

1 International Criminal Court  
2 Trial Chamber I  
3 Situation: Darfur, Sudan  
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman  
5 ("Ali Kushayb") - ICC-02/05-01/20  
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou  
7 and Judge Althea Violet Alexis-Windsor  
8 Trial Hearing - Courtroom 2  
9 Wednesday, 25 January 2023  
10 (The hearing starts in open session at 9.33 a.m.)  
11 THE COURT USHER: [9:33:10] All rise. The International Criminal Court is now in  
12 session. Please be seated.  
13 PRESIDING JUDGE KORNER: [9:33:37] Yes, good morning all. Good morning to you,  
14 sir. We'll come back to you in a moment.  
15 Appearances, please, Prosecution.  
16 MR NICHOLLS: [9:33:46] Good morning, Madam President. Good morning, your  
17 Honours. Good morning to everybody in the courtroom. Julian Nicholls with Pubudu  
18 Sachithanandan, Claire Sabatini, and Laura Morris. Thank you.  
19 PRESIDING JUDGE KORNER: [9:33:59] Thank you.  
20 Defence.  
21 MR LAUCCI: [9:34:00](Interpretation) Good morning, Madam President. Good  
22 morning, dear Judges, dear colleagues. I have my client Ali Muhammad Ali Abd-Al-  
23 Rahman present. In the Court today, we have Ms Marguerite Rémy, for the Defence --  
24 Mr Ahmad Issa, myself, Cyril Laucci, and Mr Iain Edwards for the Defence.  
25 MS VON WISTINGHAUSEN: [9:34:25] Yes, good morning, Madam President, your

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(Open Session)

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1 Honours, dear colleagues, and your Honours. The victims this morning are  
2 represented by associate counsel Anand Shah, Idriss Anbari in the back, and behind  
3 me, our interns, Nur Mahameed and Randa Bellahdid, and myself, Natalie Von  
4 Wistinghausen.

5 PRESIDING JUDGE KORNER: [9:34:40] Yes, thank you very much.

6 Yes, thank you very much for attending this morning. I don't think you're going to be  
7 here for any great length of time, but perhaps you'd be kind enough to make the  
8 solemn declaration, which is in front of you, I think.

9 THE WITNESS: [9:35:10] Good morning, your Honour. I solemnly declare that I will  
10 speak the truth, the whole truth, and nothing but the truth.

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12 (The witness speaks English)

13 PRESIDING JUDGE KORNER: [9:35:17] Yes, thank you very much. And could you  
14 just give the Court your full name?

15 THE WITNESS: [9:35:25] That's Zeno Jean Marius Hubert Geradts.

16 PRESIDING JUDGE KORNER: [9:35:34] Yes, sorry, the surname is Geradts; right?

17 THE WITNESS: [9:35:41] Yes, the surname is Geradts, but I have four first names.

18 PRESIDING JUDGE KORNER: [9:35:45] Yes, I saw that. Yes, thank you very much.

19 Mr Sachithanandan, it's you, is it? I'm assuming you're just going to tender his report.

20 MR SACHITHANANDAN: [9:35:54] Your Honour, it's going to be a little bit more  
21 substance than the previous witness. We will play two brief clips and show a few  
22 photos.

23 PRESIDING JUDGE KORNER: [9:36:04] Yes, all right. Thank you very much.

24 QUESTIONED BY MR SACHITHANANDAN:

25 Q. [9:36:07] Good morning, sir. Could you please tell the Court what your current

1 role and position is at the NFI?

2 A. [9:36:12] Yes, I'm a senior forensic scientist on biometrics and image analysis, and  
3 I'm also doing research in that area. So one day a week I'm a professor at the  
4 University of Amsterdam in forensic data science.

5 Q. [9:36:35] Thank you.

6 MR SACHITHANANDAN: [9:36:36] Could the Court Officer please pull up tab 72,  
7 that is, DAR-OTP-0000-1012.

8 Q. [9:37:17] Sir, can you see a document in front of you? This is your CV; correct?

9 A. [9:37:35] Yes, this is my CV.

10 MR SACHITHANANDAN: [9:37:37] Could the Court Officer scroll down a little. A  
11 little bit more. A little bit more. A little bit more. Yes, that's perfect.

12 Q. [9:37:44] Sir, am I right in thinking that based on what we see here, you have  
13 extensive experience in carrying out biometric assessments?

14 A. [9:37:49] Yes, I have experience since 1997.

15 Q. [9:37:55] And can you tell us, please, you testified about biometric comparisons  
16 before?

17 A. [9:38:02] Yes, I testified about biometrics comparisons perhaps one per year in  
18 court, in Dutch courts. And I wrote around 20 reports a year on biometric comparison  
19 and facial comparisons, so like the comparisons we did.

20 Q. [9:38:26] It's correct, isn't it, that you are subject to proficiency tests every year to  
21 assess your skills in doing this?

22 A. [9:38:38] Yes, certainly. So we follow the ENFSI proficiency test, that's the  
23 European Network of Forensic Science Institutes proficiency tests, where they give  
24 samples on faces where they know the ground truth. And then we, as a group, are  
25 tested, but also individually we are tested if we do -- do this, this kind of examination

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1 in a right way.

2 PRESIDING JUDGE KORNER: [9:39:05] Mr Edwards, is there any challenge to his  
3 expertise?

4 MR EDWARDS: [9:39:08] There's no challenge to his expertise. I'm going to ask some  
5 questions about the nature --

6 PRESIDING JUDGE KORNER: [9:39:18] The whole process?

7 MR EDWARDS: [9:39:19] Well, the nature of his training and that sort of thing. But  
8 there's no challenge as such.

9 PRESIDING JUDGE KORNER: [9:39:24] All right. Well, then, he's got a very, very  
10 lengthy CV attached to his statement. Can we just put that in?

11 MR SACHITHANANDAN: [9:39:32] Yes, I have no intention of going through the 21  
12 pages.

13 PRESIDING JUDGE KORNER: [9:39:35] Right.

14 MR SACHITHANANDAN: [9:39:38]

15 Q. [9:39:38] And just one final question, sir: In the 21 pages, there are many, many  
16 publications. Am I correct in understanding that many of them relate to biometric  
17 comparison?

18 A. [9:39:50] Yes, certainly. So many of them are related to biometric comparison on  
19 different parts of the face and also to automated biometric comparison.

20 Q. [9:40:06] Thank you.

21 MR SACHITHANANDAN: [9:40:07] We can take down the CV. And can we please  
22 pull up DAR-OTP-0223-0443. That is the first report. Tab 1.

23 THE INTERPRETER: [9:40:35] Interpreter's note: Could all unnecessary microphones  
24 please be switched off. Thank you.

25 MR SACHITHANANDAN: [9:40:51]

1 Q. [9:40:52] Sir, it's correct, isn't it, that this is a report drafted by you as requested by  
2 the Office of the Prosecutor?

3 A. [9:40:57] Yes, that's true. I wrote this report.

4 MR SACHITHANANDAN: [9:41:06] Could we move to the next page, please. And the  
5 next page. My apologies. Page 446. Yes, if we can scroll down just two lines. Yes.

6 Q. [9:41:43] Sir, if you can look at the section beginning "Question." Can you explain,  
7 please, based on this, what research question you were examining on our request? I'm  
8 so sorry. Yes, if you can start again.

9 A. [9:42:05] Sorry, yes. We received two video files as listed here with those names,  
10 and we have made two hypothesis. One hypothesis is the main character depicted in  
11 this disputed video files is a suspect and the other one is hypothesis 2, the main  
12 character depicted in the disputed video files is different from the suspect but has  
13 similar general facial features. And then we also assumed that both video files are of  
14 the same person.

15 Q. [9:42:49] Thank you. And it's correct, isn't it, that this Monday, you had the  
16 opportunity to sit down and view these two video files again?

17 A. [9:42:58] Yes, that's correct. So we looked at the video files and part of those. Yes.

18 MR SACHITHANANDAN: [9:43:06] For the record, I'll set down the evidence  
19 registration numbers of these videos. One is DAR-OTP-0202-1377, and the other is  
20 DAR-OTP-0215-2697.

21 I'm going to ask the Court Officer to play a brief clip from the first video, that is to say,  
22 0202-1377, starting from 36 seconds into the video. And this can be public.

23 THE INTERPRETER: [9:44:51] Message from the interpreters: Can we please observe  
24 pauses.

25 MR SACHITHANANDAN: [9:45:01] Yes, there's no need to interpret this video. And

1 we can play this from 36 seconds to 54 seconds, please.

2 (Viewing of the video excerpt)

3 MR SACHITHANANDAN: [9:45:32] Can we now jump forward to 4 minutes, 10  
4 seconds, and play for 10 seconds.

5 (Viewing of the video excerpt)

6 MR SACHITHANANDAN: [9:46:00]

7 Q. [9:46:01] Sir, it's correct, isn't it, that this is one of the videos provided to you, one  
8 of the reference videos?

9 A. [9:46:07] Yes, that's correct.

10 PRESIDING JUDGE KORNER: [9:46:10] Before you move on, Mr Sachithanandan, just  
11 could you remind us what's the evidence about this video? Where was it shot?  
12 Somebody did -- this is the one where he's in military uniform, the speaker.

13 MR SACHITHANANDAN: [9:46:26] That's correct, your Honour. Let me just pull up  
14 what information I have on him, on the video.

15 PRESIDING JUDGE KORNER: [9:46:33] Because there's two of them, and one's the one  
16 where ...

17 MR SACHITHANANDAN: [9:46:39] This is the one titled the "Um-Sory" video.

18 PRESIDING JUDGE KORNER: [9:46:54] All right.

19 MR SACHITHANANDAN: [9:46:57] Yes, so this is a video found on YouTube and also  
20 received separately from a witness, and you may recall we've shown this to --

21 PRESIDING JUDGE KORNER: [9:47:07] No, I know that. I'm just trying to remember  
22 which witness it was. Can you --

23 MR SACHITHANANDAN: [9:47:13] 643.

24 PRESIDING JUDGE KORNER: [9:47:17] Yes.

25 MR SACHITHANANDAN: [9:47:18] Yes.

1 PRESIDING JUDGE KORNER: [9:47:19] Thank you.

2 MR SACHITHANANDAN: [9:47:21]

3 Q. [9:47:22] Mr Witness, I've only shown you a very brief clip. But it's correct, isn't it,  
4 that you examined the entirety of this video in your analysis?

5 A. [9:47:30] Yes. We looked at the suspect -- the person that we should compare in  
6 this entire video, but -- and we also just saw some video frames that we really focused  
7 on.

8 Q. [9:47:46] Right.

9 MR SACHITHANANDAN: [9:47:49] We can take this down and move on to the next  
10 video, and this next video is DAR-OTP-0215-2697. And can we play this, please, from 2  
11 minutes, 42 seconds, to 3 minutes, 10 seconds. 2 minutes. 2 minutes, 42 seconds. And  
12 we can play it for 30 seconds.

13 (Viewing of the video excerpt)

14 MR SACHITHANANDAN: [9:49:04] Sorry, please keep going until 3 minutes, 10  
15 seconds.

16 (Viewing of the video excerpt)

17 MR SACHITHANANDAN: [9:49:28]

18 Q. [9:49:29] Sir, I'm right, aren't I, that this is the other video you were provided by  
19 the OTP as a reference video?

20 A. [9:49:36] Yes, that's correct. This is the other one, yes.

21 Q. [9:49:39] And, again, even though I've shown you a clip, you've analysed the  
22 entire video; that's correct?

23 A. [9:49:45] That's correct, yes.

24 PRESIDING JUDGE KORNER: [9:49:47] And, again, Mr Sachithanandan, which  
25 witness dealt with this? I think more than one, but if you can assist.

- 1 MR SACHITHANANDAN: [9:50:02] Yes, your Honour. I think this was initially  
2 obtained from an open source news article, and it was shown to some witnesses. I will  
3 update you as soon as I get information.
- 4 PRESIDING JUDGE KORNER: [9:50:12] Yes, all right.
- 5 MR SACHITHANANDAN: [9:50:23]
- 6 Q. [9:50:23] Sir, if I understand correctly, when analysing these videos, you also  
7 extracted individual frames or still shots; is that correct?
- 8 A. [9:50:34] That's correct. Indeed.
- 9 Q. [9:50:39] And could you tell us, briefly, how you did that and why you chose  
10 particular frames?
- 11 A. [9:50:45] Yes. We also showed some of those frames in the report. For instance,  
12 frames were the front face -- the front part of the face is well depicted, and also some of  
13 the back of the head. Also, some of the hands that we could also compare parts of the  
14 hands as such. So we chose those frames that we certainly should have as a reference  
15 picture so that we should make as a -- as a reference comparison picture from the  
16 suspect.
- 17 Q. [9:51:30] Thank you. And just so that we don't get confused, I'm going to call  
18 these two videos "the reference videos," and then later when we come to photos and  
19 videos taken of the accused at the ICC, I'm going to call those videos and photos  
20 "comparison videos and photos." I know it's not a technical term --
- 21 A. [9:51:52] Yes.
- 22 Q. [9:51:54] -- but just to avoid confusion.
- 23 A. [9:51:56] Okay, that's fine.
- 24 Q. [9:51:57] Sir, I understand that there's something that happens with videos called  
25 compression, which reduces the quality of it. Perhaps you can explain to us how you



1 address that in these videos.

2 A. [9:52:13] Yes, that's something I can show. Maybe in the previous video we could  
3 clearly see the compression, but in this one we can also see it here at the edge of the  
4 hand. I'm circling it somewhat. You see those kind of blocks, and that's caused by the  
5 compression, by the mp4, so the video file compression. That's because if they would  
6 record it in original quality, the file size would be too high, too much. So there is a  
7 lossy compression done and that will bring those kind of artefacts.

8 Q. [9:53:02] And am I right in thinking that you and your fellow examiners know  
9 how to deal with that and not be deterred by such artefacts?

10 A. [9:53:12] That's true, yes. That's something that we also have in our training, that  
11 we know what kind of artefacts -- what kind of parts of the images are artefacts and  
12 which are other features of the image itself.

13 MR SACHITHANANDAN: [9:53:29] Your Honour, I'm coming back to you about that  
14 question you asked. The video was shown to P-0012 and P-0883.  
15 This video can be taken down.

16 Q. [9:53:44] Sir, now we're going to leave the reference videos for a bit and come to  
17 the videos and photos that the NFI collected of the accused at the ICC. And as I said,  
18 I'm going to call those "the comparison material."

19 It's correct, isn't it, that when you're carrying out this sort of exercise, you prepare some  
20 sort of plan for what kind of material you want to take? Images of the accused.

21 A. [9:54:21] Yes, so we take images of the accused on certain positions, but we also  
22 try to have other positions available in case we -- we have more images needed, so --  
23 but there are certain positions that we certainly have made comparison images of.

24 Q. [9:54:45] So am I right in thinking that when you're taking photos and videos of  
25 the accused, you want to try and match as much as possible the positions in the

1 reference videos; is that correct?

2 A. [9:54:59] Yes, that's correct. And also in this case, we saw the images of the hand,  
3 and for that reason we also made those reference images in the same kind of position of  
4 the hand.

5 Q. [9:55:16] And it's correct, isn't it, that the people who come up with this plan,  
6 including you, then instruct the collection team on how to take these photos and what  
7 to take?

8 A. [9:55:30] That's certainly true. So I cannot -- we are not allowed to do the  
9 reference images -- or the comparison images ourselves because we might be biased if  
10 we would see the suspect.

11 Q. [9:55:47] Right. And your two colleagues who took these photographs on 14  
12 December 2021, am I right in thinking that they're also trained in biometric  
13 comparison?

14 A. [9:56:00] Yes. So sometimes they are also the -- compare -- the persons that do the  
15 comparison, and in some cases I also go for making the comparison images and then I  
16 do not report myself.

17 Q. [9:56:15] Right. But just to be clear, in this instance you were not involved in the  
18 taking of the photos, but you viewed all the photos and videos of the accused that were  
19 taken?

20 A. [9:56:29] Yes, certainly. After they were taken, I viewed all the images and video  
21 that was taken, and I used that also in the comparison.

22 Q. [9:56:41] And on Monday when you sat down with me and Ms Morris, you had an  
23 opportunity to go through all of these photos and videos; is that correct?

24 A. [9:56:49] Yes, I went through all the images and all the -- I had the opportunity to  
25 go through the whole video file.

- 1 MR SACHITHANANDAN: [9:57:03] Could the Court Officer please pull up DAR-
- 2 OTP-0000-1017.
- 3 THE INTERPRETER: [9:57:19] Message from the interpreter: Can we please, please
- 4 observe pauses.
- 5 MR SACHITHANANDAN: [9:57:25] My sincere apologies. I've grown disused to
- 6 examining witnesses who speak English.
- 7 PRESIDING JUDGE KORNER: [9:57:32] Don't you worry. Yesterday, all of us were
- 8 doing the same thing.
- 9 MR SACHITHANANDAN: [9:57:51] Right.
- 10 Q. [9:57:52] Sir, it's correct, isn't it, that this is a list of videos and photos that you
- 11 viewed that were in turn taken -- collected by your NFI colleagues at the -- when they
- 12 visited the ICC?
- 13 A. [9:58:07] Yes, that's correct. Yes, these are the images and the videos. Yes.
- 14 MR SACHITHANANDAN: [9:58:19] Could the Court Officer please scroll down to the
- 15 signature. Yes.
- 16 Q. [9:58:28] And that's your signature, isn't it?
- 17 A. [9:58:30] That's correct. That's my signature, yes.
- 18 Q. [9:58:35] And, sir, it's right, isn't it, that after you received these photos and videos
- 19 from your NFI colleagues, you and your fellow examiners, you did not alter or
- 20 manipulate any of the images?
- 21 A. [9:58:49] No, we did not alter or manipulate the images. We might do some
- 22 contrast enhancement, but that's not a real manipulation of the image. It's just to get
- 23 some clearer view of it.
- 24 MR SACHITHANANDAN: [9:59:07] This can be taken down.
- 25 Q. [9:59:22] Sir, I'm now going to walk you through a few sample shots and clips

1 from what your colleagues collected.

2 MR SACHITHANANDAN: [9:59:31] Can we please pull up video-clip DAR-OTP-  
3 0221-1467. And we can just play this clip.

4 (Viewing of the video excerpt)

5 MR SACHITHANANDAN: [10:00:44]

6 Q. [10:00:45] Sir, could you explain to us why this pan shot was taken and why the  
7 accused was made to speak during the shot?

8 A. [10:00:54] We asked this video because then we had as many positions as possible.  
9 And also, he was speaking during the videos that he -- that were shown, so the  
10 reference videos, and then you also saw his teeth, for instance. So for us, it's important  
11 that he also had similar facial expressions.

12 MR SACHITHANANDAN: [10:01:28] Yes, this can be taken down. And let's please  
13 pull up 0221-1517.

14 Q. [10:02:04] Sir, could you tell us why this photo was taken?

15 A. [10:02:07] This photo was taken because there were some images of the hand in  
16 one of the videos, and we would like to have a comparison of the hand. So this is the  
17 reason that we made this comparison video and the comparison images.

18 Q. [10:02:31] Could you tell us, sir, in light of your extensive experience, these  
19 comparison materials that you received, what is your opinion about their quality?

20 A. [10:02:45] The quality of the comparison images is very good, also because we  
21 took that ourselves. The reference images, so of those video of the mp4, they were less  
22 -- of less quality.

23 Q. [10:03:10] But I'm correct in thinking that the reference material was still good  
24 enough for you to effectively carry out your assessment; is that right?

25 A. [10:03:18] Yes, that's -- that's all right. But here, you see, of course, this video

1 doesn't have those -- or doesn't have that many compression artefacts as -- as such, so  
2 we could -- or this photograph that didn't have that much, the compression artefacts,  
3 because it was taken with a higher quality.

4 Q. [10:03:41] Now, I noticed that in your report, this first report that I showed to you  
5 already, there are a number of sample stills from the reference videos and a number of  
6 sample photos from the comparison material. Am I right in thinking that's just for  
7 illustration and you're not limiting your analysis to those photos?

8 A. [10:04:07] Yes, that's certainly true, because we cannot show all the images in the  
9 report, and so we only show those for illustration, because the video and the  
10 photographs have to be compared themselves for the -- for the real investigation. So  
11 you always should go back to that material, because also in photocopying the images  
12 from the report, it might vanish.

13 Q. [10:04:44] Right. So now I think maybe it's useful to discuss briefly how you  
14 carried out the comparison between the reference materials and the comparison  
15 materials with your two colleagues.

16 A. [10:05:01] Okay.

17 MR EDWARDS: [10:05:02] And, your Honour, in the course of this next block of  
18 questions, given that I want to test certain aspects of the evidence of the witness, I'd ask  
19 my friend to ask non-leading questions. So far I think we've had about two or three  
20 non-leading questions since the beginning of this witness' evidence, and I haven't taken  
21 the point. But from now on, I'd be grateful if non-leading questions be asked.

22 PRESIDING JUDGE KORNER: [10:05:40] It seems to me, Mr Sachithanandan, that's  
23 right on the basis that this is what Mr Edwards wants to question on.

24 MR SACHITHANANDAN: [10:05:49] Yes, absolutely.

25 PRESIDING JUDGE KORNER: [10:05:50] Yes.

1 MR SACHITHANANDAN: [10:05:51]

2 Q. [10:05:58] In fact, sir, before you answer my question, maybe we can pull up your  
3 report again.

4 MR SACHITHANANDAN: [10:06:10] And that is ERN 0223-0443, page 0446. Sorry, in  
5 fact, let's go to the next page, please. And zoom in a little. Yes.

6 Q. [10:06:56] Right, sir. And maybe you can now describe to us, briefly, how you  
7 compared the reference materials to the comparison materials. Feel free to tell us to  
8 move forward or backward in the report while you're discussing this.

9 A. [10:07:13] Yes. So we have three researchers that used an observation list of  
10 different features of the face, so that's our standard observation list, and similar  
11 observation lists are also used by other institutes in other countries, so also in the  
12 ENFSI proficiency test.

13 And then we describe the similarities and the dissimilarities or differences found in the  
14 form. And all the three researchers did that separately from each other so they should  
15 not be biased by each other before discussing the final result.

16 Then in this case, we had the three researchers. They discussed their results, and then  
17 they come to a final assessment.

18 Q. [10:08:28] And can you tell us, please, what training and qualifications do your  
19 two other examiners have? Briefly.

20 A. [10:08:37] Yes, my two other colleagues, they have similar training and education  
21 as I had. So they work at the NFI for over 20 years and do this kind of examination  
22 also for over 20 years. One of those colleagues also publishes a lot, and he's also in  
23 several of the quality assurance documents involved on facial comparison. I also read  
24 and also suggest improvements of those kind of documents. And, of course, my other  
25 colleague is also working on these kind of comparisons a lot.

1 Q. [10:09:25] Thank you.

2 MR SACHITHANANDAN: [10:09:27] Could we please pull up tab 3, that is to say,  
3 0223-0461.

4 Q. [10:09:50] Sir, could you please explain to the Court what this form is?

5 A. [10:09:53] Yes. This is the observation list of the facial comparison. So the three  
6 examiners, or the three researchers, fill in this form separately from each other. So they  
7 -- and then we combine this, the three forms. And if you look into the form itself, you  
8 see Examiner a, b, and c.

9 For instance, on the first part here, in this part, you see a, b, and c, so that's Examiner a,  
10 b, and c. They were doing a comparison and they saw a similarity in the shape of the  
11 face. And they can also write about that it's not observable, so that's "NO," or that it is  
12 different. And they can also explain -- give an explanation if they find a similar -- a  
13 difference or a similarity and an assumption if the images are of different persons, so  
14 that might be -- or that there is a difference because of ageing or other reasons that the  
15 images have been altered.

16 Q. [10:11:21] Thank you.

17 MR SACHITHANANDAN: [10:11:22] Could we please zoom in just a little bit. Right.  
18 Yes.

19 Q. [10:11:37] And can you explain what that box at the very top of the table indicates.

20 A. [10:11:50] Yes, certainly. I will do that so. So in the left we have the reference  
21 images, so the reference images that were provided, so the two mp4 -- mp4 video  
22 footage that was provided. We didn't know the year of the picture, but we knew it  
23 should be several years or many years before.

24 The camera position, that was in a variety. The camera distance was estimated in  
25 metres. The lighting was fair. The contrast was sometimes good and sometimes bad.

1 Sharpness was not so good but fair sometimes. And we also looked at the dimensions  
2 of the source material, so of the face, and then we show here the number of pixels.  
3 A pixel is the element where an image is composed of. So if you have your mobile  
4 phone or your camera, then there is a kind of -- there are many separate sensors in your  
5 system, and one pixel is the smallest part of that. So that's also the reason that we have  
6 a limited resolution in these.

7 Q. [10:13:24] Right.

8 MR SACHITHANANDAN: [10:13:26] If the Court Officer could please scroll down a  
9 little.

10 Q. [10:13:33] Right. And just so I understand, when we have a, b, and c under the  
11 same column, could you explain what that means?

12 A. [10:13:44] Yes. So if we see, for instance, here the first where similarities are found  
13 by Examiner a, b, and c, they all found similarities in shape, proportions, hairline,  
14 shape of the forehead, and -- and shape of the forehead. But then we see the next one,  
15 then Examiner a saw a similarity in bumps; whereas, Examiners b and c didn't see  
16 those. So they -- that doesn't mean that there is much difference, but it is explainable  
17 because in some of the video or some of the images you might see bumps, but that's  
18 under description.

19 PRESIDING JUDGE KORNER: [10:14:42] Sorry, I should have said we grasped that.  
20 But do I take it, sir, that if one looks at the table of who found what, none of the  
21 researchers found any differences between what was seen on the videos and that on the  
22 -- the disputed videos and those that were used for comparison, except for creases and  
23 wrinkles, which we see over the page?

24 THE WITNESS: [10:15:29] Yes, that's correct. And that was an explainable difference  
25 because of the ageing.



- 1 PRESIDING JUDGE KORNER: [10:15:36] Yes, I see that, resolution, ageing, yes.
- 2 MR SACHITHANANDAN: [10:15:43]
- 3 Q. [10:15:43] And, sir, I noticed that there's no explicit entry for the hand, but I did  
4 notice that there is an entry for the hand in your report. Could you explain that to us a  
5 little bit.
- 6 A. [10:15:58] Yes, the three researchers also examined the hand. And there was also a  
7 separate form for that, but that's a very limited form. But they also found similarities in  
8 those findings. So then we combined that on this form, and we also wrote a conclusion  
9 of that or the findings of that in the report as such.
- 10 Q. [10:16:27] Thank you.
- 11 MR SACHITHANANDAN: [10:16:28] This can be taken down. And if we can please  
12 go back to the first report, that is, 0223-0443. And let's now go to page 0447. My  
13 apologies. Actually, 0452.
- 14 Q. [10:17:20] Sir, here you have the conclusion of your first report in light of the table  
15 that you and your colleagues filled in. Could you explain this to us, please.
- 16 A. [10:17:31] I will explain the conclusion. So we had both hypothesis, so the main  
17 character is the suspect and hypothesis 2 is the suspect but has similar general facial  
18 features. At the Netherlands Forensic Institute, we use a likelihood ratio that we  
19 estimate for this kind of research, so investigation, and then we had the consensus in  
20 the conclusion that the findings of the examination are very much more likely if the  
21 main character depicted in the disputed video files is the same as the suspect than  
22 when hypothesis 2 is true.
- 23 And we also have the condition that it shouldn't be a close blood relative. So if it  
24 would have been a twin, then, of course, we need also to investigate the twin or the  
25 brother if they have close similarities. And also the conclusion is subject to the

1 condition that no facial surgery or major facial surgery has been made, so that's -- no  
2 changes have been made in the occurrence. That means those major things that  
3 someone could do with their face.

4 Q. [10:19:12] So no changes in the appearance of the face --

5 A. [10:19:14] Yes.

6 Q. [10:19:15] -- is that right?

7 A. [10:19:15] Yes, yes, that's correct.

8 Q. [10:19:18] Now, you use the term "very much more likely," and there's an  
9 explanation of that term in footnote 2. Could you please explain the meaning of that in  
10 terms of orders of magnitude.

11 A. [10:19:35] Yes, certainly. I would, indeed. Maybe we can go somewhat down --

12 Q. [10:19:39] Yes.

13 A. [10:19:39] -- on the page.

14 Q. [10:19:40] Yes.

15 A. [10:19:41] That would be great. Okay. Thank you very much. So here we see the  
16 verbal terms and the order of magnitude of the evidence. So if we have a likelihood  
17 ratio "about as likely," then it might be that the findings are as the same, that it's the  
18 same person or a different person with the similar facial features. If we have a  
19 somewhat higher conclusion, so 2-10, and that's the order of magnitude of the  
20 evidence, then it's slightly more likely.

21 In this case, we had a "much more likely," "very much more likely," so that's then 10,000  
22 to 1 million for the likelihood ratio. And in the case we discussed, we are not on the  
23 upside of the 1 million, but we might be somewhat at the lower side, around the 10,000,  
24 but it's an estimation.

25 PRESIDING JUDGE KORNER: [10:20:50] This is a DNA-type assessment, if you like --

1 THE WITNESS: [10:20:55] Yes.

2 PRESIDING JUDGE KORNER: [10:20:56] -- because, obviously, of cases that have gone  
3 on in the past. But certainly in my domestic jurisdiction, it can be sometimes put in  
4 percentages. Are you prepared to do that? In other words, the likelihood of them  
5 being the same person, are you prepared to say it's something in the region of 90 per  
6 cent? If you're not, say so straightaway.

7 THE WITNESS: [10:21:29] Thank you, your Honour. No, normally we do not do that  
8 because we do not know the prior, so we do not know how many other people might  
9 fit in this. So if the whole population of the world might fit in this, then --

10 PRESIDING JUDGE KORNER: [10:21:48] All right. It is very much like DNA, then.

11 THE WITNESS: [10:21:50] Yes, certainly.

12 PRESIDING JUDGE KORNER: [10:21:51] Yes, yes. All right, then. Thank you.

13 MR SACHITHANANDAN: [10:22:08] Thank you. This can be taken down for a  
14 moment. Could we please pull up tab 2, that is, 0223-0454.

15 Q. [10:22:32] Sir, it's correct, isn't it, that this a basic overview of your methodology as  
16 published by the NFI?

17 A. [10:22:42] Yes, that's correct. That's the appendix that we always use for the  
18 reports, and that is always provided to give some background about this kind of  
19 investigation.

20 Q. [10:23:03] And usually this is in Dutch, but my understanding is that for our  
21 benefit this is provided in English?

22 A. [10:23:08] That's correct, because we updated the Dutch version, and then we  
23 translated it. But then that's the reason that it's translated, yes.

24 MR SACHITHANANDAN: [10:23:19] Could we please go to page --

25 PRESIDING JUDGE KORNER: [10:23:22] This is because not many people in the world

1 speak Dutch other than the Dutch.

2 MR SACHITHANANDAN: [10:23:30] Precisely. Could we please go to 0458, please.

3 And if we can zoom in on the top right.

4 Q. [10:23:49] And I'm right, sir, aren't I, that one of these categories should be

5 "slightly more likely." There are two "more likelies," and the first one should be

6 "slightly more likely"?

7 A. [10:24:03] That's correct. So the information in the report itself is correct, but here

8 there has been an error in the translation, so that should be "slightly," yes.

9 MR SACHITHANANDAN: [10:24:17] If we can scroll down to the bottom left. Yes.

10 Q. [10:24:22] And here, too, the first entry should be "slightly more likely"; is that

11 correct?

12 A. [10:24:28] That's correct, yes. So it should be similar as in the report, yes.

13 Q. [10:24:37] Thank you.

14 MR SACHITHANANDAN: [10:24:38] This can be taken down. Can we please pull up

15 tab 4, that is to say, 00000976. If we could zoom in just a little bit so we can read the

16 text.

17 Q. [10:25:13] Sir, I'm right in thinking that this is a follow-up report you did at our

18 request late last year?

19 A. [10:25:20] Yes, that's when we had a video-conference, then we had -- after that,

20 you asked for this, these questions.

21 Q. [10:25:35] And could you explain to us, please, the difference between this

22 analysis and your previous analysis.

23 A. [10:25:42] Yes, I can. So in this analysis, we assumed that the two video files are

24 not -- perhaps not the same person. So in the first analysis, we assumed they were the

25 same person. But if they would have been different persons, then you have to examine

1 those videos separately, and that's what we did in this report.

2 MR SACHITHANANDAN: [10:26:21] Could we please go to the next page.

3 Q. [10:26:31] Yes. Now, I see here a set of hypotheses, beginning from number 3 to  
4 number 6. If you could please explain to the Court what this is?

5 A. [10:26:41] Yes, I made the new hypothesis, and so I numbered them further. So far  
6 we had numbers 1 and 2, and now we have hypothesis 3. The main character depicted  
7 is the same as the suspect. So the video starting with 45, .mp4, and the main character  
8 is different from the suspect but has general facial features. So then we examined those  
9 videos separately, and we also did that for hypothesis 5.

10 So then hypothesis 5 is -- the main character depicted in the disputed video file is the  
11 suspect, but then with this -- the other video file. And we also had hypothesis 6, which  
12 is similar. It's different from the suspect but has similar general facial features.

13 And we -- so we also examined those with the three same researchers, and then we  
14 came to a somewhat lower conclusion.

15 Q. [10:28:14] Yes, please. So maybe you can explain to us the change in conclusion  
16 and the significance of that.

17 A. [10:28:18] Yes. So we were already -- if we combined both videos, we were  
18 already on the lower limit of the -- so the 10,000 in the estimation of the likelihood ratio.  
19 And when we examined them separately, we have less features in the video. So then  
20 we went down in the conclusion and we gave it a "much more likely," not a "very much  
21 more likely," for both of the videos.

22 PRESIDING JUDGE KORNER: [10:28:54] It's quite difficult to -- the way you -- the way  
23 you phrase the hypotheses is quite difficult to follow.

24 If you examine the two videos separately as opposed to together with the comparison  
25 shots, you come to a lower conclusion about both videos.

1 THE WITNESS: [10:29:37] Yes, your Honour. The reason is that if we assume that both  
2 videos are from the same person, we may add those features that agree, like the hand,  
3 we may add those features also to the other one. But in this case, if you assume they  
4 are different, then we have less features that we can have.

5 PRESIDING JUDGE KORNER: [10:30:10] Okay. And so the overall conclusion is  
6 which one on the scale?

7 THE WITNESS: [10:30:16] That's -- so the "much more likely," that's 100 to 10,000.

8 PRESIDING JUDGE KORNER: [10:30:23] Okay. It's "much more likely" --

9 THE WITNESS: [10:30:25] Yes.

10 PRESIDING JUDGE KORNER: [10:30:26] -- as opposed to "very much more likely."

11 THE WITNESS: [10:30:28] Yes, that's what --

12 PRESIDING JUDGE KORNER: [10:30:30] All right.

13 THE WITNESS: [10:30:31] -- the conclusion is. But if we know -- if there is evidence  
14 that they are the same person, other evidence, then it can go up.

15 PRESIDING JUDGE KORNER: [10:30:55] Yes, all right.

16 Yes, thank you. Sorry, Mr Sachithanandan, I just wanted to make sure I understood  
17 that.

18 MR SACHITHANANDAN: [10:31:02] I had an equal -- a similar struggle, your  
19 Honour, so that's fine.

20 Q. [10:31:06] Sir, I noticed that in your second report we don't have the sort of table  
21 with three columns. Could you explain that a little bit.

22 A. [10:31:17] Certainly, I can explain that. We had the same examiners, and they  
23 already had -- yes, they didn't fill out those forms, because they already filled out the  
24 form. And then they already had in their notes some of these -- these kind of  
25 comparisons being made. So there was no need to make separate sheets again. And

1 that would not be -- make any sense to do again, because they already saw those videos  
2 and they already had investigated this.

3 But if we originally would have received the question like this, then we would have  
4 done that so.

5 Q. [10:32:10] And does the lack of that form have any impact on the integrity or  
6 completeness of your analysis?

7 A. [10:32:17] As far as I can see, it does not have any difference, because we can  
8 explain if you combine both videos, that we have a higher conclusion because of more  
9 features that could be compared.

10 PRESIDING JUDGE KORNER: [10:32:35] But, sorry, when your researchers were  
11 looking at this originally, were they making notes as to the differences or whether they  
12 agreed with it for each video separately and then combining them into one form? Is  
13 that what they were doing when the original examination was done?

14 THE WITNESS: [10:33:00] Yes, that's true. They were combining the findings, and  
15 then they were writing that down on that form. Yes.

16 PRESIDING JUDGE KORNER: [10:33:11] Yes. So when watching, say, video -- the one  
17 where the person's in uniform, for example, the first one, they would have watched it  
18 with the chart and made notes.

19 THE WITNESS: [10:33:25] Yes.

20 PRESIDING JUDGE KORNER: [10:33:27] Then they would have watched the second  
21 video. Would they have made notes on a different chart?

22 THE WITNESS: [10:33:33] Yes.

23 PRESIDING JUDGE KORNER: [10:33:34] And then combined the two.

24 THE WITNESS: [10:33:37] But the notes are not always written. They are just they --

25 PRESIDING JUDGE KORNER: [10:33:42] Scraps of paper.

- 1 THE WITNESS: [10:33:43] Not scraps of paper, but it might be just that they fill out the  
2 form based on their findings.
- 3 PRESIDING JUDGE KORNER: [10:33:51] All right.
- 4 THE WITNESS: [10:33:51] So there might not be a written note of that.
- 5 PRESIDING JUDGE KORNER: [10:33:57] Yes, all right.
- 6 MR SACHITHANANDAN: [10:34:05]
- 7 Q. [10:34:06] Thank you, Mr Witness. Those are my questions.
- 8 PRESIDING JUDGE KORNER: [10:34:08] Yes.
- 9 Any questions from the victims representatives on this?
- 10 MS VON WISTINGHAUSEN: [10:34:12] No, thank you, Madam President.
- 11 PRESIDING JUDGE KORNER: [10:34:16] Yes, Mr Edwards.
- 12 QUESTIONED BY MR EDWARDS:
- 13 Q. [10:34:30] Good morning, Professor. We met briefly Monday afternoon. My name  
14 is Iain Edwards. I'm one of the lawyers for Mr Abd-Al-Rahman.
- 15 MR EDWARDS: [10:34:45] Can we have up, please, your CV, which is at tab 72.
- 16 Q. [10:34:59] In the course of your witness preparation session on Monday, I think,  
17 you explained that you were awarded a certificate in image processing and biometrics  
18 from early 2000; yes?
- 19 A. [10:35:23] Mm-hmm.
- 20 Q. [10:35:27] So I'm just having a look at your CV. If we turn to page 2 of your CV,  
21 it's the second principal.
- 22 MR EDWARDS: [10:35:47] Next page, please. No, sorry, we've gone one page too far.  
23 It's page 2 of the CV, please. Thank you.
- 24 Q. [10:36:13] Now, if we go to the second principal entry down, 1999 to 2007, you  
25 explain the areas in which you were -- in which you have expertise, and it states "face



1 comparison," but I don't see where it says that you received a certificate in image  
2 processing and biometrics as such.

3 A. [10:36:47] Okay. The certificate, what kind of certificate do you mean? Because  
4 we had those certificates that are internal, and if I register where there is a certificate  
5 that you -- that you were -- the four reports were examined and were -- so there is a  
6 kind of certification there.

7 Q. [10:37:19] Okay. So any certification is an internal on-the-job training sort of  
8 certificate; is that right?

9 A. [10:37:26] That's correct.

10 Q. [10:37:29] I see.

11 A. [10:37:30] So most of those certificates are internally, and it might be that I get a  
12 certificate for a course that I -- that I have been at or, for instance, with the American  
13 Academy of Forensic Sciences that I attended a workshop for. Those kind of  
14 certificates.

15 Q. [10:37:50] Yes, that's fine. I want to focus on the certificates that you got in 2000,  
16 though. So do you remember what the nature of that training, that internal training  
17 session was?

18 A. [10:37:58] The nature of that internal training session is that we did many cases  
19 with colleagues that were expert also in this field. And then on several reports I had to  
20 defend internally, so four or six reports, for those different fields.

21 But in 1997, I was -- I did the work on the firearms and toolmarks, as I have described  
22 here. But in the meantime we were also involved more in some of the CCTV, but that's  
23 something that was growing then. In 1997, the CCTV images really came in the lab,  
24 and then we were examining them.

25 Q. [10:38:48] Okay. And where we see just the term "biometrics," that means,

1 essentially, that the measurements of features of the human body.

2 A. [10:39:02] Yes, but we don't measure those. We compare those because there is a  
3 morphological comparison.

4 Q. [10:39:10] Yes.

5 A. [10:39:11] If you measure those, then you might make a mistake, as we also wrote  
6 in our appendix, so -- because you often do not have the same circumstances, so you  
7 should be careful if you do measurements.

8 Q. [10:39:29] Now, if I or one of the Judges wanted to get a qualification, a  
9 certification from the NFI, how long would that course last for?

10 A. [10:39:38] The course for facial comparison might take three years or so,  
11 depending on how well someone does. So, in theory, it could be done in two years, but  
12 in practice that's not feasible.

13 Q. [10:39:56] And does that include the testing and the defending of reports that you  
14 prepare?

15 A. [10:40:05] Yes. Certainly, yes. So there should be at least 20 reports being written  
16 and being -- and then also the comparisons should be made. Also, the proficiency tests  
17 should be done in a good manner, and then so we have all conditions on that.

18 Q. [10:40:22] Now, if we were to put the testing to one side and just focus on the  
19 fundamentals, the how-to of facial comparison, how long does that part of the training  
20 last for?

21 A. [10:40:39] The facial comparison is training on the job, so it's partly based on  
22 literature, of course, and one has to go through literature, through conferences. So that  
23 takes at least three years that one can write a report themselves.

24 Q. [10:41:05] Sorry, I just want to be very clear before I move --

25 A. [10:41:10] Okay.

1 Q. [10:41:11] -- on to the substance of your report. You're saying that that would take  
2 three years, including involving the writing of reports and the defence of your reports;  
3 right? But in terms of learning the how-to of facial comparison only - never mind the  
4 testing part of it --

5 A. [10:41:39] Okay.

6 Q. [10:41:39] -- but just the learning of it - how long would that take?

7 A. [10:41:43] Normally that would take two years, but we always do it with three  
8 persons. But in the -- in the start, if someone is being trained, then we have the fourth  
9 person. So the person that's being trained does that for two years separately, so as a  
10 fourth researcher, and then they have to discuss also with the fourth person.

11 Q. [10:42:05] And the training involves, presumably, modules on record-keeping?

12 A. [10:42:10] Yes.

13 Q. [10:42:11] And the, as it were, recording of your work --

14 A. [10:42:16] Mm-hmm.

15 Q. [10:42:17] -- in the course of a preparation of a given report; right?

16 A. [10:42:23] Yeah.

17 Q. [10:42:23] And it's important that there's an accurate record kept of both the  
18 reference images and the comparison images; right?

19 A. [10:42:38] Yes.

20 Q. [10:42:39] And that's important, isn't it, in a forensic context in order for the expert  
21 to defend their conclusions in court potentially; right?

22 A. [10:42:54] Certainly, yes.

23 Q. [10:42:55] In answer to questions from judges or defence lawyers, right, or, indeed,  
24 prosecution lawyers, because I anticipate you are occasionally instructed by defence  
25 firms; right?

1 A. [10:43:06] Normally, we do not work directly for defence firms in the Netherlands.  
2 We always get -- because the law system works somewhat differently, so mostly it goes  
3 via the judge and more often, so we are neutral, as such, in the Netherlands.

4 Q. [10:43:28] Yes. Now, would it be fair to say that at its heart facial image  
5 comparison is subjective?

6 A. [10:43:42] There is some subjectivity, also because we cannot give the exact  
7 numbers, but we try to make an estimation of the likely facial. So that's -- and so in that  
8 way, we try to make it objective.

9 Q. [10:44:06] You try your best to make it objective, but fundamentally it's an  
10 individual's expert's assessment of a given image.

11 A. [10:44:15] It's with comparisons of images. Like also with firearms and toolmarks,  
12 this is a similar kind of comparison of forensic. But it's -- at least at the American  
13 Academy of Forensic Science, some of the findings were also -- literature is written on  
14 and peer review articles are written on in forensic journals.

15 PRESIDING JUDGE KORNER: [10:44:43] Wait. I'm sorry, Mr Edwards.

16 When you compare it to a firearms expert - you say it's the same type of comparison -  
17 are you thinking of where a firearms expert says, for example, this particular bullet was  
18 fired by this particular gun because of the striations or whatever it is?

19 THE WITNESS: [10:45:10] That's true, yes. So then you also compare striations with --  
20 but, of course, with facial features, they are different in the way they --

21 PRESIDING JUDGE KORNER: [10:45:22] Well, I was rather thinking that it wasn't  
22 quite the same thing.

23 THE WITNESS: [10:45:26] No. It's similar that you do the comparison, but it's  
24 different. I agree.

25 PRESIDING JUDGE KORNER: [10:45:32] All right.

1 MR EDWARDS: [10:45:41]

2 Q. [10:45:41] And there are forms of forensic analysis - toolmarks, firearms marks -  
3 where striations and marks on a tool can actually be physically measured, right, and  
4 compared as between the reference cartridge, for example, and the cartridge in dispute;  
5 right?

6 A. [10:46:04] Yeah.

7 Q. [10:46:07] But that doesn't happen, does it, in facial image comparison? You don't  
8 use tools to physically measure distance between, for example, the centre of the left eye  
9 and the centre of the right eye?

10 A. [10:46:22] No, we do not do that, so -- unless we have the same camera system.  
11 So, like with an ATM, you might have a camera at the same position, and then you can  
12 do more these kind of comparison. But in this case, we do not have the original camera  
13 system, so then we cannot do these kind of comparisons.

14 Q. [10:46:47] Yes. Well, I'll come back to the original image-taking system in a  
15 moment.

16 A. [10:46:53] Okay, yes.

17 Q. [10:46:55] Annex 1 of your report is the insert, as it were, tab 2.

18 MR EDWARDS: [10:47:04] And if we could perhaps pull that up and just turn to the  
19 second page of it.

20 Q. [10:47:09] And the left column, about halfway down, there's a section entitled  
21 "Facial Recognition versus Comparison of Facial Images." And I'll ask you to bear with  
22 me, because I know we are not talking about, strictly speaking, the same thing. But  
23 towards the end of that section, a discussion, a short discussion is had on the holistic  
24 assessment of a face, the comparison of an individual and a photo as is often done at  
25 border posts by immigration officers; right?

- 1 A. [10:48:05] Mm-hmm.
- 2 Q. [10:48:06] And this kind of holistic assessment of a face has a pretty startling rate  
3 of error; right?
- 4 A. [10:48:24] Mm-hmm.
- 5 Q. [10:48:25] The error rate is at least 30 per cent.
- 6 A. [10:48:31] Mm-hmm.
- 7 Q. [10:48:32] And in order to address that sort of error rate, we now see in a lot of  
8 modern airports automatic facial recognition machines which can read a passport and  
9 then, you know, your face is scanned by the machine and various data points are  
10 selected; right?
- 11 A. [10:49:00] Mm-hmm.
- 12 Q. [10:49:02] In order for the machine to assess the face against the passport image;  
13 right?
- 14 A. [10:49:07] Yeah.
- 15 Q. [10:49:08] And that is commonly regarded as far more accurate than a couple of  
16 seconds holistic assessment by an immigration officer.
- 17 PRESIDING JUDGE KORNER: [10:49:24] (Microphone not activated).
- 18 MR EDWARDS: [10:49:28] If that, yes.
- 19 PRESIDING JUDGE KORNER: [10:49:29] (Microphone not activated).
- 20 THE INTERPRETER: [10:49:32] Mic, please.
- 21 PRESIDING JUDGE KORNER: [10:49:36] (Microphone not activated).
- 22 MR EDWARDS: [10:49:38]
- 23 Q. [10:49:39] But, again, in more manual comparison of facial images, that kind of  
24 automatic or automated comparison exercise is not carried out, is it, by you and your  
25 colleagues?

1 A. [10:50:06] Yes, we do. We changed the system somewhat in the meantime, so we  
2 do carry out those kind of investigations also with automated comparisons also as the  
3 fourth -- fourth comparator, so -- and we have done lots of research in this area before  
4 we started to use it also as a one of the examiners as such.

5 Q. [10:50:34] But dragging it back to this case, that was not done in this case, was it?

6 A. [10:50:39] That was not done, as far as I know, in this case, no.

7 Q. [10:50:45] Boiling it down to its fundamentals, you, sitting alone in front of a  
8 screen, look at different images and you form an impression; right? Yes. And different  
9 experts, no matter how experienced, can legitimately form different impressions; is that  
10 fair?

11 A. [10:51:16] That's fair. But, of course, the examiners -- the difference between a  
12 computer examining it, at least the software that we have currently, is that they often  
13 use frontal face image and sometimes they also use other features, but you do not  
14 know exactly why the system determined that it was similar or not.

15 Q. [10:51:39] Yes.

16 A. [10:51:39] So you also see those systems, they also make errors in their estimation.  
17 And we try to explain why we see things, that they are similar or different. And also if  
18 we compare it to recognising, then that's only a few seconds, but we have much more  
19 time to compare. I mean, we will use hours for the comparison. We don't do that in  
20 seconds.

21 Q. [10:52:09] Yes, I appreciate that. Nevertheless, the literature that is cited in this  
22 annex describes an error rate, when the opinions of three forensic experts are  
23 combined, of about 3 per cent.

24 A. [10:52:37] That's -- it's around 1 per cent, but it depends also on the image. So if  
25 you have very bad image quality, then these kind of -- or very difficult images to

1 compare, then these numbers will go up.

2 Q. [10:52:54] Okay. Well, I'm just going to read out to you what's in your institute's  
3 own annex.

4 "Tests carried out amongst" --

5 So this is the right column. It's on the screen already.

6 "Tests carried out among investigators of forensic laboratories affiliated with ENFSI  
7 have shown that the error rate in forensic comparison is around 1-2% ..."

8 Right?

9 A. [10:53:29] Mm-hmm.

10 Q. [10:53:32] "... in the same order of magnitude as described by White et al, who  
11 found an error rate of around 3% when combining the opinions of three forensic  
12 experts."

13 A. [10:53:44] Yeah.

14 Q. [10:53:44] Now, is there anything that you disagree with in what's in your  
15 institute's own document?

16 A. [10:53:51] Yes, but it's in the literature by White, and that's from the ENFSI  
17 documents. The ones from White were very difficult images, and they found around 3  
18 per cent. And we also tested our examiners, so the last sentence, it says "the methods  
19 used by the NFI, in which three investigators form a joint preponderance, has not  
20 yielded any incorrect results in these tests ..."

21 Q. [10:54:28] Yes. Well, you pre-empt my next question in the last five minutes. First  
22 of all, "NFI, no incorrect results between 2008 and 2015." Firstly, how do you know  
23 that?

24 A. [10:54:46] Because with those tests, you will have the ground truth, and then  
25 afterwards they will provide you the information. That's with those proficiency tests.



1 So then you test how well your system works.

2 Q. [10:55:00] Right. I see. So in the context of proficiency tests.

3 A. [10:55:03] Yeah.

4 Q. [10:55:05] All right. I'm going too fast. But in the context of real life forensic  
5 analysis where evidence is being presented before a court, you're not necessarily  
6 always going to know whether an error has entered into the analysis and that the  
7 wrong conclusion has been made in court, are you?

8 A. [10:55:41] No, certainly not. So that's something you might find out or you might  
9 not find out.

10 Q. [10:55:49] Yes. So you've already hinted that a principal limitation to facial image  
11 comparison is the quality of the disputed material?

12 A. [10:56:10] Yes, certainly.

13 Q. [10:56:12] Yes. The lower quality, the more blurry, the lower the resolution, the  
14 fewer the pixels, the harder it is to carry out facial image comparison; correct?

15 A. [10:56:27] Normally, it is, unless we do an exclusion. So sometimes that also  
16 happens that it appears a different -- to be a different person because certain features  
17 do not -- are not the same. Like height, if certainly it appears that height is an issue  
18 there, then that might be different. So we also examine those kind of biometric  
19 features.

20 Q. [10:56:54] Okay. But in this case, we're not talking about height at all --

21 A. [10:56:56] No.

22 Q. [10:56:57] -- are we?

23 A. [10:56:58] -- no, no, we are not. But if we -- it goes sometimes the other direction  
24 as well.

25 Q. [10:57:11] I just want to ask you about this: As a general proposal, ideally the

1 comparison material - i.e., the images taken by the NFI for comparison - would be  
2 taken by the same equipment as the reference images; right? Why is that important?

3 A. [10:57:43] It's important because then you can also have the same artefacts that are  
4 made by the system. You have the same position. So if you have an ATM system, like  
5 with a face, then you can visualise it in the same manner, and then you can also do  
6 more with things like height and other features.

7 Q. [10:58:10] Okay. So it's not right to say that the higher the quality image of the  
8 comparison material, the easier it is to do your job?

9 A. [10:58:27] If the comparison -- the material that we receive is very high of quality,  
10 then it's better. I mean, if you have a good quality image, then it works better. But it  
11 makes no sense to make a very high comparison image if you have a very low. But  
12 still, I mean, in this case we made the best available -- or at least a good comparison  
13 images, because then we can compare all the features if necessary. But it's not really  
14 necessary for the -- for the case.

15 Q. [10:59:08] Okay. Well, my next question is this: If, as a general proposition, the  
16 comparison material is ideally taken by the same equipment, why was the NFI  
17 comparison material, the NFI images, why were they not taken by, for example, a  
18 mobile phone?

19 A. [10:59:35] In this case, they were not taken by a mobile phone because we can also  
20 lower the quality if that's needed, and we can -- so it makes no sense to make a lower  
21 quality image. And also with the other -- so if the equipment would be available, we  
22 still would make very high quality images also of the suspect.

23 Q. [10:59:59] Because you've looked at, carefully, the reference videos, in your  
24 experience, I'd imagine you'd agree with me that these are clearly videos taken on a  
25 mobile phone.

1 A. [11:00:17] Yes, we did not examine with what it has been taken. It might be a  
2 camera, it might be a mobile phone, it might be -- but that's something we did not  
3 investigate.

4 Q. [11:00:33] Well, okay. But looking at the dimensions of the source material in  
5 pixels, which is something that you've noted in Annex 2 - the observation lists facial  
6 comparison, pixel dimensions of 40 to 55 up to 80 to 120 - that's more consistent with  
7 video taken by a mobile phone; would you not agree?

8 A. [11:01:03] Yes. I don't know exactly in which year it has been taken, because that's  
9 one of the questions. So it might be also a lower resolution camera --

10 Q. [11:01:12] Okay.

11 A. [11:01:12] -- in that time.

12 Q. [11:01:13] All right. Fair enough.

13 MR EDWARDS: [11:01:15] Your Honour, I see the time. I've a bit more to do.

14 PRESIDING JUDGE KORNER: [11:01:20] Yes. We're going to take a half hour break  
15 now and --

16 THE INTERPRETER: [11:01:27] Mic, your Honour, please.

17 PRESIDING JUDGE KORNER: [11:01:30] We're going to take a half hour break now  
18 and be back ready to start at 11.30.

19 Yes, Mr Nicholls.

20 MR NICHOLLS: [11:01:40] Yes, sorry, your Honour, just wondering how we will  
21 proceed following the witness.

22 PRESIDING JUDGE KORNER: [11:01:45] I'm going to go straight into hearing your  
23 submissions on the legal argument.

24 MR NICHOLLS: [11:01:49] Okay. And then it will be me and then my friend, or how  
25 do you --

- 1 PRESIDING JUDGE KORNER: [11:01:54] No, I think it's Mr Edwards to go first  
2 because it's his submission --
- 3 MR NICHOLLS: [11:01:59] And I respond, yes.
- 4 PRESIDING JUDGE KORNER: [11:02:02] -- and you're responding.
- 5 MR EDWARDS: [11:02:04] It's a matter for your Honours. This is, strictly speaking,  
6 my submissions are, strictly speaking, a response, rebuttal to my learned friend's  
7 submissions following Mr Laucci's submissions back in December, so this is us having  
8 a second bite at the cherry.
- 9 Having said that, if my learned friend has submissions to make about the evidence that  
10 we've heard, because that's the only difference between that which took place in  
11 December and where we are now, if my learned friend has submissions to make on the  
12 facts, on the evidence, then I would invite your Honours to ask Mr Nicholls to go first  
13 and then --
- 14 PRESIDING JUDGE KORNER: [11:02:42] Well, wait a minute. Just a minute. It was  
15 Mr Laucci's application to exclude.
- 16 MR EDWARDS: [11:02:51] Yes.
- 17 PRESIDING JUDGE KORNER: [11:02:51] Mr Nicholls responded.
- 18 MR EDWARDS: [11:02:53] On the second day.
- 19 PRESIDING JUDGE KORNER: [11:02:54] Yes. At that stage, we hadn't heard evidence  
20 from either of the investigators, which, I should add, I still think one or other -- you, I  
21 think, Mr Edwards, should have called them and not us, but never mind that. So I  
22 think we're back to square 1. I don't think you repeat. Because we said we were going  
23 to call the investigators --
- 24 MR EDWARDS: [11:03:21] Yes.
- 25 PRESIDING JUDGE KORNER: [11:03:22] -- and I don't want to hear any further

- 1 submissions, unless you've got -- Mr Laucci addressed us at length on the law and the  
2 various cases.
- 3 MR EDWARDS: [11:03:34] Yes.
- 4 PRESIDING JUDGE KORNER: [11:03:35] So --
- 5 MR EDWARDS: [11:03:39] Well, can I make it very clear that my submissions are very  
6 firmly in response to Mr Nicholls' submissions from last December. It is not - I repeat -  
7 not a repetition of submissions that Mr Laucci has already made.
- 8 PRESIDING JUDGE KORNER: [11:03:56] Yes, I see. We didn't give you a chance to  
9 respond, Mr Nicholls.
- 10 MR NICHOLLS: [11:04:04] He's sort of at the reply stage.
- 11 PRESIDING JUDGE KORNER: [11:04:08] All right.
- 12 MR EDWARDS: [11:04:08] Having said that, if Mr Nicholls has submissions to make --
- 13 PRESIDING JUDGE KORNER: [11:04:12] I think --
- 14 MR EDWARDS: [11:04:12] -- on the evidence, I think he should be heard.
- 15 PRESIDING JUDGE KORNER: [11:04:15] But I want to hear what you say about how  
16 we should treat the evidence, and then I'm going to ask Mr Nicholls to respond.
- 17 MR EDWARDS: [11:04:20] Very well.
- 18 PRESIDING JUDGE KORNER: [11:04:21] I'm going to -- because, I think, overall this is  
19 your submission. The Prosecution say we should -- this is evidence that is admissible.  
20 You say it isn't. And I think, really, yes, I think you should go first based on the  
21 evidence that we heard, and then Mr Nicholls can respond, and then I'll give you  
22 another right of reply if necessary.
- 23 MR EDWARDS: [11:04:49] You foreshadowed my --
- 24 PRESIDING JUDGE KORNER: [11:04:51] Yes, thank you.
- 25 MR NICHOLLS: [11:04:54] Thank you, your Honour.

- 1 PRESIDING JUDGE KORNER: [11:04:55] All right. We need, because of the recording,  
2 so 11.35, please.
- 3 THE COURT USHER: [11:05:03] All rise.  
4 (Recess taken at 11.05 a.m.)  
5 (Upon resuming in open session at 11.38 a.m.)
- 6 THE COURT USHER: [11:38:07] All rise. Please be seated.
- 7 MR EDWARDS: [11:38:29] Welcome back, Professor. I was told off over the coffee  
8 break for speaking too quickly and not observing a pause, so I'm going to slow down,  
9 I'm afraid. Told off quite properly, of course.
- 10 Q. [11:38:47] It's important to make an attempt to simulate the recording conditions  
11 of the disputed images as closely as possible; right?
- 12 A. [11:38:57] Yes, that's -- certainly, that should be done.
- 13 Q. [11:39:04] Yes. And one of the conditions that it is important to try and simulate  
14 as best as possible are lighting conditions; correct?
- 15 A. [11:39:10] That should be done. But still, in this case, we can still compare it with  
16 these comparison images.
- 17 Q. [11:39:20] Well, we'll take it step by step --
- 18 A. [11:39:22] Yup.
- 19 Q. [11:39:23] -- if we may.
- 20 A. [11:39:26] Yup.
- 21 Q. [11:39:27] Both videos were filmed, obviously, outdoors. Do you agree?
- 22 A. [11:39:35] Yes, they were. Yes.
- 23 Q. [11:39:36] Yes, in sunlight, whereas the comparison images were taken indoors?
- 24 A. [11:39:47] Yes, they were.
- 25 Q. [11:39:50] So is it fair to say that much attempt, in fact, was made to simulate the

1 lighting conditions of the disputed videos when the reference material was recorded?

2 A. [11:40:06] There was some attempt being made. But, of course, some of the  
3 images, they had very bright light in the background, so some of the reference images  
4 were quite bright. And the comparison images were better in quality. So for this -- this  
5 case, we can work with those kind of qualities. And it's never -- it's nearly not possible  
6 to reproduce everything there under these circumstances.

7 Q. [11:40:50] Yes. I entirely accept that it's not possible to reproduce everything, but  
8 these are images that could easily have been taken outdoors, couldn't they?

9 A. [11:41:03] But it was not necessary to take them outdoors as far as we could see for  
10 these images, because we could see the features of the face. And in this case, the  
11 features were more important to compare. So we could still see them ourselves.

12 Q. [11:41:26] Now, in your meeting with the Prosecution last week, you explain how  
13 it is that you went about preparing for the assessment. So this is paragraph 17 of  
14 what's called a preparation log.

15 PRESIDING JUDGE KORNER: [11:41:59] (Microphone not activated).

16 MR EDWARDS: [11:42:01] Paragraph 17 of the prep log, your Honour, which is I think  
17 at tab 74.

18 Q. [11:42:11] So frames were extracted from the two disputed videos automatically  
19 via software; correct?

20 A. [11:42:33] That's number 17, you say?

21 Q. [11:42:35] Yes, just the first line.

22 A. [11:42:39] Yes, automatically, that's not -- yes, automatically, that's also manually.  
23 So automatically -- I might have said automatically, but it's with the software.

24 Q. [11:42:54] Yes, well, it says "automatically via software." And then: "The best  
25 frames were selected for comparison." How many frames in total were selected for

1 comparison?

2 A. [11:43:10] There might have been around five images being selected. So off the  
3 hand, several -- I don't have the exact number with me right now.

4 Q. [11:43:28] Well, I understood that in your report, your first report, tab 1, the  
5 selected frames, of which there are five in your report, are just a representative  
6 selection of all the frames that were selected?

7 A. [11:43:50] Yes, that's --

8 Q. [11:43:51] Have I got that right or wrong?

9 A. [11:43:53] That's certainly. So we -- we select some images that certainly should be  
10 taken. So then --

11 Q. [11:44:03] Have a glass of water and then continue.

12 A. [11:44:06] So we have some images that certainly should have been taken, and we  
13 have some -- I'm somewhat asthmatic, so I need to take some medicine.

14 Q. [11:44:42] Just take your time. Have a break if you want.

15 A. [11:44:45] Yes.

16 PRESIDING JUDGE KORNER: [11:44:47] Obviously, if you've got a problem, just say  
17 so, and we'll adjourn while you sort it.

18 THE WITNESS: [11:44:54] Yes, I think I should be fine now.

19 PRESIDING JUDGE KORNER: [11:44:58] Okay.

20 THE WITNESS: [11:44:59] Sorry, I just need to use the medicine and then it works.  
21 So for the -- so we -- we always select some images that certainly should have been  
22 taken. And then during the -- making the comparison images, we make as many  
23 images as possible.

24 MR EDWARDS: [11:45:20]

25 Q. [11:45:21] Yes, okay. So more than five?



- 1 A. [11:45:22] More than -- yes, certainly. Yeah.
- 2 Q. [11:45:29 ] So I come back to my original question: How many in total -- how  
3 many frames were selected in total if more than five?
- 4 A. [11:45:38] Yes, so we make a -- we make a report. So beforehand, we make some --  
5 some file, how many should be taken, and I think that were around five -- or it might  
6 be ten, but it certainly should be made. And then we made many more just for the  
7 comparisons.
- 8 Q. [11:46:05] Okay. But how many? Give us an idea of how many, please?
- 9 A. [11:46:08] I would say, five to ten.
- 10 Q. [11:46:11] Okay. And then you said, "And then we select many more," so how  
11 many more?
- 12 A. [11:46:17] No, but that's during the investigation. Then if you have a video, you  
13 can just play the video and each frame is a different image as such.
- 14 Q. [11:46:33] What I want to understand, Professor, is this: How many frames from  
15 the video in total were selected and used for the facial comparison with the NFI  
16 photos?
- 17 A. [11:46:55] That were five to ten images. And then the researchers can take all the  
18 images that they want to do just as a reference.
- 19 Q. [11:47:14] And do the researchers make a note of those other images that they take  
20 from the video, the other frames that they take --
- 21 A. [11:47:25] No.
- 22 Q. [11:47:25] -- from the video in?
- 23 A. [11:47:26] No, normally because there are so many frames, so normally they will  
24 just say, "Okay, this video." And if they see something special, then they might make --  
25 take that image and then also add that. It depends on the researcher.

1 Q. [11:47:43] So sticking with the five to ten of the best frames, were they used by all  
2 three of the researchers in carrying out the comparison?

3 A. [11:47:54] Yes. So they should certainly be taking them.

4 Q. [11:47:59] Okay. But then when it comes to individual frames that individual  
5 researchers might use from the video in the course of their analysis, there's no way of  
6 knowing whether the three researchers are looking at the same frames?

7 A. [11:48:16] They certainly look at the five to ten same frames --

8 Q. [11:48:20] Yes.

9 A. [11:48:23] -- and then they might -- some researcher might also take an additional  
10 frame for a certain feature and then discuss that later if they find more information  
11 there. But in this case, they -- I mean, the video was -- there were not -- no very fine  
12 details being found. I mean, we didn't have things like scars or other things in the  
13 video.

14 Q. [11:48:47] No, I understand that. But, again, I just want to be very clear in my  
15 mind. You've got the five or the ten that you know all three of you are looking at.

16 A. [11:49:01] Yup.

17 Q. [11:49:01] And then in addition, sitting alone, doing the comparison themselves,  
18 each of the three researchers - you're one of them - is using their own discretion to pick  
19 individual frames from the video to carry out their assessment as well; right?

20 A. [11:49:25] Yes.

21 Q. [11:49:25] And we have no idea, do we, what those individual frames actually  
22 were because they've not been noted, have they?

23 A. [11:49:35] If an examiner would -- if a researcher would find a very -- then it  
24 would -- it would have been noted.

25 Q. [11:49:47] Sorry, if an examiner would what?

1 A. [11:49:50] Find a very exact detail which should have been in, then it would  
2 certainly be noted, so if the others would have missed it. But in this case, that's not  
3 true. But we -- normally, we use those images and we always look for a complete  
4 video just as the reference.

5 Q. [11:50:11] I understand that. But for the purposes of a particular moment of  
6 analysis, you're not looking at a moving video. You're pausing and you're focusing on  
7 a frame in the video to carry out your analysis of bags under the eyes or creases at the  
8 bridge of the nose or the earlobe or something like that; is that right?

9 A. [11:50:39] Yes.

10 Q. [11:50:40] Okay.

11 A. [11:50:41] But you can also -- you can also use the video when playing a part of the  
12 video and then look to those features.

13 Q. [11:50:47] Okay.

14 A. [11:50:47] So then you cannot say that you only took one image of the video, so  
15 you compared the video, and then that's -- that's hard to report.

16 Q. [11:50:56] Yes. So it stands to reason that we don't know if the three different  
17 researchers have, by the end of their work, by the end of the comparison exercise,  
18 whether they have, in fact, been looking at the same frames, exactly the same frames,  
19 do we?

20 A. [11:51:26] They have been looking at certainly those five to ten frames, and then  
21 they might have looked additionally to the other frames.

22 Q. [11:51:42] And I'll ask my next question because -- to put this into some context.  
23 Because there's this uncertainty over precisely which frames of the videos each of the  
24 researchers have been considering, their work cannot be duplicated by someone else  
25 exactly, can it?

1 A. [11:52:09] Their work can be duplicated based on the same images, the five to ten.  
2 And also if another examiner would look at the video, then the same -- but you can  
3 never reproduce it exactly, no.

4 Q. [11:52:27] Well, we would be able to reproduce it if there was a careful note taken  
5 of every single frame that each of the three researchers actually looked at.

6 A. [11:52:38] Yes, but it's -- the problem is with video it's -- it's 25 frames per second,  
7 so you sometimes have to look in the streaming video, so in the playing video, just to  
8 see some detail. And that's something you cannot print. You cannot print a video. So  
9 you can only say a certain -- a certain part of the video has been taken. But it --

10 Q. [11:53:05] Well, hang on a second. In the same way that the five or the ten  
11 common reference frames were selected, you and your colleagues could easily have  
12 selected a common set of 40 or 50 or 100 frames so that everyone knows that they're on  
13 the same page? That's not impossible, is it?

14 A. [11:53:27] It could have been done, but then we still have the video as such. So we  
15 have certain parts of the video where the face is displayed, and we have taken those  
16 five to ten images out. But it's -- I mean, the researcher can always go back to the  
17 evidence and look to more frames.

18 Q. [11:54:01] Yes. And then the correct thing to do, I would suggest, is to make a  
19 note of those other frames, share them with colleagues, so that there is a common --

20 A. [11:54:14] Yes.

21 Q. [11:54:15] -- note of precisely the frames that were looked at.

22 A. [11:54:17] Yes, sorry. So colleagues will certainly also in their notes, so in the notes  
23 that were not included in this report, they will also make some images of those  
24 additional images that they were looking at.

25 Q. [11:54:31] So there is a note somewhere.

- 1 A. [11:54:32] There is a note somewhere.
- 2 Q. [11:54:34] So it's not impossible at all.
- 3 A. [11:54:35] But the -- yes, of course, they also look at the video itself, and the video  
4 itself. So they only make that selection. But what exactly happened there is difficult to  
5 reproduce.
- 6 Q. [11:54:54] You told us in answer to my learned friend's questions this morning  
7 that there was no alteration or manipulation of the comparison images taken by the  
8 NFI; yes?
- 9 A. [11:55:08] Mm-hmm.
- 10 Q. [11:55:11] You said the contrast may have been enhanced but that that's not real  
11 manipulation.
- 12 A. [11:55:17] Yes, that's not a manipulation where you add information or where you  
13 change the information in such a way that it's ...
- 14 Q. [11:55:28] Okay. Let me ask you this: Moving out of the realm of what may have  
15 happened, was, in fact, the contrast enhanced for any of the NFI photos?
- 16 A. [11:55:44] We always look to -- yeah, in regular software, you always do some  
17 contrast enhancement to see if you see a certain detail or not. But it didn't make a  
18 much -- a difference for the comparison images.
- 19 Q. [11:56:06] Now looking at the observation list, Annex 2 of your report. This is at  
20 tab 3.
- 21 MR EDWARDS: [11:56:25] Let's bring that up.
- 22 Q. [11:56:28] Three researchers, a, b, and c. You're c, right?
- 23 A. [11:56:33] Yes.
- 24 Q. [11:56:33] Is there any reason why examiners a and b have been anonymised?
- 25 A. [11:56:37] That's our standard procedure, to anonymise them.

1 Q. [11:56:42] Did you ever send on to the Prosecutor their CVs?

2 A. [11:56:45] No.

3 Q. [11:56:46] So we can't ask you about their -- about details of their qualifications or  
4 details of their experience other than what you told us this morning?

5 A. [11:56:59] Yes, I think so.

6 Q. [11:57:06] Just a couple of questions about some of the entries under the --

7 MR EDWARDS: [11:57:19] So if we go up, please. Yes.

8 Q. [11:57:24] And then there are the two greyed out columns at the top of the screen,  
9 just focusing on the left most column. We note, or you note, that the lighting in the  
10 reference videos is fair. That's in respect to both videos, is it?

11 A. [11:57:48] Yes, in the respect to the videos.

12 Q. [11:57:51] Okay. "Contrast, bad. Bad, good." Do you mean that one of the videos  
13 was bad, the other video was good?

14 A. [11:58:02] No, it depends on the part of the video. Some of it was good and some  
15 was bad. It was not that one video was very bad.

16 Q. [11:58:10] And, again, if that's across the length of each video that it changes, do  
17 we know which particular frames from which particular video had lighting that would  
18 be -- had contrast which would be described as bad or fair or good or anything else?

19 A. [11:58:36] No, I don't have a list of that.

20 Q. [11:58:42] You didn't manipulate or change or alter the NFI comparison images.  
21 Were you able to manipulate or alter any of the reference images taken from the  
22 videos?

23 A. [11:59:10] Then we only do some contrast enhancement, but we didn't use any  
24 other kind of manipulation.

25 Q. [11:59:20] And did the contrast enhancement, to your recollection, result in any

1 way in you being able to carry out the facial comparison easier?

2 A. [11:59:40] It didn't really add much information, because we could -- we could see  
3 the different facial features in the images as such.

4 Q. [11:59:57] Yes. Before we come on to the actual individual features that you look  
5 at, you've explained what - if we just scroll down a bit - the titles of the three columns  
6 in the subcolumns, "S," "NO," and "D." We've got that. But if we move right, "SI," does  
7 that refer to highly individualised features?

8 A. [12:00:28] Yes, that's correct.

9 Q. [12:00:31] So we see that in none of -- in neither of the videos was anything  
10 noticed that was highly individualised about the main character in those videos?

11 A. [12:00:44] (Microphone not activated).

12 Q. [12:01:03] Sorry, you're going to have to repeat that answer.

13 A. [12:01:05] Sorry, yes. I didn't ...

14 So "highly identifying" means that's something we do not often give, but then you need  
15 to have a very -- like, tattoos, like scars, and other features that are very fine. So in  
16 those kind of cases, we do not see that because the resolution is somewhat weaker. But  
17 I said the combination of the features, that makes the higher conclusion.

18 Q. [12:01:44] Okay. So there's no highly individualising features. All other features,  
19 then, in your field, are described as weakly individualising; is that right?

20 A. [12:01:59] Yes. So they are just counting as a feature that is similar. But as I said,  
21 we didn't find differences except one in the wrinkles and the last one, so -- but that  
22 could be by ageing.

23 Q. [12:02:18] Yes. Sorry, I didn't ask you about differences. We'll come there. All  
24 right?

25 And then in the right-most column on the screen, "Explanation for SD similarity under

- 1 assumption images are of different people." What does "SD" stand for there?
- 2 A. [12:02:48] That means for similarities and differences.
- 3 Q. [12:02:53] Oh, I see. So it's not a separate acronym. It's S and D together. Okay.
- 4 Right. So there are a total of 48 individual facial part categories, if we look at that table
- 5 on this page and over the page; right?
- 6 A. [12:03:15] Yeah.
- 7 Q. [12:03:17] And of these 48 categories - I counted them up last night - there's
- 8 unanimity in the similarities column in respect of 19 categories.
- 9 A. [12:03:31] That's correct, yeah.
- 10 Q. [12:03:32] Which, if my maths is right, is a little under 40 per cent, 39 and a half
- 11 per cent.
- 12 A. [12:03:38] Yes, but that's not the way this form should be used, because you can
- 13 very high -- you can have very good faces with only the ear, and then you might get a
- 14 higher conclusion even.
- 15 Q. [12:03:54] We don't have that in this case?
- 16 A. [12:03:55] We don't have that in this case.
- 17 Q. [12:03:58] No.
- 18 A. [12:03:59] But it doesn't mean that if you only have one part of the form with the
- 19 similarities, that you can count those like that. That's not the way the form is meant to
- 20 be used.
- 21 Q. [12:04:16] And then in respect of a full third of these categories, there's
- 22 disagreement between you and your colleagues as to whether similarities are detected
- 23 or whether similarities can't be observed. Sixteen of the categories fall into that -- sorry,
- 24 that's inelegantly put. Sixteen of the individual features fall into that category where
- 25 there's disagreement between you and your colleagues.



1 A. [12:04:53] Yes, that's what -- what we often see with these kind of -- in these kind  
2 of comparison, that -- so that's not very abnormal to see that people see different things.  
3 So, like, the eyelid angle feature, you might -- someone might see it or think they see it,  
4 and others say, okay, this is on the border, so they say not visible.

5 Q. [12:05:23] Okay. Now, doesn't that very fact highlight the extent to which  
6 comparison of facial images is, at its heart, subjective?

7 A. [12:05:44] There is a difference between the different researchers, and that is  
8 something we visualise also in this form.

9 Q. [12:05:52] Yes. And in terms of where there is disagreement, two against one if  
10 you like, it's all mixed up. It's not that there is one of your colleagues who is  
11 consistently in the minority; yes?

12 A. [12:06:11] No. No, sorry, in this case, if they -- if we don't see it, then we will also  
13 discuss if there is really a reason that something -- someone says, okay, this is strange  
14 that you saw that. But then we will discuss the images and then go through the form  
15 and then -- in the end, we look at the conclusions if they agree or not. But here, we  
16 didn't have any disagreement between the researchers as such.

17 Q. [12:06:47] Yes, you've said that a couple of times now. Now, in terms of those  
18 features where there is the minimum disagreement - just look down the table - we've  
19 got the face and the nose; is that fair?

20 A. [12:07:06] That's fair where we have the -- yeah.

21 Q. [12:07:13] The other features all contain some degree of either disagreement or  
22 agreement that nothing can be seen; is that fair?

23 A. [12:07:22] But we also see the eyebrows and the eyes at a distance. There was also  
24 agreement in the nose. There was also some part of agreement. So there were many --  
25 but there were no real disagreement. So if we would have a real disagreement, we

1 would have noticed it. And we also sometimes write a report where we say we cannot  
2 come to a conclusion because of disagreeing opinions, but that's not the case here.

3 Q. [12:07:53] What data did you have available to you about how common this sort  
4 of face shape is in Sudan or, even more specifically, Darfur?

5 A. [12:08:13] We don't have exact numbers. They are a bit -- we have databases, of  
6 course, with all kinds of persons, but --

7 Q. [12:08:25] And did you consult any of the databases in this case?

8 A. [12:08:27] We looked -- no. Normally we just do the comparison based on these --  
9 these findings. And we see -- but as said, if you have one family, they might have  
10 similar appearances.

11 Q. [12:08:43] Sorry, I'm not talking about families.

12 A. [12:08:47] Mm-hmm.

13 Q. [12:08:48] You mentioned that you do have databases of different face shapes and  
14 that covers a range of races, ethnicities, nationalities; right?

15 A. [12:09:05] Yes.

16 Q. [12:09:06] Okay. Do you have within that database data on persons from Darfur?

17 A. [12:09:15] No, we don't have.

18 Q. [12:09:16] Okay. So there would be no point in consulting that database?

19 A. [12:09:19] As far as I know, maybe there are, but they are not named by region or  
20 so.

21 Q. [12:09:26] Okay. But in your region of expertise, facial comparison, it can be an  
22 important factor to take into account whether a particular feature is common within a  
23 given population. Is that true?

24 A. [12:09:45] Some features might be important, but most of the features that we use,  
25 like a skin colour, is not in the -- in this list. No.

1 Q. [12:09:56] No.

2 A. [12:09:57] Because that's difficult to ...

3 Q. [12:10:06] Okay. I spoke about faces a moment ago. Nose shape or nose size, it  
4 was one of the features where there was most agreement between you and your  
5 colleagues; yes? You weren't able to take into account in any way how common these  
6 nose shapes or nose sizes were in Darfur?

7 A. [12:10:45] We don't know the exact numbers. No, that's true.

8 Q. [12:10:55] And the reason why this is important is - in fact, you alluded to it just  
9 before the coffee break - if, in a given population, lots of have a given shape of ear or  
10 shape of nose or shape of face, that is something that you're going to want to take into  
11 account when coming to your conclusions; correct?

12 A. [12:11:16] Yeah, but if we look into some of those features, some -- if there are the  
13 fine details, like the length of nose, okay, and width of nose, they are often similar. But  
14 then if we go to the finer details of the nose, then that might -- that differs more. Same  
15 as to the eyes. But, of course, it all adds up in their parts. But ...

16 Q. [12:11:55] I'm going to move on to hands now. You told us earlier today - this is at  
17 transcript page 19, line 18 - there was also a separate form for the hand. By that, do you  
18 mean a separate observation list for the hand? Your Annex 2?

19 A. [12:12:21] Yes, we had a separate form for that. Yes.

20 Q. [12:12:24] Are you sure?

21 A. [12:12:25] We have a separate form, but we didn't add it to the report because it  
22 was a very short form.

23 Q. [12:12:39] Well, if you just have a look at your report, please. Report 1.

24 MR EDWARDS: [12:12:55] ERN 451, so I think it page 8. Sorry, I think I've misspoken.  
25 Bear with me for just a second.

1 MR SACHITHANANDAN: [12:13:35] If my colleague is looking for the reference to  
2 the hands, it's at entry 5.

3 MR EDWARDS: [12:13:41] Yes. No, thank you. It was actually -- I misspoke when  
4 asking about a document I wanted to refer you to. It's actually your preparation log at  
5 74 on the Prosecution's list, paragraph 28. Can that be brought up on the screen,  
6 please. Thank you.

7 Q. [12:14:26] The last sentence in paragraph 28:

8 "There is no separate comparison sheet for the hands in the observation list; however,  
9 Report 1 explains the features that were taken into account for the analysis."

10 Was there or was there not a separate comparison sheet for the hands?

11 A. [12:14:44] There was a separate comparison sheet, but that's not included in the  
12 report.

13 Q. [12:14:53] Why not?

14 A. [12:14:53] Because it is a very simple report and a simple comparison sheet, and it  
15 didn't give much extra information because the researchers all found similarities there.  
16 And so then I concluded that we just described it in the report itself. I don't have the --  
17 these kind of sheets with me, unfortunately.

18 Q. [12:15:27] Well, it's not even these kinds of sheets. It's this particular sheet for the  
19 hands. You see, their Honours and I, we can't see that ourselves, can we?

20 A. [12:15:40] That's similar with all the observations we have in our logs, so that was  
21 -- so the logs are also not in the report.

22 Q. [12:15:54] No. Also in paragraph -- we'll keep it up on the screen, because I want  
23 to ask you about another entry in paragraph 28 of the preparation log. You told the  
24 Prosecutor on Monday that the -- it's the second sentence in paragraph 28:

25 "The overall conclusion is based on the number and degree of similarity."

1 A. [12:16:25] Mm-hmm.

2 Q. [12:16:26] But your table, Annex 2, that sets out number of similarities. It doesn't  
3 discuss in any way degree, does it?

4 A. [12:16:42] Number and -- no, no, it does -- so if there would be strongly  
5 identifying, we would have noted that. But if we have also the fine details or the -- the  
6 finer details that agree, then that makes up a higher conclusion.

7 Q. [12:17:06] Well, let's unpack that. You would note if there was anything strongly  
8 identifying --

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

10 Q. [12:17:15] -- in the SI column, right, such as tattoos?

11 A. [12:17:18] Yup.

12 Q. [12:17:19] Scars?

13 A. [12:17:21] Yup.

14 Q. [12:17:22] Birthmarks?

15 A. [12:17:24] Yup.

16 Q. [12:17:24] I am not talking about those. I am talking about where you did find  
17 similarities.

18 A. [12:17:27] Mm-hmm.

19 Q. [12:17:28] You told the Prosecutor on Monday that your overall conclusion is  
20 based on the number and degree of similarity. Why is there nothing noted in your  
21 report or in this observation list detailing degree of similarity?

22 A. [12:17:49] I'm not sure if -- I mean, degree of similarity, that's something we -- we  
23 don't state in the comparison sheet. We only say that it's similar. But we might also  
24 discuss that certain features are more similar than others. I mean, if you have very, yes,  
25 fine details that are similar, then we will also cross the box further on the sheet. So if

1 we -- if we look at the sheet itself, then you can see that -- maybe we can -- I don't know  
2 if it's possible to see the sheet itself.

3 Q. [12:18:41] Yes, sure.

4 MR EDWARDS: [12:18:44] Tab 3, DAR-OTP-0461.

5 Q. [12:18:55] So you're saying that if there was anything with a high degree of  
6 similarity, even if it's not a tattoo or a birthmark or whatever, that's something that you  
7 would note in the SI column, is it?

8 A. [12:19:07] That's true.

9 Q. [12:19:08] Okay.

10 A. [12:19:08] But things like hairline, hair growth, that's somewhat more strongly, but  
11 it's -- it's a feature that's smaller and that's -- so if we see eyebrows, if we see the other  
12 part of the -- that if you go further in this form, then we see some -- some similarities  
13 there. So, like, the shape of the -- the tip of the nose, that's a smaller feature that agrees.  
14 Shape of nostrils. And also with the ear, that's also important.

15 Q. [12:19:59] Well, shape and size and protrusion, there's agreement. But if we turn  
16 the page, every other feature relating to the ear, there's either disagreement between  
17 the three of you or agreement that nothing can be seen, Darwin's tubercle.

18 A. [12:20:24] Yes, but two researchers found agreement there. Only Researcher "a"  
19 had disagreements there.

20 Q. [12:20:37] Yes, I see that. Paragraph 31 of your witness log. You told the  
21 Prosecutor:

22 "In this assessment there is no prior that has been factored into the equation and that is  
23 not something the NFI can do unless the Court provides that information."

24 Now, you use the word "prior" in answer to questions from my learned friend this  
25 morning. Just explain to us, please, what does that actually mean?

1 A. [12:21:06] It means the prior of how many other people could have been there at  
2 the given time. So if you say that the whole world could have been there at that place,  
3 then that's something that you have to take into account. If you say, okay, this video  
4 has been taken and we know that he was there or around there, then you have less  
5 persons as a prior.

6 PRESIDING JUDGE KORNER: [12:21:38] I didn't follow that.

7 MR EDWARDS: [12:21:40]

8 Q. [12:21:41] By that do you mean other evidence that might identify the individual  
9 as the suspect?

10 A. [12:21:47] Yes. That's something we don't know because we don't know the other  
11 evidence. And there is also, perhaps, evidence that he was there.

12 Q. [12:22:02] Okay. So --

13 PRESIDING JUDGE KORNER: [12:22:04] In other words, are you saying that if you'd  
14 been made aware of an identification being made by someone who said he knew him  
15 and recognised him, that is something that would be factored?

16 THE WITNESS: [12:22:28] Yes, that could be factored if you are convinced that that  
17 might be --

18 PRESIDING JUDGE KORNER: [12:22:36] Sorry, how would that be factored in?

19 THE WITNESS: [12:22:39] That's up to the Court to decide how that's factored in.

20 PRESIDING JUDGE KORNER: [12:22:42] Well, just a moment. You say in this -- sorry,  
21 Mr Edwards. In this assessment, there is no prior that has been factored in. What  
22 you're actually saying is you haven't been made aware of any other evidence that may  
23 suggest that the man in the video and the man with whom you are comparing the stills  
24 or -- yes, the stills, was there?

25 THE WITNESS: [12:23:21] Yes, we didn't factor in that evidence, because that's the

- 1 likelihood ratio, and the prior is more that the things around it, there are other  
2 evidence that you can include. And then --
- 3 PRESIDING JUDGE KORNER: [12:23:34] But I still don't see why it's got anything to  
4 do with your independent comparisons.
- 5 THE WITNESS: [12:23:42] No. But if you want to make a percentage, like you asked  
6 for, then you need to have the prior.
- 7 PRESIDING JUDGE KORNER: [12:23:49] Okay. I see. So it's the likelihood -- okay. I  
8 see. All right.
- 9 MR EDWARDS: [12:23:54] Thank you.
- 10 Q. [12:24:00] Now, I just want to finish off - very nearly done - by unpacking a little  
11 bit the reason why you carried out a second report and what it actually means.  
12 So Report 1 proceeded on the basis that the individual in both reference videos was the  
13 same person.
- 14 A. [12:24:20] That's correct, yes.
- 15 Q. [12:24:21] So essentially you and your colleagues were pooling selected frames  
16 from both videos and comparing that pool of images with the comparison images.
- 17 A. [12:24:40] Yes, indeed. Yes.
- 18 Q. [12:24:43] Report 2, you were asked, right, well, don't pool the frames, don't pool  
19 the two videos together, just look at each video separately; right? But it's the same  
20 three researchers who carry out the same work; right?
- 21 A. [12:25:05] Mm-hmm. Yes.
- 22 Q. [12:25:06] Looking again at the videos separately --
- 23 A. [12:25:14] Yes.
- 24 Q. [12:25:15] -- or simply by referring to their notes?
- 25 A. [12:25:17] No, no, they were looking to the videos separately.



1 Q. [12:25:22] Answer this, please: Why was this second exercise not carried out by  
2 three totally different experts?

3 A. [12:25:42] That's not the standard procedure that we have for this case, because  
4 they already had done this for this case. And then, no, that's something we normally  
5 do not do.

6 Q. [12:25:58] All right. Okay. But, look, your internal procedures dictate that you're  
7 not present at the taking of the images; right?

8 A. [12:26:09] Yes.

9 Q. [12:26:11] Why?

10 A. [12:26:11] Because of bias, but that's a bias because you might be influenced by the  
11 person, the suspect.

12 Q. [12:26:18] Okay. But having carried out this assessment for Report 1 and everyone  
13 having come to a conclusion, a common conclusion, that it is very much more likely - I  
14 think that's the word - you're able to say that that excludes any possibility of bias in  
15 carrying out the second report?

16 A. [12:26:43] It's a different kind of bias. So, I mean, it's a bias -- so in the first -- first  
17 bias, if you see and ask the suspect certain questions, the suspect might also provide  
18 you other information.

19 Q. [12:27:00] Well, no one's going to be asking you to speak to the suspect during the  
20 photos being taken. All right?

21 A. [12:27:06] But normally we have to ask for certain positions and other things.  
22 People might -- might provide you other information. So this is a different kind of bias.  
23 The examiners already examined those videos, and they knew that if there is a split of  
24 those videos, then that there are less features then to compare. And we already  
25 discussed that we were on the lower numbers in the -- so we were more to 10,000 than

1 to 1 million.

2 Q. [12:27:48] Now, no new observation list facial comparison form was completed by  
3 you or either of your colleagues.

4 A. [12:28:01] That's correct, because that's -- that didn't make much sense to do that.

5 Q. [12:28:06] So does that mean that there was no discussion amongst the three of  
6 you to create a common list for each of the videos separately?

7 A. [12:28:19] No, we didn't see a reason for that.

8 Q. [12:28:27] Now, the reason why it was helpful to you to have the two videos that  
9 could be pooled is because there are some features from video 1 that don't exist in  
10 video 2, and vice versa; right?

11 A. [12:28:43] Indeed, yes.

12 Q. [12:28:44] But by referring to your original observation list from that pooled  
13 assessment, the assessment is the result of a scrambling up of features from both  
14 videos.

15 A. [12:29:08] Indeed.

16 Q. [12:29:09] Right. So when you're looking at the videos individually -- let me run  
17 an analogy past you: Once you break two eggs in a bowl and scramble them up, you  
18 can never separate those two eggs again, can you?

19 A. [12:29:23] But this is the difference here, because we know which parts of the face  
20 we examined. So there are some findings also below that. So we have, here, this is a  
21 summary of the forms. These are not the forms that the examiners use. This is a  
22 summary. We have some other forms below that from each examiner or researcher  
23 separately.

24 Q. [12:29:49] And that's never been passed on to the Prosecution?

25 A. [12:29:51] That's -- we never do that for these kind of facial exercises, because this

1 is a summary of the case. They can be asked for if that's necessary, but this is similar  
2 like the notes that we provide that we do for our reference.

3 Q. [12:30:08] You see, this is -- what I'm going to suggest to you is this yet another  
4 example of you providing summary findings where no one else can, as it were, check  
5 your homework. That's right, isn't it?

6 PRESIDING JUDGE KORNER: [12:30:23] Well, Mr Edwards, are you asking the expert  
7 to produce the underlying material for you to examine rather than saying this is a case  
8 where nobody can do it? You didn't ask before.

9 MR EDWARDS: [12:30:38] This is the first time we're hearing how it was conducted  
10 separately, your Honour.

11 PRESIDING JUDGE KORNER: [12:30:44] All right. Yes.

12 MR EDWARDS: [12:30:47] My last question, I accept it might be more comment than  
13 an actual question.

14 Q. [12:30:55] But in terms of what the Court has, this Annex 2, this list, it's the  
15 equivalent of the two eggs scrambled up in the bowl?

16 A. [12:31:13] It's not literally the same, I think, but there -- it's a combination of  
17 findings, yes.

18 Q. [12:31:29] Yes. Thank you very much.

19 PRESIDING JUDGE KORNER: [12:31:30] On that, Mr Edwards, I think, before we go  
20 on, you say this is the first you've heard of it. Are you now formally requesting the  
21 expert, if that material is available, to produce the underlying documents prepared by  
22 each of the researchers?

23 MR EDWARDS: [12:31:47] Your Honour, I recall that I was pulled up on an earlier  
24 occasion when I started asking a witness to produce --

25 PRESIDING JUDGE KORNER: [12:31:58] Well, no, no, this could be different. This is

1 an expert. And he says there is material which are the individual, as it were, notes  
2 compiled by the researchers. So is that what you're asking for?

3 MR EDWARDS: [12:32:16]

4 Q. [12:32:19] Well, do those notes still exist?

5 A. [12:32:21] They exist, yes.

6 Q. [12:32:23] Would you or your colleagues have any objection to passing all of the  
7 underlying notes on to the Prosecution and, in turn, on to us?

8 A. [12:32:36] I will ask them if they have some objections, but ...

9 PRESIDING JUDGE KORNER: [12:32:40] Well, I mean, Mr Edwards, are you making a  
10 formal request through the Prosecution that these documents be supplied to them and  
11 then disclosed to you?

12 MR EDWARDS: [12:32:47] Yes, yes.

13 PRESIDING JUDGE KORNER: [12:32:55] Yes. Right. Mr Sachithanandan.

14 MR SACHITHANANDAN: [12:32:57] I have just one or two questions in re-  
15 examination. Can we go to tab 2, please, that is to say, 0223-0454. Moving forward to  
16 page 0455.

17 FURTHER QUESTIONED BY MR SACHITHANANDAN:

18 Q. [12:33:32] Sir, I want to go back to the reference made here to the lack of any  
19 incorrect results, yes. You mentioned that this reference to the lack of incorrect results  
20 refers to proficiency tests; is that correct?

21 A. [12:33:59] That's correct, yes. Those were proficiency tests in that period, yes.

22 Q. [12:34:04] Could you give us an explanation of how a proficiency test is run.

23 A. [12:34:09] Yes, I can. So a proficiency test is run by another lab that makes those  
24 tests, so they will use difficult cases most often or material where they know the  
25 ground truth. So they will make videos from someone or several persons, and then we

1 have to do around maybe 20 comparisons of persons with video footage. And then,  
2 yeah, most often it's video footage. And we have then the reference material, like we  
3 had here, and the comparison videos or images.

4 And then the question is what kind of conclusion do you give here, and then we would  
5 give the same kind of conclusions here, like with the hypothesis and with the likely  
6 ratio that we report. And in that exercise, we didn't make errors at that time.

7 Q. [12:35:29] So if I understand correctly, you're given a comparison task to do a bit  
8 like what you've done here, but somebody already knows the objective answer.

9 A. [12:35:40] Yes, that's -- it's very important to know the ground truth, because  
10 otherwise you cannot test your system.

11 Q. [12:35:48] And am I right in thinking that you've also done tests like this  
12 regularly?

13 A. [12:35:52] Certainly, I also did tests like this. So I -- I did them also last year, and  
14 then we also didn't have errors at that test.

15 PRESIDING JUDGE KORNER: [12:36:05] So does that mean, for example -- sorry, Mr  
16 Sachithanandan, but, in fact, it was something I was going to ask about as well.  
17 Does that mean, for example, that a test of your abilities, if you like, would be, for  
18 example, that you would be asked to look at two comparison stills and decide whether,  
19 in your view, they -- which part of the criteria or hypothesis they filled, whereas, in  
20 fact, somebody knew beforehand that they were, in fact, of the same person but in  
21 different situations or that they definitely were not, and see what conclusions you  
22 arrived at?

23 THE WITNESS: [12:36:50] That is, indeed, how we do that.

24 PRESIDING JUDGE KORNER: [12:36:53] That's exactly how you do this.

25 THE WITNESS: [12:36:56] Yes. And, of course, it should be persons that you do not

1 know.

2 PRESIDING JUDGE KORNER: [12:36:59] Yes. No, obviously, persons you don't know.

3 Yes. Well, while I'm still on the subject, I just wanted to ask you something about

4 recognition. Do you conduct tests into the accuracy of people who say that they

5 recognise somebody?

6 THE WITNESS: [12:37:27] No, that's something we don't do regularly.

7 PRESIDING JUDGE KORNER: [12:37:30] It's not something you do.

8 THE WITNESS: [12:37:31] That's a research I know, but it's not what we do for this

9 case.

10 PRESIDING JUDGE KORNER: [12:37:35] Yes. All right.

11 Sorry, I interrupted you, Mr Sachithanandan.

12 MR SACHITHANANDAN: [12:37:43]

13 Q. [12:37:44] Sir, you've mentioned that you've done these reports -- well, my

14 apologies. Let me start again. In your professional assessment, these proficiency tests

15 you do, are they usually easier than the exercise you did for us, roughly the same

16 difficulty, or harder?

17 A. [12:38:07] That depends on the year. So sometimes they are very hard. But the

18 assessments are -- last year they were -- they were extremely hard.

19 Q. [12:38:26] In terms of the real-life biometric tests, assessments or comparisons

20 you've done, is it limited to a particular ethnic group, or have you done tests with

21 regard to people from multiple different ethnicities?

22 A. [12:38:44] Yes. We always do tests with different ethnicities. And also our case

23 workers are often with different backgrounds.

24 Q. [12:38:59] Moving on to a different topic. My friend asked you about particular

25 frames, particular frames of particular videos, which frame did one person look at,

1 which frame did another person look at. Am I right in thinking that these videos are  
2 composed of hundreds, perhaps thousands of frames?

3 A. [12:39:20] Yes, they are composed of 25 frames per second, so -- and if they are  
4 interlaced, you might even have 50. So in one minute, you might have even 60 times  
5 that amount of frames.

6 Q. [12:39:39] Am I right in thinking you're not necessarily only looking at still shots,  
7 but you're also looking at video footage?

8 A. [12:39:47] Yes. Sometimes you also look at video footage because you might see,  
9 for instance, an eyebrow in the video footage better if you look to the complete part  
10 than to the individual frames.

11 Q. [12:40:00] My friend pointed at certain areas where there was no perfect  
12 agreement in Annex 2. In your professional opinion, do those areas where there is no  
13 perfect agreement change or have any impact on the integrity and accuracy of your  
14 assessment?

15 A. [12:40:29] No, they don't have an impact on the accuracy of the assessment,  
16 because we will discuss the differences. And, as said, if we have very different  
17 findings, then we will -- we will not come to a conclusion.

18 MR SACHITHANANDAN: [12:40:52] Thank you, your Honour. That will be all.

19 JUDGE ALAPINI-GANSOU: [12:41:09](Interpretation) Thank you, Madam President.  
20 I just had a clarification.

21 QUESTIONED BY THE COURT:

22 JUDGE ALAPINI-GANSOU: [12:41:21](Interpretation) Mr Witness, earlier when you  
23 talked about the proficiency test and the evaluations in response to a concern of the  
24 Prosecutor, you said that these are things that are very difficult. And I'm curious to  
25 know how long this type of thing can take.

1 A. [12:41:29] Your Honour, perhaps I didn't understand the question right. Maybe  
2 you can repeat the question.

3 JUDGE ALAPINI-GANSOU: [12:41:39](Interpretation) Yes. Here you were answering  
4 the Prosecutor earlier when you talked of the proficiency tests. And when you were  
5 answering, you answered -- you made it clear to us that these were very difficult  
6 exercises. Is that not right? And I would like to know how long this type of exercise  
7 takes, according to you.

8 A. [12:42:09] Yes. The exercises, they take -- we also do them with the colleagues, so  
9 they take -- yeah, we do several weeks to fulfil those exercises, so in time, I mean. But  
10 if we do 20 comparisons, normally that's too much for using those forms, so not always  
11 all those forms are filled out for those proficiency tests. So then they are roughly filled  
12 out. But 20 comparisons are a lot, because it takes around three hours for one form to  
13 be filled out by one examiner, two to three hours, and then you have to multiply that.

14 JUDGE ALAPINI-GANSOU: [12:42:59](Interpretation) Okay. In terms of time, it takes  
15 a lot of time, but -- yes, yes, it takes a lot of time. It can take even days or weeks. Is that  
16 it?

17 A. [12:43:12] Yes, that's indeed. If we do this manually, it takes a lot of time to do it.  
18 And also if you have a disagreement, you have to find out why. And we also know  
19 this, we also use the computer with it, but then that's a different examiner. But we start  
20 using that a few months ago.

21 JUDGE ALAPINI-GANSOU: [12:43:41](Interpretation) Thank you.

22 PRESIDING JUDGE KORNER: [12:43:44] Well, you started a hair there by mentioning  
23 a computer, but never mind, I think we'll leave it.

24 Yes, thank you very much, indeed, for coming to give evidence in this case. As always,  
25 facial mapping is fascinating. If you could, as Mr Edwards has made the request, see



- 1 whether any of the underlying material is still available and whether there's any  
2 objection from your institute to them being handed over, and let the Prosecution know.
- 3 THE WITNESS: [12:44:20] Yes, your Honour, I will do so. Thank you very much.
- 4 PRESIDING JUDGE KORNER: [12:44:23] Yes, thank you very much indeed. That  
5 concludes your evidence and you're free to leave.
- 6 THE WITNESS: [12:44:27] Thank you.
- 7 (The witness exits the courtroom)
- 8 PRESIDING JUDGE KORNER: [12:44:48] Mr Edwards, we're clearly not going to -- we  
9 have to rise today no later than 1.00, so we're clearly not going to conclude matters. So  
10 you can make a start and then, Mr Nicholls, we'll hear from you after the normal break,  
11 and then we'll revert to Mr Edwards.
- 12 MR EDWARDS: [12:45:14] No. That's encouraging. I thought you were going to say  
13 that we have to rise for the day at 1.00.
- 14 PRESIDING JUDGE KORNER: [12:45:20] No, no, just that if I thought we could hear  
15 from both of you in normal size by 1.15, I'd sit on. But today we definitely have to rise  
16 at 1.00.
- 17 MR EDWARDS: [12:45:32] Thank you.
- 18 Yes, your Honour, just a reminder that there are three pieces of evidence for which we  
19 seek exclusion: The video, ERN ending -- DAR-OTP-0216-0119, and the transcripts of  
20 two telephone calls --
- 21 PRESIDING JUDGE KORNER: [12:45:51] Just a moment. Exclusion of the video.
- 22 MR EDWARDS: [12:45:53] Yes.
- 23 PRESIDING JUDGE KORNER: [12:45:55] Aren't there two? He sent two, didn't he?
- 24 MR EDWARDS: [12:45:59] There's no -- there's no issue --
- 25 PRESIDING JUDGE KORNER: [12:46:00] Oh, it's all on one. Yes.

- 1 MR EDWARDS: [12:46:02] -- with the second --
- 2 PRESIDING JUDGE KORNER: [12:46:05] Oh, there's no issue with the second?
- 3 MR EDWARDS: [12:46:06] No, the second -- the second video, I think -- well, A, there's
- 4 no introduction, and I think he's talking about something --
- 5 PRESIDING JUDGE KORNER: [12:46:10] And I don't think he meant --
- 6 MR EDWARDS: [12:46:11] -- relatively anodyne. It's not something that --
- 7 PRESIDING JUDGE KORNER: [12:46:18] All right, then. So you're not seeking
- 8 exclusion of the second video sent. Just the first where he says that he is -- I've drawn a
- 9 complete blank.
- 10 MR EDWARDS: [12:46:35] Ali Abd-Al-Rahman also known as --
- 11 PRESIDING JUDGE KORNER: [12:46:36] Ali Kushayb.
- 12 MR EDWARDS: [12:46:37] -- Ali Kushayb. I think words to that effect. And then there
- 13 are the transcripts of two telephone calls of 6 April 2020 and then 7 April 2020. Those
- 14 ERNs are contained in the filings, but just for the purposes of the record, DAR-OTP-
- 15 0216-0127 and DAR-OTP-0216-0128.
- 16 The evidence of the two investigators that we heard from last Monday and then
- 17 yesterday has proved the inaccuracy of a number of the Prosecution's assertions made
- 18 in their response to the original written application and in submissions made last
- 19 December, assertions that have been clung onto since the Confirmation of Charges
- 20 hearing.
- 21 It was the Prosecution's adamant position that there were no unrecorded conversations
- 22 between the second investigator and the intermediary. Well, we now know that that's
- 23 not correct.
- 24 PRESIDING JUDGE KORNER: [12:47:46] Didn't they accept that the first one on 27
- 25 December, I thought that was accepted that it was not recorded.

1 MR EDWARDS: [12:47:59] Well, originally the position of the Prosecution was, as of  
2 December last year, was that the inference that we were inviting your Honours to  
3 draw, that there must have been a conversation, that the Prosecution's position was:  
4 Well, there's just no evidence of that. Hence, the reason why it was important to call  
5 the two investigators.

6 PRESIDING JUDGE KORNER: [12:48:20] All right. Carry on.

7 MR NICHOLLS: [12:48:24] Could I just -- I'm not objecting. But just this matter, and  
8 it's been a bit blurry throughout, there's conversations before and after receipt of the  
9 first video, which is the one that's objected to. So that is the period, I think, where  
10 we're talking about for the conversations are conversations after the video leading up  
11 to the surrender that I don't think are at issue. But I think it's important to say that  
12 we're talking about December 27th, 1999, and March 20th, 2020.

13 And I see my friend nodding. So I think we need to be a bit precise about which time-  
14 period we're talking about when we say other conversations, recorded or not.

15 PRESIDING JUDGE KORNER: [12:49:06] Yes, but just -- all right. Since you've got up,  
16 Mr Nicholls, I understood you accepted that there was no record, that is to say, when I  
17 say "record," I mean in the OTP's investigative log, of the phone conversation that the  
18 investigator, the Arab-speaking investigator, had with the intermediary on 27  
19 December.

20 MR NICHOLLS: [12:49:38] Yes, absolutely. And we also have conceded clearly, I  
21 think, that there should have been, that there is no record of that.

22 PRESIDING JUDGE KORNER: [12:49:47] Right. No. And that's what I think Mr  
23 Edwards is talking about.

24 MR EDWARDS: [12:49:52] Yes. And that's absolutely right. I'm interested in that  
25 which happened up to 20 March 2020.

1 But despite the fact that there were no records of conversations between the  
2 intermediary and the first investigator, we now know, based on the evidence we heard  
3 yesterday, that there were conversations.

4 Now, I'm not going to take an issue. I'm not going to criticise the investigator for not  
5 making the notes. I could, but I'm not going to. My point is that there are no records,  
6 but there it is.

7 But what we -- what is correct to say is that we don't even know how many such  
8 unrecorded conversations there were between the 26th or 27th December and then 20th  
9 March.

10 MR NICHOLLS: [12:50:55] I'm sorry to rise. I do apologise. But since we know this  
11 from the transcript of yesterday, could we have a cite, please?

12 PRESIDING JUDGE KORNER: [12:51:04] I think it's -- I was looking at it earlier, but I  
13 think you ought to cite, Mr Edwards.

14 MR EDWARDS: [12:51:18] Yes, I --

15 PRESIDING JUDGE KORNER: [12:51:20] I did see it.

16 MR EDWARDS: [12:51:22] I may have to come back to you about that. I do recall  
17 asking the question and he's -- well, in fact, it might have been one of your Honours.  
18 But anyway, we'll come back to that, if I may.

19 Further, it was the Prosecution's adamant position that the video was unsolicited, and  
20 the evidence that we've heard casts significant doubt on that assertion.

21 Your Honours can now be sure that the question of the sending of the video was first  
22 raised in that first telephone conversation with the intermediary when the investigator  
23 was docking on the boat. There may be some residual uncertainty over whether or not  
24 it was first raised by the second investigator or the intermediary.

25 PRESIDING JUDGE KORNER: [12:52:26] I haven't found the part, but I have found the

1 part about the video. It's transcript page 68 of the uncorrected transcript. And this was  
2 in answer to me, where I pushed him on whether he'd requested:

3 "Did you, in that conversation of 27 December, ask the intermediary to send you the  
4 video?"

5 And we have this rather odd answer:

6 "I do not recall, but I am more inclined to be receptive for the video to be sent."

7 MR EDWARDS: [12:52:58] Yes.

8 PRESIDING JUDGE KORNER: [12:52:59] And then he said, I think, to the effect -- but  
9 the effect of that very long answer was that he had asked for it.

10 MR EDWARDS: [12:53:07] Yes. In any event, certainly the second investigator made it  
11 very clear in his evidence that he was clear in his own mind at the time that the  
12 existence of such a video that he described yesterday would represent, essentially, the  
13 gold standard for proof of identity and of the intermediary's contact with Abd-Al-  
14 Rahman. And so it stands, why wouldn't he ask for the gold standard of proof? Why  
15 would he have solicited anything less than that?

16 Can I make it clear, we take no issue at all with the truthfulness of either investigators'  
17 evidence, both last week or yesterday. Both were candid, frank, and honest, and  
18 yesterday's witness in particular was ready to acknowledge mistakes that he had made.  
19 And, as I say, I'm not taking any point about record-keeping.

20 But the evidence of the investigator is fresh in your mind, and I'm going to focus on  
21 other matters that are going to be relevant to your Honours' consideration of the  
22 matter. I'm not going to take up your time by running through the evidence.

23 PRESIDING JUDGE KORNER: [12:54:41] All right. Well, I think if you're going to  
24 move -- are you going to move on to the effect of all of this? Is that what you're about  
25 to come to?

1 MR EDWARDS: [12:54:48] Yes.

2 PRESIDING JUDGE KORNER: [12:54:49] All right. Well, I think, as I say, two of us  
3 have to rise definitely by 1.00, so I think I'll leave that until half past 2.00.

4 MR EDWARDS: [12:55:02] Very well.

5 PRESIDING JUDGE KORNER: [12:55:03] And then we'll hear from you.

6 Well, just before we do adjourn.

7 Mr Nicholls, I simply want to know, does the Prosecution accept that, effectively,  
8 yesterday's evidence looks -- it looks more likely than not, putting it at its lowest, that  
9 the video was asked for.

10 MR NICHOLLS: [12:55:25] What I think the evidence shows, your Honour, from  
11 yesterday, is that the investigator stated in his statement, and in answer to your  
12 questions initially, that he did not ask for a video to be made or for it to be created, and  
13 he couldn't recall whether 689, who was acting on behalf of the suspect, had said he  
14 already had one or he was going to create one.

15 PRESIDING JUDGE KORNER: [12:55:54] I agree.

16 MR NICHOLLS: [12:55:55] Yes. But as you questioned him, and as my friend said, it  
17 wasn't totally clear who may have first said it. But once the investigator heard from the  
18 person he was speaking to, 869, there's a video, or there will be a video, that, yes, he  
19 would like to receive it.

20 PRESIDING JUDGE KORNER: [12:56:15] Yes, all right. Yes, thank you.

21 Yes, very well. We'll sit again then, please, at 2.30.

22 MR EDWARDS: [12:56:22] But, your Honour, before we rise, I've prepared my  
23 submission. Is there anything that your Honours would particularly like me to focus  
24 on?

25 PRESIDING JUDGE KORNER: [12:56:29] Yes. Even if they did ask for the video, what

1 effect does that have?

2 MR EDWARDS: [12:56:34] Ah, well, that represented the remainder of my  
3 submissions.

4 PRESIDING JUDGE KORNER: [12:56:37] Right. And why you say -- sorry, and the  
5 second aspect, I suppose, is why you say the warrant of arrest has any -- that may or  
6 may not -- sorry. Obviously, they would, he said he believed certainly that there was a  
7 warrant for arrest, why that has any relevance to the issue of the admissibility of the  
8 video.

9 MR EDWARDS: [12:57:10] Yes.

10 PRESIDING JUDGE KORNER: [12:57:11] Right. Thank you.

11 THE COURT USHER: [12:57:14] All rise.

12 (Recess taken at 12.57 p.m.)

13 (Upon resuming in open session at 2.34 p.m.)

14 THE COURT USHER: [14:34:56] All rise. Please be seated.

15 PRESIDING JUDGE KORNER: [14:35:12] Yes, Mr Edwards.

16 MR EDWARDS: [14:35:14] I wonder if I can start just by addressing the first of your  
17 Honours' questions from before the lunch break. I'll deal with it in more depth, but just  
18 to answer your question in a nutshell:

19 It matters that the video was solicited by a representative of the Office of the Prosecutor  
20 because, our argument will be, that is essentially indistinguishable from a question.

21 Questioning engages Article 55(2). And since the provisions of Article 55(2) were not  
22 respected, there was a violation. A violation of a suspect's rights under Article 55(2) is  
23 such a violation that requires exclusion of evidence. That's it in a nutshell.

24 And I almost hesitate to put it like this, because your Honour may accuse me of  
25 impertinence, but your Honours know that it matters. Your Honours know that the

1 fact that the video was solicited not just on the 26th or 27th December but chased up -  
2 and I'll explain why in a moment - but perhaps the most important exchange, the most  
3 important text message from the first investigator being the WhatsApp text message of  
4 15 February, the one immediately before 20 March, amounts to a question. And a  
5 question, as I say, engages Article 55.

6 And your Honours know --

7 PRESIDING JUDGE KORNER: [14:37:27] Sorry, is that the only question, "any  
8 progress"? Is that what you're talking about?

9 MR EDWARDS: [14:37:31] It's that text message. And I'll explain why it's important.

10 But it would be our observation that your Honours know that it matters because if it  
11 didn't matter, your Honours would have said back in December, "Well, look, whether it  
12 was solicited or not, it doesn't matter. We will, for the sake of argument, assume that it  
13 was. We don't have to hear from the investigators. So let's, for the purposes of this  
14 discussion, assume that it was solicited by the investigator. Because it doesn't matter,  
15 you have to now seek to persuade us why the evidence should be excluded."

16 The fact that you --

17 PRESIDING JUDGE KORNER: [14:38:30] Mr Edwards, it's not impertinent. I mean, it's  
18 perfectly fair, but don't forget that last December we were faced with -- I mean, there  
19 was no complete divide between the parties, as we understood it, namely, that as we  
20 discovered, although it wasn't clear until Mr Laucci started his submissions, Mr Laucci  
21 was saying the video was solicited and there were lots of other conversations, and the  
22 Prosecution was taking, as we understood it, a totally different view, which was that,  
23 no, it never was solicited. So at that stage, we were simply concerned with resolving  
24 that issue of fact.

25 MR EDWARDS: [14:39:17] Yes. But if I may, if you didn't think that it would matter, I



1 anticipate you would have said something to the effect to Mr Laucci, "Well, for the sake  
2 of argument, we'll take your case at its highest. What more do you have to say?"

3 PRESIDING JUDGE KORNER: [14:39:39] All right.

4 MR EDWARDS: [14:39:41] The fact that we adjourned matters and that we spent a day  
5 and a half or more hearing from a witness to resolve this question of fact is evidence  
6 itself that it matters, but I'll come on in more detail to the why.

7 But, yes, we do agree with the Prosecution and with Mr Nicholls' summation of the  
8 issue. The question, the issue is: Did the OTP engage in questioning within the  
9 meaning of 55(2)? Once that is resolved, everything else falls away. And we say  
10 certainly the OTP did engage in questioning.

11 Article 55, your Honours are familiar with it. It's entitled "Rights of persons during an  
12 investigation." First of all, was there an investigation? Now, I don't know if my  
13 learned friend is suggesting that --

14 PRESIDING JUDGE KORNER: [14:40:55] I'm sorry, Mr Edwards. I had it yesterday  
15 the article of the Rome Statute, but it seems to have gone walkabout.

16 MR EDWARDS: [14:41:05] I can see that your Honour has the folder of legal texts in  
17 front of you.

18 PRESIDING JUDGE KORNER: [14:41:10] Ah, thank you. Yes.

19 MR EDWARDS: [14:41:14] So, yes, "Rights of a person during investigation." Now, I  
20 don't know whether there is any dispute that what was happening in December and  
21 into January and into February and to 20 March was an investigation. If there is any  
22 dispute about it, it's our submission that, clearly, this was in the context of an  
23 investigation if an investigation involves the collection of evidence, assessing whether  
24 evidence points to one or more suspects, establishing where those suspects are, and the  
25 purposes of placing a suspect under arrest and bringing them before a court. This all

1 falls under the umbrella of an investigation.

2 If the Prosecution's position is that the exchanges between the investigator and Mr  
3 Abd-Al-Rahman, directly or indirectly, did not take place in the context of an  
4 investigation, they haven't explained why not.

5 But why do we say that solicitation of a video amounts to questioning within the  
6 meaning of Article 55(2)? As I say, it's not just the communications in December. The  
7 15 February text message was put to both investigators because there could well have  
8 been other telephone calls between 15 February and 20 March. We don't know. But  
9 you'll recall my final question to the first investigator, the P4 or P3, last Monday. It's  
10 page 57 of your Honours' transcript. I asked this:

11 "... this text message from your colleague is asking a question of Abd-Al-Rahman, isn't  
12 it? 'Is there a message for us' from him?"

13 And you'll recall that the investigator last Monday accepted that proposition. He  
14 answered in the affirmative.

15 This final text message is indistinguishable in any meaningful sense from the question  
16 of: Mr Abd-Al-Rahman, is there anything that you want to tell us? And that is a  
17 question -- it's hard to think of a broader, more open-ended, non-leading question than  
18 that, your Honours, we think. It's not bounded by or limited to considerations of  
19 establishing identity: Is there anything you want to tell us? It's a question that flings  
20 the door wide open, it opens Pandora's box, and it invites an uncontrolled response,  
21 something which the Prosecution ought to have been alive to and ought to have  
22 addressed.

23 The issue of the Ali Kushayb name. Both investigators, your Honours will recall,  
24 testified that the defendant was invariably referred to as Ali Kushayb internally. They  
25 didn't refer to him as Abd-Al-Rahman. Yesterday's witness testified that he would

1 have referred to the defendant as Ali Kushayb in his telephone calls and contacts with  
2 the intermediary, and the first investigator from last Monday gave evidence to the  
3 same effect.

4 PRESIDING JUDGE KORNER: [14:45:19] And why do you say that's relevant, that  
5 internally the OTP called him Ali Kushayb?

6 MR EDWARDS: [14:45:26] Why it's relevant is that in communications between the  
7 first investigator and the intermediary, there's the presumption on the part of the  
8 intermediary that the person that they're talking about is Ali Kushayb. When the video  
9 then comes through from Mr Abd-Al-Rahman identifying himself as Ali Kushayb,  
10 we've already got the explanation as to why he may have referred to himself as Ali  
11 Kushayb, because that is the name that those who want to contact him, those who want  
12 to speak with him, those who want to deal with him for the purposes of cooperation -  
13 I'll just finish, if I may - that could amount to an explanation as to why he refers to  
14 himself as Ali Kushayb.

15 PRESIDING JUDGE KORNER: [14:46:26] But does that mean he could have been  
16 indicted as -- I thought there was some discussion at the confirmation hearing about  
17 this. Hasn't he been indicted as Abd-Al-Rahman aka Ali Kushayb?

18 MR EDWARDS: [14:46:43] Exactly, yes. Yes. Yes.

19 MR NICHOLLS: [14:46:47] Well --

20 PRESIDING JUDGE KORNER: [14:46:49] All right, Mr Nicholls. But are you trying to  
21 correct something that Mr Edwards has said? Because if not, you'll get a chance to  
22 respond anyhow.

23 MR NICHOLLS: [14:46:57] I was going to make an objection to something he has said.

24 PRESIDING JUDGE KORNER: [14:47:01] Which is what?

25 MR NICHOLLS: [14:47:03] That, well, first of all, it's not clear. He talks about the first

1 investigator talking to 869 and using the name Ali Kushayb. I think he means the  
2 investigator who testified this week.

3 MR EDWARDS: [14:47:21] Yes, forgive me.

4 MR NICHOLLS: [14:47:24] So first, that's a bit confusing.

5 PRESIDING JUDGE KORNER: [14:47:27] Oh, I see what you mean.

6 MR NICHOLLS: [14:47:28] Because if he meant the first investigator, which is the way  
7 he said before, is the one who testified first, he didn't communicate with 869 at all. So  
8 that's that.

9 MR EDWARDS: [14:47:37] Quite right.

10 MR NICHOLLS: [14:47:38] The second is for him to now be saying: Here is what 869  
11 was thinking; here is why 869 used the name Ali Kushayb. And 869 actually uses Ali  
12 Kushayb in the first e-mail to the Court. But again, 869 is on their team. 869 can testify.  
13 He's now saying what's in 869's mind while he is talking to our investigator, and the  
14 reason why 869 would have used this name, which is on the warrant, rather than a  
15 different name. And I don't think he can do that.

16 PRESIDING JUDGE KORNER: [14:48:09] All right. Mr Nicholls, I think we'll get on if  
17 you save all that for when you respond.

18 MR EDWARDS: [14:48:18] Yes. And, well, following on, following on from the first  
19 conversation, what evidence do we have of what is in 0869's mind? We don't have to  
20 call him, and I'm not giving evidence of what's in his mind. We know what's in his  
21 mind because it's contained in the one-sided conversation, the audio recording of 27th  
22 or 28th December, tab 13. It's DAR-OTP-0481.

23 It doesn't required me to magic out of thin air what is in the mind of the intermediary.  
24 This is what he says, 481, at page 3. You'll recall that the recording starts halfway  
25 through.

1 " ... we need him to ... just create material for you ... during the day, if he could create  
2 recorded material ... if you managed to film him for two or three minutes ... if he  
3 appears in recorded material saying, 'I'm ...' I mean, 'Ali Kushayb,' and so on and so  
4 forth ..."

5 Can the Court, I ask rhetorically, dismiss out of hand that this is not the intermediary  
6 passing on either instructions or his understanding of instructions or advice emanating  
7 from the investigator who gave evidence yesterday? I would suggest you cannot. This  
8 is evidence of what is in 0869's mind.

9 There's another matter which the evidence, as it's come out, has shown the  
10 Prosecution's assertions to be wrong.

11 At paragraph 9 of their written submissions of 2 December of last year, the Prosecution  
12 say this:

13 "The initial request by," the witness who gave evidence yesterday --

14 PRESIDING JUDGE KORNER: [14:50:48] Sorry. Paragraph 9?

15 MR EDWARDS: [14:51:01] Paragraph 9. The Prosecution say this. It's four lines from  
16 the bottom of that paragraph:

17 "This initial request was made simply to establish that 0869 was genuinely in contact  
18 with the accused, the person subject to the arrest warrants. Such confirmation is  
19 routine when the Prosecution receives unsolicited messages from unknown persons  
20 seeking to provide assistance."

21 So this initial request was made simply to establish -- well, we know from the evidence  
22 yesterday, in answer, in fact, to your Honour's last questions, one of the very last  
23 questions asked to the witness yesterday, asking about Article 55, we know that there  
24 were two things that the OTP, or, at least, the investigator from yesterday was focusing  
25 on. Not just establishing the identity of the suspect, not just to seek proof that the

1 intermediary was in contact with him, but to discuss cooperation. It's a matter which  
2 goes way beyond the question of establishing identity and proof of contact.

3 PRESIDING JUDGE KORNER: [14:52:34] I'm sorry, can you point me to the reference?

4 THE INTERPRETER: [14:52:36] Microphone please, your Honour.

5 MR EDWARDS: [14:52:40] From yesterday's transcript. Well, I have the --

6 PRESIDING JUDGE KORNER: [14:52:51] Oh, here we are, I think. Is this the one  
7 where he says --

8 MR EDWARDS: [14:52:56] It's at page 65 of yesterday's transcript.

9 PRESIDING JUDGE KORNER: [14:53:01] Well, no, I've got them further marked up as  
10 well. Page 58. And this was in -- this was an incredibly long answer from him in a  
11 question to you. There he said -- sorry, this is your question. Sorry.

12 "So you have the telephone conversation ... December 2019. Now, in answer to a  
13 question from Judge Alexis-Windsor ... you stated that you knew at that time that of all  
14 of the ways in which a person could prove his identity, a video would be a pretty  
15 strong piece of evidence; right? A video would confirm that -- that he is willing to  
16 cooperate within that framework --"

17 MR EDWARDS: [14:53:48] Yes. And then your Honour picks up on that at page 66,  
18 line 5.

19 "And, therefore, what you have just said about --"

20

21 Sorry, your Honour says:

22 "And so this was the OTP trying to persuade him to surrender, wasn't it?"

23 Answer:

24 "Yes."

25 "And, therefore, what you've just said about cooperation and the like, in what sense do

1 you mean cooperation?"

2 A bit further down, line 14:

3 "Well, okay. There are two things there. Were your conversations with the  
4 intermediary in respect of the video, were they to do with his identity or his  
5 cooperation generally."

6 PRESIDING JUDGE KORNER: [14:54:30] I'm sorry, it's not -- am I looking at the right  
7 spot?

8 MR NICHOLLS: [14:54:33] I'm not objecting. I can't -- I can't find where we are. I'm  
9 sorry.

10 MR EDWARDS: [14:54:40] This is from the transcript, the initial draft. It's uncorrected,  
11 but it's the transcript that was sent around this morning rather than the --

12 PRESIDING JUDGE KORNER: [14:54:48] Oh, I see. I've got it printed around this  
13 morning, but my page 66 doesn't show that.

14 MR EDWARDS: [14:54:54] If your Honour and if my learned friend are working off of  
15 the realtime transcript from yesterday, I can assist you with that.

16 PRESIDING JUDGE KORNER: [14:55:02] I think we are.

17 You mean we've got a corrected transcript sent today?

18 MR EDWARDS: [14:55:12] Yes, it came around this morning.

19 MR NICHOLLS: [14:55:15] I apologise to my friend. I'm working off the one from last  
20 night.

21 PRESIDING JUDGE KORNER: [14:55:19] So am I. I think both of us are.

22 MR EDWARDS: [14:55:24] So it's page 66. You're seeking clarification from line 14.

23 PRESIDING JUDGE KORNER: [14:55:30] No. My page 66 is me picking you out for  
24 not leaving a pause between ...

25 MR EDWARDS: [14:55:43] Ah, right. Okay, yes. Page 76. Page 76 from line 3. You

1 ask the witness:

2 "I'm sorry, this was the OTP" --

3 THE INTERPRETER: [14:56:07] Mr Edwards is far from the microphone.

4 PRESIDING JUDGE KORNER: [14:56:10 ] Mr Edwards, you're too far from the  
5 microphone apparently. Oh, yes, he here we are. I've got it. At the top of the  
6 uncorrected transcript, page 76, line 6, I say to him:

7 "And, therefore, what you've just said about cooperation and the like, in what sense do  
8 you mean cooperation?"

9 MR EDWARDS: [14:56:32] Right.

10 PRESIDING JUDGE KORNER: [14:56:32] Yes.

11 MR EDWARDS: [14:56:33] And he gives a long answer. And then your Honour at line  
12 18 says:

13 "Well, okay. There are two things there. Were your conversations with the  
14 intermediary in respect of the video, were they to do with this identity or his  
15 cooperation generally?"

16 Answer:

17 "The intermediary, I think both. The intermediary informed that he is willing to  
18 cooperate, and we wanted to confirm that he is really, indeed, willing to cooperate. We  
19 wanted to make sure that it's correct. It's accurate."

20 Now, if that is in the mind of the investigator who testified last week, it is not simply a  
21 matter of establishing identity. It goes far beyond that. And that has to be an  
22 important factor for your Honours to bear in mind, whether Article 55 is actually  
23 engaged, whether this is questioning.

24 PRESIDING JUDGE KORNER: [14:57:28] I may say on this aspect, the investigator, I  
25 think possibly it may be due to the fact that he's never testified before, was -- it is not



1 clear to me even now, and I re-read it, what he meant by "cooperate." My feeling  
2 originally was that he meant cooperating in the surrender.

3 MR EDWARDS: [14:57:56] Yes.

4 PRESIDING JUDGE KORNER: [14:57:57] As opposed -- this is all about, it seems to  
5 me, establishing that this was, indeed, the man who'd been indicted, the suspect, and  
6 whether he was going to surrender. I mean, there was a twofold aspect to this.

7 MR EDWARDS: [14:58:22] Yes. And --

8 PRESIDING JUDGE KORNER: [14:58:28] But does that -- and, I'm sorry, Mr Edwards,  
9 I think it probably helps you if I show you what's on my mind. Sorry. Why is that  
10 questioning of the suspect in the way really that Rule 55 is envisaging it?

11 MR EDWARDS: [14:58:44] Well, we have to look at the words of Article 55.

12 PRESIDING JUDGE KORNER: [14:58:48] I mean article. Sorry, Article 55.

13 MR EDWARDS: [14:58:53] Article 55, specifically (2), because our submission is that  
14 Article 55 is very black and white. There's very little room for grey. Even if you were  
15 to find that any questions relating exclusively to the matter of identity, such as Code C,  
16 for example, in UK jurisdiction, even if you were to accept that that could be  
17 permissible on that very limited basis, Article 55(2):

18 "Where there are grounds to believe that a person has committed a crime within the  
19 jurisdiction of the Court ..."

20 Well, there was a warrant for arrest for Abd-Al-Rahman in December.

21 "... and that person is about to be questioned either by the Prosecutor, or by national  
22 authorities ..."

23 We don't need to go into.

24 "... that person shall also have the following rights of which he or she shall be informed  
25 prior to being questioned."

1 The questioning is not limited to anything. It is not limited. The questioning is in  
2 unlimited terms in Article 55.

3 And even if you think that that could, in some circumstances, lead to a situation which  
4 is, I'm not going to use the word "absurd," but odd or curious or, on the face of it,  
5 doesn't seem to make sense, we are stuck with what Article 55 says. There's no grey  
6 there. It's black and white.

7 And so we've got the solicitation of the video that we say is tantamount -- well, it is  
8 questioning, in December, and then the text message in March, which certainly is. Both  
9 investigators accepted, essentially, that it amounts to a question.

10 My learned friend last month was taking issue with the fact that the questioning, if it  
11 was questioning, wasn't at any time directly of Abd-Al-Rahman but indirectly through  
12 an intermediary. And we submit that that is -- it doesn't matter a jot whether  
13 questioning was done directly or not. The intermediary, P-0869 was, in effect, a  
14 conduit. No one would sensibly say that a person has not been questioned if those  
15 questions were transmitted via, for example, an interpreter or via an intermediary who  
16 is required to explain questions in simple terms, such as to a child or a vulnerable  
17 witness; or one can envisage a situation where the police want to question a suspect in  
18 writing, and they send written questions and ask for answers in writing. No one  
19 would suggest that this doesn't amount to questioning simply because these questions  
20 are delivered by a postman. And that's essentially the role that P-0869 is playing in  
21 this. So Article 55, there are no ifs, no buts, no exceptions.

22 Mr Nicholls, on 6 December, sought to frame the issue as to whether the OTP's  
23 communications with 0869 and subsequent telephone conversations with Mr Abd-Al-  
24 Rahman himself were prohibited, and I'm looking at page 3 of last month, 6  
25 December's transcript.

1 PRESIDING JUDGE KORNER: [15:03:21] Just a moment. Was that on the Monday or  
2 Tuesday?

3 MR EDWARDS: [15:03:39] That was on the second day, 6 December.

4 PRESIDING JUDGE KORNER: [15:03:41] 6 December, page 3. Yes.

5 MR EDWARDS: [15:03:44] Page 3.

6 PRESIDING JUDGE KORNER: [15:03:45] Yes.

7 MR EDWARDS: [15:03:48] Can I make it very clear: We're not suggesting for a  
8 moment that the questions were prohibited. We're not suggesting that the Prosecution  
9 didn't have a right to engage in these communications. But if the communications  
10 amount to questioning, they should have been preceded by Article 55(2) warnings.  
11 When we look at Article 55(2) -- and I'm dealing with a point made by the investigator  
12 yesterday, I think, who had a very narrow view of what amounts to questioning. He  
13 was suggesting that it's sort of a sit-down interview before the suspect makes a  
14 statement to the Court or to the Prosecution. The word used in Article 55 is  
15 "questioning." It's broader than the concept of an interview if an interview carries with  
16 it the sense of something more formal, something that's been arranged and structured.  
17 The drafters of the Statute could have used the word "interview" if that's what they  
18 meant, but they didn't. And "questioning" is wider than that.

19 PRESIDING JUDGE KORNER: [15:05:06] But do you say -- isn't the intention, looking  
20 at all the previous ad hoc tribunals and their statutes and, indeed, domestic law, isn't  
21 the question to prohibit -- sorry, isn't the purpose to prohibit questions about the  
22 offence? Like taking at its simplest, a police officer arrives on the scene, sees a body on  
23 the floor and somebody holding a knife, and says to the person holding the knife,  
24 "What have you got that knife for?" Isn't it that sort of questioning that it's intended to  
25 prohibit?

1 MR EDWARDS: [15:06:01] Certainly the whole idea of making a caution obligatory  
2 before questions is to protect a suspect from saying something that could be -- that  
3 could prejudice him.

4 PRESIDING JUDGE KORNER: [15:06:24] Self-incrimination.

5 MR EDWARDS: [15:06:26] Self-incrimination, exactly. The problem here is the  
6 following -- and the protection is not just you have the right to remain silent but you  
7 have the right to have counsel, because the presence of counsel at questioning, your  
8 Honour dealt with it last month, of course, is to be there to, as it were, shut the suspect  
9 up if the suspect is about to say something that could be prejudicial to his rights.  
10 The problem that we have here is the way in which the communication was being  
11 conducted. Up to 20 March, you can be satisfied that the investigator who gave  
12 evidence yesterday knew of a video, didn't know what was going to be in the video but  
13 was essentially on more than one occasion seeking to chase the intermediary up and  
14 say, "Send me this video. Where is this video?"

15 Now, he doesn't know what's going to be in the video. It's not a controlled  
16 environment. As I said earlier, and the terms of the question on 15 February could not  
17 be broader.

18 And if I may, I think your Honour hit the nail on the head when discussing the  
19 question with Mr Nicholls on 6 December. At pages 24 and 25 of the transcript, you  
20 say this:

21 "Well, what's said there, Mr Nicholls, is this: That the moment there was direct contact  
22 with the accused ..."

23 And I would venture to say even indirect contact with the accused, but:

24 "... the moment that there was direct contact with the accused, there was every  
25 likelihood that he might say something, even if the conversations were never going to

1 ask him about any alleged offences directly, that he might have said something  
2 incriminating and, therefore, as a matter of caution, if you like ... it would have been  
3 better to give his rights."

4 And that's really the gravamen of the situation. But it's not just a question of it would  
5 have been prudent, it would have been better. We say that Article 55 makes that  
6 mandatory.

7 One of the cases that you were referred to, certainly in writing back in December by Mr  
8 Laucci, was the case of Bemba. And if I can just flesh it out, because I'm not too sure  
9 how fleshed out it was. It's a decision originally of 20 August 2008 entitled, "Decision  
10 on Application for Interim Release," but it was reclassified on 18 September 2009 --

11 PRESIDING JUDGE KORNER: [15:09:54] A decision where? Here, at this Court?

12 MR EDWARDS: [15:10:00] Here. Yes, yes, yes.

13 PRESIDING JUDGE KORNER: [15:10:01] In which case?

14 MR EDWARDS: [15:10:03] Bemba --

15 PRESIDING JUDGE KORNER: [15:10:03] Bemba. Right.

16 MR EDWARDS: [15:10:04] -- before Judge Hans Kaul.

17 This is what this decision was all about: Bemba was seeking interim release, and one of  
18 the arguments being made was when he was being interviewed by an investigating  
19 magistrate in Brussels, he was questioned in a way that violated his rights such as to  
20 make the warrant of arrest null and void as such. That was their argument and it was  
21 an argument which was unsuccessful, ultimately.

22 But this is what his Honour says about a situation which is very much on all fours with  
23 the situation that we are in now. It's at paragraph 45 of the Bemba decision:

24 "In respect of the warrant of arrest of 23 May 2008," a warrant that Bemba was seeking  
25 to have annulled, "it is unclear whether the interview by the investigating judge on 25

1 May 2008 constituted a 'questioning' within the meaning of Article 55(2)(d) of the  
2 Statute or whether it was merely an interview to establish the identity of Mr Jean-Pierre  
3 Bemba and to inform him of his rights. It would appear that, on the substance, it was  
4 rather the latter," i.e., just giving him his rights and establishing the identity, "in which  
5 case the alleged unlawful absence of counsel would only entail a potential exclusion  
6 pursuant to Article 69(7) of the Statute of evidence obtained in the interview."  
7 So in Bemba there is clear recognition that even if the purpose of questioning is  
8 establishment of identity, and even if it's of informing of rights, the absence of counsel,  
9 the absence of Article 55 protections, would entail potential exclusion under Article  
10 69(7) in the event that evidence came out that the Defence sought to have excluded.  
11 There's also a case which Mr Laucci cited, certainly in their written submissions, which  
12 is the case of Zigiranyirazo at the ICTR. It's a decision on the voir dire decision of the  
13 accused's curriculum vitae. It's dated 29 November 2006.  
14 Here, in the context of an interview with Protais Zigiranyirazo by investigators at the  
15 ICTR, a curriculum vitae of that interviewee was solicited and produced, and  
16 contained in that CV was a great deal of prejudicial evidence.  
17 So, first of all, having heard evidence on the voir dire, the court decided that the  
18 prosecution should have considered Zigiranyirazo a suspect, but also that soliciting  
19 and obtaining the CV, in the absence of any article or the equivalent of Article 55  
20 cautions, rendered that CV inadmissible.  
21 And at paragraph 13, the ICTR chamber says this:  
22 "The Chamber notes that Rule 95," and I say, in parentheses, of the ICTY Statute --  
23 PRESIDING JUDGE KORNER: [15:14:57] You mean ICTR.  
24 MR EDWARDS: [15:14:59] ICTR rules.  
25 PRESIDING JUDGE KORNER: [15:15:01] Yes.

1 MR EDWARDS: [15:15:01] "... does not require automatic exclusion of all unlawfully  
2 obtained evidence. Rather, 'in applying the provisions of Rule 95, this Tribunal  
3 considers all the relevant circumstances and will only exclude evidence if the integrity  
4 of the proceedings would indeed otherwise be seriously damaged.'"

5 And there they're citing a Bizimungu decision at footnote 23.

6 "As stated by the ICTY Chamber in Delalic et al, it is difficult to imagine a statement  
7 taken in violation of the fundamental right to the assistance of counsel which would  
8 not require its exclusion under Rule 95 as being 'antithetical to and would seriously  
9 damage the integrity of the proceedings.'"

10 So where there's a violation of Article 55, it's our submission that it couldn't sensibly be  
11 suggested that such a violation would not be so serious as to require exclusion under  
12 Article 69(7). And, indeed --

13 PRESIDING JUDGE KORNER: [15:16:11] (Microphone not activated).

14 MR EDWARDS: [15:16:12] No. And, indeed, I think that it's fair to say that Mr  
15 Nicholls accepts as much. In his submissions, page 25 from last month, he said this:  
16 "The real question is is there a violation of 55(2). If there's no violation and there's no  
17 other 69(7) or 69(4) reason, if there's no violation, then it comes in. If there is a  
18 violation, it's a different story."

19 PRESIDING JUDGE KORNER: [15:16:49] Well, that's what I want to come on to. In  
20 our own research, there is -- I am not sure whether it was in Mr Laucci's list, there's the  
21 Lubanga decision, I think, going back to 2000 and -- I can't remember, but fairly early  
22 on, Lubanga being the first case, where even the Court says that even if -- the Appeals  
23 Chamber says that even if there is a violation, is it such that it amounts to an abuse of  
24 the process of the Court?

25 MR EDWARDS: [15:17:30] Well --

1 PRESIDING JUDGE KORNER: [15:17:31] And I'm not sure that's one you've looked at.  
2 I don't remember it being in Mr Laucci's very lengthy list.

3 MR EDWARDS: [15:17:39] Well, the test isn't -- I'm just going to pull up Article 69(7).  
4 "The violation casts substantial doubt on the reliability of the evidence; or ..."  
5 This disjunctive test.  
6 "... the admission ... would be antithetical to and would seriously damage the integrity  
7 of the proceedings."  
8 So it's a similar sort of wording to abuse of process, but my submission would be the  
9 following:  
10 A, you have decisions from the ad hocs, Delalic and Zigaranyazo, suggesting almost  
11 without question, well, of course, it would be so antithetical to the integrity of the  
12 proceedings that it should be excluded. But I will seek to persuade your Honours as to  
13 why.  
14 This Court, this institution is designed to be a beacon of fair trial rights around the  
15 world. It is set out to reflect the very highest standards of procedural fairness, and  
16 fairness to, specifically, the accused. It should be an aspiration for all fair criminal  
17 justice systems from around the world.  
18 And that being the case, this Court should be extremely slow to embark down a  
19 slippery slope where saying, well, this violation of what is, on any account, a very -- an  
20 absolutely fundamental fair trial right of an accused person, the right to be advised that  
21 he or she doesn't have to answer any questions, the right to the assistance of counsel, so  
22 fundamental. And, your Honour, this is one of the points that Mr Laucci was making  
23 last December, taking your Honours through a huge range of national and  
24 international and regional instruments, showing how these rights are so fundamental  
25 as to be essentially universal.



1 This Trial Chamber should be very slow before finding that a breach of such -- a  
2 violation of such a fundamental right can be minimised, can be swept under the carpet,  
3 can be dealt with by saying, essentially, "Well, yes, but it wasn't that bad; we're going  
4 to allow it in." That would be, I submit, absolutely antithetical to and would damage  
5 the integrity of the proceedings.

6 As I said, it's disjunctive because the evidence can be excluded if the violation casts  
7 substantial doubt on the reliability of the evidence, and we say that that is engaged as  
8 well for the very reasons which I started discussing earlier.

9 The Prosecution want this in because on its face it has the accused identifying himself  
10 as Ali Kushayb. But if the violation provides a reason to doubt the integrity of that  
11 evidence because you've got the investigator referring to the accused as Ali Kushayb  
12 and soliciting information from the person who he is naming as Ali Kushayb in the  
13 course of telephone conversations and WhatsApp messages and so on - maybe not  
14 WhatsApp messages but telephone conversations and so on - the fact that the accused  
15 then refers to himself as Ali Kushayb in that first contact is evidence, the reliability of  
16 which substantial doubt has been cast.

17 PRESIDING JUDGE KORNER: [15:22:25] (Microphone not activated).

18 (Defence counsel confer)

19 PRESIDING JUDGE KORNER: [15:23:04] Mr Edwards --

20 MR EDWARDS: [15:23:08] Yes.

21 PRESIDING JUDGE KORNER: [15:23:08] -- my question is this: Is it right to say that  
22 it's substantially about the reliability? I don't think it's the reliability. This is clearly a  
23 video of your client saying who he is. The question is, isn't it, not that it's unreliable in  
24 the sense that it's been induced by threats or bribery or whatever; it is that it's being  
25 given when you say he should have been advised of his rights.

1 MR EDWARDS: [15:23:42] Well, it's two things. It is unreliable in that -- well, the  
2 Prosecution seek to rely on it because they say this is good evidence of the accused  
3 identifying himself as Ali Kushayb. But when you look at the surrounding  
4 circumstances as to how that material was solicited and how it was procured, the  
5 reliability of that, the way the introduction went, the introduction from the mouth of  
6 the accused, is thrown into question.

7 And the evidence of that suggests to come back to the recording of a -- the audio  
8 recording of the intermediary discussing with a third party what they're going to do,  
9 and what I submit you can infer what was expected of him. Even if it's not necessarily  
10 what was expected of him, what he understood was expected of him, which is: Make a  
11 video and introduce yourself as Ali Kushayb. That is what ...

12 PRESIDING JUDGE KORNER: [15:25:10] Yes, because here is 869 saying, "I am in  
13 contact with the man known as Ali Kushayb who wishes to surrender."

14 MR EDWARDS: [15:25:30] Yes.

15 PRESIDING JUDGE KORNER: [15:25:31] I'm summarising at the moment. And the  
16 investigators say, or the investigator says, "All very well. But how do we know that  
17 you really are in contact with the man who is Ali Kushayb?"

18 MR EDWARDS: [15:25:51] Yes.

19 PRESIDING JUDGE KORNER: [15:25:52] And, therefore, off goes 869, contacts his  
20 mate, whoever he may be, and says, what we need to do is get a video in which he says  
21 he's this.

22 MR EDWARDS: [15:26:03] Yes.

23 PRESIDING JUDGE KORNER: [15:26:05] But that in itself is not unreliable in the sense  
24 that in some way or another the OTP have issued threats or inducements to the  
25 intermediary, acting, as you say, as a mouth -- I mean, for these purposes, the

1 intermediary is the conduit of all this, saying, you know, "Unless you do it, or unless he  
2 says he is, it's no-go, mate."

3 MR EDWARDS: [15:26:50] We don't put our case quite like that. There are two things.  
4 First of all, your Honour sort of suggests it's not really a question of unreliability. We  
5 say it's a question of unreliability because it casts -- it places a question mark over, as it  
6 were, the purity of Abd-Al-Rahman identifying himself as Ali Kushayb, the purity, the  
7 truth of introducing himself and that being the truth as opposed to him introducing  
8 himself because that is what is expected of him or that is what he understands is  
9 expected of him. That's the first thing.

10 The second thing. Your Honour asks about inducement, and that is -- so, in Article  
11 55(2) -- sorry, Article 55(1)(b):

12 "In respect of an investigation under this Statute, a person:

13 "Shall not be subjected to any form of coercion, duress or threat ..." and so on and so  
14 forth.

15 Now, we're not suggesting, we're not suggesting for a moment that the Prosecution  
16 knowingly induced or coerced or used duress against Mr Abd-Al-Rahman. But the  
17 Prosecution certainly, from the 26th or 27th of December, knew because the  
18 investigator who gave evidence yesterday has told us, knew that Abd-Al-Rahman  
19 feared for his life, feared being arrested, feared being killed, and/or - these are all  
20 and/ors - and/or feared his safety by virtue of --

21 PRESIDING JUDGE KORNER: [15:28:55] Why do they know that?

22 MR EDWARDS: [15:28:57] Well, we --

23 PRESIDING JUDGE KORNER: [15:28:58] Because the investigator -- the Arabic  
24 investigator said he didn't know anything about it. The investigator said, yes, he read  
25 on the internet that a warrant for arrest had been issued, or there was -- that he was a

- 1 thing. But how he was to know that Ali Kushayb or, indeed, your client was in fear of  
2 arrest, torture, whatever?
- 3 MR EDWARDS: [15:29:28] It's in the e-mail that --
- 4 PRESIDING JUDGE KORNER: [15:29:29] Well, no, but the e-mail simply says -- I'm  
5 sorry, it doesn't go anywhere near the heights that you've --
- 6 MR EDWARDS: [15:29:37] It's ERN 837.
- 7 PRESIDING JUDGE KORNER: [15:29:4] Yes, I'm just getting it here.
- 8 MR EDWARDS: [15:29:41] And it's at your Honours' tab --
- 9 PRESIDING JUDGE KORNER: [15:29:44] No, don't worry. I've got it in a separate --  
10 I've got it for the first investigator. Just a moment.
- 11 MR EDWARDS: [15:29:51] It's the second page of that e-mail.
- 12 PRESIDING JUDGE KORNER: [15:29:5] Yes. No, it says:  
13 "Kushayb is believed to be in hiding or keeping a low profile for fear of being arrested  
14 and/or killed by Government of Sudan or others."
- 15 MR EDWARDS: [15:30:14] Yes.
- 16 PRESIDING JUDGE KORNER: [15:30:15] And according to the other intermediary, I  
17 think it is, "this will increase the possibility of him being willing to surrender."
- 18 MR EDWARDS: [15:30:31] Right. So I ask the question: How would the author of the  
19 e-mail know that? The author of the e-mail knows that because he's been told that by --
- 20 PRESIDING JUDGE KORNER: [15:30:38] By 541.
- 21 MR EDWARDS: [15:30:41] -- the investigator who -- well --
- 22 PRESIDING JUDGE KORNER: [15:30:47] That's what it says. It refers directly to 541.
- 23 MR EDWARDS: [15:30:50] Yes, but also this is an e-mail that's been drafted after he's  
24 had a conversation with the investigator who gave evidence yesterday. That's what  
25 sets off -- that's what causes this e-mail to be prepared in the first place, within hours of

1 that first call between the intermediary and yesterday's investigator. And the e-mail  
2 starts off cc'ing in the senior team leader:  
3 "I just quickly spoke with his colleague on the phone. I said I would write a short e-  
4 mail so that we are all on the same page."  
5 So this is the transmission of information to the team leader of what is understood to be  
6 the situation.  
7 I think I'm right also in saying ...  
8 (Defence counsel confer)  
9 MR EDWARDS: [15:32:15] And your Honour can also rely on the evidence from the  
10 witness yesterday at page 66 of the transcript.  
11 PRESIDING JUDGE KORNER: [15:32:30] Sorry, which page? Is that in the corrected or  
12 uncorrected?  
13 MR EDWARDS: [15:32:34] Well, this is in the LiveNote transcript, I think.  
14 PRESIDING JUDGE KORNER: [15:32:37] Right.  
15 MR EDWARDS: [15:32:45] Oh, no, this is the corrected version that was sent around  
16 yesterday.  
17 PRESIDING JUDGE KORNER: [15:32:49] So it's about ten pages further on then,  
18 judging by the last.  
19 MR EDWARDS: [15:32:56] In fact, we were dealing with it just a moment ago. One of  
20 your questions was --  
21 PRESIDING JUDGE KORNER: [15:33:01] Yes.  
22 MR EDWARDS: [15:33:02] -- "And just again tell us what you mean by "cooperate"?  
23 "Coming forward and meeting us and possibly surrendering himself. I think he has a  
24 lot of questions he -- he wanted to ask. And we -- these questions, if they're asked by  
25 him directly, then we will be able to deal with that."

1 "Your Honour, as you can see from the first phone call with the suspect, he took the  
2 position that he understood our position and that we are -- we are only working on  
3 getting him to come to another safe place where he could move on to the Netherlands  
4 and be in a safe -- most safest position, then we can discuss all, I mean, his rights as a  
5 suspect and so forth."

6 The investigator who gave evidence yesterday also stated that he was aware - that he  
7 was aware - of an arrest warrant from Sudanese language open source materials and  
8 what he had been told, if my memory is correct, from other sources.

9 Now, whether the OTP did, in fact, know that there was an arrest warrant or not - and  
10 I've said this before - is almost neither here nor there. What they were aware of was Mr  
11 Abd-Al-Rahman's, at the very least, subjective fear that his life was in danger, which  
12 causes him to seek the protection of the OTP.

13 Now, a great deal was made in questions from my learned friend of yesterday's  
14 witness. Well, why all the delay, then? Why did it take such a long time for Abd-Al-  
15 Rahman to ultimately surrender? And my submission about that is, well, as you  
16 remember, I cross-examined the witness about it.

17 First of all, the explanation of fear in late December is very, very close in time to the  
18 arrest warrant being issued. I think the evidence is it was issued on 2 December, and  
19 the contact is a couple of weeks after that.

20 He's in hiding. The OTP know that he's in hiding, so he's not swanning around at  
21 liberty where everyone knows where -- everyone can see him and he's at large. So it's  
22 the most understandable thing in the world, I would submit, that in those  
23 circumstances that would be the height of one's fear.

24 Time passes. He's not arrested. He's still in hiding. He may or may not move to  
25 Central African Republic. There comes a point when he certainly does travel to Central

1 African Republic, but he's not arrested immediately. So you can understand how, in  
2 those circumstances, the height of one's fear reduces over time, and the extreme  
3 feelings of vulnerability reduce over time.

4 And then in due course, we've got the issue of COVID - I think that's explained in one  
5 of the telephone conversations - and the much more personal desire on the part of Abd-  
6 Al-Rahman, as explained, that he wants to spend Ramadan with his family, possibly  
7 for the last time.

8 Now, that, there's no direct, perhaps, inducement or coercion on the part of the  
9 Prosecution, but what we do say is that in full knowledge of this circumstance, in full  
10 knowledge in early 2020 of the accused's vulnerability and own subjective feelings of  
11 vulnerability, they are pressing him through the intermediary to send on this video,  
12 you know, with what is being held out as being: If you come to us, we can protect you.  
13 And the evidence from yesterday's witness bears that out, saying that his concern was  
14 ensuring -- well, his concern was making sure that Abd-Al-Rahman is under the  
15 control of the Prosecution as quickly as possible because that is where he would be  
16 safest.

17 So when you add it all together, we suggest that there is this, albeit indirect, but  
18 nevertheless there is this violation of Article 55(2) -- 55(1)(b) in addition to 55(2). And  
19 whichever one it is, it is a sufficiently serious violation that were it, nevertheless, to be  
20 admitted, it would negatively impact, it would be antithetical to and would seriously  
21 damage the integrity of the proceedings.

22 And, again, I'm at risk of repeating myself, and repetition very rarely improves  
23 submissions, but this Court must be very slow to sweep that under the carpet.

24 PRESIDING JUDGE KORNER: [15:39:25] Thank you, Mr Edwards.

25 MR EDWARDS: [15:39:28] Can I assist any further?

1 PRESIDING JUDGE KORNER: [15:39:31] I'll just check with my colleagues.  
2 (Trial Chamber confers)  
3 PRESIDING JUDGE KORNER: [15:39:48] No. All right, it doesn't appear there's any  
4 further questions for you, Mr Edwards. So, thank you.  
5 Yes, Mr Nicholls.  
6 MR NICHOLLS: [15:40:02] Thank you, your Honour. I'll try to separate the two issues,  
7 the phone calls and the video, but as my friend stated, as you stated, and as I stated, the  
8 real issue here, the only issue, is for any of this material we're seeking to submit, was  
9 there a 55(2) violation, was there questioning under 55(2)?  
10 And, again, there's a real need here, I think, to look at the facts in a non-absurd way, in  
11 a sensible, rational way, and blow all the fog away here of what happened.  
12 Now, first in relation to the video, and I'll try to respond everything my friend said, but  
13 I may not be able to. The e-mail comes from 869 to the Court - not to the OTP; it gets  
14 forwarded to the OTP - that 869 is in contact with the suspect that he refers to from the  
15 beginning as Ali Kushayb. That is the name on the warrant along with Abd-Al-  
16 Rahman. It's a name he's widely known by. At that point, nobody in the OTP or  
17 anywhere else in the world knows there's going to be any dispute about the nickname  
18 or that that may be an issue.  
19 As I said earlier, in response to your Honour's question, the investigator essentially  
20 yesterday, I think, the take-away is that when 869, in the first phone call, the brief  
21 phone call on the 27th, says, "I have a video or I can make a video of the suspect," that  
22 the investigator obviously thought, all right, that would be a good thing to have. And  
23 he said he didn't remember exactly, but I think the take-away is he would have asked  
24 for it or he would have asked for it to send that video on.  
25 And, again, it wasn't clear whether that video existed or would be made.



1 The investigator was very clear in his statement and in his testimony that he had to  
2 find out, that his goal was to find out: Is this person, in that first conversation, in  
3 contact really with the suspect. And, again, there's been a parallel effort through a  
4 different person at the same time.

5 Now, there is no evidence that the OTP gave any instructions of what to say in that  
6 video, said, as Mr Laucci, to describe his submissions earlier, and in their written  
7 submissions, that the OTP solicited that he used the alias. All that happened there is  
8 that the investigator, at its highest, said, "Yeah, if you've got a video, send it on. That  
9 would be good." There is no direct contact with the suspect. There is no indirect  
10 contact with the suspect. 869 is not an OTP intermediary. 869 is not being told, "Tell  
11 the suspect this," "Tell the suspect that. We have questions for the suspect." There is no  
12 questioning at all. There is no 55(2) violation there. And if you watch that video, you  
13 look at the demeanour of the accused when he's speaking there, the calm and the  
14 voluntariness is clear.

15 Now, they've made a lot of talk, or there's been a lot of reference to the message from  
16 15 March, these WhatsApp messages, where the investigator says:  
17 "Is there an update? Are you still in the Netherlands? Is there a message for us from  
18 one of the wanted individuals requiring follow-up?"

19 Again, that is from the investigator to 869, talking about moving ahead with this. It is  
20 not a question to the accused. It is not asking the accused for anything. It is asking  
21 whether 869 has anything to give.

22 You know, you really need to think about what is the -- and I'll move on to 55(2) and  
23 69(7) in a minute. But what is the conduct that they are seeking to deter here? That if a  
24 person unknown to the Court calls up, says to the investigator in the conversation,  
25 "There's a suspect, a wanted person, I have a video or I might have a video of him," and

1 the investigator says, "Yes, send it on," that that is something that needs to be deterred,  
2 that's some kind of misconduct. It's really beyond stretching 55(2) to its limit. It does  
3 not make any sense.

4 My friend didn't come back to me, or to the Court, unless I missed it, with a cite to  
5 where we now know there were more communications. The investigator was clear  
6 yesterday that these WhatsApps, he did not find more, and he did not - at least I can't  
7 find it anywhere in the transcript - say, "Oh, yes, there were more communications," or  
8 "We know there were more communications."

9 In terms of any pressure that my friend was talking about at the end, there is none  
10 proven at all that this was any motivating factor for the accused. There is the report  
11 from 541 that you noticed, that he's worried about being arrested or killed, and, you  
12 know, the situation there is he's in conflict with the Salamaat tribe. His protector,  
13 former president Bashir, has been overthrown, his regime. The GoS may have had a  
14 warrant for him at that time. They may want to arrest him. There's a civilian  
15 component of the government at that time, and that's exactly what the GoS should  
16 have been doing since 2007 is attempting to arrest him. That is a legal obligation that  
17 Sudan was under, under the Resolution 1593. That is not any form of undue pressure  
18 or coercion, and certainly not in any way from the OTP or the Court.

19 The Defence stated in the Confirmation Hearing, and that was 26 May 2021, page 66,  
20 they made it clear that the reason their client surrendered was because he preferred to  
21 be in jail here than in Sudan. My friend said he knows very well why he has no desire  
22 to spend any time there, and he was referring to Sudanese prisons, so better to go  
23 towards the Court and the Central African Republic, and that in the context the video  
24 was taken.

25 So, again, in asking a person who has approached the OTP, said "I'm in contact with

1 the suspect, he might want to make a statement, he may cooperate," to show proof that  
2 he's in contact with him, and when that person says I can send a video, saying, "Send a  
3 video," that is just not in any way in any sense a 55(2) violation. It is not a questioning  
4 of the suspect of any kind.

5 And I can move quickly to the phone calls as well with the suspect.

6 PRESIDING JUDGE KORNER: [15:48:49] Yes. Before you do, the argument by Mr  
7 Edwards is that this is analogous with the situation in, is it, Bemba, where the  
8 authorities were questioning him to establish his identity. And during the course of  
9 that questioning, apparently, he made admissions against interest, and the Court  
10 apparently ruled that this did fall within Article 55. I mean, it not actually familiar  
11 with that case. But if that's right, why is this situation different?

12 MR NICHOLLS: [15:49:49] Well, I think that is more analogous to the phone calls,  
13 which I'll deal with in a minute. But my point with asking a third party for video is not  
14 questioning of any kind of an accused. It's certainly not questioning of any kind that  
15 55(2) is intended to preclude. And I'll move on to what 55(2) covers but ...

16 PRESIDING JUDGE KORNER: [15:50:22] So you say it's because all of this is going on  
17 with the intermediary, it's, therefore, cannot be questioning of the accused as intended  
18 under Rule 55?

19 MR NICHOLLS: [15:50:43] Yes.

20 PRESIDING JUDGE KORNER: [15:50:44] Article 55.

21 MR NICHOLLS: [15:50:47] Yes, and it could be. And if it was a situation that was  
22 similar to the case, I don't recall the name that my friend cited, where the investigators  
23 asked for the suspect to write a CV and provide background, that would be one thing.  
24 If the OTP went through an intermediary and said, "I want you to ask the suspect these  
25 eight questions and then send it to me," that could be, if it is questioning on, as your

1 Honour said, the substance of the case, as the investigator explained what the type of  
2 thing he thought this video might include would be a picture of the suspect holding a  
3 newspaper, showing it was recent.

4 The suspect sent a second video on 25 March -- there were actually four videos, just  
5 because you said two in the beginning. It's actually four that were sent in total.

6 PRESIDING JUDGE KORNER: [15:51:45] Oh, I see. Okay.

7 MR NICHOLLS: [15:51:47] He sent a video on 25 March where he didn't identify  
8 himself as Ali Kushayb. This is before the phone calls. This is before the surrender.  
9 That's actually at tab 19. It's DAR-OTP-0216-0802 and at page 0804.

10 PRESIDING JUDGE KORNER: [15:52:11] Just a minute. I'm sorry, I've been working  
11 off the bundle that I had for the first investigator, so I've just got the numbers. This is  
12 the -- which? The video ...

13 MR NICHOLLS: [15:52:30] 25 March.

14 PRESIDING JUDGE KORNER: [15:52:37] 25 March. Okay. Can you put it up, please,  
15 because at the moment I'm having some difficulty in finding anything. Oh, yes, just a  
16 moment. Hang on.

17 MR NICHOLLS: [15:52:53] Yes, and it's page 0804. It's the translation.

18 So this is five days later this video is received. There's never any question of asking for  
19 another video. That video is -- "Send us some more videos." This just comes, and the --  
20 you can see the text, your Honour. He says:

21 "The name is Ali Muhammad Ali Abd-Al-Rahman. I'm a public medical assistant. In  
22 truth, in relation to the international court, given that I've been charged with 51, or 50  
23 [counts], even though I'm just a guy ..."

24 And he goes on. And the suggestion that had this been the only video received, this is  
25 the first video we had received and the only video, that we would somehow not have

1 proceeded or thought, fine, 869 is in contact with the suspect, is just not credible in any  
2 sense. So he sends that first video where he says, "My nickname is Ali Kushayb." He  
3 sends this one five days later where he shows that he knows that he is a suspect.  
4 But to go back to your question, I think it is not in the same boat as Bemba because  
5 Bemba is a suspect in a room, he's been sat down, an Investigative Judge is speaking to  
6 him and asking him questions. And I think factually, there was nothing suppressed  
7 there. Bemba did not make any admissions against interest that the Prosecution sought  
8 to introduce. I believe Bemba was trying to throw the whole warrant out, his arrest  
9 warrant, saying, "Because that interview wasn't properly conducted, because I wasn't  
10 given 55(2) warnings, my arrest warrant should be thrown out because that took place  
11 in Belgium." That was the Defence argument, which failed. So it was not any utterance  
12 or words he spoke that he sought to suppress.

13 And all Bemba says is if there is an interview, and that was an actual proper interview,  
14 and it's only to establish identification - i.e., this is the person for whom the warrant has  
15 been issued - then it's not 55(2). Then they say that possibly it could be a 69(7)  
16 violation, but that's really dicta where they're speculating and they're saying that  
17 something could come out in that interview and it could be -- you know, that could be  
18 something that would be precluded.

19 PRESIDING JUDGE KORNER: [15:55:47] All right. So you're saying, effectively, what  
20 we have to decide is, first, is this questioning as envisaged by Article 55?

21 MR NICHOLLS: [15:56:07] Or questioning at all because it's not --

22 PRESIDING JUDGE KORNER: [15:56:10] Okay. I'm sorry. No, I'm sorry. I take one  
23 step back. This is not -- because none of this is said to the accused direct, none of the  
24 conversations are directly between the accused and the OTP, therefore, it can't possibly  
25 be an interview. But failing that, even if, as Mr Edwards asserts, that the

1 communication between the OTP and the intermediary is the same as direct  
2 conversations with the accused, does the encouragement of the investigator for a video  
3 to be provided if it identifies the accused amount to questioning.

4 MR NICHOLLS: [15:57:02] No. And if I --

5 PRESIDING JUDGE KORNER: [15:57:06] Oh, yes, but that's the nub of the problem, is  
6 it not?

7 MR NICHOLLS: [15:57:10] Yes. Yes, and if I talk about the phone calls, I can wrap it  
8 up.

9 PRESIDING JUDGE KORNER: [15:57:14] No, but not the video, but that -- the video, I  
10 think, we've grasped. So what about the phone calls?

11 MR NICHOLLS: [15:57:22] Okay. Now, the phone calls - and I'll try not to repeat what  
12 I argued before and what is in our submissions - is that the first and second phone calls  
13 where the accused identifies himself - we discussed this before - by his nickname Ali  
14 Kushayb as well, it's very clear that the first investigator testified --

15 PRESIDING JUDGE KORNER: [15:57:56] Sorry, just a moment. I'm just going back to  
16 the phone calls. The first one is the phone call of?

17 MR NICHOLLS: [15:58:08] 6 April, your Honour.

18 PRESIDING JUDGE KORNER: [15:58:09] 6 April. Yes.

19 MR NICHOLLS: [15:58:15] Yes. So 6 April, it's very clear there that the investigator,  
20 who is the one who testified yesterday, makes very clear they don't want to -- again, I  
21 won't rehash it: "We're not going to talk about the case. We're not going to talk about  
22 the substance. We're only going to talk about logistics of how we can meet." And  
23 that's exactly what happened. There was nothing -- there was no discussion about the  
24 case, and there was nothing -- there's nothing in there that we are seeking to admit  
25 where the accused talks about anything that happened or didn't happen.

1 The accused identifies himself, says his name, and says -- identifies himself by the  
2 name and the nickname. He knew he was a suspect. Your Honour pointed that out in  
3 the prior discussions on this last year that the investigator made clear to him that he  
4 was a suspect. And the video I've just alluded to, which was 25 March, so well before  
5 that phone call, the accused himself said in that video, "I know I've been charged with  
6 50 or 51 counts." So he knows he's a suspect. He knows, he understands that this is a  
7 conversation just to talk about how to meet and move forward in the process that the  
8 accused has initiated, saying he is willing to cooperate and provide a statement  
9 through his intermediary P-0869.

10 In the second call, it's the same thing. It's different people on the call. So, again, he  
11 introduces himself by his name and his nickname. And here is where I get to the  
12 argument by my friend, who is using some circular logic. What they're essentially  
13 saying is, and he -- I can't find exactly what he said, but it was essentially that 55(2) is  
14 an absolute. You know, if you're questioning, you've got to give a 55(2) warning. And  
15 your Honour questioned him a bit about, well, is it any kind of questioning, and my  
16 friend essentially said, well, if you don't give it, then it's inadmissible.

17 So the result - and I talked about this the last time - the result of that approach would  
18 be that any time the Prosecution is calling to speak with anyone, not necessarily a  
19 person with a warrant but anybody who has the right and should be given the 55(2)  
20 warnings, before they ask the person on the phone their name, before they know who  
21 is on the phone, they have to tell them it's being tape recorded, go through the entire  
22 55(2) procedure, ask them if they want counsel when they don't know who they're  
23 talking about to, and that is absurd.

24 And my friend said, well, it might lead to what seems to be absurd results, but that is  
25 the rule. And it is not the rule. It's not been the rule anywhere. It's not the rule in the

1 UK. Bemba shows that it's not the rule. That just to ask somebody who they are is not  
2 asking them to incriminate themselves and it's not questioning under 55(2). And I  
3 won't go through the examples I gave last time, but it would be impossible to operate.  
4 And then my friends say: Well, that may be absurd, that may be ridiculous. But if you  
5 don't give the warning, even if you're calling somebody for the first time to ask if they  
6 can meet you to speak, anything they say will be kept out. And that can't be correct.  
7 You cannot have an automatic exclusion. What they're essentially saying is that any  
8 time a person says anything who's a suspect who isn't given a 55(2) warning, it's per se  
9 inadmissible, and that can't be correct.

10 And the result of finding that would be we cannot, obviously, knowingly violate 55(2).  
11 We would never do that. The ruling that those calls are inadmissible would mean that  
12 when we, in any case, try to contact a person who we have information that they may  
13 have committed a crime - and that's the trigger, a person who may have committed a  
14 crime under the Statute - any time we want to call anybody to meet, who may have  
15 committed a crime within the Statute, we have to go through the full 55(2) warning.  
16 Even if they're travelling in a bus, in a car, in -- outside Khartoum, they need to be  
17 given that warning before they say their name, and we need to warn them, Don't say  
18 your name because later on you might lie about your name and say you're somebody  
19 you're not because you need to surrender because you're scared of something, a  
20 different group coming after you, and then later you might want to say you're  
21 somebody else."

22 I mean, it is a bit ridiculous.

23 I mean, my friend said the Court should be a beacon of --

24 PRESIDING JUDGE KORNER: [4:03:28] Fair trial rights.

25 MR NICHOLLS: [4:03:30] -- fair trial rights, yes. But it shouldn't be a beacon of



1 absurdity, which is what going down that route would be.

2 And, again, look at the facts. Look at how careful the OTP was in relation to 55(2) here.

3 When it spoke to the accused for the first time, it made very clear: Do not talk about

4 the case. We're not going to talk about the case. And he didn't. He understood that. If

5 he had, if he'd started saying, "I'm sorry I killed all those people in Deleig or

6 something," then there would be a real issue that your Honour Judge Alexis-Windsor

7 would have brought up or something else.

8 But just identifying that is a different category. That cannot be a question that is subject

9 to 55(2). And the investigator yesterday was clear, and I think the first investigator

10 who spoke -- the first investigator said, your Honour asked him: When do you need

11 the 55(2) questions, when should they be applied? And I think he said: Well, after you

12 know who you're talking about to, then you give the caution.

13 PRESIDING JUDGE KORNER: [4:04:48] Although, in fact, in this case, Mr Nicholls, by

14 the time the conversations are being held with him over the telephone, it was known

15 that he was the person that the OTP and the Court were seeking.

16 But as we saw, you know, we're not going to ask him any questions about the offence.

17 This is just about how we're going to achieve your surrender.

18 MR NICHOLLS: [4:05:15] But, your Honour, that's not the case for the first two calls.

19 The investigator never met him. The first call was to set up the logistics --

20 PRESIDING JUDGE KORNER: [4:05:27] Yes, but you've got the video by the first

21 telephone call.

22 MR NICHOLLS: [4:05:30] Right. So the investigator knows he's on the phone with

23 people somewhere in Darfur. As he said, and explained to everybody on the line, this

24 is being recorded. And so it was simply, you know, introduce yourself and make sure

25 that we do actually have the suspect on the line. In both cases, it's simply: Identify

1 who you are. The investigator introduced himself and then asked the suspect to  
2 introduce himself.

3 And there were different people on these calls. The bodyguard whose name I won't  
4 mention appears on some of them. We don't know, the investigator doesn't know  
5 everybody who is on that line. He needs to know whose voice belongs to who. He  
6 needs to know who he's talking to.

7 PRESIDING JUDGE KORNER: [4:06:25] All right. Well, that's -- okay. So that's the  
8 call, you say, about -- on 7 April -- sorry, on 6 April, the call, they've got to be sure it's  
9 him that they're talking to. What about 7 April, though?

10 MR NICHOLLS: [4:06:45] I think it's the same thing, your Honour. Just to see -- again,  
11 there were different people on that call. And the investigator introduced himself. I  
12 was on that call. I introduced myself. And the suspect was asked to introduce himself,  
13 as all other people on the call, just to make sure and to show who was on the call. And  
14 that is not, again, what 55(2) outlines. If it is, that means if we were ever to call  
15 somebody, we could not ask who they were on the phone without giving the 55(2)  
16 warning in order just to ask them to meet us a day later than we had said before. That  
17 is the effect.

18 Now, just in terms of exclusion. So our argument is that there was absolutely no  
19 violation of 55(2) in relation to either of these calls or the video. And 69(7) would be  
20 the exclusion method, but you don't reach it here because, if you look at 69(7), it's a  
21 two-step process:

22 "Is the evidence obtained by means of a violation of the Statute or internationally  
23 recognised human rights?"

24 No. We've said why it's not a violation of 55(2), and it's certainly not a violation of any  
25 other human right to be asked to identify yourself or to ask a third party if he can send

1 a video of somebody else. So you can stop there.

2 But even if you go further:

3 "Does the violation cast substantial doubt on the reliability of the evidence, or would  
4 the admission of the evidence be antithetical to the proceedings?"

5 And, again, the answer is neither. 55(2) for the calls and the video did not apply. If  
6 there had been some pressure on him, that's irrelevant to the fact that he's afraid of  
7 being arrested. But there is no -- first of all, the OTP had no -- that was not from the  
8 OTP. The OTP had no control over those circumstances, if they existed. And, again,  
9 they haven't called their client, they haven't called 869 to talk about that. It's just an  
10 inference they would like you to draw. And there is no causal link established between  
11 that supposed violation and the gathering of any evidence.

12 And, really, here, if you look at Hassan, primarily paragraphs 37 to 42, it goes into that.  
13 That the -- you know, the evidence that's sought to be precluded -- and in that case, a  
14 much more serious violation alleged than alleged here. There's no connection. There's  
15 no causal link that would give you a reason to preclude it. So --

16 PRESIDING JUDGE KORNER: [4:10:09] Supposing in the video instead of denying  
17 that he'd committed any offence and volunteering to be a witness, and all the rest of it,  
18 he had confessed, would you say that was admissible because of the circumstances?  
19 Supposing he'd said, "Yes, not only am I the man known as Ali Kushayb, but I admit  
20 that I carried out the looting, the pillaging," et cetera, et cetera, et cetera.

21 MR NICHOLLS: [4:10:41] Under the facts of this case and the interaction with 869, yes,  
22 because the OTP didn't question him.

23 PRESIDING JUDGE KORNER: [4:10:47] Yes, so -- all right. Yes. Yes.

24 MR NICHOLLS: [4:10:53] Or otherwise coerce or induce him to say something along  
25 those lines. So the answer would be yes.

1 Now, if the phone calls -- again, it doesn't arise because there isn't anything he blurted  
2 out that we are seeking to introduce.

3 And if I can just check, your Honour.

4 No, your Honour, I think then that unless you have any other questions -- the only  
5 other point that I would make, and I think it's absolutely clear from the record -- and I  
6 appreciate my friend saying that both investigators, he took no point with their honesty  
7 and their testimonies. Throughout this process, and it is relevant, the OTP acted in  
8 complete good faith. There was no way of knowing this was an issue. There were no  
9 sharp practices. There was no trickery.

10 The first part, just asking for the video to be sent, if the person either had it or was  
11 going to create it, is no violation. And you can see from the phone calls and the  
12 transcripts that the OTP was doing all it could to get the suspect to a place where we  
13 hoped to interview him, or we hoped to have a sit-down. That was genuine point. We  
14 didn't put them into evidence, but there were letters that we actually sent in Arabic to  
15 the accused after he arrived here asking to have an interview with him and have a  
16 statement. That's where the 55(2) warnings would have been given and all those rights  
17 would take place. But nothing here at any point was questioning under 55(2) which  
18 would trigger the need to give those warnings.

19 PRESIDING JUDGE KORNER: [4:13:07] I do have one question, Mr Nicholls, and I  
20 think maybe -- well, I'll come back to Mr Edwards, in case he wants to say anything.  
21 Before you put in your response to the original written motion, had anybody spoken to  
22 the investigator who was off sick?

23 MR NICHOLLS: [4:13:25] Well, the team leader may have spoken to him about how  
24 he's doing, et cetera, but --

25 PRESIDING JUDGE KORNER: [4:13:31] No, but actually asked him for any specific

1 input?

2 MR NICHOLLS: [4:13:36] No.

3 PRESIDING JUDGE KORNER: [4:13:37] Yes, that's what I rather thought.

4 MR NICHOLLS: [4:13:39] No, we'd -- no, he'd been off sick for -- since early September  
5 or mid-September, and in December we didn't --

6 PRESIDING JUDGE KORNER: [4:13:47] Well, I --

7 MR NICHOLLS: [4:13:49] -- talk to him.

8 PRESIDING JUDGE KORNER: [4:13:51] -- may say, and particularly in light of the fact  
9 that Mr Edwards is not alleging there was deliberate misleading by the Court, but it's  
10 what occurred to me.

11 Nevertheless, Mr Nicholls, I've already made it clear to the investigator himself there  
12 are, in our view -- or there were, in our view, some serious lacuna in the procedure that  
13 was observed as a standard operating practice, which I trust since then has been  
14 corrected.

15 MR NICHOLLS: [4:14:29] Yes, your Honour. And you'll recall I didn't contest that. I  
16 don't contest it now.

17 PRESIDING JUDGE KORNER: [4:14:34] No, I know. No --

18 MR NICHOLLS: [4:14:35] And I put it to him as well that this could have been better.  
19 And from that lacuna, the Defence have asked you and -- and your Honours to draw  
20 certain inferences of what could have been, what could have happened because there  
21 isn't that documentation and to draw these sort of sinister inferences because of that  
22 lacuna.

23 But I would just say, because you've raised this, the most powerful inference to draw  
24 here, the most powerful inference you can see from the facts, is that they haven't called  
25 their client to testify, and they haven't called 869. And 869 is the man speaking with

1 the client, sent the first message, was on every phone call, had the video, could say  
2 when it was produced, when it was done. That is a solid inference that's a matter of  
3 choice, not a mistake.

4 PRESIDING JUDGE KORNER: [4:15:28] Yes.

5 Yes, Mr Edwards, do you want to respond to any of that?

6 MR EDWARDS: [4:15:35] (Microphone not activated).

7 THE INTERPRETER: [4:15:42] Your microphone is off, Mr Edwards.

8 MR EDWARDS: [4:15:44] My learned friend says that the request for the video in  
9 December or later was not a question.

10 You would have to go behind not only the evidence of the investigator who gave  
11 evidence last week, but the evidence from yesterday's investigator. I asked him  
12 yesterday, page 74:

13 "That second question is essentially you chasing the intermediary for this video that's  
14 been long-promised; right?"

15 "Yes."

16 Okay. There were two questions that were asked.

17 "That second question is essentially you chasing the intermediary for this video that  
18 you've been long-promised; right?"

19 "Yes."

20 Yesterday's witness accepts that it amounts to a question, the text message. And the  
21 first investigator from last Monday said as much. You'd have to go behind that  
22 evidence to find that this doesn't amount to questions.

23 PRESIDING JUDGE KORNER: [4:16:56] Well, we're back, Mr Edwards, to not every  
24 question comes within the provisions of Article 55. Is it a question -- and this is where  
25 the real argument is. Is it a question or was the whole procedure, does it amount to

1 questioning under Rule 55 which requires the rights.

2 MR EDWARDS: [4:17:31] Yes.

3 PRESIDING JUDGE KORNER: [4:17:32] I mean, that is -- we've got that point entirely.

4 MR EDWARDS: [4:17:36] Yes. There are just a couple of, if I may say, straw men --

5 PRESIDING JUDGE KORNER: [4:17:43] Yes.

6 MR EDWARDS: [4:17:44] -- that were raised by my learned friend that I need to deal

7 with, and I can do it quickly.

8 The Prosecution say: Well, we didn't know that Abd-Al-Rahman was going to take

9 issue with the name Ali Kushayb later on. And any kind of questions of an accused to

10 identify themselves would involve a question asking them to essentially incriminate

11 themselves. That is not the case at all. That is a submission which is entirely -- it

12 doesn't take into account at all the realities of this particular case.

13 Firstly, the issue that the OTP didn't know that Abd-Al-Rahman would take issue with

14 the nickname that's been attributed to him. That is an argument that must be rejected.

15 Even if he only took issue with the nickname for the first time at his Initial Appearance

16 on 15 June 2020, and we would observe that as the only time he could have taken issue

17 in any practical sense with Ali Kushayb as the nickname, the Prosecution knew or must

18 have known how important it would be to create the link evidentially between Abd-Al-

19 Rahman and Ali Kushayb. The Prosecution knew from evidence of a large number of

20 witnesses that Ali Kushayb was only ever a nickname, and that is a -- it's not unique,

21 but it is an unusual feature in this case, that there is an accused who is known by most

22 witnesses by a nickname and not by his civil name, as it were.

23 The Prosecution had to create that link. They knew that that was important to create

24 that link. And, therefore, any questions that relate to identifying himself potentially

25 opens the door to incriminating answers.

1 And your Honour will know, and I don't propose to take you through witness  
2 statement after witness statement, but in Filing No. 224, I'm afraid I don't have the date,  
3 but it's the filing where the Prosecution, in answer to the Pre-Trial Chamber, provided  
4 the evidence that they had that Abd-Al-Rahman is also Ali Kushayb. There's a whole  
5 number of witnesses that the Prosecution say provide evidence of the link. They knew  
6 that it was an issue.

7 The first investigator who gave evidence last week indicated, in answer to my  
8 questions: Well, of course, linking an alias or a nickname or a street name, or what  
9 have you, to an accused is a fundamental and normal and standard -- it is the most  
10 basic investigatory steps to take. And so to say, well, any time we ask an accused what  
11 his name is, he's at risk of incriminating himself and, therefore, we have to provide a 55  
12 warning every time, that's a complete straw man argument. It's nonsense. I'm not  
13 suggesting that at all. We never have done. In the particular facts of this case, that was  
14 necessary.

15 And the Prosecution understood. The Prosecution were alive to an Article 55 warning.  
16 They knew that it was an issue. Now, as it turns out, they came down on the side,  
17 ultimately, of deciding not to issue an Article 55 caution. But in the investigation note,  
18 it's the second one that the investigator from last week produced, 26 February 2021,  
19 from pages -- well, pages 2 and 3, Discussions Regarding Direct OTP Interaction With a  
20 Suspect, they say this:

21 "It was also decided that the accused would be informed at the commencement of the  
22 call that the OTP did not intend to ask any questions in relation to the substance of the  
23 case and phone discussions would be of a non-evidential nature."

24 Fine. That may well have been their intention.

25 "For these reasons and due to the possible short timeframe where a phone call could be



1 made covertly, OTP would not provide a 55(2) warning at the commencement of these  
2 audio-recorded phone conversations."  
3 So the thought had crossed their mind. They decided not to because they didn't intend  
4 to ask any questions of an evidential nature. But also, importantly, they took a decision  
5 that was based on reasons of logistics, reasons of practicality. It was going to be a short  
6 phone call. It's going to have to be conducted covertly. I don't know, the network  
7 might not be very good. So they decided not to issue a Rule 55(2) warning.  
8 And I'm going to remind your Honours of the evidence from yesterday from the  
9 witness in response to what -- your Honour's question what his view is about when an  
10 accused should be provided his rights.  
11 So the witness gave a bit of a long answer, but what he says, this is at page 65 of the  
12 uncorrected transcript. He said:  
13 "I thought through about that too, and it was discussed also within the team.  
14 "It is something -- I mean, it's really difficult to get in touch with a person. Even, you  
15 can see it from my first contact with the suspect. Starting about rights and procedure  
16 and over phone call remotely, it might complicate his desire to cooperate. He might  
17 not understand it. It's not a right situation where I'm calling him trying to as covert as  
18 possible and not discuss things in -- in details."  
19 There's this slightly concerning spectre here, which is that a decision was taken not to  
20 give an Article 55 warning because it was convenient not to, because it might spook the  
21 accused, might --  
22 PRESIDING JUDGE KORNER: [4:24:53] (Microphone not activated). Mr Edwards, I'm  
23 just looking at the answer and -- but that, at this stage, the investigator, other than  
24 being the person to do the actual talking, is clearly under the control and direction of  
25 senior people, so I don't think he's got anything to do with it at that stage. If one looks

1 at the note of what was decided and who was present in the conversation.

2 MR EDWARDS: [4:25:30] Yes, that may be right at that stage.

3 PRESIDING JUDGE KORNER: [4:25:36] No, I'm talking about now at the stage of the  
4 phone calls.

5 MR EDWARDS: [4:25:39] Yes, yes. But in terms of the very first phone call, why  
6 would that not have been in his mind?

7 For perfectly understandable professional and personal reasons, you may conclude that  
8 this -- that this witness had a perfectly understandable desire to ensure that the  
9 opportunity to arrange to play a role in the surrender of this highly valued suspect, to  
10 ensure that that opportunity didn't slip between his fingers, and so corners could well  
11 have been cut. And that's really our argument.

12 And then again, very, very briefly. I'm sorry, I'm coming back to the issue of did the  
13 Prosecution know or ought they to have known that it was potentially a live issue in  
14 this case, that Abd-Al-Rahman would contest his alias or his nickname.

15 They must have known how important it is to create that link. If prior to 26 December  
16 2019 the Prosecution assumed that it wasn't going to be an issue, that this important  
17 feature of the case would be conceded, then that was presumptuous. It was incautious.  
18 They ought not to have presumed that it was never going to be an issue. To the  
19 contrary, they should have proceeded with the utmost caution. They should have  
20 assumed that everything was on the table. And it was incumbent, therefore, for the  
21 Prosecution to explain very clearly to Abd-Al-Rahman, whether directly or indirectly,  
22 precisely how proof of his identity should be provided if that was the only issue.

23 It was for the Prosecution to provide this direction, this advice, to ensure full respect  
24 for Mr Abd-Al-Rahman's rights, and it was wholly inappropriate for the Prosecution to  
25 provide Abd-Al-Rahman with total discretion on how to provide that proof.

1 Any time the Prosecution says, "It's absurd to think that any time we make contact with  
2 a witness or a suspect, rather, we would have to give a warning," we're not necessarily  
3 suggesting that. What we are suggesting, though, is that in -- if in the course of an  
4 anodyne conversation something incriminating comes out, the Prosecution must accept  
5 the risk that anything incriminating is subsequently excluded. They didn't do that in  
6 this case.

7 PRESIDING JUDGE KORNER: [4:29:27] Yes, I'll just check.

8 (Trial Chamber confers)

9 PRESIDING JUDGE KORNER: [4:29:36] Yes. Judge Alexis-Windsor has a couple of  
10 questions.

11 JUDGE ALEXIS-WINDSOR: [4:29:43] Mr Edwards, very quickly. It's quite late. My  
12 first question is this: When, according to you, before the OTP received the video  
13 purporting to say, "I am Ali Kushayb," when, according to you, should the Article 55(2)  
14 guarantees have been given?

15 MR EDWARDS: [4:30:10] Well, what ought to have been done -- well, what ought to  
16 have been done is this. The investigator ought to have said, in very clear terms: This is  
17 what I need from you, and this is the proof that I need that you are in contact with  
18 Abd-Al-Rahman. It should be set out in very clear black-and-white terms to avoid the  
19 risk of any confusion, to avoid the risk of a very open-ended exchange occurring.  
20 So it shouldn't have happened in the first place, but there ought to have been -- once  
21 there was sufficient evidence that the intermediary was in contact with the suspect -  
22 and the nursing certificate and the medical certificate was enough - at that point, what  
23 the Prosecution ought to have done is, through the intermediary, say, "Okay, that's fine.  
24 We now have the proof that we needed. We accept that you're in contact with him.  
25 We now need to make arrangements for the surrender. But before all of that, before we

1 ask any further questions, because we are satisfied of his identity, and before we ask  
2 any further questions, we have to make it clear to him that he has certain rights," and  
3 that's when it would have happened.

4 JUDGE ALEXIS-WINDSOR: [16:31:54] Right, which leads me to my second and last  
5 question, which is then: Would it then have been satisfactory -- you said there is no  
6 difference between the investigator speaking to the intermediary and the investigator  
7 speaking to the suspect.

8 MR EDWARDS: [16:32:09] Yes.

9 JUDGE ALEXIS-WINDSOR: [16:32:10] Yes, very well. Then would it have been  
10 satisfactory, would it have satisfied the elements of Article 55(2) if the investigator had,  
11 in effect, given the guarantees not directly to the accused, or to the suspect as he was at  
12 the time, but to the intermediary?

13 MR EDWARDS: [16:32:30] It would have been a less-than-ideal way of proceeding.  
14 But given all the circumstances, given the difficulties of making contact, given the fact  
15 that communications were to be covert, there would have been a way of transmitting  
16 the Article 55 warning and protections to the accused even if through an intermediary.  
17 And the most obvious way of doing it would be by a written document, either, you  
18 know, a PDF sent via WhatsApp: Make sure that you pass this on to Mr Abd-Al-  
19 Rahman. That is not beyond the --

20 JUDGE ALEXIS-WINDSOR: [16:33:22] But, Mr Edwards, wouldn't you have said that  
21 there was no guarantee that the suspect received the rights?

22 MR EDWARDS: [16:33:28] Well, then the first time that you actually have direct  
23 conversation with the suspect, you say, "Did you receive that document? Have you  
24 read it? Have you understood it? Have you got any further questions about it -- "

25 JUDGE ALEXIS-WINDSOR: [16:33:39] Fair enough.

- 1 MR EDWARDS: [16:33:43] "-- do you want a lawyer?"
- 2 JUDGE ALEXIS-WINDSOR: [16:33:47] All right. Those are all my questions.
- 3 MR EDWARDS: [4:33:49] It would not have been complicated or difficult. It would  
4 not have been beyond the wit of the OTP to have done that.
- 5 JUDGE ALEXIS-WINDSOR: [16:33:57] All right. Thank you, Mr Edwards.
- 6 PRESIDING JUDGE KORNER: [16:33:58] Picking up from that, you're not suggesting,  
7 are you, that at the first conversation when the investigator, getting off his boat,  
8 answers the missed call, at that stage immediately he should have been talking about  
9 transmission of rights to the accused?
- 10 MR EDWARDS: [16:34:14] No, no, not necessarily at that stage. No.
- 11 PRESIDING JUDGE KORNER: [16:34:17] All right. So at some stage before you get to  
12 any discussions with him, you say rights should have been transmitted?
- 13 MR EDWARDS: [16:34:25] As soon as we have a situation where there's some  
14 discussion that a communication is going to come from the suspect himself - in this  
15 case, a video - that first step ought to have been taken, yes.
- 16 PRESIDING JUDGE KORNER: [16:34:38] All right.  
17 (Defence counsel confer)
- 18 MR EDWARDS: [16:34:52] Yes. And I'm reminded that proof of identity was satisfied  
19 by the nursing and other medical certificates.
- 20 PRESIDING JUDGE KORNER: [16:35:00] Ah, the certificates. Well, yes. All right. I  
21 mean, I think this is where communication breaks down, because the first -- yesterday's  
22 investigator was certainly of the opinion that that wasn't sufficient.
- 23 MR EDWARDS: [16:35:18] Yes.
- 24 PRESIDING JUDGE KORNER: [16:35:19] Yes. May I -- just one other thing, because  
25 I'm terrified we're going to leave without me dealing with this. I was asked to provide

1 a cite to where it is the investigator from yesterday accepted that there was more than  
2 one telephone call, and my memory was right. It was in answer to Judge Alexis-  
3 Windsor's question. This is at page 25 of some transcript, the realtime transcript, at  
4 10.33, if that helps, a.m. Her Honour asks:

5 "Do you recall how many times after 27 December 2019 that you were in contact with  
6 the intermediary?"

7 Answer:

8 "Do you mean after the time that the suspect had surrendered or --

9 "Up until the time of the video. Between 27 December 2019 and the provision of the  
10 video.

11 "I do not recall how many times.

12 "Did you record any of these conversations or contacts?"

13 "I -- I do not -- I do not recall that I've recorded them. I wasn't able also to check my --  
14 my e-mails before coming to -- to testify."

15 That plainly opens the door to there being more than just the one telephone call. If it  
16 was just the one, you may think he would have said, "Well, it was only the one time  
17 that I called him." He can't remember.

18 (Defence counsel confer)

19 MR EDWARDS: [16:37:03] And then your Honour asks a question -- in fact, your  
20 Honour asks a question at 10.16, this is at page 19:

21 "Are there any other conversations that you had with either the intermediary or  
22 directly with Al-Rahman which were not recorded?"

23 "There are no other conversations that I had with the suspect which were not recorded.  
24 As for the intermediary, there might be other conversation that I had with him which  
25 were not recorded. These are -- "

1 PRESIDING JUDGE KORNER: [16:37:32] It's not as firmly, but my distinct impression  
2 from what he said and the way he said it was that there were other calls. And, I think,  
3 as Mr Edwards said, if there had not been any other calls, you would have expected the  
4 investigator to say so.

5 MR NICHOLLS: [16:37:56] That may be. If I can just, not to be rude, stand up. For that  
6 first cite to you, that is where my note is, that there is no timeframe given. That's  
7 before the video. And he's talking about up to the surrender. So it's a different issue.

8 PRESIDING JUDGE KORNER: [16:38:13] I should apologise to the interpreters, but it  
9 was obviously desirable that we finish this off this afternoon.

10 (Trial Chamber confers)

11 PRESIDING JUDGE KORNER: [16:38:30] All right. Again, my apologies to the  
12 interpreters. I'm very grateful to both counsel for their assistance on this matter, which  
13 is not a simple one and I don't believe has come up in this form before in any tribunal,  
14 whether this or another.

15 So we are now adjourned until Monday, and that witness is going to take -- it's over a  
16 couple of days, is it?

17 MR NICHOLLS: [16:39:08] Two, but it could be -- two. I see the nodding. Two.

18 PRESIDING JUDGE KORNER: [16:39:14] All right. Very well. Yes. So by next week,  
19 we should have a better idea about the witness in a foreign country --

20 MR NICHOLLS: [16:39:26] Yes, absolutely.

21 PRESIDING JUDGE KORNER: [16:39:27] -- the one who is causing all the problems.

22 MR NICHOLLS: [16:39:29] Yes, as soon as possible, your Honour.

23 PRESIDING JUDGE KORNER: [16:39:31] Yes, all right.

24 Yes, all right. Very well. Then we're adjourned until Monday.

25 THE COURT USHER: [16:39:32] All rise.

1 (The hearing adjourned in open session at 4.39 p.m.)

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