial Chamber, about the preparation logs
25 and disclosure. At the moment, I'm sorry, what is being asked for by anybody, if

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 anything?

2 MR EDWARDS: [9:40:01] Your Honour, it's true that my learned friend and I had a
3 bit of a row overnight because of some very late disclosure. Can I make it clear, I
4 really don't want this to delay Ms Marsh's evidence; so I'm sure we are content for
5 this to be dealt with at the conclusion of her evidence.

6 PRESIDING JUDGE KORNER: [9:40:22] Right.

7 MR EDWARDS: [9:40:23] Yes.

8 PRESIDING JUDGE KORNER: [9:40:24] Mr Nicholls?

9 MR NICHOLLS: [9:40:25] Yes, absolutely. We can do it at the end. I don't
10 think -- I mean, I think it needs to be dealt with today, but I don't think this witness
11 will take the full time, so I think that's fine.

12 I just -- I wouldn't call it a row, or late, but we can talk about that later.

13 PRESIDING JUDGE KORNER: [9:40:41] Yes, all right.

14 MR EDWARDS: [9:40:42] A very polite disagreement.

15 PRESIDING JUDGE KORNER: [9:40:45] That's fine, thank you. Then the witness
16 can come into court.

17 While that happens, I suppose, Mr Edwards, formally, I have been reminded you
18 need to apply to put her report in under 68(3).

19 MR EDWARDS: [9:40:52] Yes.

20 PRESIDING JUDGE KORNER: [9:40:54] Do you make that application?

21 MR EDWARDS: [9:40:56] Your Honour, I formally apply to have her report
22 admitted under Rule 68(3).

23 PRESIDING JUDGE KORNER: [9:41:03] Yes. This time I will remember to ask the
24 Prosecution.

25 MS WHITFORD: [9:41:07] We have no objection, your Honour.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [9:41:10] Right.

2 I take it, Mr Shah, you are not interested in this?

3 MR SHAH: [9:41:14] No objection. Interested, of course, but no objection.

4 PRESIDING JUDGE KORNER: [9:41:16] Right. Yes, thank you.

5 Yes, then we so order that the report is admitted.

6 Good morning, Ms Marsh. I'm not going to ask whether you can hear and
7 understand me, but can I just mention, before we ask you to take the solemn
8 declaration, two things.

9 The first is this: I speak English, Mr Edwards speaks English, you speak English, but
10 everything has to be translated both into French and into Arabic.

11 So -- although I'm not sure we do need Arabic? I suppose we do for the public, yes.

12 So if you could remember not to speak too quickly and to leave a pause for a moment
13 once Mr Edwards has asked the question, or Ms Whitford, or whoever it is. That's
14 the first thing.

15 The second thing is this: Your evidence will be completed today, I'm told, without
16 any difficulty. We'll have a break at 11 o'clock for half an hour and then there's a
17 lunch break as well, but it may well be that you're finished by lunchtime, I don't
18 know.

19 In any event, thank you very much for coming and would you be good enough to just
20 take the solemn declaration, which I think it should be in front of you.

21 WITNESS: DAR-D31-P-0027

22 (The witness speaks English)

23 THE WITNESS: [9:43:53] Thank you. I solemnly declare that I will speak the truth,
24 the whole truth and nothing but the truth.

25 QUESTIONED BY MR EDWARDS:

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 Q. [9:44:00] Thank you. Please tell the court your full name?
- 2 A. [9:44:04] Fiona Elizabeth Marsh.
- 3 Q. [9:44:08] Is there a folder in front of you, a yellow-coloured folder in front of you
4 containing some documents?
- 5 A. [9:44:14] Yes, there is.
- 6 Q. [9:44:15] Could you please turn to tab 3, DAR-D31-00000159. Is that your CV,
7 Ms Marsh?
- 8 A. [9:44:30] Yes, it is.
- 9 PRESIDING JUDGE KORNER: [9:44:32] Tab 3 -- isn't that tab 2?
- 10 MR EDWARDS: [9:44:36] Tab 2, is it? Sorry.
- 11 PRESIDING JUDGE KORNER: [9:44:40] Yes.
- 12 MR EDWARDS: [9:44:43]
- 13 Q. [9:44:43] You have a -- I should have checked, but I presume I can lead in terms
14 of qualifications? Thank you.
- 15 You have a bachelors degree and a masters degree in chemistry?
- 16 A. [9:44:58] Yes, I do.
- 17 Q. [9:44:58] And is it right you joined the Forensic Science Laboratory of the
18 Metropolitan Police in London, England, in --
- 19 A. [9:45:05] Yes, I did.
- 20 Q. [9:45:05] -- March 1980.
- 21 A. [9:45:06] Yes.
- 22 Q. [9:45:07] Initially, your duties at that laboratory included examining clothing for
23 paint, glass and other trace contacts and that sort of thing?
- 24 A. [9:45:18] That's correct, yes.
- 25 Q. [9:45:19] And comparing shoe prints and tool marks?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [9:45:22] Yes.

2 Q. [9:45:23] And did you move on to looking at questioned documents in about
3 March 1982?

4 A. [9:45:35] Yes, I did.

5 Q. [9:45:37] I'm going to slow down because I know already I'm going too fast.

6 And whilst at the Metropolitan Police Forensic Science Laboratory, were you trained
7 in all aspects of the scientific examination of documents and handwriting?

8 A. [9:45:59] Yes, I was.

9 Q. [9:46:01] Who was the head of the questioned documents section at the
10 Metropolitan Police at the time, please?

11 A. [9:46:07] For most of the time, it was David Ellen. For a short period he went to
12 Australia to set up a laboratory there and Audrey Giles took over.

13 Q. [9:46:18] And did he -- is it right that he published in 1989 a book called the
14 Scientific Examination of Documents: Methods and Techniques?

15 A. [9:46:29] Yes, he did.

16 Q. [9:46:32] Does the forensic examination of documents involve the examination
17 and comparison of handwriting?

18 A. [9:46:45] Yes, it does.

19 Q. [9:46:46] And does that include signatures?

20 A. [9:46:49] It does.

21 Q. [9:46:54] During your time at the Metropolitan Police Forensic Science
22 Laboratory, did you examine many documents?

23 A. [9:47:01] I did.

24 Q. [9:47:01] And just give their Honours an idea of the sort of cases you worked on
25 and the sort of documents you worked on?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [9:47:12] Well, in the early stages, the training stages, they would have been very
2 simple cases -- so cheque frauds, DSS frauds, something as simple as vehicle tax discs,
3 MOT certificates, and then we would move on to more complex frauds. But also
4 documents are found in every single type of crime; so we would look at handwriting
5 on letters, wills. They can be found in any crime from -- I did crimes involving spy
6 cases, terrorist cases, murders, rapes, all sorts of cases.

7 So it's not just fraud and forgery-type cases.

8 Q. [9:48:02] Thank you. Just for the record, "DSS", Department of Social Security
9 in the UK?

10 Ms Marsh, just for the record, because not all of the acronyms are familiar here, does
11 "DSS" mean Department of Social Security?

12 A. [9:48:26] Yes, it does.

13 Q. [9:48:28] And "MOT", Ministry of Transport?

14 A. [9:48:30] That's correct, yes.

15 Q. [9:48:33] Whilst working at the Metropolitan Police laboratory, were you
16 recognised as an expert in order to be able to give opinion evidence on handwriting in
17 court?

18 A. [9:48:46] Yes, I was.

19 Q. [9:48:48] Did you then leave the Metropolitan Police service in 1989?

20 A. [9:48:54] I did.

21 Q. [9:48:56] And between 1980 and 1989, can you give an idea of how many times
22 you gave expert evidence in court?

23 A. [9:49:04] From early '83 -- 1983, between 25 and 30 times a year.

24 Q. [9:49:16] And did you produce reports on handwriting and signatures in cases
25 beyond those where you were required to testify in court?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [9:49:30] Yes, I did.

2 Q. [9:49:32] Can you give us a rough idea of how many reports you produced
3 during your employment with the Metropolitan Police?

4 A. [9:49:41] In the early stages, doing the simple cases, I might do perhaps 200/250
5 cases a year.

6 Q. [9:49:51] I see.

7 A. [9:49:52] But, obviously, as the cases became more complex, the numbers would
8 become considerably less.

9 Q. [9:49:57] Thank you. Do you publish in academic journals?

10 A. [9:50:04] I don't, no.

11 Q. [9:50:06] Could you give their Honours an idea what -- why that is your choice?

12 A. [9:50:11] I have no interest in publications. I like to do case work. I have a
13 couple of publications in my name, but not through choice particularly.

14 Q. [9:50:25] Well --

15 PRESIDING JUDGE KORNER: [9:50:26] Very sensible.

16 MR EDWARDS: [9:50:28]

17 Q. [9:50:29] Have you -- do you speak at conferences? Are you invited to speak at
18 conferences?

19 A. [9:50:33] I have. I spoke at a conference of the international forensic science
20 society when I was employed at the Metropolitan Police Forensic Science Laboratory,
21 because it was my job to do so.

22 Q. [9:50:48] Now -- sorry, did you --

23 A. [9:50:51] I was just going to say I have another publication in a medico-legal
24 journal. I was asked to do a talk. I had no idea it was going to be published.

25 Q. [9:51:02] Okay. Well, we've all seen it and I think we all think you did very

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 well.

2 A. [9:51:12] Thank you.

3 Q. [9:51:13] All right. Since 1989, is it right that you've worked as an independent
4 questioned document examiner?

5 A. [9:51:19] That's correct, yes.

6 Q. [9:51:21] And do you work out of your own independent laboratory?

7 A. [9:51:24] I do.

8 Q. [9:51:27] What sort of equipment do you have in your laboratory in order to
9 carry out that work?

10 A. [9:51:31] The basic equipment is a good quality stereo microscope with an
11 oblique light source. I also have an electrostatic detection apparatus, which is ESDA
12 for short, and that's a piece of equipment used to examine paper documents for
13 indented impressions of writing.

14 Q. [9:52:04] In this case, was it necessary to use the ESDA?

15 A. [9:52:06] Not at all, no. And there are other pieces of equipment which aren't
16 relevant either in this case.

17 Q. [9:52:16] No, okay. In this case was there any particular equipment that you
18 used or needed to use in order to carry out your examination and prepare your
19 report?

20 A. [9:52:27] Bearing in mind I only examined copied documents, so certain features
21 or certain techniques just aren't relevant. All I needed was a hand magnifying glass.

22 Q. [9:52:44] Thank you. Have you continued to give expert evidence in court
23 since 1989 and your working as an independent questioned document examiner?

24 A. [9:52:58] Yes, I have.

25 Q. [9:53:01] Do you give evidence in court only in the UK or abroad as well?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 A. [9:53:09] Over the years I have given evidence abroad on a few occasions.
- 2 Q. [9:53:16] Can you give one or two examples?
- 3 A. [9:53:19] The first case I went abroad for was in Muscat, Oman, where I gave
4 evidence for the prosecution in a forged bankers draft case.
- 5 Q. [9:53:37] Okay. Yes. Thank you for that example. Have you -- before this
6 case, had you ever been instructed to provide an expert report in a case before the
7 ICC, the International Criminal Court?
- 8 A. [9:53:50] I have been instructed before, yes.
- 9 Q. [9:53:53] Did you actually have to testify, though?
- 10 A. [9:53:55] No, I didn't.
- 11 Q. [9:53:58] All right. Are you on the list of approved experts at this Court?
- 12 A. [9:54:02] Yes, I am.
- 13 Q. [9:54:05] Now, you told us that you've -- you were trained in the 1980s. In
14 essence, have the principles and techniques of the scientific examination of
15 handwriting changed much since your training in the 80s?
- 16 A. [9:54:25] Not at all, as far as I'm concerned, no.
- 17 Q. [9:54:31] As an independent expert, are there any limitations in terms of from
18 whom you can accept instructions to provide expert reports?
- 19 A. [9:54:42] No.
- 20 Q. [9:54:44] Do you provide reports for the prosecution and the defence in the UK?
- 21 A. [9:54:49] Yes, I do.
- 22 Q. [9:54:51] Is the way you approach a case ever impacted by the identity of the
23 instructing party?
- 24 A. [9:55:00] Absolutely not.
- 25 Q. [9:55:04] When's the last time a court has refused to recognise you as an expert?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [9:55:11] It's never happened.

2 Q. [9:55:14] Are you or have you ever been a member of a professional forensic
3 science society?

4 A. [9:55:21] I was a member of the forensic science society for many years, from
5 early 1980s up until -- I'm going to say around 2007, when I let my membership lapse.

6 Q. [9:55:35] Okay. Is membership of such a society a prerequisite to any kind of
7 accreditation as an expert?

8 A. [9:55:44] No, it's a professional society which provides a journal regularly with
9 up-to-date papers. They have conferences, but it's not a qualification as such. To
10 join it one requires two references from members and to pay the fee.

11 Q. [9:56:09] Does it have any disciplinary function?

12 A. [9:56:17] I don't think there's any formal disciplinary function. Obviously, they
13 have the right to exclude people if they so wish.

14 Q. [9:56:30] Okay.

15 PRESIDING JUDGE KORNER: [9:56:32] Mr Edwards, I don't think anybody is going
16 to be questioning Ms Marsh's qualifications.

17 MR EDWARDS: [9:56:39] No, all right. I'll --

18 PRESIDING JUDGE KORNER: [9:56:41] At least I should be surprised if they are.

19 MS WHITFORD: [9:56:47] We accept that Ms Marsh is an expert, your Honour.

20 MR EDWARDS: [9:56:53] Thank you.

21 Q. [9:56:53] Ms Marsh, I'm only asking this question because of the international
22 nature of this court, but is there a difference between graphology and the sort of work
23 that you do as a questioned document examiner?

24 A. [9:57:11] In the United Kingdom a graphologist is somebody who will take a
25 sample of your handwriting and tell you your character. What I do is scientific

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 examination of documents and handwriting. It's a very different field and the two
2 should never be mixed. I believe graphologists in different European countries have
3 a different meaning, or the term graphology has a different meaning.

4 Q. [9:57:41] Have you in the past described the difference between a graphologist
5 and a handwriting expert as similar to the difference between an astrologer and an
6 astronomer?

7 A. [9:57:54] Yes, I have.

8 Q. [9:57:56] Is every person's handwriting unique, Ms Marsh?

9 A. [9:58:03] That's what we base our conclusions on, yes.

10 Q. [9:58:06] Can you briefly explain to their Honours how a person's handwriting
11 develops to become unique?

12 A. [9:58:14] Yes. Certainly speaking from the perspective of living in the UK and
13 seeing handwriting mainly from people who have been educated in schools, in
14 schools people -- children are taught to write in a particular way and the way they are
15 taught to write will change depending on the part of the country, the era or whatever
16 is considered fashionable at the time. So in the early years, children's writing will
17 look very similar, but as they grow older, and perhaps they stop using lined
18 notepaper with different lines for the lower part of the letter and the tall part of the
19 letter, then their handwriting tends to develop into their own unique style.

20 During the early mid to late teenage years, children's handwriting can vary
21 considerably from one day to the next, as indeed can some adults. But, eventually,
22 they will tend to settle down into their own unique style.

23 But we also have to put the -- make the comment here that every person's
24 handwriting will show a range of natural variation. You never write the same
25 signature or the same thing exactly the same more than -- you don't repeat the same

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 thing more than once. And it's very important to be aware of natural variation and
2 when comparing handwriting, to have sufficient reference sample to be able to
3 establish that range of natural variation.

4 Then as you go into later years, handwriting can change for all sorts of other reasons.
5 It could be injury, arthritis, it could be illnesses such as Parkinson's, which brings on
6 tremor, it could be the effects of drugs. So towards the later there are other
7 complications in handwriting that can make it alter quite considerably.

8 Q. [10:00:42] Thank you very much for that summary. Now, in August of this
9 year were you asked by the Defence for Mr Abd-Al-Rahman to carry out an expert
10 examination two questioned signatures?

11 A. [10:00:56] Yes, I was.

12 Q. [10:00:57] Could you please have a look at the document behind tab 1 in the
13 yellow folder in front of you, DAR-D31-00000158. Have a look at the first page and
14 the last page at page 8. Is that your signature at page 8, Ms Marsh?

15 A. [10:01:22] Yes, it is.

16 Q. [10:01:27] And in terms of the document that you were asked specifically to look
17 at — this is not for public broadcast, your Honours — at Annex A, which is at page 10
18 of the document -- let's just have that up on the screen, please. Do you see the
19 document that's behind Annex A in your report? In the bottom right-hand corner it
20 says, "DAR-D31-00000158-0010"?

21 A. [10:02:11] Yes, that's correct. Sorry, it's not on the screen. I had to --

22 Q. [10:02:14] It's coming up, yes.

23 And it was the second document -- actually, no, let's stick with this document for a
24 moment. And is it right that you were advised by the Defence that this is a
25 document that purportedly dates back to November 2006?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 A. [10:02:42] Yes, I was.
- 2 Q. [10:02:44] Can we move forward to the document at Annex --
- 3 PRESIDING JUDGE KORNER: [10:02:47] Can you just remind me, this is said to be
- 4 part of the interview?
- 5 MR EDWARDS: [10:02:51] This is said, your Honour, to be the last page of an
- 6 interview conducted by the Sudanese authorities of Mr Abd-Al-Rahman in
- 7 November 2006. Yes.
- 8 Q. [10:03:04] Now, let's go to Annex B, please, which is at page 12, two pages on.
- 9 Was that the second document you were asked to look at?
- 10 A. [10:03:17] Yes, it is.
- 11 Q. [10:03:19] And were you advised that this was a kind of a laissez-passer that
- 12 purports to date back to 2003?
- 13 A. [10:03:26] Yes, I was.
- 14 Q. [10:03:27] Now, the first thing to note is that both of these signatures are written
- 15 in the Arabic script. Do you read Arabic? Do you write Arabic?
- 16 A. [10:03:36] I do neither.
- 17 Q. [10:03:38] Okay. Does the fact that these questioned signatures are in Arabic...
- 18 (Overlapping speakers)
- 19 THE INTERPRETER: [10:03:39] Note from the interpreter: Can we observe pauses,
- 20 please.
- 21 PRESIDING JUDGE KORNER: [10:03:43] Yes.
- 22 MR EDWARDS: [10:03:45] Too fast.
- 23 PRESIDING JUDGE KORNER: [10:03:46] Too fast. You've got to leave a pause.
- 24 I know it's difficult, from my own experience.
- 25 Sorry, your answer was you didn't read or write Arabic?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 THE WITNESS: [10:03:59] That's correct.

2 MR EDWARDS: [10:04:01]

3 Q. [10:04:01] Does the fact that these questioned signatures are written in Arabic
4 impact on your ability to carry out an examination of the signatures?

5 A. [10:04:09] Not at all, for the simple reason that when comparing signatures, as
6 you'll appreciate, there are many times when even English speakers or writers will
7 not write a signature that is recognisable as the name it represents, so it can just be a
8 squiggle. So to compare one squiggle with another is not much different to
9 comparing handwriting such as Arabic handwriting.

10 Q. [10:04:54] Does the fact that in Arabic the writing tends to -- well, goes from
11 right to left, does that impact in any way on the way you might analyse a signature?

12 A. [10:05:07] It's an important feature in some cases, for the simple reason that
13 should an English person or an English writer attempt to forge an Arabic signature,
14 they may well reproduce a very good pictorial representation, but they are oblivious
15 to the fact it should be written from right to left. So they write it in their normal
16 manner from left to right, so it can be quite a useful feature to look for. It wasn't
17 relevant in this case.

18 Q. [10:05:54] Is the fact that it might have been a relevant feature in this case the
19 reason why you asked the Defence if a working theory was that if the signature on
20 Annex A was a forgery, that it was written by an Arabic speaker?

21 A. [10:06:32] It's a question that I would normally ask at the outset, when looking
22 at Arabic signatures, if the person -- if it's alleged it's a forgery, if the person would be
23 another Arabic writer or an English writer or somebody who uses English script.

24 Q. [10:06:56] Thank you?

25 A. [10:06:56] So I'd ask as a matter of course.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Q. [10:06:59] Yes. In fact, to be entirely accurate, it was the Defence who said to
2 you the working theory was that any such signature would be written by an
3 Arabaphone?

4 A. [10:07:14] Yes, I wouldn't know any different.

5 Q. [10:07:16] Yes. Okay. Now, you only saw copies of these documents; is that
6 right?

7 A. [10:07:26] That's correct, and some of them weren't particularly good quality
8 copies.

9 Q. [10:07:32] Yes. And is it right that you were advised that neither the Defence
10 nor the Prosecution had possession of the originals?

11 A. [10:07:42] That's correct, yes.

12 Q. [10:07:46] Did the fact that you were working off copies have any impact on
13 your ability to carry out an examination of these signatures?

14 A. [10:07:54] Yes, it did. The best evidence will always come from examining
15 original documents, purely because some of the detail will be lost in the process used
16 to reproduce the copy.

17 Q. [10:08:10] Okay. Does it make it impossible to carry out a useful examination
18 of signatures, when you're working off of copies?

19 A. [10:08:21] It limits -- sorry. It limits the examination. In reality, more and
20 more we are rarely given the original documents, so we have to do the best we can
21 from copied documents.

22 Q. [10:08:39] Is it right that you were, in your instructions, asked to examine these
23 two signatures -- to compare these two signatures with each other?

24 A. [10:08:51] Yes, I was.

25 Q. [10:08:52] And also to examine these two signatures and compare them to

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 known reference signatures of Mr Abd-Al-Rahman?

2 A. [10:09:05] That's correct. Firstly, I compared the two questioned with each
3 other and then I compared each of the questioned signatures individually with the
4 reference signatures.

5 Q. [10:09:18] Okay. We'll go through that very briefly, but again I'm being told
6 that we need to observe a pause.

7 Can we now please bring up DAR-D31-00000261, which is at tab 3. Yes, next page.
8 You're on it.

9 Is this a signature chart that you produced yourself, Ms Marsh?

10 A. [10:09:59] Yes, it is. This chart contains all the signatures I examined on one
11 page for ease of reference.

12 Q. [10:10:09] Yes. Thank you for having done that.

13 MR EDWARDS: [10:10:14] Your Honours, A3 hard copies have been placed before
14 you. We thought that might assist.

15 PRESIDING JUDGE KORNER: [10:10:23] Thank you.

16 MR EDWARDS: [10:10:26] This can be publicly broadcast.

17 PRESIDING JUDGE KORNER: [10:10:31] (Microphone not activated)

18 THE INTERPRETER: [10:10:33] Microphone, please.

19 JUDGE KORNER: [10:10:34] (Microphone not activated)

20 THE INTERPRETER: [10:10:36] Mic, please, your Honour.

21 PRESIDING JUDGE KORNER: [10:10:38] Sorry. Is that a chart of the -- as you put
22 it, the reference signatures together with the questioned ones?

23 THE WITNESS: [10:10:45] That's correct, yes.

24 MR EDWARDS: [10:10:46] The flip side of the hard copy you have is a sort of index
25 of an index --

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [10:10:53] Oh, yes.

2 MR EDWARDS: [10:10:54] -- of what signatures are what.

3 Q. [10:11:02] Please feel free to refer to your report in answer to my next few
4 questions. But, very briefly, how did you go about carrying out your first
5 examination; in other words, the examination of the signatures at Annex A and
6 Annex B, madam?

7 A. [10:11:23] Okay. Annex A and Annex B are the two questioned signatures that
8 I was asked to examine.

9 Q. [10:11:34] Okay.

10 A. [10:11:35] So I compared these first.

11 Q. [10:11:37] Just pause for a moment. I'm going to ask the court officer, please, to
12 zoom in on Annex -- the signatures at Annex A and Annex B, and make them as large
13 as possible for the screen.

14 Sorry, I interrupted you.

15 A. [10:11:54] Okay. When comparing signatures, and indeed any handwriting,
16 we have to consider every single part of it. So we -- if we're fortunate enough to be
17 looking at handwriting where the letters are discernible, we would look at each
18 individual letter and we would consider the method of its construction, that's the
19 number and direction of pen strokes. We look at the shape, we look at the
20 proportions, and that's the proportions from one letter to its neighbours, and
21 proportions within a letter. And we also look at other features such as maybe the
22 slope, spacing, and we compare each and every aspect of each part of the signature
23 with the similar part in the signature we are comparing it to, so the questioned
24 against the reference. In this case, I'm comparing two questioned signatures.

25 Q. [10:13:17] (Microphone not activated) Just pause for a moment.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 MR EDWARDS: [10:13:19] Can I just ask the court officer, please, to maybe zoom in
2 on Annex B-- because Annex B is still sort of hidden here. Can we centralise it and
3 zoom in as best as we can. Yes. No. That's fine. That's fine. All right. That's
4 fine.

5 Actually, no, zoom in once more, please, because we really just want the signature.

6 Q. [10:13:46] Now, madam, if we look at the signature Annex A, there's two lines of
7 writing there, correct?

8 A. [10:13:57] Yes.

9 Q. [10:13:58] Right. But the signature itself is the squiggle, for want of a better
10 word?

11 A. [10:14:04] Yes.

12 Q. [10:14:04] That is, the lower-most bit of writing. Is that what you examined?

13 A. [10:14:09] It is. Perhaps I can describe it as it looks like almost a fraction and a
14 half but with two lines through the middle.

15 Q. [10:14:12] Yes.

16 A. [10:14:14] It looks like a 1 over a 2.

17 Q. [10:14:20] Okay. And were there other features of this signature, Annex A, that
18 struck you as noteworthy?

19 A. [10:14:36] Well, as far as the comparison's concerned, it's clear that Annex B is a
20 very, very different signature. It's made up of two parts. The first part which looks
21 like in English writing an upper case "B". It's got a sloping stroke and then a zigzag
22 line through it. There's nothing like that in Annex A.

23 The second part of Annex B does have two horizontal lines and the top line has a
24 curved part on the right-hand side.

25 Now, although there are two horizontal lines in Annex A, the top line has no curved

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 part. The lower line does have a feature to the right-hand side. But there is literally
2 nothing in common between these two signatures. There's nothing to suggest they
3 were written by the same person.

4 Q. [10:15:59] Thank you.

5 A. [10:16:00] Can I just qualify that?

6 Q. [10:16:02] Yes.

7 A. [10:16:03] Having said that, although my conclusion is that there's no evidence
8 they were written by the same person, it's not possible to totally exclude that, for the
9 simple reason we can all choose to write something very different if it suits us, or just
10 because we've changed our handwriting over a period of time, so anyone can write a
11 completely different moniker for a signature, if they want to. But, from my
12 perspective, looking at the handwriting alone, there is nothing to link these two
13 signatures.

14 Q. [10:16:46] Okay. Thank you.

15 Now, another part of your instruction was to compare the two questioned signatures
16 one by one with reference signatures.

17 Did the Defence provide you with two examples of Mr Abd-Al-Rahman's signature
18 on documents that date back to June 2020?

19 A. [10:17:22] Yes, they did.

20 Q. [10:17:23] Let's scroll down, please, to -- actually, no, I think what we ought to
21 do is go back to your report. Let's go back to your report, please, and go first to
22 Annex C -- not for public broadcast. It's page 14 of the report.

23 If there's a way that that could be rotated by 90 degrees? Thank you.

24 Top line of writing to the far right, is that the signature that you were asked to look at,
25 examine?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [10:18:09] Yes, it is.

2 Q. [10:18:10] And then if we go two pages -- well, yes, two pages on to the

3 document at Annex D. Zoom in.

4 And is the signature to the far left of that document -- is that the other signature that
5 you were asked to look at?

6 A. [10:18:31] Yes, it is.

7 MR EDWARDS: [10:18:43] And for the record, your Honour, the document at
8 Annex C is a signature on a document relating to Mr Abd-Al-Rahman's detention
9 when he was first brought to The Hague, yes. And the document at annex D is
10 a -- you'll see that there is some French writing there, and our understanding is that
11 this is a document that was created shortly after Mr Abd-Al-Rahman's surrender in
12 Central African Republic, a Francophone country.

13 Q. [10:19:38] All right. Were these the only two examples that the Defence gave
14 you of signatures written, as it were, in the course of business?

15 A. [10:19:50] Yes.

16 Q. [10:19:51] Were you advised that there were other reference signatures from
17 Mr Abd-Al-Rahman in the Latin script?

18 A. [10:19:58] Yes, I was.

19 Q. [10:19:59] Would that have helped you in any way at all in carrying out a
20 comparison?

21 A. [10:20:03] Not at all, purely because comparing signatures is like any other
22 comparison, we can only compare like with like.

23 Q. [10:20:19] These were the only two examples that the Defence gave you. And
24 were you advised that these were the only two reference signatures that the Defence
25 had to give you?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [10:20:34] Yes, and written in the normal course of business, yes.

2 Q. [10:20:40] Was having only two reference signatures written in the normal
3 course of business enough to carry out a useful examination?

4 A. [10:20:52] It's very, very limited, and the other complication is they're not
5 contemporaneous with the questioned signatures.

6 Q. [10:21:00] No. Given this limitation, was there anything that you advised the
7 Defence to do?

8 A. [10:21:15] Yes. I asked them to provide reference signatures from the client,
9 and although these were written specifically for the purpose of the signature
10 comparison and they weren't contemporaneous with the questioned signatures,
11 sometimes they can give a little bit of additional information.

12 Q. [10:21:46] Was there a particular process or procedure that you advised the
13 Defence to follow in order to obtain some reference signatures?

14 A. [10:21:58] Yes. When obtaining reference signatures, it's very important that
15 the person should not have the questioned signatures in front of them at the time of
16 writing and they should also be encouraged to write naturally.

17 And I like to see signatures scribbled out, several on a sheet of paper, and, ideally, to
18 allow a break and then another sheet and another sheet, purely because it's just
19 human nature when asked to do a sample like this, to be a bit cautious at the outset.
20 So by getting them to repeat the signature time and time again, we are more likely to
21 see their natural handwriting.

22 Q. [10:22:56] And were you given to understand that the Defence followed that
23 advice?

24 A. [10:22:59] Yes, I was.

25 Q. [10:23:02] Can we move forward, please, to pages 18, 19 and 20. We'll just

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 whizz through them very briefly.

2 Are these the reference signatures that the Defence sent you, three lots of 12?

3 A. [10:23:17] Yes, they are.

4 Q. [10:23:20] We can put the report away for a moment and go back to the sheet
5 that Ms Marsh prepared for us, tab 3.

6 What were you told by the Defence in terms of the last time Mr Abd-Al-Rahman had
7 seen either of the questioned signatures?

8 A. [10:23:58] From memory, I believe he had -- I was told he hadn't seen them for a
9 year.

10 Q. [10:24:06] If we look at Annex A - just scroll up a bit, please, thank you.

11 Now, we see that in Annex A, the signature is written on a line, and I don't know if
12 you recall, but the page of the document that the questioned signature was on, was a
13 lined piece of notepaper; right?

14 A. [10:24:47] That's correct, yes.

15 Q. [10:24:50] Did that -- so that's Annex A. As far as Annex B is concerned, the
16 laissez-passer signature, was that on an unlined piece of paper?

17 A. [10:25:05] That's correct, yes, it was.

18 Q. [10:25:07] Did those considerations - one, questioned signature being on lined
19 notepaper and the other not being - did that have any -- did that in any way inform
20 your request in terms of how the Defence should go about obtaining the 36 reference
21 signatures?

22 A. [10:25:25] I don't actually recall specifying whether it should be on lined or
23 unlined paper. In this case, it really doesn't make any difference.

24 Q. [10:25:36] Why do you say that?

25 A. [10:25:39] Because the line will make a difference as to positioning. So whether

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 the signature is written entirely above it, half and half, like this case, or sloping
2 against it, maybe, but the differences found are not differences of layout or spacing
3 and they are not differences of confinement.

4 Sometimes when handwriting is written in boxes on a form, and, particularly, when
5 maybe signing a passport application and you're told to make sure you keep it within
6 the lines, these factors can affect the way you write. But it's more likely to affect the
7 overall proportions and size, rather than change the detail of the signature or the
8 main part of the detail which is what we have here.

9 Q. [10:26:44] Thank you. Overall, what was your assessment of the quality of the
10 reference signatures you were asked to compare with the questioned signatures?

11 A. [10:26:59] Quality in terms of reproduction, bearing in mind I only examined
12 copy documents, was fine. Suitability, if that's what you're referring to, this is a
13 sample that's far from ideal. None of the reference samples are contemporaneous
14 with the questioned signatures and we only have two reference signatures written in
15 the normal course of business.

16 So it was a very limited sample.

17 Q. [10:27:44] Okay.

18 A. [10:27:44] Although, on the face of it, there's a lot of signatures there, the
19 majority of them were written in one sitting, long after the questioned signatures.

20 Q. [10:27:58] Now, bearing in mind those limitations, what was your assessment
21 about whether a useful comparison could nevertheless be carried out?

22 A. [10:28:11] Define "useful". Obviously, a comparison can be made. I can still
23 look for similarities and differences and I can assess the significance of what I find,
24 bearing in mind the limitations of the reference sample.

25 Q. [10:28:34] And I just want to pick up on the words you've just used. Is there

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 anything that you can tell the judges specifically about the significance of
2 changes -- of differences or similarities that you find as a handwriting expert?

3 A. [10:28:57] Okay. If we go back to the concept of natural variation, perhaps if
4 we can just look at the three lines of signatures on the chart under the heading of
5 "Annex E," and if we look at the top, so the top three signatures --

6 Q. [10:29:23] One moment.

7 MR EDWARDS: [10:29:25] Madam Court Officer, can you please bring up the top
8 three signatures under Annex E.

9 Q. [10:29:35] Have a look at the screen. Is that what you mean?

10 A. [10:29:40] That's fine, yes.

11 Q. [10:29:41] Okay. Thank you.

12 A. [10:29:42] Firstly, if we look at the feature that comes down through the
13 horizontal strokes and you look at the shape of that, it's vastly different on all three,
14 but these signatures were written by the same person, one after another.
15 Similarly, if you look at the end of the lower horizontal and the shape of those curves,
16 very different.

17 And the third signature down, it only seems to have two horizontal strokes, whereas
18 the other two have three.

19 Q. [10:30:24] Okay.

20 A. [10:30:24] Now, when you have handwriting that's so varied, it's again
21 important to have a good reference sample to establish that whole range as best we
22 can.

23 Now, I'm aware of the fact I don't have a reference sample from the date the
24 questioned signatures purport to have been written. All I can do is work on the
25 material given and, certainly, the two reference signatures written in 2020 that I was

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 provided, differ from those in Annex E.

2 So they extend the range further than those in Annex E. So my comparison
3 consisted of comparing each of the questioned signatures individually with those
4 reference signatures, Annexes C, D and E.

5 Q. [10:31:43] Thank you. Let's go backwards and deal with what your conclusions
6 were, having examined, first, the reference signatures and the signature at Annex B.
7 Can we please scroll up so that on the screen we see Annex B.

8 Thank you. And if we can zoom in to Annex B, that's fine. Okay. That will be
9 enough for now.

10 A. [10:32:17] My conclusion here was that there is no similarity between Annex B
11 and the reference signatures. I think I said little or no in my report. Clearly very
12 different, and no evidence to link the writer of Annex B's signature to the reference
13 signatures.

14 Q. [10:32:42] Now, you've twice -- before we move on to Annex A, you've twice
15 now summarised your conclusions as being, you know, either -- well, no evidence or
16 no similarity.

17 Let me just ask you about --

18 Sorry, one second.

19 Yes. Let me just ask you about qualitative scales of evidence. What, if any, sort of
20 scale of similarity or differences, when you come to your ultimate conclusions, what
21 do you use?

22 A. [10:33:45] Document examiners use a form of wording. We will not quote
23 statistics or figures. Different experts will have different wording and different
24 numbers or points on the scale.

25 The scale I tend to use is at the top end either definitely wrote or didn't write,

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 depending; high probability or almost certain, or very strong evidence.

2 Then the third point is strong evidence or probably.

3 Then there is a weak positive conclusion, which can be expressed as moderate
4 evidence.

5 Then there is a big broadband of inconclusive, and it's important to make clear that
6 not every -- every conclusion is the same in bandwidth. So inconclusive is a big
7 broadband; it's not just fifty-fifty. Because it would be quite wrong to come out of
8 that inconclusive band - one side or the other - without reasonable cause to do so.

9 And then as you go up through the conclusion scale, the bands become very much
10 narrower.

11 Now, on the negative side, I tend to use "no evidence." Some experts will give
12 degrees of negativity. Personally, I don't -- I don't see the point of that because if it's
13 negative, it doesn't really help either side, or it might help one side. But degrees of
14 negativity, I don't think are particularly helpful, whereas degrees of positive strength
15 are.

16 Q. [10:35:48] Thank you.

17 PRESIDING JUDGE KORNER: [10:35:49] Just before we leave that topic, in the old
18 days, Ms Marsh, I recall, going back a long time, something like a positive would
19 be said to be -- a "definitely wrote" would be 99 per cent sure, or whatever and THE

20 WITNESS: [10:36:01] I would say "definitely wrote" is one hundred per cent sure.

21 PRESIDING JUDGE KORNER: [10:36:05] Sure, okay. And then you get something
22 like "highly probable", "almost certain", whatever, but you don't do that anymore?
23 Do any experts do that now?

24 THE WITNESS: [10:36:14] Well, the trend is to go with "very strong evidence",
25 "strong evidence".

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Yes, I was taught "definite", "high probability", "probably". Different people
2 understand different things, but they have tried to make it more uniform.

3 PRESIDING JUDGE KORNER: [10:36:32] Right. Yes, thank you.

4 THE WITNESS: [10:36:35] So "very strong evidence" would be the equivalent of
5 "high probability".

6 "Strong evidence" would be the equivalent of "probably".

7 MR EDWARDS: [10:36:48] Sorry, has your Honour finished with that topic? Thank
8 you, yes.

9 Q. [10:36:56] You say that they've tried to make it more uniform. I'm just going to
10 follow up on that for a moment. What do you mean by "they"?

11 A. [10:37:05] That's a very good question. There are a small number of official
12 laboratories, Home Office laboratories, and scientists within those laboratories would
13 stick to the same form of wording. SO more and more independent people adopt
14 that, but it's not compulsory by any means.

15 Q. [10:37:31] In all your years of experience, have you ever received judicial
16 criticism for using the scale that you do as opposed to the scale used by, for example,
17 Home Office laboratories?

18 A. [10:37:44] No, but mostly I would stick to that, apart from -- well, certainly
19 originally I was taught down as far as "inconclusive" and then "no evidence".
20 Subsequently, maybe different people have decided it's a good idea to have maybe
21 13/14 points on the scale, but bearing in mind we can't justify the form of wording or
22 confirm it with figures and statistics, I think the more you add, the more difficult it is.
23 Because either people want to know, did he do it or didn't he; is there very strong
24 evidence; is there some evidence; or is there no evidence?

25 And degrees in between sort of don't mean a great deal, particularly when you can't

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 back it up with figures.

2 Q. [10:38:44] Thank you. Just before I move on, in your experience, how often do
3 you analyse signatures and come to a conclusion of one hundred per cent certainty
4 either way?

5 A. [10:39:10] It's quite rare to be definite that somebody definitely wrote
6 something - signature-wise, not general handwriting - purely because a number of
7 signatures are very short, many of them are simple in their method of construction,
8 which makes copying always a possibility.

9 On the other side, to say somebody definitely didn't do it, there are occasions when
10 that is possible, particularly when you've got a signature that's been traced.

11 Q. [10:39:52] I see. But other than in those rare occasions when you can say
12 somebody definitely didn't write a signature -- I just want to be clear in my mind, is
13 the next best thing no evidence?

14 A. [10:40:11] Yes. There aren't too many cases you can say somebody definitely
15 didn't write it. But, again, another example when that can be done is, if you have a
16 signature on a will of a very elderly person who is incapable of writing fluently at the
17 time of signing, and the forger has found difficulty reproducing that level of fluency,
18 or lack of fluency, and sometimes the signature is just far too fluent, that's an occasion
19 when you can be sure.

20 Q. [10:40:47] Yes.

21 A. [10:40:48] But in most cases, I can write my signature as on my report one
22 minute and I can choose to do something that looks completely different. So if you
23 look at them, there's no evidence they're by the same person. That's not the same as
24 saying they're definitely not.

25 Q. [10:41:10] Thank you. Let's bring up, please, your sheet again, the document

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 with all the signatures on it all together; it's the chart at tab 3.

2 I'm now going to ask you to summarise what your findings were with regard to the
3 signature in Annex A.

4 So scroll down, please, or scroll up, I suppose. Yes. That's it, thank you. Zoom in
5 a little bit more, please, on Annex A. There. Thank you.

6 All right. Yes, could you summarise your findings in respect of the signature on
7 Annex A, madam?

8 A. [10:42:01] Yes. Annex A, although it's much simpler than any of the reference
9 signatures, it does bear a cursory resemblance to parts of the reference. I considered
10 three possible explanations for my findings: One is that the similarities found are
11 the result of just pure coincidental chance; the second one is that the Annex A
12 signature was written by somebody attempting to copy the reference signature; and
13 the third one is that Mr Rahman wrote the questioned signature on Annex A, but this
14 signature lies outside the range of natural variation.

15 I found in the limited sample of known signatures I examined, I was unable to
16 determine with any degree of certainty which of these three options was the most
17 likely.

18 So the result of this comparison was inconclusive.

19 Q. [10:43:50] Were each of those alternatives, in other words, as likely as each
20 other?

21 A. [10:43:55] I wouldn't like to say. It's -- they're three options.

22 Q. [10:43:59] Yes.

23 A. [10:43:60] They're all reasonable options and I can't say that they're all equal or
24 not.

25 Q. [10:44:05] Okay. Thank you very much, Ms Marsh. If you could just stay

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 there, there's another 15 minutes before the break. There may be some questions for
2 you from the Prosecution, or perhaps from the victims first. I don't know.

3 PRESIDING JUDGE KORNER: [10:44:19] I'm assuming that the victims, other than
4 listening with interest to scientific and historical matters, have no questions.

5 I suppose you'd better confirm that, Mr Shah.

6 MR SHAH: [10:44:34] That's correct.

7 PRESIDING JUDGE KORNER: [10:44:35] Thank you.

8 MR SHAH: [10:44:36] It is interesting evidence, but no questions on behalf of my
9 clients. Thank you.

10 PRESIDING JUDGE KORNER: [10:44:42] Yes, Ms Whitford.

11 QUESTIONED BY MS WHITFORD:

12 MS WHITFORD: [10:44:47] Good morning, Ms Marsh.

13 A. [10:44:48] Good morning.

14 Q. [10:44:49] We met briefly this morning but for the record, my name is Alison
15 Whitford and I will be asking you some questions on behalf of the Prosecution.

16 A. [10:44:57] Okay.

17 Q. [10:44:58] What I'd like to start by doing is looking at some of the reference texts
18 in your field of expertise, and I will start with the books that you referred us to when
19 we asked you what your references were.

20 Now, the first book that you referred us to - and it's on tab 9 of the Prosecution list,
21 but there's no need to bring it up - is Suspect Documents: Their Scientific Examination
22 by Wilson R. Harrison.

23 And that was a book actually used in your training in the 1980s; correct?

24 A. [10:45:33] That's correct, yes.

25 Q. [10:45:36] The second book that you referred us to - and this is tab 10 on the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Prosecution's list - the Scientific Examination of Questioned Documents, and that
2 book is by Ordway Hilton and this book was also used during your training in the 80s;
3 correct?

4 A. [10:45:52] That's correct, yes.

5 Q. [10:45:55] The third book you referred us to - and this at tab 11 of our list, and
6 this was mentioned by our colleagues in the Defence during your
7 evidence-in-chief - is the book by David Ellen, the Scientific Examination of
8 Documents: Methods and Techniques.

9 Now, I'm right that all three of those books are considered authoritative texts in your
10 field of expertise?

11 A. [10:46:24] Yes, they are. There's a big difference between the book written by
12 David Ellen and the later editions with two other authors, in that it's a much easier
13 read. It's a smaller book and a much easier read. So the early two went into a lot
14 more detail.

15 Q. [10:46:49] Thank you, Ms Marsh. And we also did some research and found
16 some other references that I'd like to ask you about.

17 If we could please have on the screen the document at tab 5 of the Prosecution list,
18 which is DAR-OTP-00006624.

19 It should be on your screen now, Ms Marsh, and we see there the Best Practice
20 Manual for the Forensic Handwriting Examination, Edition 04 of September 2022.

21 Now, this is a manual published by an organisation with the acronym ENFSI, which
22 stands for European Network of Forensic Sciences Institutes.

23 Ms Marsh, are you familiar with this best practice manual?

24 A. [10:48:03] No, I'm not.

25 Q. [10:48:04] Have you heard of this best practice manual, at least?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 A. [10:48:11] No, I haven't.
- 2 Q. [10:48:14] Now, there's another document that I'd like to show you now, and
3 that's at tab 8 of the Prosecution list, DAR-OTP-00005127.
4 If we could have that on the screen, please.
5 We see here, it's a report called the Forensic Handwriting Examination and Human
6 Factors, and it's a report of the Expert Working Group for Human Factors in
7 Handwriting Examination, and it was published in 2020.
8 Are you familiar with this report?
- 9 A. [10:48:56] No, I'm not.
- 10 Q. [10:48:59] Have you heard of this report?
- 11 A. [10:49:02] No.
- 12 Q. [10:49:04] We can leave that for now and I'd like to move on to a new topic, and
13 that is the topic of the sample of known signatures that you had available to you in
14 this examination. First, a little bit of theory. You've confirmed already that nobody
15 writes their signature in exactly the same way every time; correct?
- 16 A. [10:49:38] That's correct, yes.
- 17 Q. [10:49:41] And you've explained this term of natural variation which is the
18 differences between signatures each time a person writes them?
- 19 A. [10:49:54] Yes.
- 20 Q. [10:49:57] And we also understand that in order for you to establish this range
21 of natural variation, you need to have a decent sample of known signatures?
- 22 A. [10:50:08] Ideally, yes.
- 23 Q. [10:50:11] We also know from your evidence-in-chief that in this case, you had
24 two normal course of business signatures from 2020; correct?
- 25 A. [10:50:22] That's correct, yes.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Q. [10:50:23] And the requested specimen taken from the accused in 2023; correct?

2 A. [10:50:29] Yes.

3 Q. [10:50:31] And you've acknowledged this as a limitation in your

4 evidence-in-chief today, and I'd like to just take you to the part of your report where

5 you also acknowledge this as a limitation. It's tab 1 of the Defence list. If we could

6 have on the screen Ms Marsh's report and if we could please go to page 4. You say:

7 "This combination of only two signatures written in the normal course of business

8 and signatures written specifically for the purpose of a handwriting comparison is a

9 very poor sample for comparison purposes and will not show the full range of natural

10 variation that can be found in the signature of Abd-Al-Rahman."

11 Today in your evidence you describe this sample as very, very limited; correct?

12 A. [10:51:42] That's correct, yes.

13 Q. [10:51:45] You gave some further information about this range of natural

14 variation in the signature of the accused in an email that you sent to the Defence, and

15 I'd just like to have a quick look at that email. That's at tab 1 of the Prosecution list,

16 ERN DAR-OTP-00005129. We have prepared a redacted version of this, such that it

17 could be broadcast publicly. So if that's available, I'd ask that that be used.

18 PRESIDING JUDGE KORNER: [10:52:36] Yes.

19 MS WHITFORD: [10:52:45]

20 Q. [10:52:46] Now, this is a chain of emails that we received from the Defence team.

21 It's emails between you and members of the Defence. I'd like to move forward, if we

22 can, to page 6 of this document. We see there, if we go to page 6, we can see at the

23 bottom of the screen now an email from 22 August 2023, and what I'd like to look at is

24 a part of that email that's actually on the next page, if we could please scroll down

25 further. That's fine, thank you.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 There's a long paragraph there that begins:

2 "The original questioned signature ..."

3 But I'd just like to focus on one small part of that paragraph. You say this:

4 "However, one only has to look at the reference signature on the ICC document
5 compared to the three page sample to see how different they are and your client no
6 doubt has a number of other variations in his signature over a period of time."

7 Do you recall writing that in that email?

8 A. [10:54:35] Yes, I wrote it.

9 Q. [10:54:38] And, in fact, that's consistent with what you've said in the courtroom
10 today when you explained that there were quite some differences between the normal
11 course of business signature of Mr Abd-Al-Rahman that you had, compared with the
12 reference signatures that were taken from him. Do I understand well?

13 A. [10:54:57] That's correct, and I believe in the report it also says that the sample
14 won't reflect his full range of natural variation?

15 Q. [10:55:09] Indeed. And you're highlighting here in this email that no doubt he
16 has a number of other variations in his signature; correct?

17 A. [10:55:20] Yes.

18 Q. [10:55:22] While we are on the topic of the range of natural variation in
19 handwriting, you explained in your evidence-in-chief that the first comparison that
20 you made was between the two questioned documents; correct?

21 A. [10:55:36] That's correct, yes.

22 Q. [10:55:38] And am I right that when you're comparing those two documents,
23 you are not yet taking into account the reference samples?

24 A. [10:55:47] That's correct, yes. Just one on one.

25 Q. [10:55:49] Just one on one. And it follows, then, that this is somewhat a

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 limitation on that examination, that you don't have the range of natural variation that
2 might be established by those reference samples; that's correct?

3 A. [10:56:07] They weren't reference samples; they were given to me as questioned
4 signatures. A range of variation is something you want when you have a reference
5 sample from somebody. When you're looking at two questioned signatures, the
6 question was are they written by the same person or not.

7 In those circumstances, you're never going to have the luxury of a decent sample of
8 each and establish a range of natural variation.

9 Q. [10:56:48] So I'm correct that when you're comparing the signatures one on one,
10 you're not taking into account the range of natural variation?

11 A. [10:56:55] Just simply looking at what's in front.

12 Q. [10:56:57] That's understood, thank you, Ms Marsh.

13 MS WHITFORD: [10:57:03] Your Honour, I'm moving on to a new topic. It might
14 be a --

15 PRESIDING JUDGE KORNER: [10:57:07] Yes.

16 THE INTERPRETER: [10:57:11] Microphone, please.

17 PRESIDING JUDGE KORNER: [10:57:15] Ms Marsh, we'll have the first break now
18 and we'll sit again, please, at 11.30.

19 I don't think there's any doubt, is there, Ms Whitford, she'll be completed by
20 lunchtime?

21 MS WHITFORD: [10:57:28] Yes, I intend to complete.

22 PRESIDING JUDGE KORNER: [10:57:30] Yes, thank you.

23 THE COURT USHER: [10:57:32] All rise.

24 (Recess taken at 10.57 a.m.)

25 (Upon resuming in open session at 11.34 a.m.)

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 THE COURT USHER: [11:34:25] All rise.
- 2 Please be seated.
- 3 MS WHITFORD: [11:34:56]
- 4 Q. [11:34:57] Now, Ms Marsh, we've talked about the sample of known signatures,
5 and I'd like to move now to the questioned signatures.
- 6 Now, you're aware that on the Prosecution's case those questioned signatures date
7 from 2003 and 2006 respectively; correct?
- 8 A. [11:35:20] I believe one of the documents, the date is possibly disputed, but I'm
9 aware of those dates, yes.
- 10 PRESIDING JUDGE KORNER: [11:35:32] So that's the passport at 2003 and the
11 interview signature at 2006.
- 12 MS WHITFORD: [11:35:37] That's correct, your Honour.
- 13 Q. [11:35:39] And in terms of the date that's possibly disputed you're referring to
14 the November 2006, I believe, based on your report?
- 15 A. [11:35:48] Yes, that's right.
- 16 Q. [11:35:49] Okay. So we're talking about, really, a very long time here between
17 the questioned and the known signatures, as much as 20 years; is that correct?
- 18 A. [11:35:58] Certainly for one of them, yes.
- 19 Q. [11:36:02] And you already acknowledge this as a limitation in your
20 evidence-in-chief and also in your report, and I'd like to have a look at what you say
21 in your report about that.
- 22 So if we could have that on the screen, please. It's tab 1 of the Defence list.
- 23 If we could go to page 6, and it's the top of the page. Yes.
- 24 And you say this:
- 25 "When comparing signatures, ideally one should compare known signatures that are

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 reasonably contemporaneous with the questioned signatures as a number of factors
2 can affect the person's handwriting over time."

3 Now, it's true to say that one factor that could affect someone's handwriting changing
4 is their own decision to modify their style; is that correct?

5 A. [11:37:10] Yes, that's one of many.

6 Q. [11:37:14] And you also in your evidence-in-chief confirm some other factors.
7 You already told us that injury can affect a person's handwriting, correct?

8 A. [11:37:26] That's correct, yes.

9 Q. [11:37:29] I'm just trying to leave some pauses for the interpreters.
10 You told us also that illness can affect handwriting?

11 A. [11:37:40] That's correct.

12 Q. [11:37:44] You mentioned drugs, but alcohol is also another possible factor?

13 A. [11:37:49] Yes. Drugs can be prescription or nonprescription, obviously.

14 Q. [11:37:56] So medication --

15 A. [11:37:57] Yeah.

16 Q. [11:37:57] -- is another factor.

17 Stress or nervousness could affect handwriting?

18 A. [11:38:06] Yes.

19 Q. [11:38:09] Tiredness or fatigue?

20 A. [11:38:13] Yes.

21 Q. [11:38:14] Age and infirmity could affect handwriting?

22 A. [11:38:16] Yes.

23 Q. [11:38:18] And if I can give an example, if a person was in their 50s when they
24 wrote the questioned signatures but in their 70s when they wrote the known
25 signatures, this difference in age could play a role in any change in appearance to the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 handwriting, correct?

2 A. [11:38:41] It certainly could, but the same would apply with a 20-year span
3 regardless, you know, whatever the age difference.

4 Q. [11:38:53] Now, if someone specifically had an injury to their writing hand or
5 arm, I take it that this might affect their handwriting?

6 A. [11:39:05] Yes, certainly it could easily affect handwriting, but with a lot of
7 factors that affect handwriting, there can be classic indications of it. So with an
8 injury to the writing hand, one might expect a difference in fluency, not necessarily
9 major differences in overall construction, but just poor fluency.

10 Q. [11:39:43] Now, I've, of course, studied your report and the correspondence
11 between you and the Defence, and I think I'm right to say that you haven't received
12 any information from the Defence regarding any specific injury that the accused
13 might have sustained in this 20-year period; is that right?

14 A. [11:40:01] That's correct, yes.

15 MR EDWARDS: [11:40:08] Your Honour, before a completely wrong piste is taken,
16 there is no evidence of an injury occurring to Mr Abd-Al-Rahman specifically in this
17 20-year period.

18 PRESIDING JUDGE KORNER: [11:40:23] (Microphone not activated)

19 I thought there was some evidence that at some stage during the events that we're
20 concerned -- no, it was a later stage, wasn't it, that he had an injury? Wasn't he shot
21 or something at some stage?

22 MR EDWARDS: [11:40:40] There's evidence that Ali Kushayb was shot at some
23 point.

24 PRESIDING JUDGE KORNER: [11:40:42] Sorry. Yes.

25 MR EDWARDS: [11:40:44] There is no evidence that Mr Abd-Al-Rahman received

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 any injury to his arm or hand in the 20-year period between 2003 and 2023.
- 2 PRESIDING JUDGE KORNER: [11:40:57] Yeah -- no, I mean -- there is -- yes.
- 3 Ms Whitford, that's -- that's right, that whoever Ali Kushayb is, there is evidence that
- 4 he had an injury. The question then goes back to whether it's the same man.
- 5 MS WHITFORD: [11:41:10] Indeed, your Honour, and that's a matter that my friend
- 6 can take up in submissions at the appropriate time.
- 7 PRESIDING JUDGE KORNER: [11:41:18] All right.
- 8 MR NICHOLLS: [11:41:20] (Microphone not activated)
- 9 PRESIDING JUDGE KORNER: [11:41:21] No. No, let's get on. Let's go on,
- 10 Ms Whitford.
- 11 And, Mr Edwards, no. Yes, you made the point.
- 12 MR EDWARDS: [11:41:23] No, no, no. All I wanted -- I have made my -- I just
- 13 don't want the witness to be led to believe that this is a matter that is not in dispute
- 14 between the parties.
- 15 PRESIDING JUDGE KORNER: [11:41:33] Yes, all right.
- 16 MR NICHOLLS: [11:41:40] (Microphone not activated) Okay.
- 17 PRESIDING JUDGE KORNER: [11:41:42] No, no, Mr Nicholls.
- 18 MS WHITFORD: [11:41:45]
- 19 Q. [11:41:46] Ms Marsh, there are other factors that can affect handwriting.
- 20 Another one is writing position; am I right?
- 21 A. [11:41:54] That's correct, unnatural writing position.
- 22 Q. [11:41:59] So if I can take an example, if someone is standing up and writing
- 23 while leaning on the hood of car, that might affect the handwriting compared to
- 24 sitting comfortably at a desk; is that fair?
- 25 A. [11:42:10] It might do, not necessarily has to; but, yes, it might do.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Q. [11:42:19] Another factor that can affect is the writing surface. So, for example,
2 a rough or an uneven surface compared with a smooth surface?

3 A. [11:42:32] Yes. A gain, one might expect if it's a rough surface, a lack of fluency
4 in the writing as opposed to a very different change in method of construction.

5 Q. [11:42:50] Another possible factor is the visibility and lighting conditions at the
6 time that the handwriting is made?

7 A. [11:43:01] Possibly.

8 Q. [11:43:04] And then we have motion, so if I can take an example, if somebody is
9 writing in a moving vehicle, it could affect the appearance of the handwriting?

10 A. [11:43:15] Yes.

11 Q. [11:43:22] Now, the evidence in this case is that the laissez-passer document that
12 you examined from 2003 was written in the field in the context of a military operation.
13 I take it that that's not information that you received when -- before you conducted
14 your examination?

15 A. [11:43:42] No, it's not.

16 MR EDWARDS: [11:43:48] My learned friend will place on the record where that
17 evidence comes from I hope.

18 PRESIDING JUDGE KORNER: [11:43:54] I'm afraid I was going to -- I don't recall
19 that evidence either, Ms Whitford, so I was going to ask if you'd just remind us where
20 that comes from.

21 MS WHITFORD: [11:44:01] Yes, certainly, your Honour. It was from the witness
22 who provided the document, which was Witness P-922, and the cite is in his
23 statement which was tendered into evidence, DAR-OTP-0222-0312 at page 0319,
24 paragraphs 27 to 28.

25 PRESIDING JUDGE KORNER: [11:44:19] Right. Thank you.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 MS WHITFORD: [11:44:25]

2 Q. [11:44:25] Ms Marsh, do you know whether the accused is left or right-handed?

3 A. [11:44:30] No. I don't believe I was told that. I might have been, but I don't
4 recall.

5 MS WHITFORD: [11:44:37] Now, Madam President, this is a point I wasn't entirely
6 sure whether it would be in dispute or not, and whether my learned friend might be
7 willing to accept whether the accused is left or right-handed?

8 MR EDWARDS: [11:44:53] Can I just turn my back or a moment. I'm at a huge
9 disadvantage because today of all days he's not here.

10 (Counsel confers)

11 MR EDWARDS: [11:45:31] Your Honour, we always try to be as cooperative as we
12 can be, but we are at quite a disadvantage, so we don't feel that we're in a position to
13 make that concession. If there's proof, and I think I know what my learned friend is
14 going to bring up as proof, but the circumstances being what they are, I just can't
15 make that concession right now. I'm sorry.

16 PRESIDING JUDGE KORNER: [11:46:00] All right. Well, Ms Whitford, you can
17 put it to the witness, whatever you say, and then at a later stage I'm sure it could be
18 agreed.

19 MR NICHOLLS: [11:46:12] Can I just speak to my friend for one moment, because it
20 may move this ahead?

21 PRESIDING JUDGE KORNER: [11:46:19] Okay.

22 (Counsel confers)

23 MR EDWARDS: [11:46:45] Your Honour, there's...

24 PRESIDING JUDGE KORNER: [11:46:53] Sorry. Yes.

25 MR EDWARDS: [11:46:54] There's video evidence, if you like, from these

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 proceedings of Mr Abd-Al-Rahman writing with his right hand.

2 MR NICHOLLS: [11:47:05] Sorry to -- we won't play the video we agree with the
3 video of him writing with his right hand.

4 MS WHITFORD: [11:47:12] I'm grateful to my colleagues for that stipulation.
5 Thank you.

6 Q. [11:47:17] Then, Ms Marsh, what I'll do now is show you a photograph, and
7 that's at tab 21 of the Prosecution list and the ERN is DAR-OTP-0221-1457.
8 Now, Ms Marsh, it's not disputed in this case that this is a photograph of the accused.
9 It was taken on 14 December 2021. Do you see inside the red box there what appears
10 to be a long scar on the inside of his wrist?

11 A. [11:48:00] Yes, I do.

12 Q. [11:48:04] And I'll show you another photograph now, it's at tab 22 of the
13 Prosecution list, DAR-OTP-0221-1458.

14 And this is another photograph of the accused taken on that same occasion. Do you
15 see inside the red box there what appears to be quite a large scar on the inside of his
16 right arm running through the elbow?

17 A. [11:48:51] Yes, I do.

18 Q. [11:48:54] And I take it that you have no information whatsoever about how and
19 when the accused might have sustained injuries resulting in those scars?

20 A. [11:49:08] I have no information as to how or when he resulted -- the injuries
21 were made. But I also have no medical information as to whether or not they would
22 actually affect the movement of the fingers and handwriting.

23 Q. [11:49:27] That's well understood. Thank you, Ms Marsh.

24 We're finished with that item now. It can be removed. Thank you.

25 Moving to another topic. According to page 2 of the report and your testimony

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 today, all of the documents that you examined in this case were copies, correct?

2 A. [11:49:50] That's correct.

3 Q. [11:49:54] And you've very fairly acknowledged that as a limitation in your
4 evidence today and you also acknowledge it in your report. And I'd like to have a
5 look at what you say in your report about that.

6 If we could have that on the screen, please. And if we could go to page 3, please.

7 Here you say:

8 "I have taken the copied documents to be true copies of their originals. However,
9 some of the detail of letter construction will not be as clear on a copied document as it
10 is on the original document and this has limited my examination to a certain extent."
11 You recall writing that in your report?

12 A. [11:50:59] I did write that and perhaps I can explain that a bit more.

13 There are a lot of features that can be masked in the copying process, so the things we
14 might not be able to see are -- evidence of tracing, so indentation in the paper,
15 remnants of pencil lines. You can't necessarily see unnatural pen lifts where
16 somebody has attempted to copy, lifted the pen, had a look, come back.

17 Now, these features are much more important when questioned and known
18 signatures look very similar. We have to look further into the detail. In this case,
19 the differences are very apparent even from examination of a copied document.
20 They're not going to disappear by seeing the original document. So, yes, there are
21 limitations, but they don't make a difference to the conclusion in this case.

22 PRESIDING JUDGE KORNER: [11:52:16] Just to be clear, that's between the two
23 questioned signatures, the differences you're talking about the two questioned
24 signatures.

25 THE WITNESS: [11:52:25](Interpretation) And the differences between the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 questioned and the reference. If they're visible to the naked eye on a copy, they're
2 never going to go away.

3 MS WHITFORD: [11:52:36]

4 Q. [11:52:38] We'll come to that in a little bit more detail in a moment, but thank
5 you for that clarification.

6 And you actually gave a similar explanation in your presentation in 2005 to the
7 medico-legal society, and I'd like to have a look at that.

8 That is on our list at tab 4. And the ERN for the record is DAR-OTP-00005130. If
9 we could skip forward, please, to page 10. And if we could zoom in on the bottom
10 right-hand part of the document.

11 And here you say:

12 "The best evidence always comes from an original document and photocopies mask
13 certain features."

14 And it's a lengthy passage, but I think it's useful so I will read it all.

15 You say:

16 "So the detail I would be looking for an "O", unless one has the benefit of a joining
17 stroke to the next letter which indicates the direction will not be visible on a copy.

18 For example if the signature has been written in ballpoint pen striations may appear
19 in the ink line, and it is those striations on the curve that tell us the direction. You

20 don't get that detail on a photocopy. You also lose on the photocopy evidence of

21 tracing and copying; you can't see the indentations, you can't see the pencil lines. So

22 there is an awful lot of information we just can't pick up on a photocopy. So,

23 whenever you are examining a photocopy, particularly small amounts of writing, you
24 always have to be very cautious."

25 I take it that's still your position today, what you said in 2005?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [11:54:45] That is still the position, yes.

2 Q. [11:54:52] So I understand from that, for best evidence you should use the
3 original whenever possible?

4 A. [11:54:59] Absolutely.

5 Q. [11:55:03] And if you only have access to a copy, then the quality of the copy
6 does matter?

7 A. [11:55:11] Yes. But I come back to what I said earlier, it's more important when
8 the reference and questioned are very similar. If the difference is apparent even on a
9 poor copy, that's never going to go away by seeing the original document.

10 Q. [11:55:36] Is it also fair to say that each time you copy a document, it tends to
11 lose quality, that's something that you need to be aware of; is that right?

12 A. [11:55:46] Yes, it can lose copy. It can also change in size very slightly by a
13 large percentage if it's set accordingly. But, certainly, even if you think you have a
14 life-size copy, there can be a small difference in size.

15 Q. [11:56:06] And, equally, a black and white copy could lose some features or
16 detail that you might be able to see in a colour copy; is that fair to say?

17 A. [11:56:19] Possibly, but not -- not necessarily always.

18 Q. [11:56:32] So following all of that logic, when you can, you like to use the best
19 quality copy that's available?

20 A. [11:56:40] Definitely, yes.

21 Q. [11:56:44] It's also fair to say that sometimes the quality of the document that
22 you have will be so poor that no useful comparison can be made; is that right?

23 A. [11:56:57] Yes, if you really can't see very much of the detail. That's correct.

24 Q. [11:57:11] I'd like to apply those ideas to one example from your report and
25 that's the laissez-passer document. So if we could please have on the screen

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Ms Marsh's report and if we could go, please, to page 12.

2 Now, in your report at page 5 - and I'll just read it while we leave this document on
3 the screen - you say:

4 "The exact method of construction is not clear due to parts of the signature appearing
5 faint on the copy document examined."

6 Now, if we could just zoom into the signature at the bottom there, I think we can see
7 now what you're talking about. Parts of the signature appear faint on this copy; is
8 that fair?

9 A. [11:58:17] That's correct, yes.

10 Q. [11:58:20] And in your evidence-in-chief you said that the copies that you
11 received, some of them were not particularly good quality copies. I think we can
12 agree that this is one of the poor quality ones?

13 A. [11:58:34] That's correct, yes.

14 Q. [11:58:39] Now, the Prosecution has the copy of this document that was received
15 directly from the witness. I take it that you weren't aware that that copy was
16 available to examine?

17 A. [11:58:55] No.

18 Q. [11:59:00] What I'd like to do now is to put on the screen a version of that copy
19 that's a higher quality scan and that's the item at tab 20 of our list. Sorry, I'll put the
20 ERN on the record. It's DAR-OTP-00006690. And before we take a closer look, I'd
21 just like to remind you of what you said in your evidence this morning before this
22 signature.

23 This is at page 22 of the transcript at lines 17 to 18, you were describing the signatures
24 and you say: "It's made up of two parts". Do you recall saying that?

25 A. [12:00:06] Yes.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Q. [12:00:07] If we could now zoom in as much as possible on the signature in this
2 version. And even a little more, if we can.

3 PRESIDING JUDGE KORNER: [12:00:25] Who has written on this? This is someone
4 in the OTP, is it?

5 MS WHITFORD: [12:00:30] Yes.

6 Q. [12:00:36] Now, Ms Marsh, in this version of the document with this scan
7 quality, you would agree that we can in fact see that the line extending from what you
8 described as a upper case B actually connects to the long stroke coming down
9 through the signature; that's fair to say?

10 A. [12:01:04] Yes, it certainly seems to follow that line with a faint, faint mark. It
11 does, yes. It's not -- it's not a clear-cut join, but yes, it certainly could do.

12 Q. [12:01:18] And, Ms Marsh, you didn't have the benefit of this resolution scan.
13 In fact, in your evidence you told us that you used a handheld magnifying glass to
14 examine the copy that you had; that's correct?

15 A. [12:01:39] That's correct, yes.

16 Q. [12:01:43] If we can take that from the screen now and I'd like to show you again
17 the email that you sent to the Defence. It's at tab 1 of the Prosecution list. And this
18 time if we could go to page -- we're already -- no, sorry, just up to page 6, please.

19 Okay, and here you're talking about that laissez-passer signature in this email to the
20 Defence and you say:

21 "Is it believed that everything within the circle is one signature? The lefthand side
22 looks like quite an angular forward slanting B and nothing like that is found in any of
23 the other signatures examined."

24 And then the Defence team is replying to you in red:

25 "The evidence that is before the Court is that the whole thing is a signature. The

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 circle was drawn by a witness, that witness identified the whole thing as being the
2 signature".

3 Now, it's fair to say that when you received that information from the Defence, you
4 conducted your examination on the basis that everything inside the circle was the
5 signature, correct?

6 A. [12:03:10] That's correct, yes.

7 Q. [12:03:13] As for the November 2006 questioned document, this is a document
8 that the Prosecution also has in its vault, the copy that was received directly from the
9 source. I take it that you were not aware that that version was available to examine;
10 is that right?

11 A. [12:03:47] That's correct, yes. But this signature does look -- it doesn't have the
12 faded parts to it that annex B has. So they're quite strong lines. There may
13 obviously be additional parts to it, but there's no particular reason, looking at annex A,
14 to think that that's not a complete signature other than possibly some light feathering
15 or tailing of lines as they come to an end.

16 Q. [12:04:38] If we could just scroll down in the email that's still on the screen,
17 please, to page 7 and in the paragraph that begins "One other comment", you say:
18 "One other comment I would make is that I believe the other day you commented on,
19 with the exception of the tail to the bottom right on the original questioned signature,
20 there is no evidence of heavy and light pen pressure illustrated by darker and lighter
21 ink lines or tailing off of other pen strokes in the signature."

22 I think that's what you were just mentioning now, this observation that you made?

23 A. [12:05:29] Yes, that's correct.

24 Q. [12:05:32] If we could have on screen, please, item 19 on the Prosecution list.
25 That's DAR-OTP-00006688. And if we could zoom on to the signature as close as we

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 possibly can. The signature is the -- it's there, yeah. If we could zoom even further,
2 really as far as we can without losing resolution.

3 Now, Ms Marsh, as I said, this is a high resolution scan using the copy from the
4 Prosecution's vault. So this is not a version of the document that you had the benefit
5 of, but would you agree with me that in this version it is possible to see some
6 variation in pen pressure in this signature, correct?

7 A. [12:07:02] Yes, the bit at the bottom that curls round to the right shows the
8 classic feathering. It narrows to a tip. Interestingly, the horizontal strokes are
9 written quite bold, heavy lines. They don't show that narrowing to a tip. They stop
10 abruptly. But there is a thinning of the line certainly on the horizontal strokes, the
11 line is fatter on the right and thinner on the left. But stops with a splodge, which is
12 interesting. Or maybe it doesn't, maybe it starts with a splodge, depending on
13 whether it's left to right or right to left.

14 Q. [12:08:01] It's fair to say you're now able to make out some details on this copy
15 that you weren't able to see on the copy you had?

16 A. [12:08:08] Yes, it's a bit darker.

17 Q. [12:08:12] Just very briefly, in relation to the known signatures starting with the
18 normal course of business signatures that you received, the Defence team actually
19 offered to make available to you whatever copy they had, whether it be the original or
20 a better quality copy. I take it that you never took them up on that offer?

21 A. [12:08:42] No, it didn't make any difference to the findings in this case.

22 Q. [12:08:51] We can remove the item from the screen, sorry, thank you.

23 And in terms of the sample that was collected from the accused himself, of course the
24 Defence team took that sample, correct?

25 A. [12:09:11] I assume so.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Q. [12:09:14] So the assumption is that the Defence team have the original. I take
2 it that you didn't ask to see the original of that document?

3 A. [12:09:22] No, I didn't.

4 Q. [12:09:29] Okay. Thank you very much for all those clarifications, Ms Marsh.
5 I'd like to move to a new topic now and that's this issue of the conclusion scale.

6 A. [12:09:41] All right.

7 Q. [12:09:42] You told us that different experts use different conclusion scales to
8 present their results; that's right?

9 A. [12:09:52] That's correct, yes.

10 Q. [12:09:54] I'd like to show you a page of the expert working group report that
11 we saw at the beginning of my examination and that's the document at tab 8, it's
12 DAR-OTP-00005127. And if we could go forward to page 104, please. And if we
13 could enlarge it a little so that we can hopefully read it.

14 Now, what we have here is a little table with some of the scales that are used by
15 different forensic handwriting experts around the world. And if we look at the
16 legend we see C, which is just off the page, with column C, this is the scale used by
17 the FBI; E is the scale used by the European Network of Forensic Handwriting
18 Experts; and F is the scale used by the Scientific Working Group for Forensic
19 Document Examination.

20 And what we see is similar about all of them is that they all have "inconclusive" in the
21 middle, correct?

22 A. [12:11:33] They do.

23 Q. [12:11:36] And then they have an equal number of levels on either side, correct?

24 A. [12:11:43] Yes.

25 Q. [12:11:45] And we have the propositions on the top level for "did write" and the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 propositions for "did not write" on the bottom level, correct?

2 A. [12:11:56] Correct, yes.

3 Q. [12:11:59] Now, we asked you for a copy of your conclusion scale so we could
4 see how it compared, and we have that in an email from you, and I'd like to have a
5 look at your conclusion scale. That's in tab 2 of the Prosecution list and the ERN is
6 DAR-OTP-00006132, and we've already provided a redacted version. Yeah, thank
7 you.

8 If we could scroll down, please, to page 2. At the top of the page we see your
9 conclusion scale that you very helpfully explained to us earlier today. It's just -- if
10 you could scroll slightly up. It's just slightly cut off. Yes, thank you. Yeah.
11 You explained earlier today this is the original scale that you were trained within the
12 1980s correct?

13 A. [12:13:03] That's correct, yes.

14 Q. [12:13:04] And I'm right to say that the big difference between this scale and the
15 scales that we just saw is that you only have the one point on the negative side which
16 is no evidence?

17 A. [12:13:18] Yes.

18 Q. [12:13:20] And again, you gave a very clear explanation of this in the
19 presentation that you gave in 2005, and I think it accords with the evidence that you
20 also gave today, it's at page 7 and we don't need to open the document now, but I'll
21 just read to you what you said.

22 You said:

23 "On the negative side, I don't see any point of different degrees of negativity. If there
24 is no evidence, there is no evidence, and that is what I say. I don't say 'No evidence
25 and unlikely, no evidence and very unlikely, and no evidence; I don't think he did it',

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 as some experts will, but that is just personal preference ... I like to keep it ... simple..."

2 And that's still your approach --

3 A. [12:14:15] Yes, it is.

4 Q. [12:14:16] -- today I take it?

5 A. [12:14:17] Yes.

6 Q. [12:14:20] And, finally, you also explain this no evidence conclusion in an email
7 that you sent to the Defence, and it's the email at tab 1. If we could have that back.

8 And we're already on the correct page.

9 And, again, we're looking at that very long paragraph. It's a little long, but I think
10 it's important for our understanding, and I'll -- I will read most of it.

11 So you say this:

12 "On the basis of the very limited reference sample it is not possible to link the two
13 questioned signatures as having been written by the same person as the reference
14 signatures, or the two questioned signatures as having been written by the same
15 person."

16 And then this part that we heard before:

17 "However, one only has to look at the reference signature on the ICC document
18 compared to it the three page document to see how different they are and your client
19 no doubt has a number of other variations in his signature over a period of time.
20 Consequently, the fact the questioned and reference signatures are different and
21 cannot be linked does not mean they were definitely written by different people just
22 that there is no evidence from the sample provided that they were written by the
23 same person."

24 And I think that accords with the evidence that you've already given today; am I
25 right?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 A. [12:16:01] I think so, yes.
- 2 Q. [12:16:14] Okay. Moving on to a new topic.
- 3 I assume that you've never met the accused in this case; is that right?
- 4 A. [12:16:25] Never met him, no.
- 5 Q. [12:16:27] And we know that you weren't present when the specimen was taken
- 6 from him; correct?
- 7 A. [12:16:33] Correct.
- 8 Q. [12:16:34] But we do know that you gave the Defence team some advice or
- 9 instructions about how to collect the specimen?
- 10 A. [12:16:42] Yes, I did.
- 11 Q. [12:16:45] And in your evidence this morning — this is at page 28 — the two
- 12 pieces of advice that I picked up on were that he should not have the questioned
- 13 signatures in front of him. That was one.
- 14 A. [12:17:00] Yes.
- 15 Q. [12:17:00] And that there should be a break between each of the three sheets of
- 16 writing?
- 17 A. [12:17:07] Yes.
- 18 Q. [12:17:08] Correct? Okay.
- 19 Now, before we get into some further details, I'd just like to talk more generally about
- 20 requested samples. And at page 4 of your report you acknowledge and you have
- 21 also today acknowledged that signatures written specifically for the purpose of a
- 22 handwriting comparison are far from ideal.
- 23 A. [12:17:39] That's correct, yes.
- 24 Q. [12:17:42] And if I understand well, the reason that they are far from ideal is
- 25 because by their very nature, they don't show the full range of natural variation in a

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 person's handwriting; correct?

2 A. [12:17:57] There's a few reasons. One is that they're all written at one sitting.

3 You can see that even signatures written one after another can vary considerably.

4 But, yes, the fact it's one sitting means that it's not ideal; but also they're never going
5 to be contemporaneous.

6 Q. [12:18:22] And it's correct that another reason is that it's possible that the subject
7 makes an attempt to deliberately disguise their writing, this is a possibility?

8 A. [12:18:36] Yes, that's true and that's one reason we ask that they don't have the
9 questioned signatures in front of them, because I've seen both arguments in the past.

10 When you say -- when we say that the reference and questioned look the same, the
11 argument comes back, "Well, I thought I was supposed to copy it." When you -- the
12 alternative is they will look at and deliberately change what they see in front of them.
13 So it's best that they don't have them at all.

14 Q. [12:19:13] Now, this topic of requested samples is discussed by Mr Hilton in one
15 of those books that you referred us to that was from your training and that is the item
16 at tab 10.

17 If we could please have that on the screen. The ERN is DAR-OTP-00006623.

18 And if we could please go forward to page 15. And if we could just zoom in on the
19 bottom of that left-hand side. Yes.

20 So here Mr Hilton is discussing the issues with request samples and he says:

21 "The conditions under which these standards are prepared make it imperative that
22 certain precautions be observed so that * their comparison value is not impaired:"

23 I take it you'd agree with that proposition?

24 A. [12:20:32] Yes.

25 Q. [12:20:35] If we could scroll down to the next page, we see at the top there he

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 gives seven guidelines for the preparation of specimens. I won't read them all, but to
2 focus on a couple of them.

3 Number 5:

4 "Writing instruments and paper should be similar to those used in preparing the
5 disputed document."

6 And number 6:

7 "The dictation should be interrupted at intervals."

8 I take it you would agree with the guidelines that Mr Hilton sets out in his book?

9 A. [12:21:19] Not entirely. We ask that reference samples are either dictated or
10 they're given a typed version to copy from. So that's one variation.

11 As far as the type of paper is concerned, I don't think the actual -- if he means the
12 substance of the paper, I would dispute that. If he means it should be lined, or not
13 or if the questioned writing is written in boxes, then the reference should be.

14 I would go along with that.

15 Q. [12:22:00] And if we could move forward to page 25, please. And if we could
16 enlarge -- yes, exactly there.

17 And here Mr Hilton is talking the specific issue of request signatures as opposed to
18 request handwriting in general. And he says this:

19 "By far the most troublesome problem with the request writing is obtaining a
20 satisfactory set of signature standards. Since the amounts of the writing is small
21 even when a large number of since are prepared, the effects of nervousness or *
22 deliberate disguised may not be entirely eliminated. * Request signatures, too, have
23 a tendency to be more uniform than signatures written from day to day. For this
24 reason, they fail to show fully how the person usually signs his name."

25 And, again, it's fair to say that that's consistent with what we've been discussing

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 today in relation to request samples?

2 A. [12:23:12] Yes, but I've touched on this earlier. Certain things like deliberate
3 disguise, nervousness, there are signs of those. It's not just it appears naturally.
4 There are telltale signs of a lot of these things. So if somebody has chosen to
5 deliberately alter their handwriting with a view to denying it later, that looks very
6 different to somebody who might have attempted to copy that signature. They all
7 have their indicators.

8 Q. [12:23:52] And I'd like to move a little down in this same page, if we could scroll
9 down to the part that starts, "The most common fault".

10 And here he says:

11 "The most common fault of request signatures is their failure to contain a
12 representative amount of writing variation. Every effort must be made to overcome
13 this deficiency. To achieve this end, each specimen should be written on separate
14 sheet of paper, similar to the questioned document. The shift of writing position
15 accompanying each change of paper tends to introduce slight variations that are not
16 generally encountered in a series of signatures executed on a single sheet. In fact,
17 ten signatures written one after the other on a single sheet often have less value than
18 two or three signatures written on separate occasions."

19 Now, Ms Marsh, you told us this is the book -- one of the books that you trained with
20 in the '80s. So I take it that Mr Hilton is an expert on these matters, you would agree
21 with what he says here?

22 A. [12:25:12] I don't agree with what he says here. Yes, it was a standard textbook
23 at the time and a lot of it is still standard practice. From my perspective, when
24 taking a sample, I want to see natural writing and the best way to get natural writing.
25 If you can imagine somebody sitting down in an interview room or wherever and

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 they're asked to give a writing sample, some people will give you the neat version of
2 their signature. Others might be nervous and you get a little lack of fluency. But
3 the best chance of getting natural writing is to make them so bored with writing their
4 signature they just trot it out time and time again. That's what I want to see.
5 Everybody has their own view.

6 Q. [12:26:10] I'd like to look at another reference now, and that's at tab 9 of the
7 Prosecution list. The ERN is DAR-OTP-00006626. And this is the book by Wilson
8 Harrison, which was also used in your training in the '80s.
9 If we could go, please, to page 259.

10 Okay, and we need the paragraph that begins: "If the questioned signature". Yes.
11 So Mr Harrison says:
12 "If the questioned signature were made on a large sheet of unlined paper, then similar
13 large sheets of unlined paper should be made available, and conversely, if the
14 questioned handwriting were done on lined paper, then similar lined paper should be
15 provided for the request writings."

16 Do you see that there?

17 A. [12:27:31] Yes, I do.

18 Q. [12:27:33] And if we could move forward to page 260. If we can go down to
19 the paragraph that starts:

20 "It is to guard [...]"

21 Now, Mr Harrison here, he starts by talking about the problem of obtaining request
22 signatures all on the same sheet of paper and he says:

23 "It is to guard against this that, once a specimen handwriting has been written, the
24 sheet is placed out of sight before any subsequent specimens are commenced on
25 another sheet of paper."

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Do you see that there?

2 A. [12:28:19] Yes, I do.

3 Q. [12:28:22] Okay, and if we can -- I'm not sure whether it's -- if we can see the
4 paragraph that begins "For an investigator". So, it might be actually at the top of this
5 page.

6 (Counsel confers)

7 MS WHITFORD: [12:29:00] Thank you very much.

8 And he says here:

9 "For an investigator to push a piece of paper under the nose of the intending writer
10 and a ball-point pen into his hand and say "sign here three times" is a stupid and
11 senseless proceeding, and evidential value of the handwriting obtained is usually
12 about equal to the thought which has been given to the matter -- [which is] practically
13 nil [...]"

14 Q. [12:29:29] Now, Ms Marsh, we know that the questioned documents in this case,
15 one was on lined paper and one was on blank paper, correct?

16 A. [12:29:40] That's correct, yes.

17 Q. [12:29:41] Now, according to the advice -- guidance of both of these books that
18 were used in your training in '80s, it would have been better to have some of the
19 sample on lined paper; you would agree?

20 A. [12:29:58] It makes no difference in this case. If I'm looking at handwriting on a
21 cheque, I ask samples to be written on a blank-cheque format. If you're looking at
22 handwriting contained in boxes, that's quite important because a lot of people feel
23 constrained by the size of the box. Others don't, but as you can see here, that
24 signature is written across the line.

25 They have made no attempt to write between the lines. And it also -- whether

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 you've got lines or plain paper, it doesn't affect your actual method of construction,
2 the overall shape and appearance.

3 Q. [12:31:01] Ms Marsh, I just wanted to clarify something you said just now. You
4 say, "As you can see here, that signature is written across the line". Which signature
5 are you referring to?

6 A. [12:31:14] Annex A. Which I believe is the one that's written on lined paper.

7 Q. [12:31:21] And when you say "across the line", do you mean --

8 A. [12:31:25] Sorry, atop and below, they haven't confined it to being on top of the
9 line or between the lines.

10 Q. [12:31:34] Okay. If we could just have back on the screen, the scan at item 19 of
11 the Prosecution list. And if we could zoom in again as we did before on the
12 signature. A little further down, please.

13 You would agree with me that one of those horizontal lines is practically symmetrical
14 with the lined paper, correct?

15 A. [12:32:46] It's parallel to it.

16 Q. [12:32:49] Okay. We can -- we're finished with that document. We can
17 remove it from the screen. Thank you.

18 Ms Marsh, I'd like to move to another topic now. And it's a passage from the
19 European Best Practice Manual, the one that we saw at the beginning of the
20 examination, which is at tab 5 of the Prosecution list.

21 MR EDWARDS: [12:33:20] Your Honour, no objection. It's just that whereas the
22 document that's being brought up now has been identified in terms of the institution
23 or the association that it comes from, the document, Forensic Handwriting
24 Examination in Human Factors, Ms Marsh was asked about it, but I don't think it's on
25 the record where this document comes from. It's just -- at the moment, it's just some

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 experts.

2 MS WHITFORD: [12:33:49] I'm happy to do that, your Honour. It's not the
3 document that I was going to use now, but I can do it immediately after this line of
4 questioning.

5 PRESIDING JUDGE KORNER: [12:33:55] Yes.

6 MS WHITFORD: [12:33:56] So the document we're looking at now is tab 5. If we
7 could please go to page 15. And if we can go to a little bit down in the page, 13.2.
8 Yes, thank you.

9 Q. [12:34:31] And here, this part of the manual is talking about standards for the
10 preparation of written evidence -- written reports, and it says there, "Written reports
11 must be peer reviewed."

12 Now, it's correct that your report in this case was not peer reviewed, correct?

13 A. [12:34:51] That's correct. And whenever working in an official
14 laboratory - certainly, when I was at the Metropolitan Police Forensic Science
15 Laboratory - every case would be checked. Obviously in independent practice, that
16 isn't possible, but I do have the benefit of a very good -- well, actually Dr Chris Davies,
17 one of the authors of -- co-authors of David Ellen's book, he lives very close to me,
18 and if ever I have a difficulty, that's where I go.

19 When I say a difficulty, sometimes there's a difference between degree, you know,
20 you're just not quite sure which way to go.

21 Q. [12:35:37] Then you would agree that, in general, the principle of peer review is
22 to reduce the possibility of error; is that right?

23 A. [12:35:47] That's right, yes.

24 Q. [12:35:48] And you don't mention anywhere in this report that you went to see
25 Mr Davies; so I presume that you didn't on this occasion?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [12:35:56] I did not. The differences are plain to see even for a layperson.

2 Q. [12:36:01] Okay. I'd like to show you again the Human Factors reports that we
3 looked at at the beginning. That's tab 8 of the Prosecution bundle. The ERN ending
4 in 5127.

5 Okay, now, we can see here that this is a document which is the initiative of the
6 National Institute of Standards and Technology, which is part of the US Department
7 of Commerce and the National Institute of Justice.

8 So you see that there on the report? It's in the bottom --

9 A. [12:36:59] Yes, yeah.

10 Q. [12:37:01] -- right-hand corner. Thank you.

11 And if we could go, please, to page -- I don't have a page number on mine. It's the
12 introduction page 9.

13 Sorry, just a moment, your Honour, I'll find the correct page.

14 (Counsel confers)

15 MS WHITFORD: [12:37:40] Perhaps if we could just skip through and I'll identify
16 the right page. I'm sorry, my copy doesn't have useful page numbers.

17 I think it's one more. It's here. Okay. If we could zoom in there, please. Okay.

18 Q. [12:38:08] And all I wanted to highlight on this page is what this expert working
19 group is. So we can see there, it's for, "Human Factors in Handwriting Examination
20 [...] convened in June 2015".

21 And if we scroll down a little, we see that:

22 "The Working Group met eight times over the course of 2-1/2 years and heard
23 presentations from experts in the areas of human factors [...]"

24 And several other relevant fields of expertise in handwriting.

25 And your Honour, I trust that that satisfies my learned friend in terms of the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 provenance of this report.

2 And with that, your Honour, that concludes my examination. I have no further
3 questions.

4 Thank you, Ms Marsh.

5 A. [12:38:56] Thank you.

6 PRESIDING JUDGE KORNER: [12:38:57] Thank you, Ms Whitford.

7 Any re-examination, Mr Edwards?

8 MR EDWARDS: [12:39:02] Yes, there will be some re-examination, but I was waiting
9 for my learned friend to put to the witness anything in her report that they disagreed
10 with. The witness -- the conclusions of Ms Marsh are set out in pages 7 and 8 of her
11 report. No evidence to find that the two questioned signatures are written by the
12 same person, no evidence that Mr Abd-Al-Rahman wrote the questioned signature on
13 the laissez-passer document, and inconclusive regarding whether Abd-Al-Rahman
14 wrote the questioned signature on the November 2006 document.

15 There's a lot of questions around methodology, but at no point has the Prosecution
16 suggested that any of her conclusions are challenged, and if the Prosecution do
17 propose to suggest that any of her conclusions are wrong or challenged in some way,
18 they should be put. Once that's done, I shall re-examine.

19 PRESIDING JUDGE KORNER: [12:40:13] Ms Whitford, do you have a positive case
20 to put?

21 MS WHITFORD: [12:40:22] No, your Honour.

22 PRESIDING JUDGE KORNER: [12:40:24] Does it show -- I mean, the Prosecution
23 case is that - certainly that, I'm assuming - the signature on the interview is his?

24 MS WHITFORD: [12:40:37] Your Honour, our position is that based on all of the
25 limitations in this comparison - and that's what I've sought to highlight today, what

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 those limitations were and the extent of them - that no useful comparison can be
2 made and that these results are not reliable.

3 PRESIDING JUDGE KORNER: [12:41:05] So let me think about this for a moment.
4 The real gravamen of what I think the Defence want is that Ms Marsh's evidence is to
5 the effect is that there is no evidence to suggest that the signature on the
6 laissez-passer and the -- at the end of the interview are made by the same person.
7 And it's inconclusive as to whether the signatures, the reference signatures -- I'm just
8 trying to -- match up to either of the two disputed signatures.
9 Is that right, Ms Marsh? And I can see --

10 THE WITNESS: [12:42:06] No.

11 PRESIDING JUDGE KORNER: [12:42:07] -- you're lifting your hand. Is that -- I
12 just -- as a summary?

13 THE WITNESS: [12:42:11] The signature, annex B, which is the laissez-passer, that's
14 no evidence it's the same as the reference signatures.

15 PRESIDING JUDGE KORNER: [12:42:17] Right.

16 THE WITNESS: [12:42:18] It's just the annex A --

17 PRESIDING JUDGE KORNER: [12:42:19] It's the other one.

18 THE WITNESS: [12:42:19] -- that's inconclusive.

19 PRESIDING JUDGE KORNER: [12:42:24] Right. So -- and your case -- the
20 Prosecution case on this, or based on the evidence we've heard, I suppose, certainly as
21 far as the laissez-passer is concerned, is that it was written by the man who was
22 Ali Kushayb and who the Prosecution say is, in fact, this defendant?

23 MS WHITFORD: [12:42:53] Yes.

24 PRESIDING JUDGE KORNER: [12:42:59] Yes. Well, in that case, you're obliged,
25 aren't you, to put it to her that -- I think the witness -- that you can't -- at least, can't

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 exclude that it was done by the same person. I think that's -- I think that's the way of
2 dealing with it.

3 MS WHITFORD: [12:43:16] I'm happy to do that, your Honour.

4 PRESIDING JUDGE KORNER: [12:43:19] Mr Edwards, you -- I see you raising your
5 eyebrows.

6 MR EDWARDS: [12:43:23] Well --

7 PRESIDING JUDGE KORNER: [12:43:24] I mean, you can't --

8 MR EDWARDS: [12:43:24] -- to be fair, the witness has said that she can't exclude it.

9 PRESIDING JUDGE KORNER: [12:43:28] Yes.

10 MR EDWARDS: [12:43:30] She said that in chief.

11 PRESIDING JUDGE KORNER: [12:43:31] Well, then, I -- but I suppose that's ...

12 MR EDWARDS: [12:43:32] The burden is on the Prosecution, your Honour, isn't it?

13 The burden isn't on the Defence to prove a negative.

14 PRESIDING JUDGE KORNER: [12:43:36] But what's the point (Overlapping
15 speakers)

16 MR EDWARDS: [12:43:37] The burden is on the (Overlapping speakers)

17 PRESIDING JUDGE KORNER: [12:43:38] Yes -- no, no, hang on. What's the point of

18 Ms Whitford putting to her that on evidence she doesn't know anything about, we say,

19 "This is one in the same person." And she says, "Well, I can't exclude it"? Where
20 does that get us?

21 MR EDWARDS: [12:43:49] That doesn't take us anywhere.

22 PRESIDING JUDGE KORNER: [12:43:50] No.

23 MR EDWARDS: [12:43:51] But the point is, if it is the Prosecution's case that

24 Ms Marsh is wrong about her conclusion, wrong about her conclusion, then that must

25 be put. There's obviously no point in --

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [12:44:03] Well, I don't think that you can
2 put it -- because her conclusions are not -- in that sense -- it's "could be wrong", I
3 suppose.

4 MR EDWARDS: [12:44:13] The conclusions are --

5 PRESIDING JUDGE KORNER: [12:44:18] But which conclusion -- when she said she
6 can't exclude various possibilities, which conclusion do you say that the Prosecution
7 must put a positive assertion to that?

8 MR EDWARDS: [12:44:31] The Prosecution, if it -- if it is the Prosecution's case that
9 the two questioned signatures were written by the same person, as it must be their
10 case, and the evidence that we've heard from Ms Marsh is that she finds no evidence
11 that they were written by the same person, then the Prosecution must put that, well,
12 there is evidence and she's wrong in that assertion and there is no evidence.

13 PRESIDING JUDGE KORNER: [12:45:01] Well, no, why must -- no, I don't follow
14 that at all, Mr Edwards. I mean, there is evidence outside the -- but on the basis of
15 the -- of what she has said, why have they got to put that it is made by the same
16 person? She doesn't know one way or another. All she can say is, "In my opinion,
17 these don't look as though they were made by the same" -- no, sorry, "there is no
18 evidence".

19 MR EDWARDS: [12:45:31] Yes.

20 PRESIDING JUDGE KORNER: [12:45:32] But unless she's saying it could never have
21 been written by the same person, in other words, there is no -- I don't see that they're
22 obliged to put a case to her. If she -- if that was her evidence, "There's absolutely no
23 question in my mind, two different people -- I'm a hundred per cent sure, two
24 different people wrote those signatures", well, then the Prosecution would have to
25 put to her that she was mistaken, but I don't --

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 Ms Marsh, is that -- are you going as far as that and saying that it is inconceivable that
2 the same person could have written those two signatures?

3 THE WITNESS: [12:46:15] No, that's not what I'm saying.

4 PRESIDING JUDGE KORNER: [12:46:17] No.

5 THE WITNESS: [12:46:18] And perhaps I can just clarify. No evidence means it's a
6 statement of fact from this handwriting alone, which is all I can consider, there is
7 nothing to link them.

8 PRESIDING JUDGE KORNER: [12:46:29] Yes.

9 THE WITNESS: [12:46:30] But for the reasons I've given, I can't exclude.

10 PRESIDING JUDGE KORNER: [12:46:33] Yes. Well, then Mr Edwards, I'm sorry, I
11 don't -- I don't think there's a requirement for the Prosecution to put anything else.

12 QUESTIONED BY MR EDWARDS:

13 Q. [12:46:42](Microphone not activated) ... a few matters in re-examination then,
14 Ms Marsh, please. Won't detain you for very much longer.

15 In answer to questions in cross-examination, you made a distinction between what
16 you can see of the method of construction of signature, its overall shape and
17 appearance, and you drew a distinction between that and fluency of a signature?

18 A. [12:47:16] They're two different things.

19 Q. [12:47:18] Yes. Can you just explain that to us, please.

20 A. [12:47:21] The method of construction is the number and direction of pen
21 strokes; so as an example, you could write an upper case A, as an arch with a
22 cross-stroke in the middle, two strokes. Or you can write it as three separate strokes,
23 the two sides and the cross-stroke. That's the method of construction. The shape
24 then comes into it as to -- with the arched shape A. Is it a narrow arch? Is it a big
25 arch? Is it sloped? Is it -- lots of different things.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 So the method of construction is the number and nature of the pen strokes, number
2 and direction.

3 Q. [12:48:12] Now, if I understood your evidence from cross-examination, you
4 stated that you would expect -- just tell me if I've got this wrong, you would expect
5 that the effect of an injury might affect fluency?

6 A. [12:48:30] Yes, if somebody's in some discomfort and having physical difficulty
7 in writing, one would expect that to reflect in the nature of the writing and it would
8 lose fluency.

9 Q. [12:48:46] And once again, in terms of injury, what would you expect to see in
10 terms of a change in construction or shape or appearance, overall shape and
11 appearance of the signature?

12 A. [12:49:00] Well, it would obviously depend on the extent of the injury, but
13 certainly for more minor injuries, one would expect the person to attempt to follow
14 their usual signature. So I wouldn't expect them to be adding features that aren't
15 there; or, you know, having a three-word signature when they'd normally have a
16 one-word signature.

17 So you'd be more likely to lose detail. You certainly don't add detail. And the line,
18 the pen flow would be more wobbly and sometimes can become quite bedraggled.

19 Q. [12:49:45] Now, in the reference signatures from 2020 and from 2023, if we could
20 bring up the sheet, please, and have a look at annexes C, D and E. It's going to be
21 brought up, but you've got the hard copy in front of you.

22 Do you see evidence of wobbly lines or bedraggled lines?

23 A. [12:50:19] The two from 2020 are fairly fluent.

24 Q. [12:50:25] Yes.

25 A. [12:50:25] But the reference samples annex E, specifically for the purpose of a

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 comparison, I don't -- if you can go in, perhaps to the top three on the first line again
2 of annex E.

3 Can that be enlarged, you can see it easier?

4 You can see -- you can see on the first one, the lack of fluency in the centre line.

5 It's the middle horizontal line.

6 Q. [12:50:54] Yes.

7 A. [12:50:56] Some of them are showing it in other areas and some are remarkably
8 fluent. So if you go across to the middle one, you can see the -- the curly bit that
9 comes down through the horizontal.

10 Q. [12:51:08] Yes.

11 A. [12:51:08] That's very fluent. But in other areas, there's a lack of fluency. So
12 there does seem to be -- this -- this could be a result of the fact they're samples and the
13 person is nervous when he's written them. It could be the result of any number of
14 things. Or maybe the handwriting has just deteriorated since 2020 --

15 Q. [12:51:33] Yes.

16 A. [12:51:34] -- for some reason.

17 Q. [12:51:34] Thank you. Now, again, looking at annex A and annex B, just to
18 compare those two for a moment. Well, let's zoom in so that we can have them as
19 large as possible on the screen, please. Thank you.

20 Now, you've described -- whether connected or not, you described something that
21 looks a little bit like a slanted upper case B to the left of the signature on annex B.

22 A. [12:52:08] Yes.

23 Q. [12:52:09] Is that a feature that you saw in any other signatures that you were
24 asked to look at, whether questioned or other reference signatures?

25 MS WHITFORD: [12:52:20] Your Honour, I don't see how this is emerging

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 specifically from the -- what I put in cross-examination. This is essential elements of
2 her examination to the extent she didn't describe it in-chief; it's not the time to do it
3 now.

4 MR EDWARDS: [12:52:40] My learned friend specifically asked about the
5 completeness of the signature in annex B, whether it was one -- whether the two parts
6 of the signature were joined or not. I'm just following up on that.

7 MS WHITFORD: [12:53:06] Your Honour, I put that, but I put that on the basis of a
8 copy that actually showed it.

9 But that's not what the question was, I don't believe.

10 PRESIDING JUDGE KORNER: [12:53:22] Sorry, what are you asking?

11 MR EDWARDS: [12:53:24] Okay. Let me put it another way.

12 Can we please bring up the document that Ms Marsh was taken to. I think it's 7 on
13 the Prosecution's list of material. Just bring that up. This is the higher-quality
14 version of the laissez-passer document.

15 No. I've got it as -- I've got it as ...

16 MS WHITFORD: [12:54:22] It's item 20, your Honour.

17 MR EDWARDS: [12:54:24] Item 20, that's --

18 MS WHITFORD: [12:54:25] But might I say that if Mr Edwards is going to ask
19 Ms Marsh to do any kind of examination on a document that she's seen for the first
20 time today, then I would object to that.

21 MR EDWARDS: [12:54:39] I'm not going to. My learned friend can rest assured I'm
22 not going to do that, but she's the one who brought this document up and asked the
23 witness to answer some questions about it, the better quality of the copy. So a bit of
24 latitude, I think, is probably fair.

25 Right, zoom in, please, on the signature. Thank you.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

- 1 Q. [12:54:58] This was shown -- this better quality was shown to you a moment ago
2 and you said that, yes, possibly the top of the slanted B shape looks like it may link up
3 with a downward stroke?
- 4 A. [12:55:20] Yes.
- 5 Q. [12:55:22] Now, does that fact, the fact that those two strokes may, in fact, be one
6 stroke, does that affect your conclusion relating to -- well, in terms of the shape and
7 general construction of this document -- of this signature, does that change your
8 conclusion regarding the signature on this document and the signature on document
9 annex A?
- 10 A. [12:55:53] Firstly, it doesn't actually change the comment that it's two parts
11 because what I described as a two-stroke B, a stem and a zigzag bit --
- 12 Q. [12:56:11] Yes.
- 13 A. [12:56:12] -- if the stem now becomes part of the second part, you're still left
14 with the zigzag bit in isolation.
- 15 Q. [12:56:20] Yes.
- 16 A. [12:56:21] And that exact bit doesn't match anything in the known signatures.
17 So it makes no difference to my conclusion.
- 18 Q. [12:56:27] Thank you. You were also asked about quality of copies that -- or
19 the things that might impact on the quality of a copy of a document that you might be
20 shown. And you were asked about whether as a document is copied and recopied,
21 that might change the size of writing on a given document.
- 22 A. [12:56:56] Yes.
- 23 Q. [12:56:56] Do you remember?
- 24 A. [12:56:57] Yeah.
- 25 Q. [12:56:59] Would copying and recopying of a document impact the size of the

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 writing that you're being asked to analyse by comparison with the surrounding
2 writing?

3 A. [12:57:16] No.

4 Q. [12:57:17] Why do you say that?

5 A. [12:57:19] Unless there's some very obscure form of copying to distort the paper
6 going through, one would expect the whole page to copy to the same level. Either
7 slightly higher -- rule of thumb with the old photocopiers, you could lose one or two
8 per cent on a copy, either gain it or lose it. So with subsequent generation copies,
9 you could distort perhaps 5, 8, 10 per cent, but that would go across the board, the
10 whole page.

11 Q. [12:58:02] You also agreed with the suggestion that the quality of a copy can be
12 so poor that no useful comparison can be made?

13 A. [12:58:13] Yes.

14 Q. [12:58:14] Do you remember being asked that?

15 A. [12:58:17] Yes.

16 Q. [12:58:21] Now, let's just put to one side hypotheses and hypotheticals. In this
17 case, were any of the copies that you were given so poor that no useful comparison
18 could be made?

19 A. [12:58:30] No, for the simple reason that there was enough detail to show that
20 there were differences.

21 Q. [12:58:41] You were asked about sort of best practice in terms of obtaining
22 sample signatures for comparison and in one of the books you were asked to -- that
23 you were taken to, it was suggested that best practice is that once a first sheet is
24 written on and signatures are placed on one sheet and then there's a pause, that that
25 first sheet should be put to one side to be put out of sight?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 A. [12:59:24] Yes.

2 Q. [12:59:25] Did you advise the Defence that that's what should be done when
3 collecting the three sets of signatures from Mr Abd-Al-Rahman?

4 PRESIDING JUDGE KORNER: [12:59:40] (Microphone not activated)

5 THE INTERPRETER: [12:59:43] Microphone, please.

6 PRESIDING JUDGE KORNER: [12:59:44] Whether she advised the Defence or not
7 isn't quite the point, is it?

8 MR EDWARDS: [12:59:50] Your Honours, can I -- just to make the link, because my
9 learned friend has taken the Chamber in some detail through the correspondence
10 between the Defence team and Ms Marsh --

11 PRESIDING JUDGE KORNER: [13:00:10] But, sorry, Ms Marsh doesn't agree with
12 that particular one.

13 MR EDWARDS: [13:00:14] Oh, well --

14 PRESIDING JUDGE KORNER: [13:00:16] I thought. It was one of the-- when she
15 was -- it was pointed out it was in the book.

16 THE WITNESS: [13:00:21] The one I didn't agree with, I believe, was doing one
17 signature, taking it away; another signature, taking it away. I like to see them
18 continuous to get the natural flow.

19 MR EDWARDS: [13:00:34] And I'll show your Honours, because if your Honour's
20 not with me, then I won't ask the question, but the point is could your Honours please
21 turn up page 7 of the document at tab 1 of the Prosecution's bundle.

22 PRESIDING JUDGE KORNER: [13:01:00] Yeah.

23 MR EDWARDS: [13:01:01] Right at the bottom of page 7:

24 "Further to Friday's email, please now find attached.

25 (i) [...] collected this morning in the manner advised ..."

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [13:01:11] All right. Well, yes, all right, you want to
2 clarify what advice she gave.

3 MR EDWARDS: [13:01:17] Yes. Exactly, yes.

4 PRESIDING JUDGE KORNER: [13:01:21] Okay.

5 MR EDWARDS: [13:01:21]

6 Q. [13:01:22] Sorry, do you -- have you got that tab 1 in front of you, the
7 Prosecution -- yes, it will be on the screen.

8 A. [13:01:31] Yes, I have that.

9 Q. [13:01:33] Page 7, please. Right at the bottom, please. Right to the bottom,
10 please.

11 PRESIDING JUDGE KORNER: [13:02:02] I think we're going the wrong way.

12 MR EDWARDS: [13:02:05] Can we just scroll up, please, to the bottom of page 7.
13 Yes, there we are.

14 Q. [13:02:13] Do you see at the bottom of the screen?

15 A. [13:02:17] I do, yes.

16 Q. [13:02:19] So the Defence writes back to you saying here are the three sheets of
17 paper collected this morning in the manner advised.

18 A. [13:02:27] Yes.

19 Q. [13:02:28] I just want to clear. In terms of the -- in terms of the manner advised,
20 what was your advice in terms of what to do with the pieces of paper once 10 or a
21 dozen signatures were taken?

22 A. [13:02:42] After one page is complete, to remove it.

23 Q. [13:02:49] I think -- yes, just one -- yes, just one last matter. In terms of the
24 reference, the 36 reference signatures taken, now, you said that there are sometimes
25 that -- sometimes one can discern indications of deliberate changing of a signature or

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 deliberate disguising of a signature. What are those indications? Can you give us
2 some examples of some indications?

3 A. [13:03:24] Yes. The question is obviously: Is a signature a copy by someone
4 familiar with it or somebody deliberately altering their signature to deny it later.

5 Q. [13:03:33] Yes.

6 A. [13:03:34] When they're very similar.

7 Q. [13:03:36] Yes.

8 A. [13:03:37] Now, When somebody attempts to copy a signature, their
9 concentration is at the beginning, so they try very hard to reproduce pictorially what
10 they say. But as they get towards the end of the signature, they may lose
11 concentration and lose accuracy. And when people copy in the attempt to reproduce
12 something, they can be quite slow and deliberate in their pen strokes. You don't get
13 the fluency that you get with natural handwriting. Now, when somebody
14 deliberately alters their signature to deny it later, they want everybody to notice the
15 differences so they start with major differences at the beginning, it might change the
16 slope or the way they do the first two initials, something like that. But because
17 writing a signature can be very automatic for people, particularly if they do it
18 regularly, they tend to revert to their natural signature towards the end. So you've
19 got the two opposites as to where the accuracy is.

20 Q. [13:04:50] And looking at the 36 reference signatures that you were sent, did you
21 identify any indications of deliberate attempts to disguise the signature?

22 A. [13:05:02] No, not at all.

23 MR EDWARDS: [13:05:04] Thank you very much. Those are my questions, unless
24 your Honours have any questions.

25 (Trial Chamber confers)

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [13:05:12] (Microphone not activated)

2 None of us have any questions, thank you very much, Mr Edwards.

3 Ms Marsh, thank you very much indeed for coming and your evidence is now
4 completed.

5 THE WITNESS: [13:05:32] Thank you.

6 PRESIDING JUDGE KORNER: [13:05:33] Have a good weekend.

7 THE WITNESS: [13:05:35] Thanks very much.

8 MR EDWARDS: [13:05:38] Your Honour, I know that Ms Marsh was anxious to try
9 and return to the UK as soon as she could. She has a flight back booked for
10 tomorrow, but I wonder if - I'm just saying it now to put the Registry on notice - if
11 some attempt could be made to bring her flight forward so that she could leave today.
12 I'm sure that would be appreciated.

13 PRESIDING JUDGE KORNER: [13:05:59] Right. Well, I'm sure the Registry hears
14 what you said.

15 Thank you very much, Ms Marsh.

16 THE WITNESS: [13:06:05] Thank you.

17 PRESIDING JUDGE KORNER: [13:06:08] Yes, you needn't stay. Thank you. The
18 court officer will show you out.

19 (The witness is excused)

20 PRESIDING JUDGE KORNER: [13:06:33] Right. Do you want to return to this
21 business of whether or not you should be showing Defence documents to
22 your -- Prosecution documents to your witness? That's what this was all about,
23 wasn't it?

24 MR NICHOLLS: [13:06:47] Yes, I think it's important, your Honour. What's going
25 on here is that we're struggling with the principle of whether once a witness has been

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 proofed, prepared by the calling party and the opposing party indicates its materials
2 for cross-examination, whether the calling party should be able to go back and now
3 sit down with the witness they're calling and say, "Right, we've just received these
4 from the Prosecution, let's have another prep session with all these documents". The
5 specific -- and that has not been the way this case has progressed --

6 PRESIDING JUDGE KORNER: [13:07:29] Sorry to interrupt you. Normally what
7 would happen - as what has been happening - is that the Defence documents, or
8 indeed with the last witness Prosecution documents, only get released once the
9 witness has started to give evidence, as I understand it.

10 MR NICHOLLS: [13:07:43] No, we -- that is the way in my past experience and in
11 many parts of the outside world. Here we've got this 24-hour window, which is
12 created by three documents: The witness prep protocol, which says that the calling
13 party must carry out the preparation as soon as possible, this is paragraph 11, but in
14 any event at least 24 hours before their testimony; we've got paragraph 44 of the
15 conduct of the proceedings, which dictates that the non-calling party will provide its
16 list of materials, give that indication of what is going to be used at least one day
17 before the testimony commences, and if something has not been disclosed,
18 exceptionally may be provided, that document, by email; and paragraph 30, the
19 protocol on witness familiarisation, which prohibits conduct -- excuse me, contact --

20 PRESIDING JUDGE KORNER: [13:08:41] Contact.

21 MR NICHOLLS: [13:08:42] -- between the calling party --

22 PRESIDING JUDGE KORNER: Oh, yeah, this rather odd one.

23 MR NICHOLLS: -- and the witness. Yes. So -- but what the effect of these
24 three -- these three provisions from these documents have, which is not coincidental,
25 is to create this space of 24 hours before the witness testifies in which the calling party

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 cannot go back to the witness, cannot prep the witness further and that is after or at
2 the same time that they have received the non-calling party's cross-examination
3 materials. That's the procedure we've followed up to this point.
4 Throughout this case the Defence did not, I believe, on a single occasion disclose their
5 list of materials or tell us what they were going to use for cross-examination until
6 we'd released our prep log indicating that we had finished the prep session and then,
7 of course, after that, we can't go back to the witness and say, "Look at what we got
8 from the Defence, we want to ask you some questions about this, or they might ask
9 you about that".

10 And we never did, and that's the way we understood the rule to be. If we were
11 surprised by some document, then we dealt with it in thinking about how to do our
12 direct, but we didn't go back to the witness.

13 Now, in this case what brought this up is we made a disclosure.

14 PRESIDING JUDGE KORNER: [13:10:12] I've read -- I've now read through all the
15 emails. I'm afraid I was -- that's what I was doing when re-examination was going
16 on, Ms Whitford got up to object and I hadn't a clue because I hadn't been listening,
17 but --

18 MR NICHOLLS: [13:10:23] Thank you, your Honour. So the nature of that
19 disclosure which we sent out yesterday which we put in the disclosure letter was
20 relevant to Witnesses D-11, D-8 and D-6, which are testifying starting Monday with
21 D-11, was that these were materials relevant to them. And we did that three days
22 earlier - four days earlier for D-8 - because the Court is going to be closed over the
23 weekend, we were trying to get this out early. Given that -- that circumstance, we
24 did not want to hear -- or have happen that if it was disclosed on the day before,
25 that --

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [13:11:07] But this is the weekend, is it, where it's not
2 going to be open at all?

3 MR NICHOLLS: [13:11:13] Yes. Yes.

4 PRESIDING JUDGE KORNER: [13:11:16] Ah, right.

5 MR NICHOLLS: [13:11:17] So I was thinking let's get it to them early. And I
6 thought that although this is not this 24-hour rule, that my friends would follow the
7 principle that they -- and we did that after we understood they had concluded their
8 prep. So it was just give it to them early, they need to print, they need to work with
9 it, they need to do whatever. It's not the weekend where they can't get into the office
10 and it will be difficult.

11 PRESIDING JUDGE KORNER: [13:11:41] What you're saying is they can't go back
12 and have further prep sessions.

13 MR NICHOLLS: [13:11:45] Right. And if I could go into private session for one
14 second and that's to describe the nature of the materials.

15 PRESIDING JUDGE KORNER: [13:11:52] Yeah.

16 MR EDWARDS: [13:11:53] Your Honour, we can have this discussion and I would
17 prefer that we have this discussion in open session without going into the nature of
18 the materials, because it's not relevant for the purposes of this question of principle.
19 What I don't want is for poison to be dripped into your Honours' ears. I know
20 you're professional judges --

21 PRESIDING JUDGE KORNER: [13:12:21] Well, you're here. I mean, Mr Nicholls
22 can't drip poison into my ear -- into our ears while you're here. Do you see what I
23 mean? Or are you saying we shouldn't know anything about the documents?

24 MR EDWARDS: [13:12:31] Well, I'm saying that you need not know anything about
25 the documents because it's -- because it's not relevant for the purposes of this

Trial Hearing
WITNESS: DAR-D31-P-0027

(Private Session)

ICC-02/05-01/20

1 discussion.

2 MR NICHOLLS: [13:12:40] I disagree. It's absolutely relevant. And it's
3 completely relevant and you have the materials because they are disclosed to the
4 Court as well.

5 PRESIDING JUDGE KORNER: [13:12:48] In any event, I mean, the one thing you
6 can rest assured, Mr Edwards, is that we are, all three of us, professional judges and
7 we're not likely to be poisoned, as you put it.

8 All right. Can we go into private session, please.

9 I'm sorry, I'm saying sorry to the interpreters, but I want to finish rather than coming
10 back this afternoon.

11 Yes. All right. Let's go into private.

12 (Private session at 1.13 p.m.)

13 THE COURT OFFICER: [13:13:21] We're in private session, Madam President.

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
WITNESS: DAR-D31-P-0027

(Private Session)

ICC-02/05-01/20

- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
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- 19 (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 (Open session at 1.16 p.m.)

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 THE COURT OFFICER: [13:16:15] We're back in open session, Madam President.

2 MR NICHOLLS: [13:16:20] So just to wrap up, none of these materials show a new

3 theory on the Prosecution side. None of them concern anything that could not

4 reasonably be expected as the types of themes, topics that would be gone into in

5 cross-examination. None of this is something that could not have been anticipated.

6 So again, yes, we disclosed this not within the 24 hours because we thought that was

7 the courteous thing to do. I did not -- I'm flabbergasted, it did not even occur to me

8 that after prep they would run back and say we want to use these with our witnesses.

9 This is not our official list of materials, which is coming, but it's derived from this, and

10 we've made it clear these are items to be used for these witnesses' cross.

11 So whatever happens on this occasion, I think going forward it's important to know,

12 because I won't talk about conversations we've had, but I believe my friend's position

13 is, it doesn't matter, even within the 24 hours, if I get something new from you,

14 I can -- I have to go back and prep the witness on it, even if it's the day before they

15 testify. His argument, I understand, is that whatever the Prosecution is going to

16 show on cross, I need to show to my witness, even though that is not the way it was

17 done the entire case up to now, will not lead to better information for your Honours

18 because it's another way to try to hamper the cross. It's unnecessary. It's not

19 envisioned in any of the rules. It violates the principle of that 24-hour space --

20 PRESIDING JUDGE KORNER: [13:18:00] Yeah, my understanding --

21 MR NICHOLLS: [13:18:07] And so going forward, we need to know what's -- what

22 the situation is.

23 If it's shame on me, I'm going to get bitten for disclosing early, then, all right, my

24 mistake, because I thought that they would follow the principle, not pick apart the

25 rule and say this is in advance of 24 hours. But we need to know what the situation

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 is going forward.

2 PRESIDING JUDGE KORNER: [13:18:35] The only -- I thought this was all about the
3 expert. But the only thing I would say is that where experts are concerned, and if we
4 haven't made it clear, my view, and I discussed it with my fellow judges, is that with
5 an expert it's different, and if there's something that, you know, the expert's going to
6 see for the first time, then you're going to waste a lot of time if the expert isn't given a
7 chance to explain what it's all about. But that's separate from what you're now
8 saying.

9 MR NICHOLLS: [13:19:07] That may be, your Honour. We'll take it on board
10 and -- (Overlapping speakers)

11 PRESIDING JUDGE KORNER: [13:19:13] Well, I mean, that's something, I
12 really -- as I say, my present intention is to try and write something that goes across
13 the Trial Chambers so that all experts are dealt with in the same way.
14 All right. Thank you.

15 Mr Edwards, that is the rule, isn't it? So on what basis can you go back and say
16 you're going to now show them all the documents?

17 MR EDWARDS: [13:19:34] We have not received the Prosecution's list of materials,
18 the final list of materials that ordinarily is served 24 -- or the day before -- it's not
19 24 hours, it's the day before cross-examination starts.

20 What we have received is a letter disclosing 247 items related to -- accepted, related to
21 the cross-examination of the three witnesses that are coming next week and today's
22 expert. So we haven't received the formal, official list of materials that the
23 Prosecution proposed to rely on. And this cannot be turned into such a list of
24 materials.

25 The rule is that during the -- during the process of witness preparation, the calling

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 party may - paragraph 22 of the witness protocol -- witness preparation
2 protocol - may explain in general and neutral terms the topics on which in the calling
3 party's opinion the witness may be questioned during cross-examination.
4 Now, it's not just a question of this is what the calling party may do. When it comes
5 to the Defence, we would be professionally negligent if we did not in the witness
6 preparation session give our witnesses in general and neutral terms an idea of the
7 topics on which the witness may be questioned during cross-examination.
8 So if we all can agree that that is a reasonable interpretation of the witness protocol,
9 that's fine.
10 There is also -- the guillotine is the calling parties shall endeavour to complete its
11 preparation sessions as early as possible and, in any event, at least 24 hours before the
12 witness's testimony is due to commence.
13 We're not obliged to disclose our witness prep. If matters come to light that mean
14 that we have an obligation to go back and indicate to a witness, explain in general and
15 neutral terms, matters on which the witness may be questioned during
16 cross-examination. And I would submit that until we have received the formal list
17 of materials that the Prosecution proposed to use with our witnesses, then that
18 guillotine hasn't come down.
19 There are -- we've had argument already about what the Prosecution should be
20 entitled to use in cross-examination of Defence witnesses.
21 PRESIDING JUDGE KORNER: [13:22:46] That's a different -- that's a different issue.
22 MR EDWARDS: [13:22:49] It's a different -- it's a different issue, but there are
23 essentially -- there are four levels of Prosecution disclosure. The first about which
24 we don't really have a great to say is material that was disclosed a long time ago and
25 was on the Prosecution's list of evidence. Okay? The Defence had full disclosure of

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 that; we know what the Prosecution's evidence is.
2 There is evidence that is in the Prosecution's holdings to which the Defence have
3 access, but is not on the list of evidence. All right.
4 Now, the Defence, it could be said, ought to be fixed with knowledge of what has
5 been disclosed even if it's not on the Prosecution's list of evidence. Fine.
6 But then there is -- where we have a real argument relates to evidence that was not
7 disclosed in time, that was disclosed after the close, for the sake of argument, of the
8 Prosecution case. But if it was disclosed -- even if it was disclosed after the close of
9 the Prosecution case but in good time prior to preparation sessions, for example, prior
10 to decisions being made about which Defence witnesses to call, of course we're
11 entitled to use that material and to speak with Defence witnesses and say it's possible
12 that the Prosecution will cross-examine you on this. That's the third level.
13 And then we have the situation we're dealing with today, a forth level, the most
14 prejudicial level, which is where disclosure is being made essentially on the eve of a
15 witness's testimony.
16 Now, if that is disclosed, and there is no good reason why it is disclosed so late and it
17 is not on the Prosecution's list of witnesses -- evidence and it isn't even on a formal
18 Prosecution list of materials that it proposes to use for the witness, then it doesn't
19 matter in the slightest bit whether the preparation session with the witness has started
20 or not, provided the 24-hour guillotine hasn't come down, we must be entitled to go
21 back and say, "We've just received this. The Prosecution up to last night had never
22 given any indication that it was going to rely on this and, in general terms, you can
23 expect to be cross-examined on these topics."
24 PRESIDING JUDGE KORNER: [13:25:32] All right.
25 MR EDWARDS: [13:25:33] And that's where we are.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 PRESIDING JUDGE KORNER: [13:25:35] Let's go back a step, shall we?

2 In normal circumstances - in other words, if there wasn't a weekend intervening
3 where the court will be closed completely, so that there's no access - the Prosecution
4 would be obliged -- you wouldn't be able to see the witness who's coming on Monday
5 after the end of tomorrow; is that right?

6 MR EDWARDS: [13:26:04] Yes.

7 PRESIDING JUDGE KORNER: [13:26:05] And the Prosecution would then have
8 disclosed the documents that it intended to use with that witness?

9 MR EDWARDS: [13:26:13] Can I just pause you for a moment there. The
10 documents that the Prosecution intended to use. All we have is a vague idea. We
11 don't have --

12 PRESIDING JUDGE KORNER: [13:26:22] No, no. I'll come back to that,
13 Mr Edwards. I'm talking about what in the normal course of events would happen.
14 That is what would happen.

15 So the Prosecution under the protocol is not obliged to disclose its list until Sunday.

16 MR EDWARDS: [13:26:39] Correct.

17 PRESIDING JUDGE KORNER: [13:26:42] And if you objected to something, as you
18 did with the witness that we had a couple of weeks ago because you said it was not
19 on their list of documents and it had never been disclosed, then there would have
20 been an argument before the Prosecution began its cross-examination.

21 MR EDWARDS: [13:26:58] Correct.

22 PRESIDING JUDGE KORNER: [13:27:00] And you wouldn't have had the
23 opportunity to show it to the witness that you're calling.

24 MR EDWARDS: [13:27:07] Yes.

25 PRESIDING JUDGE KORNER: [13:27:08] But because, Mr Nicholls, in order to assist

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 you, disclosed, without it being the official list, the documents that he intended to use,
2 you say for that technical reason, the protocol doesn't come into play?

3 MR EDWARDS: [13:27:33] The protocol comes into play in the sense that we are
4 entitled to call -- (Overlapping speakers)

5 PRESIDING JUDGE KORNER: [13:27:39] I don't know why you're saying that the
6 protocol about not going back to see your witness doesn't apply.

7 MR EDWARDS: [13:27:46] Well, the paragraph that says not going back to -- hang
8 on.

9 I think -- I think my learned friend was referring to paragraph 30 as being the basis
10 for his position.

11 PRESIDING JUDGE KORNER: [13:28:05] But this is where VWS say you're not to
12 see anybody -- you're not to see your lawyer because we had the argument. What I
13 think of the rule, I've already expressed.

14 MR NICHOLLS: [13:28:14] Yeah, and just not an objection - I'm trying not to
15 interrupt - but it is also the rule in the conduct of the proceedings that the -- or -- that
16 the preparation must be concluded at least 24 hours prior to the witness testifying.

17 PRESIDING JUDGE KORNER: [13:28:32] Okay. All right. But anyhow,
18 that's -- but because it's not an official list -- effectively, you're saying, "It's not an
19 official list and I've got until Sunday to ask the witness -- if the Prosecution had been
20 silly enough to disclose this to me, I can go and speak to the witness about it." That's
21 your position, is it?

22 MR EDWARDS: [13:28:56] No, it's not. And it's not -- it's not a question of the
23 "Prosecution was silly enough to disclose it to us".

24 PRESIDING JUDGE KORNER: [13:28:58] Well, then what is it, Mr Edwards?

25 MR EDWARDS: [13:29:01] The Prosecution should have served -- they should have

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 disclosed this material weeks ago, months ago.

2 PRESIDING JUDGE KORNER: [13:29:11] That is an argument that you could have
3 had, as we did last time, because you wouldn't have known about it had the normal
4 course of events taken place. And the prohibition would be that the Prosecution
5 couldn't use the documents.

6 MR EDWARDS: [13:29:31] Yes.

7 PRESIDING JUDGE KORNER: [13:29:33] Rather than you taking the view that as
8 the Prosecution has done this, this is a chance to cut off, I suppose, the surprise value
9 of their cross-examination of the witness. That's effectively it, isn't it, Mr Edwards?

10 MR EDWARDS: [13:29:57] It is. We have an obligation, and I would suggest a
11 right, to be in a position, a fully-informed position during witness preparation to
12 identify those areas that the Prosecution may cross-examine a witness on. What we
13 have at the moment -- what we have been faced with -- forgive me, sorry.

14 PRESIDING JUDGE KORNER: [13:30:25] Mr Edwards, of course, you do. You
15 would be failing in your competence as counsel, which is one thing one can't say
16 about you, not to have a pretty good idea what the cross-examination -- what the
17 Prosecution is going to ask you -- ask the witness, sorry, and to go through the
18 witness potential areas of examination. That is a completely different matter from,
19 as I say, you, through for whatever reason - and I'm sure you accept that Mr Nicholls
20 was trying to be helpful - have been given a gift, which is the documents which they
21 do intend to ask yours.

22 MR EDWARDS: [13:31:04] But, your Honour, it's a gift that we can't do anything
23 about. It's not a gift at all. This is the most poisoned of poisoned chalices. We
24 can't do anything with it.

25 And it sounds to me that -- I don't want to take an unfair point. There are some who

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 might have raised argument that this material was disclosed because the Prosecution
2 knew that the prep sessions had been completed, that there was a degree of
3 gamesmanship here.

4 PRESIDING JUDGE KORNER: [13:31:45] Well, it's not gamesmanship, is it? That's
5 the whole point of the protocol.

6 MR EDWARDS: [13:31:48] Well, the point of the protocol is the
7 witness -- (Overlapping speakers)

8 PRESIDING JUDGE KORNER: [13:31:50] In the same way -- just a moment,
9 Mr Edwards. In the same way as when the Prosecution called it's witnesses, you
10 didn't disclose your materials. In fact, I don't think your materials got disclosed,
11 which is different because you've got no onus on you, but you didn't disclose your
12 materials that you were going to use in cross-examination of the Prosecution
13 witnesses until, I think, the evidence started, or was it the same -- was it 24 hours?

14 MR EDWARDS: [13:32:10] It was always the day before cross-examination started.
15 What's good for the goose is good for the gander. And I can't say hand on heart that
16 we always disclosed a day before, but we certainly tried to, the day before
17 cross-examination started, disclose our list of materials. But here we have --

18 MR NICHOLLS: [13:32:31] Just on that point -- sorry.

19 PRESIDING JUDGE KORNER: [13:32:33] Let Mr Edwards finish and then I'll come
20 back to you, Mr Nicholls.

21 Anything else you want to say?

22 MR EDWARDS: [13:32:39] Well, only that again I'm coming back to -- I'm coming
23 back to paragraph 30. There is -- there is nothing that I can immediately see in the
24 witness preparation protocol that says we cannot go back -- that prohibits us going
25 back to -- I may be wrong about that, but prohibits us going back to a witness for

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 further witness preparation sessions up to the 24-hour guillotine. We will always
2 respect that 24-hour guillotine.

3 But for the Prosecution to argue that that guillotine must come down before 24 hours
4 because for some reason we're estopped from carrying out our duties under
5 paragraph 22 of the protocol just cannot be right.

6 PRESIDING JUDGE KORNER: [13:33:31] But the reality is, isn't it, Mr Edwards, that
7 it's only because the Prosecution took a decision which on the face of it they would
8 not have otherwise done in compliance with the protocol had it not been for the fact
9 that they were trying to assist?

10 MR EDWARDS: [13:33:53] With respect, that's not -- that's not right. What they are
11 obliged to do under the protocol is to provide us with their final -- their list of
12 material. This is a disclosure letter. It is not the same thing. It is not the same
13 thing.

14 PRESIDING JUDGE KORNER: [13:34:12] You're saying, are you, I see - sorry, just let
15 me make sure I get that right - that you understood that the Prosecution was
16 disclosing to you in advance of its cross-examination all the materials or a rough idea
17 of the materials they were going to use to cross-examine your witnesses? Are you
18 telling the Court that was your impression?

19 MR EDWARDS: [13:34:38] Something -- I'm not too sure I understand.
20 It was our impression in this letter dated yesterday, served --

21 PRESIDING JUDGE KORNER: [13:34:51] Can I see the letter, please?

22 MR EDWARDS: [13:34:59] Forgive the annotation.

23 It's the standard letter that is sent around every time there's disclosure.

24 PRESIDING JUDGE KORNER: [13:35:18] Yes, but it's not the standard letter, is it?
25 Yes, well, the standard letter here -- disclosed to the Defence presumably on other

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 occasions. It says material that may assist the Defence or material which
2 undermines our case.

3 MR EDWARDS: [13:35:33] We don't get many of those.

4 PRESIDING JUDGE KORNER: [13:35:36] Or -- well, never mind that, Mr Edwards.
5 Or, alternatively, which is relevant to an issue in the case --

6 MR EDWARDS: [13:35:40] Yeah.

7 PRESIDING JUDGE KORNER: [13:35:42] -- which has not been appreciated. This
8 says, in terms, consisting of the 247 items related to the cross-examinations of the
9 witnesses.

10 MR EDWARDS: [13:35:54] Yes, but essentially on the eve of the witness's evidence
11 when we can do nothing about it, when we can't continue our preparation and say in
12 addition to -- in addition to. I mean, my point isn't going to be improved by
13 repetition.

14 PRESIDING JUDGE KORNER: [13:36:13] No, it's not.

15 MR EDWARDS: [13:36:15] I feel that I am just repeating myself. But it is unfair and
16 it is highly prejudicial.

17 PRESIDING JUDGE KORNER: [13:36:26] I'm sorry, what's unfair and prejudicial?

18 What? If we were to order you to say that you can't show the document to the
19 witnesses?

20 MR EDWARDS: [13:36:36] That the circumstances in which this very, very late
21 disclosure was made is prejudicial.

22 PRESIDING JUDGE KORNER: [13:36:46] Actually, it made earlier, as I said -- if
23 there is -- this disclosure. You don't accept that, do you, Mr Edwards, that this
24 disclosure was clearly related to the documents they intend to use to cross-examine
25 these witnesses. Do you accept that?

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 MR EDWARDS: [13:37:00] Yes, it's disclosure.

2 PRESIDING JUDGE KORNER: [13:37:03] Right. Therefore, as happened on the last
3 occasion. Were this had to have happened the day before the client -- the witness
4 was due to testify, any arguments you had would have had to have been made in
5 court to say: "The Prosecution should have disclosed these matters before and we
6 object to them using it".

7 MR EDWARDS: [13:37:28] Yes.

8 PRESIDING JUDGE KORNER: [13:37:29] You would not have had an opportunity
9 to show it to the witness, would you?

10 MR EDWARDS: [13:37:35] Well, what happened -- what happened with the
11 previous witness is that there was late disclosure. We objected to it, but at least it
12 was disclosure that we had had the opportunity to analyse and assess, and to -- and to
13 discuss in general terms with the Defence witness.

14 The distinction between the last time with the witness - I can't remember, D-16 I think
15 it was - and here is that the disclosure is made so late that we cannot discuss it with
16 the witness.

17 Let me put it more concrete terms -- let me put it more concrete terms, your Honour.
18 With D-16 it was late disclosure, we didn't like it, there were -- we didn't believe that
19 the Prosecution should be able to rely on it, but we were still able to discuss it in
20 general terms with the Prosecution witness so that in the event on an application that
21 the Prosecution not be allowed to rely on it, in the event that that application is
22 dismissed by your Honours.

23 PRESIDING JUDGE KORNER: [13:38:45] I'm sorry, Mr Edwards, I'm now slightly
24 confused. You're saying that with the last witness, where there was
25 cross-examination, you've got the documents, or the formal list of documents, in

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 sufficient, in advance so that you were able to discuss it with the witness. Is that
2 what you're saying?

3 MR EDWARDS: [13:39:14] I'm turning to my friend. Yes, it was -- that disclosure
4 was made, I'm almost certain, in good enough time for us to be able to deal with it
5 with the witness in preparation sessions. We had something like three or four or five
6 witness preparation sessions with the witness before. But here we don't have that.

7 PRESIDING JUDGE KORNER: [13:39:36] Sorry, I just want -- so I'm quite clear on
8 this. You're saying, are you, that the disclosure of the documents in respect of that
9 witness, the witness who took a week, was made before you had concluded your
10 preparation sessions and, therefore, in advance of the 24 hours?

11 MR EDWARDS: [13:40:01] Yes, yes. And the -- I'll just finish my point. The
12 prejudice is that, you know, we would make the argument before the witness is
13 cross-examined, you're with us or not. But if you're not with us, so that the
14 Prosecution can use that document, at least the Defence had had the opportunity to
15 discuss in general terms what that evidence is and the way in which the witness
16 might be cross-examined.

17 PRESIDING JUDGE KORNER: [13:40:32] Well, then I'm now really confused,
18 because I thought the whole thing was that the Prosecution didn't disclose the
19 documents that it was going to use before preparation had finished, that was the
20 cut-off point. And you're telling me that's not right.

21 MR EDWARDS: [13:40:47] No, I think we had -- I think we had very late disclosure,
22 but it was still in enough time to deal with it.

23 MR NICHOLLS: [13:40:55] There was no late disclosure with either witness. There
24 has been no late disclosure since their defence case started. There's no late disclosure
25 for the witnesses next week. There was no late disclosure for D-16.

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 My friend has been, I think, a bit confusing here about D-16. The list of materials,
2 the indication of what we would rely on for cross, was sent to them,
3 I believe - unfortunately we were late then - after the witness started his direct
4 testimony.

5 (Counsel confers)

6 MR NICHOLLS: [13:41:28] Well, it was the day before cross-examination began,
7 which is on time. It was within that 24 hours, and there was no prep session, at least
8 not that we got notice from, after we made that disclosure. So that was within the
9 24 hours. These are the documents we're going to use for cross the day before the
10 witness started. So I was confused and I think he's trying to mix the earlier
11 disclosure and, again, I would just say - and that's why I went through these, what
12 these documents are and their character - there is nothing in here that would preclude,
13 if I was calling these witnesses, lines in general of cross-examination to expect. It
14 wouldn't change anything.

15 PRESIDING JUDGE KORNER: [13:42:21] Well, what is it you're asking me to
16 do -- no, I don't want to hear more, Mr Edwards. I've heard it all.

17 What is it you're asking me to do, Mr Nicholls?

18 MR NICHOLLS: [13:42:37] Well, your Honour, What I'm asking is mainly just for
19 absolute -- and he started the email discussion last night. What I'm asking is just -- is
20 just to understand how we're going forward, because my friend again when he was
21 speaking was talking about how he -- even if it's within the 24 hours, they have an
22 obligation to go back and show the cross-examination materials to their witness.
23 That's wrong, I think.

24 Now, I accept -- I'm not asking you to order that they do not go back and talk to their
25 witnesses. I have learned from this experience I won't ever make an early disclosure

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 again. It will be after we receive the prep log, for the future. Again, my -- I thought
2 that this wouldn't happen given the clear indication that these were materials for
3 cross and we knew they had finished their prep sessions, and we got a confirmation
4 from Mr Edwards that they received these materials after they had finished their prep
5 sessions, so I'm not -- I'm not asking you to do anything, your Honour. I'm just
6 asking that it be understood in the future and I won't make this mistake again.

7 PRESIDING JUDGE KORNER: [13:43:49] No, well, Mr Nicholls, I'm afraid there
8 was -- there was nothing we can do about this at all.

9 Other than to say, Mr Edwards, you are no doubt familiar with the number of cases in
10 the English courts about either inadvertent disclosure or counsel picking up
11 documents that were left lying around, and it seems to me there are parallels with
12 that in this situation. But, having said that, your duty is to your client. The
13 Prosecution have made disclosure which they would not otherwise have made and
14 are not obliged to make, then you're entitled to use it. But, in my view, it's not
15 something that I consider to be desirable in the way that this has developed.

16 Yes. All witnesses for the next three days, we're only sitting Monday to Wednesday,
17 I take it there is no problem with any of the witnesses?

18 MR LAUCCI: [13:45:07] I wish I could confirm so. But I'm running immediately
19 after leaving the courtroom, the witnesses had a meeting with the VWU, I think at
20 noon, and I need to go back to them to ask just a simple question: "Do you confirm
21 your appearance next week?" And that applies to the three of them.

22 PRESIDING JUDGE KORNER: [13:45:35] They're all on video link, are they?

23 MR LAUCCI: [13:45:37] They are.

24 PRESIDING JUDGE KORNER: [13:45:39] All right. Well, I don't know why -- you
25 know, unless they tell VWS they're not going to appear, I'm not sure why you have to

Trial Hearing
WITNESS: DAR-D31-P-0027

(Open Session)

ICC-02/05-01/20

1 ask them whether they confirm they will appear. That is, I don't think you ought to
2 be putting into their mind, for your own benefit, Mr Laucci --

3 MR LAUCCI: Yeah, I know.

4 PRESIDING JUDGE KORNER: [13:46:01] -- that there's any choice about the matter.

5 MR LAUCCI: [13:46:08] The idea was not to put in their mind, but was -- actually,
6 that's -- I thought the issue -- the old issue -- we're in public session -- I thought the
7 old issue that had prevented their appearance the other time was resolved, I travelled
8 where they are, especially to solve that, I had exchanges with the VWU before and
9 after that meeting to make sure that everything would be resolved, and I discovered
10 yesterday morning during -- we discovered yesterday morning during the first
11 preparation sessions that, well, I don't want to say nothing had been done, but that's
12 almost the situation, essentially the situation.

13 PRESIDING JUDGE KORNER: [13:46:53] Well, I would strongly suggest you don't
14 ask them are you still prepared to give evidence. Wait to see if VWS get back in
15 touch and say there is a problem.

16 All right. Very well, yes. So that's Monday morning, please, at --

17 MR LAUCCI: [13:47:08] Anyway, Madam President, last thing, if there is any new
18 information in the afternoon, the Chamber and the parties will be immediately
19 informed.

20 PRESIDING JUDGE KORNER: [13:47:16] Yes. All right. Thank you very much.
21 Yes? Oh, no, you're just standing up.

22 THE COURT USHER: [13:47:24] All rise.

23 (The hearing ends in open session at 1.47 p.m.)