

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Status Conference - Courtroom 2
9 Tuesday, 6 December 2022
10 (The hearing starts in open session at 9.34 a.m.)
11 THE COURT USHER: [9:34:29] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:34:50] Yes. Good morning, all.
15 Appearances. Prosecution, same as yesterday?
16 Oh, no, I won't call the case.
17 MR NICHOLLS: [9:35:00] Good morning, your Honours. Good morning,
18 Madam President. Good morning, everyone. Not exactly. The difference is that
19 Mr Elkholy has left us and Ms Mazzarella has joined us.
20 PRESIDING JUDGE KORNER: [9:35:12] And Mr Sachithanandan?
21 MR NICHOLLS: [9:35:16] He was here yesterday as well.
22 PRESIDING JUDGE KORNER: Was he here yesterday?
23 MR NICHOLLS: [9:35:14] Yes. Mr Sachithanandan is here again. And
24 Ms Sabatini and Ms Saba. And myself, Julian Nicholls.
25 PRESIDING JUDGE KORNER: [9:35:27] All right. Yes. Representative of the

1 victims.

2 MS VON WISTINGHAUSEN: [9:35:29] Yes, good morning, Madam President,
3 your Honours. The victims today are represented by associate counsel, Anand Shah.
4 We have an intern with us, Randa Bellahdid. And myself, Natalie von
5 Wistinghausen.

6 PRESIDING JUDGE KORNER: [9:35:40] Thank you.
7 And the Defence.

8 MR LAUCCI: [9:35:42](Interpretation) Good morning, your Honours, dear
9 colleagues. Same composition as yesterday.

10 PRESIDING JUDGE KORNER: [9:35:47] Thank you very much.
11 And I see Mr Edwards on the screen.

12 Just to let you know, Mr Nicholls, I think you thought you would be, what, one
13 session?

14 MR NICHOLLS: [9:35:59] Yeah, I hope so. I've got quite a lot, but I think one
15 session.

16 PRESIDING JUDGE KORNER: [9:36:03] Right. I'm just wondering whether,
17 Mr Laucci, you would want to save any response until January, when we hope that
18 the investigator will be here.

19 MR LAUCCI: [9:36:21](Interpretation) Yes.

20 PRESIDING JUDGE KORNER: [9:36:25] Mr Edwards, if you look at him, seems to
21 think that's a good idea.

22 MR LAUCCI: [9:36:29](Interpretation) Yes, with your permission, Madam President,
23 I might make a very swift reply today. The question of the investigator, if he's called,
24 we can deal with that in January.

25 PRESIDING JUDGE KORNER: [9:36:47] All right.

1 And Ms von Wistinghausen, it is a matter for you, so if you want to add anything
2 after the Prosecution have responded, you may do so.

3 Yes. Right, Mr Nicholls.

4 MR NICHOLLS: [9:37:06] Thank you, your Honour.

5 First of all, I'll just give you a brief update on what you asked about at the end of the
6 day regarding the medical situation. So, after court, I informed the team leader on
7 the team and forwarded her the transcript of your comments. That was forwarded
8 to the medical unit. I understand that they will contact the investigator and make
9 enquiries along the lines of what you requested, the general condition and his
10 availability. They don't have that information yet this morning. But they will have
11 a discussion with the - excuse me - with the investigator and come back to us with
12 more information and, specifically, and it's been requested, more certainty on the
13 availability for January. So that that's what I can tell you now.

14 PRESIDING JUDGE KORNER: [9:38:01] Yeah. Thank you.

15 MR NICHOLLS: [9:38:04] Now, moving on, as I said yesterday, and you put a
16 question yesterday, your Honour, saying words to the effect of - I don't have the cite
17 to the transcript - well, isn't the issue here about whether or not the OTP engaged in
18 questioning within the meaning of 55(2)? Does this fall within that, in requesting the
19 video and otherwise? I think that is clearly the issue here, is whether or not the OTP
20 in request in -- in its communications with 869 and in the phone calls in any way
21 engaged in questioning under 55(2) which would otherwise be prohibited. And then
22 there are some other points I'll come to about opening the door.

23 But let's look at the facts. The first email arrives 26 December 2019, out of the blue, a
24 person unknown to the OTP. He contacts the Court's public affairs unit first, before
25 we even get the message, and he says that Ali Kushayb, quote -- or, yes, Ali Kushayb

1 is the person he is in contact with and that he has indicated his willingness to
2 cooperate with the Court.

3 And I think it's worth bringing that up, please, at DAR-OTP-0215-6799. Probably
4 shouldn't broadcast it, because of one name in there, unless my friends say it's not a
5 problem.

6 MR LAUCCI: [9:39:42] No, better to -- not to broadcast it. Thank you.

7 MR NICHOLLS: [9:39:48] Thank you. Well, maybe --

8 PRESIDING JUDGE KORNER: [9:40:13] Can I say, Mr Nicholls, we've all got --

9 MR NICHOLLS: [9:40:18] You've all read it.

10 PRESIDING JUDGE KORNER: Yeah, we've all got it and read it, yeah.

11 MR NICHOLLS: [09:40:17] In any event, that is the start of all of this, December 26,
12 2019. It's up now, so page 6800, if anybody wants to look at it.

13 Everything is set out, that occurred subsequently, in our chronology that we filed as
14 Annex A to our filing last Friday. That chronology, and the messages which I passed
15 out, and the investigator report shows that that same day, P-869 - again, unknown
16 person to the OTP - contacts the investigator via WhatsApp and indicates he's got an
17 important issue to discuss. And then the investigator has a missed call from this
18 person.

19 After this, the investigator calls 869 back and states, as it says in the report, that the
20 OTP needs proof that 869 is actually in contact with the suspect. That the OTP
21 required proof that his email was genuine and proof of the identity of the suspect
22 referred to as Kushayb in his email. That is a routine necessary step when an
23 unknown person contacts OTP, through email or otherwise, and offers assistance or
24 says they want to help with a person whose -- for whom a warrant has been issued.
25 Of course, before we proceed further, we need to check is this a hoax, is this some

1 time-wasting nonsense. And even, unfortunately, sometimes we get emails from
2 mentally disturbed people who say they're in contact with suspects and know where
3 they are, and then we find out that it's a fantasy.

4 So --

5 PRESIDING JUDGE KORNER: [9:42:12] Just pausing there, Mr Nicholls. And if
6 necessary I'm sure you can -- but how often, on average, if you know, does the OTP or
7 the Court get emails like this?

8 MR NICHOLLS: [9:42:26] I don't know. What I can say is from my personal
9 experience on -- on other situations I've worked on, we have had emails, I have -- my
10 team has received emails saying "I'm in contact with this person." We've checked it
11 out and it's turned out that the person -- that there's nothing to it whatsoever. I
12 couldn't give a number. That's happened at least twice in my personal experience.

13 PRESIDING JUDGE KORNER: [9:42:54] Yeah. I mean, I'm not sure that you
14 should be giving evidence about it, but I suppose, if necessary, if anybody wants
15 to -- Yeah. All right.

16 MR NICHOLLS: [9:43:02] No, it's not frequent, but if we get an email from
17 somebody we don't know offering something, we check them out and we -- we try to
18 make sure that it's genuine before we spend time on it.

19 And actually there's an example from this trial, your Honour. The witness testified
20 in closed session, but it came up, he said that he had sent an email. And that was
21 one that possibly we hadn't followed up on enough, but we did go through that
22 process of seeing is this real or not, and it didn't go further.

23 PRESIDING JUDGE KORNER: [9:43:36](Microphone not activated) Sorry. I think
24 it came out as a result of cross-examination, didn't it, that he'd sent an email?

25 MR NICHOLLS: [9:43:44] Yes, and that's one where, unfortunately, we didn't follow

1 up enough, but we -- we hadn't been able to establish --

2 PRESIDING JUDGE KORNER: [9:43:51] Yeah. All right. I mean, that was
3 pure -- that was just pure curiosity, that's all.

4 MR NICHOLLS: [9:43:58] Now, that's all that was done in terms of requesting proof
5 that 869 was in contact with the person subject to the warrant.

6 But note, the OTP did not ask the accused throughout this process for anything. The
7 Prosecution -- before receipt of the video, the Prosecution did not ask the accused to
8 identify himself before receiving the video with the name Ali Kushayb, as set out in
9 paragraph 12 of our response. We had no contact - excuse me - with him. There
10 was no question to him at all.

11 At this time when the request is made, immediately, for proof of being in contact with
12 the suspect, the person on the warrant, you know, 869 may at that point have been
13 able to show already that he was in contact. He could have had a copy, as we say in
14 our filing, of the accused's passport. Some other form of ID that he sends, says,
15 "Look, I'm in contact with the accused." We didn't know at that point when we
16 asked for -- for proof that he would have to go anywhere or do anything additional to
17 get it.

18 And again, 869, from the beginning, throughout this communication wherever you
19 see it - I'm not going to go through everything - refers to the person he's talking about,
20 that he's in touch with, as Kushayb. And the next day, on the 27th, 869 sends copies
21 of those two medical certificates that have the accused's photo on them. And this is
22 where the eyebrows go up in our motion that we say we were satisfied. But if you
23 look through the messages -- if you look through the messages and the further
24 communications, there isn't anywhere where we say that proof's not good enough, we
25 need more proof. There isn't anywhere where we say "How do we know these

1 certificates are him? These could be for" -- there's none of that. Those are accepted,
2 according to the record, according to the investigator's statement, which the Defence
3 agreed would be in evidence. And if you look through those messages, and you
4 look -- you won't see the OTP asking for more proof from 869 that he is in contact
5 with the accused before we get the video. That is why it was in our filing that way.
6 Now, the same day, P-869 sends an audio file of himself - 869 - speaking with
7 unknown persons. We don't know who those people are. And they are talking
8 about creating a video.

9 PRESIDING JUDGE KORNER: [9:46:51](Microphone not activated)

10 THE INTERPRETER: [9:46:53] Message from the interpreter: Can we slow down a
11 little bit, please.

12 PRESIDING JUDGE KORNER: [9:46:57] Mr Nicholls, you, like Mr Laucci, are going
13 quite fast.

14 MR NICHOLLS: [9:47:00] I'm sorry.

15 PRESIDING JUDGE KORNER: [9:47:04] So if you could slow down.

16 MR NICHOLLS: [9:47:06] Yeah, the English translation of that audio recording that
17 was sent to us is DAR-OTP-00000481, and that was an audio file sent as a WhatsApp
18 message.

19 PRESIDING JUDGE KORNER: [9:47:25](Microphone not activated) it's one of the
20 WhatsApp?

21 MR NICHOLLS: [9:47:25] Yeah. That he sends right away, 869.

22 Just to be clear, no speaker on that. OTP has nothing to do with that call, is not on
23 that call.

24 PRESIDING JUDGE KORNER: [9:47:37](Microphone not activated)

25 THE INTERPRETER: Mic, please.

1 PRESIDING JUDGE KORNER: Sorry. P-869 sends an audio file via WhatsApp.
2 Which one -- and you say what was that again?
3 MR NICHOLLS: [9:48:00] Correct, your Honour. That is on 27 --
4 PRESIDING JUDGE KORNER: [9:48:04] Of December.
5 MR NICHOLLS: [9:48:05] -- of December. And on that audio file, which he sent, it
6 appears to be him discussing with other persons, presumably in Sudan or Central
7 African Republic somewhere, creation of a video.
8 PRESIDING JUDGE KORNER: [9:48:27] Sorry, I hadn't realised that. I'm not sure
9 you -- I'm not sure I've seen that.
10 Audio from -- just says creation of a video.
11 Yes, all right.
12 Yeah, Mr Laucci.
13 MR LAUCCI: [9:48:58](Interpretation) Madam President, this is not an objection that
14 would be repetitive, I would just like to remind you that we contested the possibility
15 of using all this evidence in -- all this material as evidence. I just wanted to make
16 this point and I will leave my learned friend to continue.
17 PRESIDING JUDGE KORNER: [9:49:21] Yes, I understand that objection, and it's
18 one that we will of course consider when we're arriving at a decision.
19 And actually it's something, Mr Nicholls, that we will ask you to deal with as well.
20 MR NICHOLLS: [9:49:35] I plan to deal with it. And I will get to that, if I may,
21 when we get to that portion.
22 Now, after that, on the 27th, there's more communication between 869 and the
23 investigator. I'm not going to go over it all. We passed out copies of the WhatsApp
24 messages and it's in our chronology. Again, though, nowhere in there, before
25 receiving the video, does the OTP have any direct contact with the accused. We are

1 only speaking to P-869.

2 And one point I want to deal with is the Defence claimed several times yesterday that
3 the OTP waited too long to set up to surrender. Why didn't he surrender in the first,
4 you know, right at the beginning of the year, in January? They said at page 21,
5 lines 8 to 11, that the Prosecution should have been more diligent and arranged
6 Mr Abd-Al-Rahman's surrender as early as January 2020, without waiting for the
7 video to be sent in March 2020 in order to take action.

8 PRESIDING JUDGE KORNER: [9:50:45](Microphone not activated)

9 THE INTERPRETER: [9:50:49] Microphone, your Honour.

10 PRESIDING JUDGE KORNER: [9:50:52](Microphone not activated)

11 You keep on telling me to turn it off, so I turn it off. Then I have to turn it back on
12 again.

13 Once -- once you had received the identity, or the photographs of the documents,
14 why was it -- well, I mean, this may be a question of evidence. But it's right, isn't it,
15 that no attempt was made to say "All right, that's him. Now let's talk about
16 surrender"?

17 MR NICHOLLS: [9:51:28] No, that's not right. Because what -- what I would say
18 that record shows, the evidence, the WhatsApp messages before you, and the phone
19 conversations when they ultimately do occur, show is that it was not easy and took
20 time to set that up. Again, at 44, lines 17 to 20, the Defence argue that April to June
21 passes with no action by the OTP. And this is part of the --

22 PRESIDING JUDGE KORNER: [9:51:59] December to April and then further on till
23 June?

24 MR NICHOLLS: [9:52:03] Yeah. So what -- what the Defence are again trying to
25 argue here is that somehow we would not have accepted a surrender of the suspect,

1 that we would not have accepted him to come, they said that several times. And
2 there's this idea that somehow we were sitting around in our office saying, "Not until
3 we can trick him into telling us his alias will we accept his surrender and bring him
4 under the protection of the Court." And besides being on its face ridiculous, that we
5 would not try to bring a suspect in as soon as possible. The record doesn't show
6 that.

7 So the messages and the communication is in the record between what happened
8 between December and the first call in April. So we're talking about the beginning
9 of April, the first call is 6 April, takes several months. I think the record there shows
10 that we're essentially in the hands of 869 in when this can happen.

11 And I'll make this point: The first call is on 6 April. The sixth phone call, all of
12 which we're trying to arrange the transfer and to bring the accused here and to get a
13 statement from him, is on 4 June. So even when we get on the line and we are
14 urging the accused to come, it still takes two months before it's possible. That's after
15 the first phone call is made.

16 PRESIDING JUDGE KORNER: [9:53:51] Okay. Can-- well, I'll let you take your
17 own course in a minute, but I would like to go through some of these WhatsApp
18 messages with you, because there are WhatsApp messages, but they don't seem to be
19 dealing with his surrender. There's one in -- there's -- there's WhatsApp messages,
20 I'm assuming between the investigator and 869, 16 Jan. The blue is presumably -- the
21 blue messages are those sent by the intermediary.

22 MR NICHOLLS: [9:54:38] Light blue are our investigator. So, for example, on 1
23 January, it looks like it says 28 December on top. That's the way these WhatsApp --

24 PRESIDING JUDGE KORNER: Yeah, I know --

25 MR NICHOLLS: [9:54:49] -- but it's actually 1 January. The investigator says, "Are

1 there any developments on this issue?" And then P-869 responds, "There's no
2 contact because of the network. The guys" --

3 PRESIDING JUDGE KORNER: [9:55:06] Where are you?

4 MR NICHOLLS: [9:55:08] Sorry, your Honour, this is --

5 PRESIDING JUDGE KORNER: [9:55:11] Just a moment. I don't seem to have that
6 one. Oh, yes, no -- yes, I'm sorry. Got that, yeah, which is not 28 December but 1
7 Jan, yeah.

8 MR NICHOLLS: [9:55:25] Yes. And so the investigator's saying "Are there any
9 developments on this issue?" And P-869 is saying "There's no contact because of the
10 network. The guys went to the area of Um Dafuq." So 869 is saying "I'm not in
11 contact at this time with him."

12 PRESIDING JUDGE KORNER: [9:55:46] And then at the bottom of the -- on 16 Jan,
13 "appearing before the International Criminal Court", it means the accused's
14 appearance?

15 MR NICHOLLS: [9:55:57] Yeah. That -- that is a message from 869, and he also
16 sent a video that he created of himself speaking in front of the International Criminal
17 Court.

18 PRESIDING JUDGE KORNER: [9:56:09] Oh, that's the one where there's -- in front
19 of the -- this Court, right?

20 MR NICHOLLS: [9:56:12] Yeah. And again, not to give evidence, not sure exactly
21 why that was done, but you see that on the next page, where he had made a video on
22 the -- and sent that on 15 of -- that's 15 February.

23 PRESIDING JUDGE KORNER: [9:56:29] So he turns up there -- here, but doesn't
24 contact the investigator to say he's here; is that right?

25 MR NICHOLLS: [9:56:36] Yeah, and the investigator asks him if he's still in the area

1 and he says, "No, I've gone home." And he makes this video sort of promoting the
2 Court.

3 PRESIDING JUDGE KORNER: [9:56:51] All right. And so there's this gap between
4 January and March.

5 MR NICHOLLS: [9:57:01] February and March, 15 February and 20 March, so there
6 is a gap there.

7 PRESIDING JUDGE KORNER: [9:57:04] And that's when the video arrives?

8 MR NICHOLLS: [9:57:07] Yes. And he says, "I'm returned from the Netherlands.
9 We need to arrange some meetings with you." And then the next thing that comes
10 is -- is the video.

11 So as I was going to say, the --

12 PRESIDING JUDGE KORNER: [9:57:26] But there are no messages from this
13 investigator saying, look, you say you're in contact with him and that he wants to
14 surrender. What's happening? Apart from the one -- the one that we just saw.

15 MR NICHOLLS: [9:57:39] Yeah, that's -- that's the only one with the update, yes.

16 PRESIDING JUDGE KORNER: [9:57:45] Yeah. Okay.

17 MR NICHOLLS: [9:57:47] So that, at least in early January, which is early on, 869 is
18 having trouble on his end with the contact.

19 Now, when we do get on the phone - this is after, of course, we've received the
20 video - to discuss the arrangements for the suspect to come, he -- he refuses to come
21 earlier, when we are saying we want this to happen right away. And he's saying he
22 needs more time and he's delaying. He says he needs documents. I don't have -- I
23 was looking through this this morning. And we can bring up the transcripts of this
24 call, the one -- there are several places where this happens, but the call of 10 April
25 2020.

1 PRESIDING JUDGE KORNER: [9:58:35] Just a moment. I've got the -- I've got
2 them here. You don't need to bring them up, well, unless the other judges.
3 10 April.

4 MR NICHOLLS: [9:58:46] Yes, if we could bring it up. This is probably not to
5 broadcast. DAR-OTP-0215-8950.

6 PRESIDING JUDGE KORNER: [9:59:12] I mean, Mr Nicholls, I think we've -- all
7 three of us have read it, and there's no doubt about it, these conversations are
8 effectively all about trying to get arrangements put in place for surrender. And I
9 think that's clear. The argument, of course, against this is at the stage after you knew
10 that he was, on the face of it anyhow, the accused person, none of these conversations
11 should have been taking place without him being warned.

12 MR NICHOLLS: [9:59:52] Right. Well, I will get to that. I was dealing with the
13 video first, then I will discuss the calls, if that's all right. And then I won't -- I won't
14 go -- I'll just go through the first one.

15 If we go to 8953, which is page 2 of the transcript, and we look at lines 48 to 55.

16 Scroll down, please. And we say we'd like to -- at lines 52 to 53: "I'd like to hear
17 what you have to say today but we would very much like to keep this process
18 moving as quickly as possible [and] to get you somewhere safe.

19 "Yes, we'd like to hear what you'd like to say today and we'd like to try from our side
20 to speed this issue up, I mean, at the earliest opportunity."

21 And I won't go through all of them because you have them, but the accused talks
22 about how he needs more time, he needs money, he needs to wait till after Ramadan.
23 And so that that's just my point, that this was not easy to make happen quickly. The
24 accused resisted coming quickly, despite this alleged coercion. Said, "No, I need
25 more time where I am before I come." And so it's hard to say that this all could have

1 happened in January, because the OTP tried to make it happen as quickly as it could,
2 and even from the first phone call took two months, over two months.

3 Just quickly, there was some conversation yesterday at page 75 to 76 about the
4 Defence's knowledge - excuse me, the defendant's - the accused's knowledge over his
5 being a suspect, and your Honour went through parts of the transcript of the first call
6 where that was made unambiguously to him. But I'll also just point out that a video
7 that we received from P-0869 on 24 March 2020 sent by the accused, the accused states
8 there: "The name is Ali Muhammad Ali Abd-al-Rahman. I'm a public medical
9 assistant in truth. In relation to the International Court, given that I've been charged
10 with 51 or 50 counts, even though I'm just a guy."
11 That's DAR-OTP-0216-0802 at 0804.

12 So, again, this is before any discussion, he has sent a video saying "I know I'm
13 charged with 50 or 51 counts", which actually shows he's read the warrant pretty
14 carefully, because it was a bit confusing --

15 PRESIDING JUDGE KORNER: [10:02:55] And in fact denies that he's guilty of
16 anything.

17 MR NICHOLLS: [10:03:00] Yes.

18 Now, I'll wrap this up again quickly on the video. But on March 20 then, the video
19 from P-869 arrives via WhatsApp. Thinking about 55(2). Up to this point, no
20 contact of any kind with the accused by the OTP. No discussion by the OTP with the
21 accused. No questioning of any sort by the OTP of the accused. No request to
22 P-0869 to ask a single question of the accused or to interrogate the accused. There is
23 no 55(2) issue whatsoever regarding the video.

24 I won't spend time going through it, but the decision in the confirmation decision, we
25 would say, at paragraph 55 of that decision by the Pre-Trial Chamber is spot on.

1 PRESIDING JUDGE KORNER: [10:04:29](Microphone not activated)

2 THE INTERPRETER: [10:04:36] Microphone.

3 PRESIDING JUDGE KORNER: [10:04:40](Microphone not activated)

4 MR NICHOLLS: [10:04:44] It's a decision on the confirmation of the charges. It
5 really goes from paragraphs 54 and 55. But in 55 the Chamber -- Pre-Trial Chamber
6 stated:

7 "As to the videos created by the suspect, the Chamber is not persuaded by the
8 Defence's submissions at the Confirmation Hearing to the effect that the Chamber's
9 reliance on them would be contrary to the rights of the suspect, in particular in light
10 of the fact that Mr Abd-Al-Rahman would not have benefitted from legal assistance in
11 the context of their recording and subsequent handover to [...] the Prosecutor."

12 PRESIDING JUDGE KORNER: [10:05:32](Microphone not activated)

13 THE INTERPRETER: [10:05:36] Microphone.

14 PRESIDING JUDGE KORNER: [10:05:38] Far be it for me to quarrel with the
15 Pre-Trial Chamber's decision, but the argument mounted by the Defence is that a
16 lawyer might well have advised him not to do such a thing.

17 MR NICHOLLS: [10:05:53] Well, a lawyer might well have, but there was no
18 obligation. There is nothing that would trigger that right because there was no
19 questioning by the OTP of him. There was no indirect or direct questioning of him.
20 There was just --

21 PRESIDING JUDGE KORNER: [10:06:13] Well, I think it's also -- I mean, the point
22 that you make is that there was no contact between you and the suspect.

23 MR NICHOLLS: [10:06:20] Absolutely.

24 PRESIDING JUDGE KORNER: [10:06:22] Yeah.

25 So is it your case, as I put to Mr Laucci yesterday, that this is the intermediary on a

1 frolic of his own?

2 MR NICHOLLS: [10:06:35] I don't know if I'd use the word "frolic", but he --

3 PRESIDING JUDGE KORNER: Well, I mean --

4 MR NICHOLLS: [10:06:36] -- we have asked for proof, as I explained, that he is in
5 contact with the suspect. That is all we have done that triggers this video, and then
6 he provides that.

7 PRESIDING JUDGE KORNER: [10:06:50] But you say there's no request between the
8 original request of proof in December and then March, when this video is supplied.

9 MR NICHOLLS: [10:07:02] No. That's the one request and then there's no request
10 after the next day, we receive two medical certificates in the name that's on the
11 warrant, with photographs of him.

12 PRESIDING JUDGE KORNER: [10:07:13] Yeah. Okay. "A frolic of his own" is not
13 meant to be funny. It's -- I supposed it's really -- it's a British expression.

14 MR NICHOLLS: [10:07:25] Yeah. No, I know, I just --

15 PRESIDING JUDGE KORNER: [10:07:26] Yes, all right.

16 MR NICHOLLS: (Microphone not activated)

17 MR LAUCCI: [10:07:31](Interpretation) Just so that the dossier is complete here --

18 MR NICHOLLS: (Microphone not activated)

19 MR LAUCCI: [10:07:42](Interpretation) So that the information is complete here, this
20 precise passage of the decision on the confirmation of charges has been subject by the
21 Defence successively to a request for reconsideration and a request for
22 appeal -- application for appeal which were rejected on the grounds that the decision
23 on confirmation of charges cannot be appealed. And that, obviously, that's
24 something that we contest majorly with regards to its validity.

25 PRESIDING JUDGE KORNER: [10:08:17] Mr Laucci, I think I said yesterday, a

1 Pre-Trial Chamber decision is -- has no binding force and we are considering the
2 whole matter anew. I think Mr Nicholls was simply saying: Well, this is what we
3 would say, we agree with the Pre-Trial Chamber's language.

4 MR LAUCCI: [10:08:43](Interpretation) If you would allow me just to clarify that we
5 are not in agreement.

6 PRESIDING JUDGE KORNER: [10:08:50](Microphone not activated)

7 MR NICHOLLS: [10:08:50] Okay. Thank you.

8 Now, I'm nearly finished with -- well, I'm getting close to being finished with the
9 video part.

10 I do want to point out some misstatements made by the Defence in their submissions.

11 I think that's important for your Honours to see these misstatements of fact.

12 Defence submissions, paragraph 15. This is from the ...

13 PRESIDING JUDGE KORNER: [10:09:18](Microphone not activated)

14 MR NICHOLLS: [10:09:35] And I do have to say I'm working off a very rough
15 translation, so ...

16 PRESIDING JUDGE KORNER: [10:09:41](Microphone not activated) Sorry. We
17 have the original French, but also we have, likewise, a rough translation.

18 MR NICHOLLS: [10:09:48] Yeah. And so I'm working off a translation, but I
19 understand paragraph 15, it's asserted that the investigator asked for evidence of the
20 alias. That is just not true.

21 Paragraph 15 in my translation says to ask, as the investigator did, for "evidence of
22 the alias". That did not happen.

23 At paragraph 16, the Defence state the investigator made a request to record a video
24 in which Mr Abd-Al-Rahman identified himself with Ali Kushayb. Again, no
25 evidence of that whatsoever.

1 PRESIDING JUDGE KORNER: [10:10:39] Well, just pausing there for a moment.

2 Of course, what's now being said is that we should draw the inference that there have
3 been other conversations which simply haven't been recorded. But as I've already
4 pointed out to Mr Laucci, at present there is no such evidence before us.

5 MR NICHOLLS: [10:10:57] There is no such evidence. I read the transcript last
6 night. It wasn't clear to me actually if that is what they're saying or not. At one
7 point I thought Mr Laucci backed away from that, at least from the period up to
8 receipt of the video on 20 March from the first contact. But again, it's very odd to
9 have the person on the other end of the line on your team, that you're paying, and say,
10 "We have no way of knowing if any calls were made, and we're not going to call
11 anybody." So I'll leave it at that.

12 The misstatement in Defence submission at paragraph 17 that the OTP waited until its
13 closing argument, or rebuttal of the confirmation hearing, to rely on the video, and
14 this somehow shows our consciousness that it was a 55(2) violation.

15 Our filing last --

16 PRESIDING JUDGE KORNER: [10:12:03](Microphone not activated) At the
17 confirmation hearing, that was part of the evidence that was put forward?

18 MR NICHOLLS: [10:12:11] Yes. And what -- I bring this one up because we have
19 corrected the Defence on this before. It's just an argument they like, so they keep
20 making it, even though they know it's not true. And in our December 7 filing, 2020,
21 well before the confirmation hearing, over five months before the confirmation
22 hearing, we had a section of our filing setting out the evidence on the name issue and
23 the alias, they referred directly to this video and to the phone calls.

24 PRESIDING JUDGE KORNER: [10:12:49] Is this the one entitled "submissions on the
25 evidence demonstrating that Mr Al-Rahman is also known as Ali Kushayb"?

1 MR NICHOLLS: [10:12:57] Yes, and it's paragraphs 23 to 24.

2 PRESIDING JUDGE KORNER: [10:13:01] All right.

3 MR NICHOLLS: [10:13:09] And now, right at the beginning of the confirmation
4 hearing, so this is not in rebuttal, this is not after the Defence have had their say, this
5 is 24 May 2021, transcript page 27, lines 7 to 15, at the start of the Prosecution's
6 presentation, where it's actually me speaking there talking about evidence of the
7 name issue, I state:

8 "The evidence that Mr Abd-Al-Rahman was widely known as Ali Kushayb during the
9 material times is set out in our filing to the Court of 7 December 2020. There is some
10 more information in the citations to footnote 1 of our Pre-Trial Brief, and I won't
11 repeat [this] information now."

12 So I refer specifically and incorporate, by reference, that information at the beginning
13 of the confirmation.

14 And, again, I just point this out because it's the second time they've made this
15 misstatement.

16 PRESIDING JUDGE KORNER: [10:14:31] Is this -- at what -- hang on, Mr Laucci.

17 At what stage was it made known to the Court? Was it the first appearance that he
18 was disputing that he was the man known as Ali Kushayb?

19 MR NICHOLLS: [10:14:51] I would say not, your Honour, because in the first
20 appearance -- well, first of all, when the Registry confirmed the identity of the suspect
21 to bring him here, and the CAR authorities, they refer to in their report as Ali
22 Kushayb confirmed his identity. When the judge presiding over the confirmation
23 hearing first spoke to the accused, he referred to him as Mr Kushayb, or Mr Ali
24 Kushayb, and Mr Abd-Al-Rahman said, "Ali Kushayb is not my name." Which is
25 perfectly reasonable, because what he's hearing is "Mr Strong Alcohol", or it's as

1 though a Defendant with an alias is, you know, Big John or something, does not
2 expect to be referred to that way by the judges in the Court.

3 And then I don't have the exact date, but I think the first time we -- we saw that this
4 was not just about being referred to -- and we agreed, of course refer to him by his
5 legal name, not his nickname in the courtroom. But the -- my friend filed a motion
6 on June 17, so only a couple days later, in which -- in which it became an issue.

7 PRESIDING JUDGE KORNER: [10:16:10] All right.

8 Now, Mr Laucci, you should actually -- I keep telling you this. You shouldn't stand
9 up while Mr Nicholls is still speaking, until I call you. But anyhow, what is it you
10 want to say now?

11 MR LAUCCI: [10:16:22](Interpretation) Thank you, your Honour. And I'm just
12 intervening with a view to giving to my colleague the opportunity to have a
13 presentation and an argument which is as complete as possible.

14 With regards to the two points that have just been mentioned, firstly, where it
15 concerns * submission number 224 of December 2020 by the Office of the Prosecutor,
16 which relied on the video, it was answered by the submission 235 of 17 December
17 2020 in which the Defence said that this video is strictly inadmissible should be
18 excluded and ignored. It is in paragraph 35 of the response.

19 PRESIDING JUDGE KORNER: [10:17:21] Mr Laucci, Mr Laucci, you know, all that
20 Mr Nicholls is doing at the moment is saying, when you say that the first time they
21 relied on this video was in their final submissions, Mr Nicholls says that's not right.

22 MR LAUCCI: [10:17:36](Interpretation) Precisely. But following that written
23 exchange, your Honour, when we arrive at the confirmation charges hearing, the
24 Office of the Prosecutor gives the presentation of its evidence, not relying on the
25 video. And it's only going to bring the video in in its reply, considering that the

1 video is necessary. So that's the clarification that I wanted to make.

2 The second element --

3 PRESIDING JUDGE KORNER: [10:18:16] Mr Laucci, I'm sorry, really, you will have,
4 as I say, you will have a chance to respond later. Interrupting Mr Nicholls like this is
5 really not the thing.

6 MR LAUCCI: [10:18:29](Interpretation) I thought I was helping, but if that's case, I
7 will stop.

8 PRESIDING JUDGE KORNER: [10:18:33] As I say, that's why you have the right of
9 reply at a later stage.

10 All right. Yes, Mr Nicholls.

11 MR NICHOLLS: [10:18:44] Thank you.

12 So just to wrap up on the video, Article 55(2) never applied. It was never triggered.

13 We never questioned the accused directly or indirectly. The Prosecution set out to
14 confirm that 869 was in contact with the person on the arrest warrant.

15 I won't go through the law, other than, again, to note that in the UK, absolutely clear,
16 we cited it, and we cited other law, that in the UK, under Code C of the Revised Code
17 of Practice for detention, treatment and questioning of persons by Police Officers, it's
18 very clear, section 10.1(a): "A person need not be cautioned if questions are for other
19 necessary purposes, e.g.: (a) solely to establish their identity ..."

20 On the facts, let me just deal with the coercion argument. There was no evidence of
21 any pressure on the accused to lie in the video. The Defence misrepresents that in
22 paragraph 17 where they say that the OTP were aware of the fact that the recording of
23 this video was the result of undue coercion.

24 PRESIDING JUDGE KORNER: [10:20:15] Yeah. Well, I raised that yesterday with
25 Mr Laucci, as you may recall. What he says is, and I suppose it's a question of

1 whether it's coercion, but the fact that the intermediary referred to, whatever it was,
2 problems with tribes, I think, or words to that effect, and the fact that you, the OTP,
3 were aware that an arrest warrant had been issued for him by the Sudanese in
4 December 2019. Well, I mean, the first thing is, Mr Nicholls, again, this is something
5 we hope we can deal with with the investigator, but was the OTP aware of the arrest
6 warrant? I know there's a -- we've seen the news cutting in February '20.

7 MR NICHOLLS: [10:21:12] Well, let me -- that's what I'm going to deal with just
8 now, very briefly.

9 First of all, as to the problems with the tribes, you know, his problem with the other
10 tribe, I won't -- I don't think they want me to mention. But, yeah, that is in the -- in
11 the WhatsApp messages, or in one of the messages received, that he's having these
12 difficulties with two tribes.

13 PRESIDING JUDGE KORNER: [10:21:37] That's it, yeah.

14 MR NICHOLLS: [10:21:38] I mean, that is not evidence of coercion such that 55(2) is
15 somehow triggered by us. That, you know, we have -- before we received that video
16 just said, we need proof that you're in contact with the suspect. Then we get the
17 certificates. After that, we get a message saying he has got some problems with
18 tribes. I think it's a bit much to think at that point we need to say, "All right, now
19 maybe he's lying about his name and he wants to come here even though he's not the
20 person on top of the warrant, but he needs to do that because he's really scared of this
21 tribe that are trying to kill him, so we better get a warning to him somehow, in case he
22 decides to lie about his name and send us a video and then go back on it when he gets
23 here."

24 There is nothing in that -- and there's nothing that says he's having undue pressure.
25 It says he has got a problem with the tribe, so that that we were aware of.

1 As far as the arrest warrant issue -- and this is, again - I hate to go like this - this is
2 reverse engineering by the Defence. They would like us to be aware of an arrest
3 warrant issued in December '19. They find that in July, 13 July 2020, in our response
4 to their motion for provisional release, we cite an article from June 2020 that says
5 there was an arrest warrant. That doesn't show we knew in December '19. After
6 Mr Kushayb was arrested, there was an article that came out that said that. It's --
7 PRESIDING JUDGE KORNER: [10:23:24] It was attached to your filing -- it was an
8 annex to your filing of 13 June -- 13 July?
9 MR NICHOLLS: [10:23:34] Yes, your Honour. And there was another attachment
10 that showed that -- I don't have it in front of me, but the Sudanese authorities
11 approved of or commended the surrender and said that they had actually been
12 looking for him as well. But we did not have that on December '19.
13 And I don't know how you extrapolate back from our filing in 13 July that because we
14 had an article from June, that means we knew in December.
15 And if you look at our filing, the one you just referred to, at paragraphs 15 to 17, it
16 makes it clear that even there we say, we don't -- we don't -- we're speculating about
17 his motive for surrendering. It could have been this. And that was because the
18 Defence were making the argument in favour of his provisional release. Why would
19 somebody run away who has come here for justice and voluntarily surrendered?
20 And so we said, no, he may have been fleeing the Sudanese, look at these authorities.
21 And in any event, any pressure, even had it existed, even if it was established, was
22 not from us, in my defence. My colleagues on the Defence said that yesterday.
23 It would be very easy, if they wanted to show there was pressure, to call the person
24 under pressure and have him testify to that pressure or coercion. They've chosen not
25 to do that. And I think you raised that earlier at one point, that they might have to

1 put on evidence of that. They haven't. There is none.

2 And I would also just make the point that their argument also, in a way, makes this
3 video relevant and something for you to consider. Because in the video he says his
4 name, he says his nickname. They say it's because of pressure, he was coerced,
5 which is why he came here, even though he's not the person. Well, that makes the
6 video relevant to that argument as well, although we don't accept that argument, of
7 course.

8 But I have to say, you know, this is really a forest for the trees situation. You know,
9 behind this -- this real blitz of submissions, for hours, many of them inaccurate, comes
10 down to the argument that the OTP violated the rights of the accused by asking an
11 unknown person who contacted us to provide proof that in fact he was in contact
12 with the suspect, the person subject to the arrest warrant. That cannot be a 55(2)
13 violation.

14 And moving on to the phone calls. Again, our argument, of course, no violation of
15 55(2). No questioning of the suspect within the meaning of 55(2). The calls, when
16 you go through them, if you go through them, all of those calls are clearly for one
17 purpose only, those are to arrange the logistics for the accused to come to The Hague
18 to give an interview and a statement, what he said he wanted to do, and for security
19 issues of him and his family, and taking care of his guards who were going to
20 transport him.

21 PRESIDING JUDGE KORNER: [10:27:33] Well, what's said there, Mr Nicholls, is this:
22 That the moment there was direct contact with the accused, there was every
23 likelihood that he might say something, even if the conversations were never going to
24 ask him about any of the alleged offences directly, that he might have said something
25 incriminating and, therefore, as a matter of caution, if you like - that's probably not

1 the right word - it would have been better to give him his rights under -- not better,
2 sorry, that's not the right way of putting it. They're saying you should have given
3 him his rights under -- sorry, you, the OTP, should have provided him with his rights.
4 MR NICHOLLS: [10:28:27] Yes, I understand that, your Honour, and I agree with
5 your point, that it's not better. The real question is, is there a violation of 55(2)? If
6 there's no violation, and there's no other 69(7) or 69(4) reason, but if there's no
7 violation, then it comes in. If there is a violation, it's a different story.
8 Now, I'll move through this, if I can, and address that point. But just as I was saying,
9 the calls were all only, and you could see in that, to discuss about how he came. We
10 scrupulously, the OTP, avoided asking any questions about the substance of the case,
11 what happened in Darfur 2000 -- there's none of that. And I won't go through it
12 because I think you did yesterday a bit. But the only part here in dispute is the
13 accused saying his name and nickname when being asked to introduce myself.
14 So to come to your point, I think we need to think about what a ruling saying that a
15 warning needed to be given at that point would mean and would mean for future
16 interviews. In the same as every conversation with somebody who should be given
17 55(2) witnesses, the first step is to contact that suspect and ask them to meet for an
18 interview, or to get them to an interview. That is not considered questioning within
19 the meaning of 55(2). Otherwise, every interview done has violated 55(2) because
20 the first step is to contact the person and say, "Hello, will you come to an interview?"
21 And to do that, you need to know who is on the line.
22 I mean, * it veers into the ridiculous a bit, if we were to call -- I'll go back to my old job
23 where -- where I interviewed General Mladić's deputy about six times, General
24 Milovanović. Each time we would contact him, say "Hello, hello, who's this?" "It's
25 General Milovanović." "Good afternoon, General. Can you meet us in Banja Luka

1 for an interview?" All right.

2 What we don't do in front of that call is call the number we think belongs to him and

3 say, "Stop, stop. Don't say your name," whoever answered the phone, "got some

4 important rights to read you. We're * tape-recording this." Go through the 55(2).

5 "Who am I talking to?" It then turns out, "Oh, it's not the person. Please put him on

6 the line, but tell him not to say his name." I mean, that sounds ridiculous, but that's

7 what it would mean.

8 And, again, when an interview starts - I'm jumping ahead here - virtually every

9 interview transcript I've seen or read begins with the investigator putting the time

10 and location on the record and then going around the room and saying everybody

11 please introduce themselves for the recording. And everybody goes around the

12 room and says their name and then they go into the rights.

13 I've never seen an interview start, a 55(2) or any other suspect interview, where the

14 investigators don't know for sure who is in the room with them, give a warning and

15 then hope it's the person they wanted to interview. And that's what happened in

16 this case. We were calling somebody in very difficult circumstances, where the

17 phone line keeps coming in and out. We've gotten -- it's been through this process

18 that we've discussed, and the investigators - I won't go through the transcripts - ask

19 the person to introduce themselves so that we know and have on the record who

20 we're talking to.

21 Now, that -- that comes to your question - again, this is another red herring -that we

22 somehow pledged, acknowledged -- I can't remember all the phrase, that we --

23 PRESIDING JUDGE KORNER: [10:32:49] Well, it says, in whichever transcript it is,

24 not to be used for evidential purposes, or whatever. And why, may I ask, does

25 it -- was that put down?

1 MR NICHOLLS: [10:33:04] That is not in the transcript, I don't believe. This is in
2 the investigator's report.

3 PRESIDING JUDGE KORNER: [10:33:12] Yes. But I think it's -- no, I think it's not
4 all of them, but it's somewhere. I thought I saw it in the -- or maybe you're right, it is
5 just the investigator's report.

6 MR NICHOLLS: [10:33:25] I can be corrected. I think we're talking about the
7 investigator's report.

8 PRESIDING JUDGE KORNER: [10:33:28] You may be right.

9 MR NICHOLLS: [10:33:29] And the investigator's report there, on
10 DAR-OTP-0215-9700, is talking about the discussions we had internally before
11 making this call. And we decided, it states, that the accused would be informed at
12 the commencement of the call that the OTP did not intend to ask any questions in
13 relation to the substance of the case.

14 And that's exactly what happened. In the first call, the investigator said, "We're not
15 going to ask you about the case, the substance." In the second call, the OTP said,
16 "We're not going to ask you about what happened in Darfur. We don't want to talk
17 about what happened in Darfur. We're going to talk about your situation now."
18 This is us discussing what we are going to do and it's part of the decision-making
19 process. And it says here, in the same sentence, maybe it should have a comma, it
20 would be a different sentence, "the OTP did not intend to ask any
21 questions" - sorry - "in relation to the substance of the case and phone discussions
22 would be a non-evidentiary nature." And that means we're not going to ask about
23 the evidence. We're not going to ask what happened in Deleig. We're not going to
24 ask "Were you a member of the CRF?" We're not going to go -- ask him any
25 questions that we would ask once he was here to give a statement, or once we were in

1 a safe place to interview him. Because this call was solely to set up the logistics and
2 mechanics so that we could meet with him here, get him here and talk to him.
3 And when we said we're not going to ask questions of an evidentiary nature, that was
4 to make sure everybody knew we weren't going to do it. And we didn't -- and we
5 didn't consider it a question of an evidentiary nature to say, "Please introduce
6 yourself or who -- say your name."

7 PRESIDING JUDGE KORNER: [10:35:30] Okay. Mr Nicholls, who drafted that
8 note?

9 MR NICHOLLS: [10:35:38] This is the investigator whose name is on it. I mean, it's
10 not the one who's out on sick leave, it's the other one.

11 PRESIDING JUDGE KORNER: [10:35:51] It's the other one, is it?

12 MR NICHOLLS: [10:35:52] Yeah. Yeah. Now (microphone not activated)
13 evidence. But what I would say is, it doesn't matter, because you can see from the
14 phone calls that that is what happened. And other than that, my friend will not be
15 able to point to any pledge made to anyone, certainly not the accused, that these will
16 never be used in evidence.

17 Now -- and so it was much more complicated, but in essence, what we were doing
18 was no different than if we called somebody in Amsterdam who might be a witness
19 and said "Can you meet us in The Hague on Wednesday, we'd like to talk to you?"
20 If that person was a 55(2) suspect, we would call them, ask them who we were talking
21 to and bring him here without tape recording that and giving him warnings before
22 we knew who was on the other end of the line.

23 I skip ahead a bit. Again, starting to wind down. So to sum up, it was necessary,
24 our duty, standard practice, basically the way every phone call is made, unless it's
25 with, you know, your grandmother, that you first find out who is on the line. There

1 was no pressure, no direction whatsoever to use any particular name, just could you
2 introduce yourself. Nobody said, "What's your nickname? Do you have any other
3 names? Is there any other way you're called?" There's none of that. And, you
4 know, it's also important, especially in the situation of calling a suspect, we don't
5 know exactly where they are, somewhere in Sudan, Darfur, Central African Republic,
6 we're talking about a possible surrender. It's also just for security purposes, we need
7 to be as sure as we can who's at the end of that call. We don't want to end that call
8 talking about travel, how this will work, money, and then find out the person at the
9 end saying, "All right, I'll tell that to Mr Abd-Al-Rahman when I see him." Or saying,
10 "You know, sounds like he's a traitor. He's about to surrender." We need to know
11 who's on the line for those purposes as well.

12 PRESIDING JUDGE KORNER: [10:38:30] On the law, Mr Nicholls, as you're
13 winding down, are there any other authorities -- I mean, Mr Laucci has ranged
14 around the world for his authorities. But are there any other authorities, in
15 particular from either ICTY or ICTR, that you would wish to rely on and not
16 mentioned in Mr Laucci's?

17 MR NICHOLLS: [10:38:57] Well, what we've cited, you know, which is not much,
18 just Bemba, but I think there's not a whole lot of law on this because it doesn't happen
19 that you start an interview saying, "Hello, could you say your name" and then that
20 ends up being contested. There is the UK law that I cited. There is the --

21 PRESIDING JUDGE KORNER: [10:39:16] No, I just wanted to -- "I mean, whether
22 the -- yeah, I know what you cited to in your -- in your filing.

23 MR NICHOLLS: [10:39:22] Yeah. And I just. You know, I wasn't trying to be
24 rude yesterday when I said that we quickly skimmed all of his sources and didn't
25 think any of them helped him. But we don't. None of them are on point. And,

1 you know, I looked, out of interest, at the US case, Rhode Island v. Innis, whatever,
2 you know, to suggest that that somehow supports his case, that case is -- is absolutely
3 absurd. It goes completely against him. And to suggest that somehow Miranda
4 would have kicked in here when you're talking to an intermediary, saying "Can
5 I -- are you in contact with this person", that somehow that would be a Miranda
6 violation is, I mean, just off the charts.

7 So a bit more on the law, and just closing down. So just -- I'll get to 69(7) now. But
8 regarding the video, no contact, no discussion, no questioning, no 55(2) trigger.
9 Regarding the phone calls, no questioning of the accused at all, other than to
10 introduce himself, and about the logistics. So the OTP did not act with, quote,
11 "major ethical misconduct", as Defence say in their submissions at paragraph 13, at
12 any time. There was no bad faith, no sharp practice at all on the part of the OTP
13 throughout any of this up and through the surrender of the suspect.

14 I would say -- and the video, why are we even talking about this? Because he's
15 opened the door. He's opened the door to this issue by after coming here, putting
16 his name, the nickname in dispute. He's made this an issue. Until he raised that,
17 we never thought we were going to be relying on that video or on these phone calls.
18 They were entirely non-evidentiary until this issue arose. And they -- and then you
19 have to do the balancing and weigh, but they -- whether they should come in, which
20 I'll speak about. But he has really opened the door to this by claiming that is not his
21 name and he lied during those videos and phone calls.

22 PRESIDING JUDGE KORNER: [10:41:49] Well, the argument finally raised, I think,
23 by Mr Laucci at the very end was effectively that you had indicted him as Ali
24 Kushayb. The case -- I mean, in his real name but alias, or aka, otherwise known as,
25 and, therefore, you must have realised that you would be obliged, or you might be

1 obliged to be put to strict proof to show that he was in fact that man. And therefore,
2 it's not that -- and that's as I understand Mr Laucci's argument, and it's not therefore
3 this came as a -- as a major surprised when he said, "not me", at whichever
4 appearance it was.

5 MR NICHOLLS: [10:42:37] Well, it did come as a major surprise, because we'd been
6 talking to him and he'd been saying, using the name Ali Kushayb in a perfectly free
7 and natural way on the phone calls and in the video, so it was a surprise. Many
8 suspects domestically, and as well internationally, have aliases. They don't all come
9 up with the defence that I'm not that person. If, you know, if Arkan hadn't been
10 assassinated and he showed up, he'd been put on trial, I don't think anybody would
11 necessarily say, "Yeah, that's my name, Željko Ražnatović" - probably
12 mispronouncing it - "but I'm not Arkan." That would not be a surprise had that
13 happened.

14 I will go -- let me just -- that was further on in my -- in my notes, but I'll move on to
15 what -- what you've just said. It's an absurd argument.

16 First of all, as our December 7 filing has shown, there was ample evidence before any
17 of this happened of the name. There's is UNCOI documentation, other
18 documentation, showing the link to the name. We had witnesses interviewed before
19 the warrant establishing the name. In this trial, I won't go into it, there's been a lot of
20 evidence establishing the link. You know, again, I don't want to testify, there wasn't
21 some panic in the OTP about how are going to establish this link to the nickname.
22 That was not an issue that we would anticipate, that he would say "It's not me. I've
23 got the same name. I've got the same occupation, in the same place, in the same
24 military record, but I don't have that nickname and it's not me." So that is not
25 something that we should have or would have anticipated. And even if we did,

1 none of that, even if we had, which we didn't, none of that would alter the fact that
2 we didn't violate 55(2) by asking him his name.

3 And it's just a fantasy that if Mr Abd-Al-Rahman had come to us, connected us and
4 said, "I'm Ali Muhammad Ali Abd-al-Rahman, the name on the arrest warrant, I want
5 to come in", we would have said no. There's this argument they've made that, in
6 order to come under the protection of the Court, he would have to give us his alias.
7 That -- I mean, that, I have to use the word, is almost frivolous that we would refuse
8 to have -- accept him.

9 And again, at no point, at any time did we direct him any particular name to use or
10 how to use it.

11 And just to continue, this argument they say at paragraph 17, and several times
12 yesterday, that there was a requirement to come under the protection of the Court
13 that we imposed, is an absolute misstatement. There's no requirement to come
14 under the protection of the Court. He could have surrendered on the warrant
15 without any contact with the OTP. He could have reported to the UN MINUSCA
16 base in * Birao, where he did, and say "My name's Muhammad Ali Muhammad
17 Abd-Al-Rahman. I'm wanted for, as I'm aware, 50 or 51 counts. Please take me to
18 The Hague." And they would have. He could have walked into the embassy of
19 any state party in Khartoum and said, "I'm the guy wanted on this warrant." Is the
20 Defence suggesting we would have said "No, no, no, we can't take him", that there's a
21 requirement that we impose that he come under our protection? He could have
22 gone into the US embassy in Khartoum, said "I'm wanted on this warrant", and could
23 have been transferred. He could have gone to Bangui, in the Central African
24 Republic, said "I'm the person on the warrant", without any contact with us, using his
25 legal name, and he would have been here sooner. Instead, we had to spend two

1 months talking to get him. In the end, he came.

2 And again, what I said, even if - and we don't concede it at all - but even if his
3 argument was in any way correct that their client lied to the OTP in the video and on
4 the calls, that he lied to the Registry in surrendering on the warrant, that he lied to the
5 authorities in the Central African Republic, all of which those documentation contain
6 the name Ali Kushayb. If he told all those lies to come here, essentially to perpetrate
7 a fraud on the Court, to surrender here when he's not the right person, because he's
8 got a problem with another tribe, then those calls would still be relevant to evaluating
9 whether or not there was any truth to that.

10 Just very briefly, very briefly, I'll address 69(7).

11 PRESIDING JUDGE KORNER: [10:48:28](Microphone not activated)

12 THE INTERPRETER: Microphone, please.

13 PRESIDING JUDGE KORNER: [10:48:30] I don't think you need to, Mr Nicholls.

14 It's fairly clear. And the appeal of Bemba, I think, sets it all out.

15 MR NICHOLLS: [10:48:43] All right. Thank you. Well, then I would just say that
16 you don't even need to go there, because there's no violation of the Statute.

17 PRESIDING JUDGE KORNER: [10:48:49] Correct. It says -- well, yeah, your
18 argument is, which is the Bemba appeal decision, 8 March 2018, Article 69, was it
19 obtained by means of violation? You say, no. Even if it was, however, does it cast
20 substantial doubt on the reliability of the evidence?

21 MR NICHOLLS: [10:49:19] Yeah, so we will --

22 PRESIDING JUDGE KORNER: [10:49:21] Or the admission. This is the bit, I think I
23 put it to Mr Laucci, the admission of the evidence would be -- I don't know what this
24 word -- I have a real thing about it, antithetical to and would seriously damage the
25 integrity of the proceedings.

1 MR NICHOLLS: [10:49:39] So our answer is, for all the reasons I've stated, that, one,
2 you wouldn't need to get there because there's been no violation. And two, on the
3 balance, it should be admissible anyway because it's not a serious violation. There's
4 no bad faith. Even if you found some kind of technical violation of 55(2).

5 One other point that thank you to my -- to Ms Saba for raising it to me. It's clear that
6 the burden on 69(7) is the person raising the violation. That's from Prosecutor v. Al
7 Hassan, public redacted version of decision on request related to the submission into
8 evidence of Mr Al Hassan's statements, 20 May '21, paragraph 37. And it states:

9 "The party bringing the motion under 69(7) of the Statute bears the burden to show
10 that the criteria for exclusion of evidence has been met."

11 PRESIDING JUDGE KORNER: [10:50:53] On -- what, on the balance of probabilities,
12 I take it? Which is actually not a concept, as I understand it, that exists in civil law.

13 MR NICHOLLS: [10:51:09] Well, what they state is that --

14 PRESIDING JUDGE KORNER: [10:51:11] Is that a trial decision Chamber -- is that a
15 trial decision? It must be, yeah, because it's still ongoing, yes.

16 MR NICHOLLS: [10:51:22] Yes, it's a Trial Chamber X decision of 7 -- yes, it's a Trial
17 Chamber decision. Yeah, I don't have the standard in front of me, your Honour, that
18 they applied for the test.

19 PRESIDING JUDGE KORNER: [10:51:55] Yeah. I must say I'm slightly -- well, I'm
20 quite surprised they didn't -- there are no appeals decision on this, other than ...

21 MR NICHOLLS: [10:52:08] No. No, your Honour, that we found. And we were
22 looking at this this morning, right before court, so we can check back on that, but no.

23 PRESIDING JUDGE KORNER: [10:52:22] In most of the common law jurisdictions,
24 including yours, Mr Nicholls, it would -- it would be if it is -- if it is said that a
25 confession in some way has been induced by coercion or whatever, the burden would

1 be on the Prosecution to show that it was voluntary.

2 MR NICHOLLS: [10:52:48] Yes. But I think there would need to be not just the
3 bare assertion there was torture. There was some burden to show the foundation to
4 even get to that enquiry, which we would say is not here in that case, so they have not
5 met that burden of showing any form of coercion that would rise to that level.

6 PRESIDING JUDGE KORNER: [10:53:09] No, that's a different -- that's a different
7 matter. But what you just read to me seems to suggest that the burden is on the
8 accused to show that there's been a violation under 69.

9 MR NICHOLLS: [10:53:22] Yeah, or other human rights.

10 PRESIDING JUDGE KORNER: [10:53:23] I think we'll have to read the whole thing.

11 MR NICHOLLS: [10:53:25] Yes. Yes, your Honour.

12 PRESIDING JUDGE KORNER: [10:53:27] Yes. Thank you.

13 Right. Yes, and that's your -- those are your submissions, are they, Mr Nicholls?

14 MR NICHOLLS: [10:53:34](Microphone not activated)

15 PRESIDING JUDGE KORNER: [10:53:37] All right. I'll just check to see: Any
16 question?

17 Judge Alexis-Windsor has got a question.

18 JUDGE ALEXIS-WINDSOR: [10:53:46] Mr Nicholls, my first question is a bit
19 hypothetical. In your view, what would have been the responsibility of the OTP
20 if - and this is post-video - if the then suspect had blurted out something
21 incriminatory? So during the interactions with respect to getting the suspect to a
22 proper place and so on, during those interactions, when you said, if I understand you,
23 that it was not necessary or practical to give 55 assurances. What -- what would
24 have happened? What would have been the responsibility of the OTP?

25 MR NICHOLLS: [10:54:38] Well, I think it depends, your Honour, but I think it's a

1 good question. It would depend -- I think just purely as a matter of law, it could be
2 argued that the -- that the blurted out evidence was admissible because it wasn't the
3 subject of any questioning. So, again, as a hypothetical, if we were speaking to a
4 person, nothing to do with this case or this accused, saying "we'd like to meet you for
5 an interview" in the first phone call with that person, and they had said, "All right, I'll
6 meet you. But I want to let you know right away, I was never the commander of the
7 15th brigade" and that somehow became relevant, I think we could argue that that
8 was admissible because it wasn't elicited by any question from us and it wasn't -- it
9 wasn't the product of any questioning.

10 I think the issue of asking the name of a person is in a completely separate category.
11 And as I've said, if we were to go -- what Mr Laucci was arguing yesterday at one
12 point - I don't have the cite, so forgive me if I don't completely paraphrase
13 correctly - was, look, the investigator in any -- in any jurisdiction can give the
14 warnings whenever they like. But if they haven't given them, then they live with the
15 consequences and nothing can come in. And that's not right.

16 It can't be that because something incriminating is said, if the 55(2) warnings were not
17 given, automatically that stays out. Because a person could contact you, without any
18 questioning, and send something incriminatory to you. An investigator could be
19 talking to somebody who they have no reason to know is a suspect and not -- not
20 questioning them at all, and they say something incriminating, that's not a 55(2)
21 violation.

22 Had -- in this case we were very careful to avoid asking any questions that we
23 thought would elicit any kind of response about our case, about -- about the facts of
24 the warrant, charges, or anything like that. If the defendant had start -- if the
25 accused had started talking along those lines, we would have -- if he'd hypothetically

1 done that, we would have stopped him and said, "That's not what we're talking about.
2 We are -- we're here for one reason only." Again -- explain again that that wasn't the
3 purpose.

4 And then, and then perhaps, if the -- if the accused persisted and it was clear he was
5 going to continue, in any situation, not necessarily this one, then we would stop and
6 give him the warnings. But in this case it's a hypothetical. If the witness had
7 blurted something out totally unrelated to the name, we would look at that. Likely,
8 likely we would -- we would probably not seek to use it. But again, the name is a
9 different category.

10 JUDGE ALEXIS-WINDSOR: [10:58:08] Next question, Mr Nicholls. This one not
11 hypothetical. And thank you for the answer, by the way.

12 After the intermediary, I think, gave the nursing certificate, after that, but before the
13 provision of the video, was the -- or, are you in a position to say whether the OTP was
14 then satisfied that the person was indeed Ali Kushayb, was the subject of the
15 warrant?

16 MR NICHOLLS: [10:58:51] I saw the Presiding Judge looking. What I could say is,
17 at that point, when we got -- and the record shows this, and the WhatsApp messages
18 show it, and the telephone calls show it, is that at that point we never asked again for
19 any further additional proof.

20 Now, whether that -- looking at your question, whether we were satisfied beyond
21 reasonable doubt. We were satisfied at that point that this person, 869, who again
22 we had never known before, was in contact with the accused. He had shown
23 sufficient -- sufficient evidence for us to proceed further.

24 If the person had come back and said, "You know, I have no way of doing that. You
25 just got to trust me. I'm in contact with him", then -- then we probably would have

1 stepped back. But he provided photos and certificates of the accused, in his name,
2 and we were then -- and we did then proceed and continue with him, and ultimately
3 we got the video. So the basic answer is yes.

4 JUDGE ALEXIS-WINDSOR: [11:00:02] All right. I thought that is what the position
5 was, but I just wanted to be clear.

6 My last question: There was -- the OTP had said that the -- I think this was post the
7 video, that it would not be used as evidence, the interactions, unless I completely
8 misunderstand. Is that so?

9 MR NICHOLLS: [11:00:29] No, we never said that. And thank you, that's a good
10 question. That's what I was trying to explain. In the investigator's report, what the
11 Defence have seized on is a line where the investigator is writing down discussions
12 internally held between myself and the two investigators, where we discussed how
13 we would approach the phone calls with the accused if they happened. And what
14 we said in that note, and it's - I don't have it - it's on page 3 of that investigator's note,
15 was that the accused would be informed at the commencement of the call that "the
16 OTP did not need -- intend to ask any questions in relation to the substance of the
17 case". And that was done. And then the sentence continues, "and phone
18 discussions would be of a non-evidential nature." That is not anything we ever
19 informed the accused or anybody else outside other than through this report. That
20 was not an assurance - that's the word I couldn't remember - made to anybody that
21 these would not ever be used. That was just our internal discussion, where, exactly
22 what it says, the calls would be of a non-evidentiary nature. And the only -- and
23 that's -- and that is what we did. So there was never a pledge not to use those.
24 The WhatsApp messages before those calls are completely unconnected, have nothing
25 to do with that part of the report. So I have yet to understand even the argument

1 that somehow, because this is what we decided the way we would conduct the calls,
2 that somehow the WhatsApp messages are inadmissible.

3 And, again, what we're seeking to admit here is the video and the two phone calls.

4 And, you know, really only the portion of the phone calls relevant to this all is where
5 we go through the process that is normal of identifying who is on the call.

6 JUDGE ALEXIS-WINDSOR: [11:02:37] Thank you. That is all.

7 PRESIDING JUDGE KORNER: [11:02:39] Yes. Judge Alapini-Gansou has a couple
8 of questions.

9 JUDGE ALAPINI-GANSOU: [11:02:47](Interpretation) Thank you, your Honour.

10 I have sufficient concerns in this sequence of notes, but I'm going to keep myself to
11 two questions. The first question is linked to the video. What I would like to know,
12 if you could confirm it, was this video prepared, the video that you showed as
13 evidence, was it prepared between the intermediary and the accused today? Is it a
14 video - how do I put it - that was made in a way by surprise, or was it planned in such
15 a way?

16 MR NICHOLLS: [11:04:02] Well --

17 JUDGE ALAPINI-GANSOU: [11:04:05](Interpretation) Did that person know that he
18 was going to speak to that intermediary via the video?

19 MR NICHOLLS: [11:04:16] Well, your Honour, thank you. What I can say is that
20 we -- we don't know precisely how that video was prepared. We know that we did
21 not ask for it to be prepared. We can see from the video itself, just from the content
22 of it, and from the later videos, that the accused is addressing the Court and is
23 speaking about himself coming to the Court and being willing to cooperate with the
24 Court.

25 Now, the intermediary, in his very first message, which was not to us but to the

1 public affairs unit, said that he was in contact with a person he referred to as Kushayb,
2 at least to his family, and that he was willing to cooperate. And then when it came
3 to us, we requested the proof. We got the medical certificates with the photos and
4 then we got the video of Mr -- of the accused speaking to us.

5 So exactly how that video was prepared, what discussions the accused had with
6 whoever prepared that video, who we don't know, and who sent it, we don't know,
7 but he then sent it to 869, who sent it on to us. So I don't know if I've answered your
8 question. But the video was made to be sent to us, but I -- we were not there and we
9 do not know exactly how. Again, the accused was there and so was the member of
10 the team who sent it to us. But we don't have precise information on how that video
11 was prepared.

12 JUDGE ALAPINI-GANSOU: [11:06:13](Interpretation) The second question, still
13 with regard to the intermediaries: What legal value would you give to the
14 interviews or interactions that intermediaries could have had with witnesses called to
15 the International Criminal Court? What legal value would you give to those
16 interviews?

17 MR NICHOLLS: [11:06:42] Well, if an intermediary took a statement from someone
18 and wanted to put that statement in without calling that person, I don't think that
19 would -- that would have a lot of value, or interviews conducted by an intermediary
20 that was not working on our behalf, which this intermediary was not. However, in
21 terms of this video, the Defence have conceded that it is their client in the video
22 making it and that he sent it to the Court so that we would receive it. And that was
23 so he would come under the protection of the Court and so he could come here.
24 And so I don't -- what I don't think is in dispute is that the accused made that video,
25 however it was made, by whom, in Darfur or Central African Republic, and then sent

1 it to 869 to send on to us. That that is not in dispute. And the Defence have made
2 clear their case that the reason he did that was because he wanted to come here and
3 escape from the situation he was in.

4 JUDGE ALAPINI-GANSOU: [11:08:09](Interpretation) My thirst hasn't been
5 quenched as yet, Mr Prosecutor. I'm speaking about intermediaries at the moment
6 and I would really like to have a precise idea of the legal value that you give to these
7 intermediaries there. But I understand, with regard to what you've just said, that it
8 depends, it depends on the intermediary.

9 Would you confirm that this intermediary that we're speaking about now is
10 considered an intermediary that is looked after by the Court?

11 MR NICHOLLS: [11:08:59] No, absolutely not. And I would not even use the term
12 intermediary, really, in relation to this person. Intermediary is often used as a term
13 of art, as a person who has been contracted with, who is working for a party. You
14 know, an OTP intermediary might be in the field to -- you know, VWS might use an
15 intermediary for some task. This person, 869, you know, at the time we met him and
16 talked to him and he sent this video, he's not an OTP intermediary. He's a person
17 who contacted us. The only reason he's got a P number, 869, is because we give that
18 to everybody external we're in contact with so we can refer to them without saying
19 their actual name. If he was an intermediary for anybody, it was for the accused.
20 Sorry, I don't know if I answered your question.

21 But he, essentially, was a private citizen to us at this point who, again, came to us
22 through a -- out of the blue through an email contact and said he -- said that the
23 accused wanted to cooperate and come. So he was not an OTP intermediary in that
24 sense at all.

25 JUDGE ALAPINI-GANSOU: [11:10:31](Interpretation) So could we accord little

1 interest to what that person has done up to now, to everything that person has done
2 now?

3 MR NICHOLLS: [11:10:46] Well, yes and no. I mean, we're not -- we have no
4 interview or statements taken by 869 that we want to introduce. We're not trying to
5 introduce his WhatsApp messages, or his recordings that he sent us, as evidence in
6 any way. The fact is that the video -- the only relevance of this intermediary at all to
7 what we're discussing - and again intermediary, P-869, that person - the only
8 relevance is that the video came through him. That's it. So it's not him -- it's not
9 anything that he wrote down that he said, that he said the accused said. He hasn't
10 interviewed anybody. He was simply the conduit for that video to reach us, which
11 again, the Defence do not contest it's their client on the video speaking to us that he
12 sent to us.

13 JUDGE ALAPINI-GANSOU: [11:11:53](Interpretation) Thank you very much.
14 Thank you, Prosecutor.

15 MR NICHOLLS: [11:11:55] Thank you, your Honour.

16 PRESIDING JUDGE KORNER: [11:11:56] Right. Ms von Wistinghausen, I said -- I
17 want to complete this before we take the break. Is there anything you want to say?

18 MS VON WISTINGHAUSEN: [11:12:04] Just a few words, Madam President. Of
19 course, this whole discussion is very important to our clients, and it is clearly in the
20 interests -- in the personal interests of our clients that this video and the calls are
21 admitted into evidence. So I -- I clearly want to put on the record that we're
22 supporting the OTP request to admit the video and the two telephone calls into
23 evidence.

24 And let me just say this, if the Trial Chamber sees otherwise, I'm not too concerned,
25 because, in our view, there is already overwhelming evidence, through witness

1 testimony, that has been heard in this courtroom that the accused is indeed Ali
2 Kushayb. To the contrary, if the Trial Chamber was to admit the video and the two
3 telephone calls, then in our view, depending on the evidence you -- the weight you
4 would give it, it would just corroborate the witness testimonies that we've already
5 heard. That's all I want to say. Thank you.

6 PRESIDING JUDGE KORNER: [11:13:06] Yes. Thank you very much, Ms von
7 Wistinghausen.

8 Mr Laucci, I think I'm going to say that we'll hear your response after -- in January
9 to -- to these matters. We're not going to make a decision, or even begin to make a
10 decision, until we discover whether or not either the original investigator, and failing
11 him, for whatever purpose, the second investigator is available, can assist on any of
12 the matters that have been discussed.

13 MR LAUCCI: [11:13:43] I would have wished, Madam President, to sort of wrap up.
14 And it's a five-minute exercise, no more. Because I think the whole debate that we
15 had yesterday and today was extremely useful in clarifying all the issues, and I would
16 like, if possible, not to lose the opportunity to conclude and say what is the very easy
17 issue for you to get to (Overlapping speakers)

18 PRESIDING JUDGE KORNER: [11:14:15] No, but I -- the issue couldn't be clearer,
19 Mr Laucci. As I think I've made clear, we fully understand the issue. If you want,

20 I'll give you five minutes. Not now. I think we'd better take the break. The
21 interp -- and Mr Nicholls, rather like you yesterday, went at some speed in his
22 submissions. So we'll give the interpreters a break. I'll then give you five minutes
23 to respond, which doesn't mean you repeat everything you've already said to us.

24 And then, as I say, in January, and we will hear -- we'll conclude this discussion on 16
25 January, so the first day. Then I'll give you a full chance to respond, but also you'll

1 have the opportunity, if we get him, to ask questions of the investigator.

2 MR NICHOLLS: [11:15:04] Can I just ask a question? So then is the investigator
3 coming for questions from the Chamber?

4 PRESIDING JUDGE KORNER: [11:15:11] Well, he's coming -- no, I mean,
5 obviously -- well, yes, I suppose originally he would be coming for questions from us,
6 yes. That's right.

7 MR NICHOLLS: [11:15:19] Yes, because, I mean, my friend, I think, had said he
8 didn't need to call him (Overlapping speakers)

9 PRESIDING JUDGE KORNER: [11:15:26](Overlapping speakers) No. I
10 think -- okay, you're right. This is the Chamber's request to have a witness. We
11 will ask the original question in good civil law style, well known in France, less in
12 England, and then we'll -- then obviously you'll have the opportunity, Mr Laucci, to
13 ask questions. And you -- and Mr Nicholls then, obviously, as well.
14 All right. We'll take the break until quarter to 12. Then I'll hear you for five
15 minutes, Mr Laucci. After that, I gather that you want to respond orally to the
16 application by the -- the renewed application to put in witness whatever it is under
17 Rule 68(2)(c).

18 MR LAUCCI: [11:16:29](Interpretation) Yes. And it's my colleague, Iain Edwards,
19 who deals with that aspect.

20 PRESIDING JUDGE KORNER: [11:16:35] Right. After that, we'll move to
21 effectively what I think all parties have been informed of, which is a status conference
22 about where we go from here.

23 Yes. All right. Quarter to 12, please, 11.45.

24 THE COURT USHER: [11:16:54] All rise.

25 (Recess taken at 11.16 a.m.)

1 (Upon resuming in open session at 11.47 a.m.)

2 THE COURT USHER: [11:47:22] All rise.

3 Please be seated.

4 PRESIDING JUDGE KORNER: [11:47:49] Yes, Mr Laucci.

5 MR LAUCCI: [11:47:52](Interpretation) Thank you, your Honour.

6 I promised five minutes, and I will keep to my promise. But I will take my time as
7 well by starting to pay homage to human ingenuity, which invented the adversarial
8 proceedings. The debate that we had yesterday and today demonstrated the interest
9 and the quality of the exercise in the impact that it has on the clarification of the
10 questions put to the Chamber. And I would go so far as to say that I spent the whole
11 day yesterday on a question which was very simple.

12 The single question that is put is that of knowing whether incriminating evidence
13 obtained during an interaction between the Office of the Prosecutor and the accused
14 can be admitted into evidence if there was not notification of Article 55(2) prior
15 thereto. No more, no less.

16 The answer of the Office of the Prosecutor is, "Yes, it is admissible, and it is admissible
17 because, if not, in the future, we will no longer be able to speak to anyone, including
18 somebody suspected of having committed crimes within the jurisdiction of the Court
19 without immediately having to carry out that notification."

20 This answer of the Office of the Prosecutor was slightly relativised in answer to the
21 question from Judge Alexis-Windsor with regard precisely to what the responsibility
22 of the Office of the Prosecutor would be if incriminating elements were spontaneously
23 given during an interaction without notification.

24 The answer of my colleague was that, "Yes, it would be admissible, but without doubt,
25 we would not use it."

1 The answer of the Defence is, of course, "No, under these conditions, the
2 incriminating evidence is not admissible." And we turn towards the future, as my
3 colleague did.

4 I would say that to admit such evidence would have the effect of creating an incentive
5 to delay the notification of Article 55(2) in the hope that, who knows, you never know,
6 perhaps the person will give us evidence which we can use against that person.

7 It's an incitation to delay 55(2) against the text of the Court and it is contrary to
8 everything that I cited yesterday, and the Defence asks this Chamber not to give this
9 message.

10 The outstanding question -- oh, sorry, to answer this precise question, I think that the
11 Pre-Trial Chamber III in Bemba perfectly covered the scenario. It was an interaction
12 which aimed at the verification of identity, a routine action. And what the Chamber
13 said is very clear. I can quote it. Apparently, it is rather a simple interview. In
14 which case, the alleged absence of any counsel during this interview will, under
15 Article 69(7) of the Statute, will not lead to the exclusion of evidence obtained during
16 this interview. So a verification of the identity is routine. The person gives
17 incriminating evidence by going on too much, and the Pre-Trial Chamber in Bemba
18 says, no, it is not admissible under Article 69(7). Now, the burden of proof with
19 regard to the fact that everything that must be done was done in an interaction with
20 the accused, that burden of proof is incumbent on the Office of the Prosecutor beyond
21 reasonable doubt. That is the jurisprudence of Delalic * of 2 September 1997, at
22 paragraph 42 of the judgment. This evidence, in our case, is so non-existent that the
23 Chamber is considering whether to have to call the investigator. Now, we have said
24 that we would not be opposed thereto, but I would repeat that we also don't see the
25 interest in doing so.

1 With regards to the case, it's the penultimate chance for the Office of the Prosecutor to
2 fulfil or meet the burden of proof. And in what situation will this investigator be?
3 This investigator will have to say that he participated in interviews on 26, 27
4 December without any investigation log, any notes of these interviews. He will put
5 himself in a situation which will potentially compromise the rest of his career within
6 the Office of the Prosecutor.

7 I think that all the elements are before this Chamber in order to decide without
8 having to carry out this exercise. If the Chamber decides to carry it out, then we will
9 go with it, but we think that the question is so simple that it does not merit submitting
10 this poor investigator to that.

11 I have gone somewhat overtime, and I would apologise.

12 PRESIDING JUDGE KORNER: [11:55:50] Well, Mr Laucci, it's very noble of you to
13 have such regard for the investigator, but you started this off, I'm afraid, by
14 suggesting that we should draw the conclusion that there are conversations which
15 took place between the investigator and the intermediary which were not recorded.
16 And that in one of those unrecorded conversations, the investigator asked for the
17 video. And in fairness, we think, to all sides - in particular, your client - we need to
18 know what the investigator says about that, amongst other things.

19 MR LAUCCI: [11:56:43](Interpretation) If that makes it possible for the Chamber to
20 deliberate the need of having the Prosecutor come or not, let me say, Madam Judge,
21 that this telephone conversations -- these additional telephone conversations took
22 place, whether they took place or not, it changes nothing. We have on record that,
23 for the reasons that the Prosecutor explained perfectly, the notification of Article 55(2)
24 was not given. And the consequence of that, according to the Bemba jurisprudence
25 is that the incriminating evidence from the interaction are inadmissible under 69(7).

1 That whether the Prosecutor had telephone exchanges, whether there was pressure,
2 whether a video was asked for or not, that changes nothing with regard to this very
3 simple question from our perspective, as clarified by this excellent debate.

4 PRESIDING JUDGE KORNER: [11:57:53] Yes. Well, thank you very much,
5 Mr Laucci.

6 Mr Nicholls.

7 MR NICHOLLS: [11:57:57] Very, very fast, very brief.

8 PRESIDING JUDGE KORNER: You can't --

9 MR NICHOLLS: [11:57:58] I'm not responding. I'm just asking, if that is the reason
10 the investigator would need to come to testify, could we just ask the Defence, you
11 know, with absolute clarity, is their position that the Chamber should draw an
12 inference that there were phone conversations that were held that were somehow
13 nefarious, or not? If they don't -- are not making that argument, then it may not be
14 necessary to call the investigator. If they are, they are. But it's -- it's not clear what
15 the position is. It's, well, it doesn't matter, but it could be. You know, are they
16 making that argument or not is what I would like to know.

17 PRESIDING JUDGE KORNER: [11:58:40] Well, unfortunately, Mr Nicholls, that isn't,
18 I'm afraid, the only part of it, because, effectively, you gave evidence in answering
19 questions. And unless you want to take off your robe and go and give evidence, as
20 you well know, we cannot rely on what counsel -- sorry, of course we accept what
21 counsel say, but it's not evidence. So that's -- that's part of the reason, but the other
22 part is this question of these conversations on the telephone.

23 MR NICHOLLS: [11:59:16] Yes, your Honour.

24 PRESIDING JUDGE KORNER: [11:59:18] All right. Thank you.

25 Yes. Right. Yes, can we move to the application by the Prosecution to -- the

1 reapplication, if you like, to submit evidence -- to enter into evidence under the terms
2 of Rule 68(2)(c) Witness P-0085.

3 Mr Edwards, you're going to respond to that application, I take it?

4 MR EDWARDS: [11:59:56](Microphone not activated)

5 PRESIDING JUDGE KORNER: [11:59:59] You're on mute, Mr Edwards.

6 MR EDWARDS: [12:00:11] Can you hear me now? Thank you.

7 I'm able to control the muting from my end, but I think the court officer can also shut
8 me up as well. I was just saying thank you, thank you very much, your Honour.

9 Yes, we object to the introduction of P-0085 under this rule.

10 In essence, our argument is that this is a witness who provides evidence that goes to a
11 key issue in this case, which is the identity of the person described by the Prosecution
12 as Ali Kushayb. His evidence also goes to acts and conduct of the person described
13 as Ali Kushayb. And in -- and whilst we recognise that there are cases in which the
14 mere fact that a witness whose evidence comes in under Rule 68(2)(c) is not
15 determinative of the matter, our argument is that it is one of the issues that gets
16 thrown into the -- into the mix, it's one of the matters that your Honours will take into
17 account when -- when balancing the question.

18 The -- I was just looking actually at the annexes, the list of witnesses in the summary
19 of witness evidence that accompanied the Prosecution's original trial brief, and this
20 witness, 0085, has always been down as a witness to testify under 68(2)(c). So I can't
21 say that this is a witness who is always envisaged as being a viva voce witness, for
22 example, until the Prosecution lost contact with him. But I think it's right to say that,
23 when looking at the totality of this witness's evidence, and when comparing this
24 witness's evidence against witnesses who have given a similar quality, similar nature
25 of evidence, this is a witness where we can fairly confidently say he would have been

1 called viva voce and not 68(3). This is a witness who in all circumstances, had he not
2 disappeared, would undeniably be a witness that the Defence would have the
3 opportunity to cross-examine.

4 And the Prosecution in their response, rather glibly says, "Well, there's no prejudice to
5 the -- there's no prejudice to the Defence because this is a witness who gives evidence
6 that is corroborative in nature to a number of other witnesses." To some extent that's
7 right, but to say that robbing the Defence of the opportunity to cross-examine a
8 witness on important matters causes no prejudice to the Defence is -- is rather
9 alarming.

10 Anyway, that sort of sets out my -- my stall. If I can go into the details. I'm not
11 going to take issue with the fact that the Prosecution appeared to have lost contact
12 with him or that they've taken steps to try and locate him. It seems that he has
13 disappeared, albeit disappeared of his own volition. There's no suggestion, it seems,
14 on the evidence, that he's dead or has been done away with, or anything like that. I
15 think he's just made himself scarce, for whatever reason, including, it seems, from his
16 own family. We're not too sure why that would be, but that seems to be the
17 situation.

18 But anyway, I'm not -- I'm not taking that point.

19 PRESIDING JUDGE KORNER: [12:04:12] Mr Edwards, can I just -- supposing the
20 Prosecution, as they've done with other witnesses where agreement has been reached,
21 were to remove from it the paragraphs that he -- or, in particular, where -- the section
22 headed "Ali Kushayb", would that meet your objection?

23 MR EDWARDS: [12:04:43] I'd have to discuss the matter with Mr Laucci, of course.
24 But my initial view is that, in principle, that would certainly assuage many of our
25 difficulties. I don't know whether Mr Nicholls is putting that on -- on the table or

1 not.

2 PRESIDING JUDGE KORNER: [12:04:58] I don't know either, but it just occurred to
3 me, because you've reached agreement on -- on a number of witnesses who've gone in
4 as 68(2)(c) on that basis.

5 MR EDWARDS: [12:05:09] Yes.

6 PRESIDING JUDGE KORNER: [12:05:09] I mean, I'm just wondering. That's all.
7 Mr Nicholls, I mean, I'm raising this now, but I don't know whether you can answer.
8 Or do you want to time to consider?

9 MR NICHOLLS: [12:05:21] I'd just a little bit of time, your Honour, and we can come
10 back and perhaps have a couple emails about what would -- what would come out,
11 what would come in and --

12 PRESIDING JUDGE KORNER: [12:05:32] Yeah.

13 Well, I'm just wondering, Mr Edwards. I mean, I appreciate what you say. I mean,
14 the point is an obvious one.

15 Mr Laucci.

16 MR LAUCCI: [12:05:39] If you allow me, Iain. (Interpretation) I agree.

17 MR EDWARDS: [12:05:53](Microphone not activated) I was looking forward to this,
18 your Honour. But, I don't know, would you like me to press on, as a matter of
19 principle, or is this a matter that should be weighed off until Mr Nicholls and
20 ourselves have had an opportunity to -- to discuss?

21 PRESIDING JUDGE KORNER: [12:06:07] Well, we've read the statement, we read it
22 originally and we reread it now as a result of this application, and the point is clear.
23 The question is whether -- does the fact that this statement, if it goes in unedited,
24 cause you more than usual -- obviously, all Prosecution evidence causes a Defendant
25 prejudice in one sense, but does this cause you more prejudice than can be cured by

1 allowing this in? So, I rather think --

2 MR EDWARDS: Can -- can I --

3 PRESIDING JUDGE KORNER: [12:06:45] Yes.

4 MR EDWARDS: [12:06:49] I wonder if I could just raise one point,

5 because -- because it may be of assistance.

6 One of the -- one of the reasons in which this could cause us real prejudice is because,

7 having -- having now received a copy of the screening interview of this witness, it

8 was only disclosed recently. I don't criticize the Prosecution. I know these things

9 happen. But there it is. And there are some pretty startling --

10 PRESIDING JUDGE KORNER: [12:07:24] Differences.

11 MR EDWARDS: [12:07:25] -- issues raised as between the screening interview and

12 the statement. This is a witness -- can I -- can I be very clear. This is not a witness

13 where, were I to be cross-examining, I'd be suggesting, you know, well, benefit of the

14 doubt, you misidentified, or whatever. No. We are saying that this is a witness

15 who is lacking in credibility. And there are certain differences between the

16 screening interview and the witness statement that provide considerable -- a

17 considerable basis to make that suggestion.

18 Can I -- can I give just by way of an example. And I don't want to take up too much

19 of the Court's time, but by way of example, the witness says in his screening

20 interview that he -- this is paragraph 7 of the screening interview, if your Honour is

21 interested, it's DAR-OTP-0194-1541. I think it was circulated a couple days ago.

22 PRESIDING JUDGE KORNER: [12:08:21] Yeah, I've got it.

23 MR EDWARDS: [12:08:22] Paragraph 7. By way of example: "He heard that Ali

24 [Kushayb]'s order to his subordinates: 'Go back and burn those trucks. Don't let

25 them run away.' Ali [Kushayb] even gave the plate number of the trucks which

1 were 26 and 29."

2 Well, when we get to his witness statement, which I'm going to have to -- well, he
3 essentially says that from a distance of 80 metres, I think it was - I'm just trying to find
4 it now - from a distance of 80 metres -- paragraph 26, from his position in the millet
5 field where he was hiding, he recognised Ali Kushayb amongst the group of attackers,
6 this is at Bindisi.

7 So, first of all, he's pretending that from a distance of 80 metres he's able to hear
8 Kushayb say the words "match, match", middle of paragraph 26, and then a truck was
9 burned, a truck belonging to a Fur trader.

10 And then the witness goes on to say: "Well, the driving assistant was present when
11 the truck was burned and he said that Kushayb had whispered in the man's ear before
12 the order was given."

13 So there's that inconsistency, I would suggest. And it's just -- it's just one of a
14 number of different -- different examples.

15 The witness also give -- well, I was going to go into how it is that he says that he
16 knows Kushayb. But in terms of uniqueness, because I know that that's another
17 feature that your Honours will -- will consider, or they have -- you have considered in
18 the context of Rule 68(3) submissions. This witness suggests that he knew Ali
19 Kushayb from the 1990s when this witness was at school. This is at paragraph 44.

20 And he says: "I was with my brother when we reached a military registry. Ali
21 Kushayb was the man who came to check our papers." And I think that this is the
22 only witness who has ever suggested that Ali Kushayb, as a military man in the '90s,
23 was ever responsible for checking papers or working at a military registry and doing
24 this sort of work, because that that's the basis of this witness's apparent knowledge of
25 Kushayb.

1 So, in short, there are a number of features that I would wish to not simply test the
2 witness on, but put to the witness, on the basis of contradictions, that he's not telling
3 the truth about what he says about seeing Ali Kushayb. And, yes, this is a witness
4 whose credibility would very much be at issue.

5 If this were a different kind of witness who was, as one of the many other Mukjar,
6 Bindisi and Kodoom witnesses who say: Well, I was there, the Janjaweed arrived,
7 the attack started, houses were being burned, I ran away. I heard Ali Kushayb was
8 leading the Janjaweed. I can tell you, we'd have no problem, of course. Such a
9 witness as 0085 would not bring a great deal to the -- to the totality of the evidence.
10 But 0085 is not one of those witnesses. And being unable to cross-examine him on
11 these specific issues, I'm just giving you a taster, would -- would cause prejudice.

12 PRESIDING JUDGE KORNER: [12:12:22] Yes. Yes, thank you, Mr Edwards. I
13 think we've got the point.

14 Well, as I say, obviously, if some agreement can be reached between the parties, that
15 would be helpful. But if it can't, we'll give a ruling at some stage.

16 MR NICHOLLS: [12:12:40] I will consult, but I don't think -- I don't think we're
17 going to be able to agree on anything really substantive.

18 PRESIDING JUDGE KORNER: [12:12:47] Yes. All right. Yes. Thank you very
19 much.

20 Right. That concludes, as it were, the legal discussions.

21 Can we now effectively turn ourselves from a hearing into a status conference, given
22 the fact that, as we discussed last time we were sitting, it looks like the Prosecution
23 case is drawing to a close much faster than we had anticipated, so we really need to
24 discuss issues which arise as a result.

25 Can I deal, then, with the closing at the end of the Prosecution case, starting -- I think

1 you've all had the agenda for this status conference. The first is the Rule 68(2)(b)

2 declarations. Now we did get some update from Registry.

3 Is anybody from Registry at court? No. Well, apart from -- do we -- do we know

4 how many declarations are still outstanding? Does anybody know?

5 MR NICHOLLS: [12:14:12] What I have, your Honour, and I may be corrected, is

6 that there are 18 to be certified, and there is a schedule already set out for doing so

7 and that those will be completed this month and January.

8 PRESIDING JUDGE KORNER: [12:14:28] All right. Okay. Because obviously

9 they've got to be completed before you close your case formally.

10 Right. Then next. Now, bar table motion for, effectively, the admission of any

11 evidence. It seemed to me, looking at the sitting dates in January, because of

12 unavoidable non-sitting days, that your case is actually going to go into February,

13 isn't it, Mr Nicholls? That's subject to you being able to get your witnesses.

14 MR NICHOLLS: [12:15:13] Just very quickly. If we are fortunate, yes, it would go

15 into February. Not including the investigator that we've been discussing this

16 morning, we'd anticipate nine witnesses remaining, which would go into February.

17 I have to say that two of those witnesses, which we discussed some time ago, we

18 don't know if we're going to be able to -- two are unlikely, I'll put it that way, I think,

19 unless something changes. One of them I told you about refused, said, "Don't call

20 me again." We're going to try. The other one has some real problems.

21 That would take us sort of to the end of January, early February. So if all goes well,

22 yes, February, but we -- we could conclude in January with live witnesses.

23 PRESIDING JUDGE KORNER: [12:16:13] Right. Well, don't forget there are, as I

24 say, a number of non-sitting days for various reasons such as we start on the 16th and

25 then there's the -- the state opening of the Court for the -- the sort of new year opening

1 of the Court. And then there's a non-sitting day at the end of January, and then
2 some non -- then in February because all the judges are concerned in interviewing.
3 So, I mean, there are really a large number of days where we can't sit.
4 Anyhow, we'll see where we get. But it's a question of the bar table motion. Any
5 submissions on -- on that?

6 MR NICHOLLS: [12:17:03] Yes, your Honour. We -- we will file one this month.
7 We're still working on it and trying to narrow down the materials. And we would
8 intend to file any remaining bar table motion in January.

9 PRESIDING JUDGE KORNER: [12:17:21] So one before the Christmas break?

10 MR NICHOLLS: [12:17:25] Yes. And then the remaining, whether we split it up for
11 some reason, it may be more than one, but the rest for sure in January, anything
12 remaining.

13 PRESIDING JUDGE KORNER: [12:17:37] Thank you. All right. Well, I think
14 what we'll say is by 31 January then.

15 MR NICHOLLS: [12:17:42] Thank you.

16 PRESIDING JUDGE KORNER: [12:17:48] Mr Laucci.

17 MR LAUCCI: [12:17:48] Yes, just a question of clarification. This bar table motion
18 that you are mentioning, is it the one on which the consultation has already taken
19 place in May, or is it a different one?

20 MR NICHOLLS: [12:18:01] Thank you. Both. Some -- some consultation on some
21 of these items, but we would be submitting more to our colleagues to see if they agree
22 or not to.

23 PRESIDING JUDGE KORNER: [12:18:13] All right.

24 What about you, Mr Laucci, are you intending to file anything at this stage?

25 MR LAUCCI: [12:18:24] I don't know exactly what, Madam President, mean in

1 terms of filing?

2 PRESIDING JUDGE KORNER: [12:18:29] Are you going to -- are there any
3 documents you think should go in as part as of the Prosecution case, that they're not
4 proposing to put in? I'm thinking of any motions that come up in the future.

5 MR LAUCCI: [12:18:44] No, have no -- I'm not anticipating any -- any further
6 motion, Madam President.

7 PRESIDING JUDGE KORNER: [12:18:49] All right. All right. Okay.

8 And then I understand here it's not good enough for you to say, Mr Nicholls, "that's
9 the end of the Prosecution case", or "the Prosecution rests", if you're an American.

10 You have to file something saying you've closed it. So, well, we'll just wait and see,
11 but I suppose I'm just asked to remind you to file a formal closing.

12 MR NICHOLLS: [12:19:18] Thank you for that.

13 PRESIDING JUDGE KORNER: [12:19:18] Yes. I don't understand what's wrong
14 with you simply saying on the record, you know, that's it.

15 All right. Now, the next thing is no case to answer. What is going to happen is we
16 have not put that in the conduct of proceedings document. Before the Prosecution
17 closes its case we are going to do an addendum about this, because it is an issue
18 which has been the subject of much discussion and conflicting, if I can put it,
19 decisions. And certainly what the upshot of such a ruling, if in favour of the
20 Defendant, would be. So as I say, before the close of the Prosecution case, we will
21 file an amendment to the Conduct of Proceedings which will set out what we hope
22 will be something that becomes standard. As yet, there hasn't been sufficient
23 discussion to do that. It is likely to be entitled motion for acquittal as opposed to no
24 case to answer, because no case to answer carries, I suppose, too much baggage, as a
25 purely adversarial procedure and has been discussed as such.

1 And I don't suppose at this stage, Mr Laucci, you -- although you mentioned that you
2 would be filing, I suppose you had better see what we intend will be the format of
3 such a submission before you make such a decision.

4 MR LAUCCI: [12:21:30](Interpretation) I anticipate that that will be the answer of
5 my co-counsel, Iain Edwards, but he is the one who will now give you our reply, if he
6 may.

7 MR EDWARDS: [12:21:44] Yes. Thank you. Yes, we'll certainly await with
8 interest your Honours' amended ruling on conduct of proceedings. We're also, I
9 have to say, a little reluctant at this stage, with nine witnesses for the Prosecution still
10 to be called, to show our hand, for reasons which will be obvious to your Honour and
11 to my friend. But we have identified, I think, five or six of the charges where we are
12 tempted to seek to persuade your Honours that Mr Abd-Al-Rahman ought to be
13 acquitted, out of the 31.

14 PRESIDING JUDGE KORNER: [12:22:36] I should tell that you one of the matters
15 for discussion is whether these sort of part - I'll call it no case to answer for the
16 moment - these sort of part submissions should be allowed. In other words, unless
17 you're saying there is no case to answer on any charge whatsoever, what is the
18 purpose of tinkering with two or three charges. But I mean, as I say, that that's still a
19 subject for discussion, but just so you're alive to that.

20 MR EDWARDS: [12:23:03] Yes. I mean, I know at the ad hocs there was a lot of
21 push back from trial chambers in terms of the Defence arguing that, you know, say
22 there's a charge of murder as a war crime, and that's count three out of five counts,
23 and murder as a war crime encompassed seven or eight different attacks or incidents
24 or, you know, concentration camp activities, there, there were rulings which made it
25 clear that the Defence could not say, in respect to four of these counts of murder,

1 there's insufficient evidence, so these should be sloughed off from count whatever it is,
2 murder as a crime against humanity.

3 That's not what we are looking to do in this case. We would seek to, if your Honours
4 allowed us to, we would seek to argue that entire counts out of the total of 31 be -- be
5 adjudged at this point as being counts to which the accused has no case to answer.

6 It's certainly not the case that we're looking to seek dismissal of the entire indictment
7 containing the charges. It's --

8 PRESIDING JUDGE KORNER: [12:24:47] Yes. But I mean, I mean, as I say at the
9 moment, I think it's better we -- you wait until we've added what we've proposed,
10 and then you can decide what you want to do, if you want to apply for leave or not.

11 MR EDWARDS: [12:25:02] The only other thing I'll say before we move on is that
12 your Honour asked sort of rhetorically a moment ago what's the point in tinkering,
13 and the short answer is that it allows the Defence to really focus its limited means and
14 energy and resources to that which remains at the close of the Prosecution case. And
15 that's very important, I would submit.

16 The alternative is that the Defence may have -- if the Defence doesn't have to deal
17 with, say, six out of 31 counts on the indictment, that that really does free up a great
18 deal of time and effort and energy and resources to dealing with what is -- what is left,
19 as it were. So that tinkering has a very real impact on the Defence's work.

20 PRESIDING JUDGE KORNER: [12:26:03] Yes, I do see that. All right. Thank you.

21 Yes. All right. That's that then. Right. Legal rep -- unless there's anything,

22 Mr Nicholls, else that you think we need to consider as far as your case is concerned.

23 MR NICHOLLS: [12:26:23] No, your Honour. Thank you. And again we'll, on
24 that one statement, we'll get back today for sure.

25 PRESIDING JUDGE KORNER: [12:26:31] Right. Yes.

1 Now, Ms von Wistinghausen, your case. If we, let's say, we -- the Prosecution case
2 finishes mid-February, for the sake of argument, we would -- you told us that you do
3 want to present -- you want leave to present witnesses to - sorry - to call some of the
4 victims to present their views. Right. What sort of time would you need to
5 assemble your -- your case?

6 MS VON WISTINGHAUSEN: [12:27:21] Yes. Thank you, Madam President.

7 Well, we sat down with the team and had of course, you know, some brainstorming
8 about exactly that question. There are still some question marks, but we have a
9 schedule in mind that we would like to propose to the Trial Chamber, which I think is
10 a sensible proposal, before you to see. So there are a few uncertainties, as we have
11 seen. The end of the Prosecution case, we don't know exactly. We don't know if
12 the Defence will file a no case to answer motion. And we don't know exactly how
13 much time the Defence will ask for their preparation. Our intention is certainly not
14 to delay these proceedings at all, but we can also say that, in our view - and I think
15 I've discussed it at least with Mr Edwards, but maybe also with Mr Laucci - the
16 presentation of our case will have no bearing on the preparation of the Defence case.
17 Why is that? Because we don't intend to present evidence. We intend to call a few
18 clients to present their views and concerns.

19 We may call one witness, but this witness -- well, first we need to request all of that,
20 of course, but if leave was granted to call our clients and the witness, I can already say
21 that the testimony wouldn't touch on the charges against the accused.

22 So maybe this, as premise, I think is important. So the schedule we propose is, of
23 course, in view of an earlier expected conclusion of the OTP case than we could
24 anticipate. And we need a reasonable opportunity to continue consultation with
25 participating victims which, given the circumstances that we've all heard about in the

1 course of the proceedings, of courses it's the same for us. Recently your Honours
2 decided to add 101 victims to the list of participating victims, and after consultations
3 with VPRS, we can expect maybe more to come.

4 So the more time we get, the more opportunity we have at least to try to consult with
5 clients. I can publicly state it's impossible for us to reach out to all of them, but we
6 are trying our best with the means of the modern world and -- and given that
7 missions to Darfur, for reasons that we all know and that also apply to us, are very
8 difficult.

9 So based on informal consultations with the VPRS, we understand that it is likely that
10 VPRS will transmit around a hundred further applications. Moreover, we have to --

11 PRESIDING JUDGE KORNER: [12:30:44] Sorry, just remind me, didn't we give a
12 cut-off point at some stage? Wasn't it the end of the Prosecution case?

13 MS VON WISTINGHAUSEN: [12:30:53] The current cut-off date is the end of the
14 Prosecution case. I think there may be a request by VPRS to extend the deadline but
15 this is, you know, outside of my responsibilities and there may be good reasons for
16 this request.

17 And lastly, even though we only intend to have a small number of people to talk to
18 you, we would, of course, prefer them to speak to you in person, because we really
19 think that this makes a big difference. But that also means travel arrangements.

20 And we are already in contact with VWS, but some of our clients don't have travel
21 documents. All of this takes time.

22 So to cut a long story short, our proposal is to file a request for leave to present our
23 case beginning of February. The date I'm proposing is 6 February. We would
24 file - well, of course, if leave is granted - a trial brief at the end of March, 31 March,
25 and disclose evidence, if necessary, you know, any documents or evidence we would

1 have to disclose. We would suggest an opening statement on 1 May, and we would
2 present our evidence on the first week of May. We anticipate that we won't need
3 more than two days, maximum of three. We intend to call again three or four clients,
4 and maybe one witness. Right. And, of course, you know that what they can
5 present to your Honours is also limited.

6 This may sound very far away, if I speak about the first week of May, but again, I
7 think this would give us the time to prepare, you know, in -- in a reasonable manner
8 and it has no, I would suggest, it has no impact on the celerity of the proceedings.

9 PRESIDING JUDGE KORNER: [12:33:32] Ms von Wistinghausen, may I say that, I'll
10 say it straight away, that it sounds to me very reasonable, because particularly if we
11 do have some kind of no case to answer procedure. So unless either of my
12 colleagues have anything.

13 MS VON WISTINGHAUSEN: [12:33:54] Well, this is what we would aim at. And
14 the proposal we are making, of course, you know, there may be changes, but it's -- I
15 mean, it's -- we have quite a good overview of, you know, what we can do and what
16 we would like to do.

17 What again is important for us, and of course we have to consult with our clients and
18 VW and see how it goes, but, if possible, we would like to have people here with us in
19 the courtroom and we would like this victims' case to be as public as possible,
20 keeping in mind all security issues that may arise, but I think that this is something
21 that we owe to our clients and to the wider community. So this is what we'll
22 endeavour to do. If we succeed, I don't know yet.

23 PRESIDING JUDGE KORNER: [12:34:39] Right. Well, I mean, as I say, that subject
24 to anything that my colleagues say, and obviously we'll give a decision in -- actually,
25 there's no reason why it shouldn't be by email rather than written.

1 Yes.

2 MS VON WISTINGHAUSEN: [12:34:54] But does that mean that you don't really
3 expect from us a formal request where we explain exactly what we're going to do and
4 the whys and the deadlines and all the rest of it? I mean, I'm happy to do that by
5 email and to save some of your time and my time, but --

6 PRESIDING JUDGE KORNER: [12:35:15] I suppose -- no. I suppose this is, because
7 it's a formal request for leave, so no, you'd better do it.

8 MS VON WISTINGHAUSEN: [12:35:26] Okay. No, we will do it.

9 PRESIDING JUDGE KORNER: [12:35:28] But I think we've made our position clear.

10 MS VON WISTINGHAUSEN: [12:35:33] Okay. No, it's fine, of course, we'll do it.

11 Thank you.

12 PRESIDING JUDGE KORNER: [12:35:33] Thank you.

13 Right, Mr Laucci, or Mr Edwards, whoever is dealing -- who is dealing? All right,

14 Mr Laucci.

15 First of all, you -- your, clearly, defence is -- up you get.

16 MR LAUCCI: [12:35:56](Interpretation) Just a moment of absence, your Honour.

17 PRESIDING JUDGE KORNER: [12:36:00] Sorry. You are sort of running some kind
18 of an alibi defence, because you keep putting to witnesses that he wasn't there
19 because he was serving elsewhere. So at some stage you're going to have to give us
20 formal notice of this.

21 MR LAUCCI: [12:36:24](Interpretation) We are aware of it, your Honour. And this
22 alibi defence that was identified, or potential alibi defence which was identified very
23 early in the proceedings is subject to request for cooperation from November and
24 December 2020, and we hope to be able to obtain an answer on 13 January or before
25 that.

1 PRESIDING JUDGE KORNER: [12:36:56] No, it isn't. Calling of evidence to
2 support it, I agree, may be a question of what happens with the cooperation. But
3 you still have to give formal notice of alibi saying -- although, as Mr Edwards pointed
4 out, because each count contains a number of different aspects, but saying that you
5 were not at, I thought, is it the attack on Mukjar you're saying that your client was -- I
6 think it is, isn't it?

7 MR LAUCCI: [12:37:38](Interpretation) It could have an impact on the events of the
8 month of March 2004.

9 PRESIDING JUDGE KORNER: [12:37:44] That's what I thought. Yeah. So at
10 some stage you're going to have to give a notice of alibi. I think, really, this is all
11 going to depend on how long - let's go to, it's jumping to the end - but how long are
12 you going to be asking for before you present your case?

13 MR LAUCCI: [12:38:09](Interpretation) Your Honour, I will answer you as best we
14 can. The problem is there is one big unknown, and that is something that you know
15 about, namely, cooperation of the Sudanese authorities. And as a result, our
16 capacity to carry out -- continue to complete our investigations. You rendered a
17 decision which gives to the 13 January 2023 to start executing this.

18 PRESIDING JUDGE KORNER: [12:38:51] Hang on, we're in open session.

19 MR LAUCCI: [12:38:54](Interpretation) Yes, it's correct. I take good note thereof.
20 The signs -- perhaps it would be more comfortable to go into private session,
21 your Honour.

22 PRESIDING JUDGE KORNER: [12:39:08] Yes. All right. We'll go into private
23 session just for this aspect.

24 (Private session at 12.39 p.m.)

25 THE COURT OFFICER: [12:39:23] We are in private session, Madam President.

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5 (Open session at 12.47 p.m.)

6 THE COURT OFFICER: [12:47:55] We are back in open session, Madam President.

7 PRESIDING JUDGE KORNER: [12:48:00] Yes. All right.

8 Well, then -- I mean, working -- I think what we're going to say is - we'll have to
9 consider that request - but what we're going to say is you will have to give any notice
10 relating to any statutory defences, I think we'll say six -- no, two months before the
11 start of your case.

12 You told us that you would be filing a fuller trial brief before the start, so that had
13 better come in. Are there any -- are there any normal deadlines here? Or does
14 everybody have a different one? What's the normal?

15 MR NICHOLLS: [12:49:08] I think about three months.

16 PRESIDING JUDGE KORNER: [12:49:14] Oh, well -- well, that makes -- I said -- I
17 think what we'll say is defences, we'll say two months before. So defences and trial
18 brief two months before. I don't think it requires three months. And I accept that
19 there will be problems.

20 So pre-trial brief two months. We're not setting a date for the start of the Defence
21 case yet. I'm just saying so it will be two months before that.

22 Deadlines to disclose evidence? Well, I suppose it might all be -- I mean, you might
23 as well say the whole thing is -- yeah, all right, two months. All be done together.

24 And -- oh, I suppose, yeah, you have to tell us whether you're going to call a case at
25 all. You'd better do that two months before as well. Yes. All right.

1 So that would take it, if it was October, that would take it to the end of August.

2 (Trial Chamber confer)

3 PRESIDING JUDGE KORNER: [12:51:04] Right. As far as I think we're concerned,
4 we've dealt with all the matters we wanted to raise.

5 Mr Nicholls, you said you didn't want to raise anything else?

6 MR NICHOLLS: [12:51:14] Just -- just that's a very long time, you know, the
7 proposed date. That's a long time. I understand all the cases are different. I
8 understand the Defence will have difficulties similar to some that we have, I won't go
9 into those. Other than to say that, again, we will help wherever we can, where they
10 feel that they can ask us something. But that's a -- that's a very long time. We had a
11 scare earlier, a health scare, and so --

12 PRESIDING JUDGE KORNER: [12:51:43] Yes, I haven't -- at the moment, that's what
13 Mr Laucci's asking for. I'm giving no indication at all that that's what's going to be
14 allowed. But I do see the problems, given what we know has been happening.
15 Right. Ms von Wistinghausen, anything else you want to raise?

16 MS VON WISTINGHAUSEN: [12:52:08] No. Thank you, Madam President.

17 PRESIDING JUDGE KORNER: [12:52:10] And Mr Laucci, Mr Edwards, anything
18 else other than what we just dealt with?

19 MR LAUCCI: [12:52:17](Interpretation) I was looking at the screen, but obviously, I
20 can't obtain an answer. The answer is no, your Honour.

21 PRESIDING JUDGE KORNER: [12:52:24] Right. Well, then that brings us to the
22 conclusion of the hearings in this case before the end of 2022.

23 As far as January is concerned, we'll start with the investigator or investigators, and
24 anything else that arises out of the discussions that we -- the legal discussions we've
25 had today. Then, Mr Nicholls, I do hope that the witnesses will come, whatever

1 you've managed to get, without any gaps.

2 MR NICHOLLS: [12:53:05] Well, I -- I will have an update, I hope, this week from
3 the team that is working on this. I would ask, I don't think it's a big deal, possibly
4 for some flexibility on whether the investigator is the first witness, because it may be
5 we have somebody we can only get on the first day, or it will be much easier if the
6 investigator could then -- does not need to be the absolute first day, we will bring
7 them early.

8 PRESIDING JUDGE KORNER: [12:53:37] No, except that, obviously, we have got to
9 make a ruling before, in fact, I suppose your bar table motion or -- and certainly
10 before the end of the Prosecution case, so it can't be left too long.

11 MR NICHOLLS: [12:53:53] Yes. It's just in case for some reason there's a reason
12 that we really need to use that first day for a witness who is difficult, then we may
13 want to do that. We will send out the schedule soon. And we will, you know,
14 really do our best. But as I said again, except for the investigator and a couple other
15 witnesses, all of these are difficult. But we will make this as certain as we can this
16 week.

17 PRESIDING JUDGE KORNER: [12:54:18] All right. Yes.

18 Well, then it just remains for me at the end of the year to thank, first of all, and most
19 importantly, the interpreters. I know that I've heard various not entirely
20 complimentary things to say on a number of occasions, but I fully appreciate, and we
21 all do - I say I, we all do - as does -- as do counsel, the difficult job that they have, and
22 we're very grateful, and particularly when we sit longer than we should.
23 Secondly, the Court staff, who don't get much of a mention either, and we're
24 enormously grateful to them. We know there's a lot of work done behind the scenes,
25 and obviously the courts couldn't run without them.

1 And to everybody else, counsel, staff not on strike, those who are here, we do thank
2 you, all three of us, for, with a few odd exceptions here and there, what has been an
3 extremely good cooperation, even though obviously each side has its own agenda.
4 The overriding factor is that, where matters can be agreed in the interest of justice,
5 and it's in the interest of the Defendant above all that the trial moves smoothly and
6 efficiently, and the victims who are waiting to see what happens, that cooperation is
7 essential. And I've said it before and I say it again, that it has been most impressive,
8 and I think it's -- I think I can say that it's probably, of all the trials that are going on in
9 the building at the moment, the one that has shown the proper agreement between all
10 sides, and we're very grateful for that.

11 And so, finally, wish you all a happy Christmas, or whatever the religious festival is
12 that anybody has, and we will see you on 16 January in the new year. So thank you
13 all very much.

14 THE COURT USHER: [12:56:58] All rise.

15 (The hearing ends in open session at 12.57 p.m.)