

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 Monday, 5 December 2022
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: [9:36:08] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:36:31] Yes. Good morning, all.
15 For future reference, I think I'm going to stop having the case called after the
16 Christmas break, because I see no point. But for today, one last time, call the case,
17 please.
18 THE COURT OFFICER: [9:36:47] Madam President, the situation in Darfur, Sudan,
19 in the case of The Prosecutor versus Ali Abd-Al-Rahman, case reference
20 ICC-02/05-01/20.
21 We are in open session.
22 PRESIDING JUDGE KORNER: [9:36:58] Yes. Thank you.
23 Let's have the appearances, please, for the Prosecution.
24 MR NICHOLLS: [9:37:05] Good morning, Madam President. Good morning,
25 your Honours. Good morning, everybody in the courtroom. Good morning,

1 Mr Edwards, remotely.

2 Julian Nicholls with Diana Saba, Claire Sabatini, Pubudu Sachithanandan and

3 Mohanad Elkholy. Thank you.

4 PRESIDING JUDGE KORNER: [9:37:22] Yeah. Thank you.

5 And the Defence.

6 MR LAUCCI: [9:37:29](Interpretation) Good morning, your Honour. Good

7 morning, your Honours.

8 This morning for Mr Abd-Al-Rahman, present in the room, Vanessa Grée, legal

9 adviser; Ahmad Issa, case manager; and support staff of the Court * who have chosen

10 not to join the ongoing strike in the other Defence teams. My colleague Iain

11 Edwards, he's participating from a distance via video conference, and myself, Cyril

12 Laucci, counsel.

13 PRESIDING JUDGE KORNER: [9:38:07] Yes. Thank you, Mr Laucci.

14 And the representatives of the victims.

15 MR SHAH: [9:38:15] Good morning, Madam President. Good morning, your

16 Honours.

17 The participating victims are represented today by our legal interns, Nur Mahameed

18 and Randa Bellahdid. I'm Anand Shah, associate counsel. And Ms von

19 Wistinghausen should be with us momentarily.

20 PRESIDING JUDGE KORNER: [9:38:32] Right. Yes, thank you.

21 Right. Before we get to today's business, which is not the business that this Court

22 expected until last Friday, Mr Nicholls, why did nobody enquire of the witness who

23 was scheduled for today whether he was prepared to testify from the location which

24 was intended before bringing him there?

25 MR NICHOLLS: [9:38:58] That was done, your Honour. And we expected the

1 witness to go ahead as planned, had been discussed. And, essentially, the witness
2 stated what we included in our email, that he refused at that point upon arrival.

3 In other words, this had been arranged and discussed with the witness.

4 PRESIDING JUDGE KORNER: [9:39:23] I mean, are you saying it was positively
5 confirmed that if he was taken to that location, he would actually give evidence via
6 video link?

7 MR NICHOLLS: [9:39:33] The witness had agreed.

8 PRESIDING JUDGE KORNER: [9:39:37] What, and having been taken there, he then
9 said no?

10 MR NICHOLLS: [9:39:41] Correct.

11 PRESIDING JUDGE KORNER: [9:39:42] And had to be taken back again?

12 MR NICHOLLS: [9:39:44] Correct.

13 And we explored with VWS the possibility of getting him quickly to another location,
14 but that was just not feasible, not technically possible, in order to obtain visas and
15 some other materials.

16 PRESIDING JUDGE KORNER: [9:40:03] No. I mean, I perfectly understand that.
17 What I didn't understand was why nobody had confirmed with him, or didn't appear
18 to have, that he was willing to testify from the location.

19 MR NICHOLLS: [9:40:17] No, I checked on that, your Honour. It was discussed
20 with him. Ms Whitford had her direct finished. It was not a situation of, as soon as
21 the witness appeared, dropping this on the witness. The witness essentially changed
22 his mind or now has refused. And that that's all I can tell you.

23 PRESIDING JUDGE KORNER: [9:40:36] Yes. All right. As you know, I'm not -- I
24 know all the difficulties that you've had in getting witnesses here and, obviously,
25 having got witnesses here, deciding not to call them. But, in effect, this Court was

1 supposed to be sitting the whole of this week, and it looks as though we're going to sit
2 one day.

3 MR NICHOLLS: [9:41:01] Yes, I realise that, your Honour. And as I'd stated when
4 we met earlier, we have a team down there now working with VWS on the witnesses
5 for the next block.

6 PRESIDING JUDGE KORNER: [9:41:13] Yeah.

7 MR NICHOLLS: [9:41:13] So, on the ground, trying to firm this up. And I'm not
8 making excuses, but I'd said a couple of times, we were now down to the last pool of
9 witnesses who are in this last block, in large part because they've been difficult to
10 bring, not because we've tactically decided this is the best time to call them. These
11 are the difficult witnesses that we are now stuck with and we'll try to bring them in
12 January. And I apologise, but we were as surprised as anybody on Friday when we
13 heard that the witness refused.

14 PRESIDING JUDGE KORNER: [9:41:45] Yeah. All right. Well, I think I've made
15 the point.

16 Right. Now, Mr Laucci, before you begin, perhaps you'd like to explain to me why
17 you waited until this morning to send to us a list of authorities relevant to the
18 argument you propose to make this morning, when you've had all of last week to do
19 this. And what's more, appreciating that one of us is a French speaker, native, the
20 rest of us are not, even though we may read French, you send them all in French.
21 How do you expect us to go through them today in any possibly logical or even
22 comprehensible fashion?

23 MR LAUCCI: [9:42:41](Interpretation) Your Honour, I don't think that I can pretend
24 that the Court can go through every single reference today. These are just the
25 references which I'm going to use to support my argument during the presentation of

1 the complete argument with regards to the issue of the video. I thought that it
2 would be useful to make it available to the Chamber, and to the parties, for their
3 consideration at any useful time. But, indeed, if I had been able to send them earlier,
4 you can be sure that I would have done.

5 * In fact, as asked, we prepared and submitted the summary, the outline of the
6 arguments, last Monday. And behind it, your Chamber also mentioned that the full
7 debate on the video would probably take place in January, thinking that we would
8 have the time then.

9 So the date of today for the video was confirmed. Once that was the case, we saw
10 that we didn't have time. And I mention -- without mention to -- mention the
11 extenuating circumstances, that unfortunately I was ill and I wasn't able to work from
12 Monday to Wednesday last week. The team worked in order to advance and make
13 progress in the research, but unfortunately, technically, it was not possible to submit
14 it to you earlier, and I regret that.

15 PRESIDING JUDGE KORNER: [9:44:17] A few things, Mr Laucci.

16 On the second aspect, the reason you have co-counsel is if the leading counsel cannot
17 do the work required, that is what co-counsel does, even if co-counsel is not in The
18 Hague.

19 Second thing is this: I don't think you quite follow. You cannot refer us to
20 authorities, none of which come from this Court. For some reason you've given us
21 an Inter-American Human Rights one in French, when it was in English, to begin with,
22 the original, and expect to mount an argument based on those authorities without us
23 having copies of them, the ability of to look -- having looked at them in advance and
24 to ask any questions that we think are relevant. You may quote one aspect of it. I
25 don't know whether the Prosecution's had a chance to look at all these authorities. I

1 would very much doubt it, as I assume they got it the same time as we did, so they
2 can't counter your arguments.

3 Do you understand that, Mr Laucci? It is absolutely no good saying that this
4 morning was the first time you could do it.

5 MR LAUCCI: [9:45:40](Interpretation) Unfortunately, and regret -- it's the
6 regrettable truth. * As I said, I'm not trying to draw mitigating circumstance from
7 the fact that I was ill last week, as my colleagues Iain Edwards did, of course, make
8 progress on the work, but one week in order to bring together all the authorities that
9 are compiled into this document was not a luxury period, if I might put it like that.
10 We worked on -- under maximum pressure to be able to have the complete argument,
11 to make it ready for today.

12 Well, we thought we would be able to develop it more fully by the month of January.

13 PRESIDING JUDGE KORNER: [9:46:23] But I appreciate and I fully accept that up
14 until - what was it? - Thursday, I think, or was it even Friday, you were expecting
15 there would be a witness today. I fully accept that. But we made it clear that if
16 there was no witness, we would expect to deal with this argument today.

17 I should also add that your understanding of the skeleton argument is somewhat
18 different from mine. Skeleton argument means two pages setting out the headlines.
19 Mr Edwards knew that, but it doesn't matter. But anyhow, as it turns out, you've
20 given us a thorough argument.

21 Right. Well, before we see where we're going today, Mr Nicholls, in the light all
22 these authorities having been produced this morning, are you asking for time to
23 consider them?

24 MR NICHOLLS: [9:47:24] No, your Honour. We'll go ahead. Ms Saba, who reads
25 French well, went through them as quickly as possible, and I don't think any of them

1 support his case.

2 PRESIDING JUDGE KORNER: [9:47:37] All right. All right.

3 Well, as I say, it's a bit difficult for us because we only got the list this morning, so we
4 haven't been -- I mean, indeed, I wasn't even aware that there was a list because I was
5 checking something else. All right. We'll see where we go from here.

6 Right. Well, let's get -- let's get started on this.

7 Mr Laucci, we read -- we've all read your argument, and the response. Is it you or
8 Mr Edwards that's going to be mounting this argument?

9 MR LAUCCI: [9:48:14](Interpretation) I will do it, your Honour.

10 PRESIDING JUDGE KORNER: [9:48:15] All right. Well, then you can go ahead.

11 You don't need to repeat what you've already got in writing. So -- but you can
12 expand on anything that you feel needs expanding upon.

13 MR LAUCCI: [9:48:42](Interpretation) Thank you, your Honour. I consider that
14 the full argument should take approximately an hour.

15 Today we're speaking about a document, which is a video recording, which was
16 received by the Office of the Prosecutor on 21 March 2020 by a person who played the
17 role of an intermediary during the voluntary surrender of Mr Abd-Al-Rahman, and
18 this person was designated under the name P-0869.

19 Now, on this recording, Mr Abd-Al-Rahman appears on camera and speaks in Arabic.

20 It's not disputed that Mr Abd-Al-Rahman is indeed the person appearing in this
21 video.

22 At the beginning of the video, Mr Abd-Al-Rahman introduces himself in words that
23 have been interpreted as: "I am Ali Muhammad Ali Abd-Al-Rahman nicknamed Ali
24 Kushayb."

25 The video makes no mention of any notification under Article 55(2) of the Statute by

1 the OTP, nor of the waiver of Mr Abd-Al-Rahman's right to counsel -- or to the
2 assistance of counsel prior to making this recording.

3 The genesis of this video is informed by two notes from the Office of the Prosecutor,
4 investigator's notes, DAR-OTP-0215-7063, dated 7 December 2020, which states:

5 (Speaks English) "Following receipt of the email [sent by P-0869 on 26 December
6 2019]" - I'm adding that - "Investigator [...] contacted P-0869 and informed" --

7 Problem with the --

8 PRESIDING JUDGE KORNER: [9:51:04] I'm grateful, but you've suddenly switched
9 from French to English, Mr Laucci.

10 MR LAUCCI: [9:51:10] Yes, I'm reading from English.

11 PRESIDING JUDGE KORNER: I see.

12 MR LAUCCI: Yes, the note is in English, so I'm quoting it in English, but the
13 interpreters have the full text with French and English.

14 So: "... Investigator [...] contacted P-0869 and informed him that the Prosecution
15 required confirmation that he was in contact with the suspect."

16 (Interpretation) The Defence requested to receive from the Office of the Prosecutor the
17 recording and transcript of the communication reported in this sentence, but it hasn't
18 received it.

19 PRESIDING JUDGE KORNER: [9:51:51] Sorry. I noticed that, but what are you
20 saying? I thought we had been given all the WhatsApp messages, plus -- isn't that
21 all the communication?

22 MR LAUCCI: [9:52:02](Interpretation) There is communication that we have
23 received, and we think that there is indeed other communication, probably by
24 telephone, of which there is no trace, nor recording. That is our case.

25 PRESIDING JUDGE KORNER: [9:52:14] Okay. I'm going -- Mr Nicholls, are there

1 any other records of communication between your office and the intermediary which
2 have not been disclosed?

3 MR NICHOLLS: [9:52:27] No. At least certainly not until possibly something well
4 after the video and these materials were received. This call on - that my friend is
5 talking about - 26 December 2019, this report is the report of the call in the other
6 report. The call was not tape recorded. The investigator did not tape-record when
7 he called 869 back.

8 PRESIDING JUDGE KORNER: [9:52:53] Right. I see.

9 MR LAUCCI: [9:52:55](Interpretation) Indeed. Our understanding is that we
10 accept that not everything is recorded, and we have to do our best.

11 * The note OTP-0215-9698 of 26 February 2021 indicates:

12 (Speaks English) "An OPT Investigator [...] then contacted P-0869 and informed him
13 that the OTP required proof that his email was genuine and proof of the identity of
14 the suspect referred to as Kushayb in his email."

15 (Interpretation) In its response of 2 December 2022, the Office of the Prosecutor
16 presents these requests as routine for the sole purpose of establishing the identity of
17 an individual who has come into contact with the Court. The Defence accepts that
18 verifying the identity of an individual is a normal and fully acceptable practice.
19 However, it must be limited to the identity, that is to say, the civil status of the person,
20 or his first and last name, and must not include any other question relating to the
21 status of a subject or the existence of an alias. Furthermore, whenever such
22 verification is not preceded by notification under 55(2) of the Statute --

23 PRESIDING JUDGE KORNER: [9:54:35] Okay. Could you quote -- would you like
24 to tell me what the basis of that assertion is? Is it a case?

25 MR LAUCCI: [9:54:43](Interpretation) For the moment, I'm making the introduction

1 to my submission. Everything will be made clear and linked to the jurisprudence on
2 which it is based. One of the jurisprudential pieces is the Bemba jurisprudence,
3 which I will find for you in my notes.

4 PRESIDING JUDGE KORNER: [9:55:07] I've looked at them, thank you very much.
5 And I was going to come to that eventually. But I just -- you assert that the civil
6 status of the person, his first/last name, must not include any other question relating
7 to the status of the subject or the existence of an alias. And I want to know if that's
8 based on an authority.

9 MR LAUCCI: [9:55:32](Interpretation) Everything will be explained in the
10 presentation, Madam President, but I can already answer your question. We are in a
11 case in which the alias is a central question and the Office of the Prosecutor has the
12 burden of proof thereover.

13 * Now, where the question is put and there is a risk that this aspect be mentioned in
14 the reply, for reply to thereafter to possibly be used as evidence - and there are other
15 reasons why it cannot be used as evidence, but for it to be used as such, it would have
16 been necessary to take the precaution of notifying this right to Mr Abd-Al-Rahman
17 under 55(2).

18 I hope that briefly replies to your question, but everything is further elaborated in my
19 presentation.

20 PRESIDING JUDGE KORNER: [9:56:37] All right. You carry on.

21 MR LAUCCI: [9:56:58](Interpretation) Furthermore, so what I was saying is that,
22 whenever such verification is not preceded by notification under Article 55(2) of the
23 Statute, then any other information, even unsolicited, that may emerge during such
24 verification and which may have evidentiary value against the person must be
25 excluded from the file and may not be admitted into evidence.

1 In the case in point, the information that Mr Ali Muhammad Ali Abd-Al-Rahman was
2 the suspect known under the alias "Ali Kushayb" was indeed requested by the Office
3 of the Prosecutor investigator. The two investigator's notes cited above establish this
4 without ambiguity.

5 In preparation for today's hearing, the *senior trial lawyer contacted me to ask me if I
6 wished for the investigator to be called to appear to testify before the Chamber, and I
7 gave a clear answer thereto. Unless the Office of the Prosecutor wishes to go back on
8 or revise the version of events reported in the investigation notes, there is no need for
9 the investigator to appear. The *senior trial lawyer assured that the Office of the
10 Prosecutor would not challenge the version of events reported in the notes, the
11 investigation notes, and the Chamber therefore received the agreement of the parties
12 not to call the investigator to testify. However, in its submission, the Office of the
13 Prosecutor did not respect the commitment made and radically reversed the version
14 of the facts reported in the investigation notes:

15 In paragraph 6, the Office of the Prosecutor writes that the video was sent to the
16 Office of the Prosecutor, in English, (Speaks English) "without any initiation,
17 encouragement or direction from the Prosecution".

18 (Interpretation) In paragraph 10, the Office of the Prosecutor writes that after
19 receiving the medical assistance certificates of Mr Ali Muhammad Abd-Al-Rahman
20 on 27 December 2019, the Office of the Prosecutor would have been satisfied with his
21 identity and would not have asked for more.

22 In paragraph 11, he writes, and here I quote in English:

23 (Speaks English) "This video was unsolicited, which is obvious from the Prosecution's
24 contemporaneous correspondence with P-0869. The Prosecution did not speak with
25 the Accused up to this point - let alone 'question' him - such that Article 55(2) would

1 apply".

2 (Interpretation) And the last quote. In paragraph 12, the Office of the Prosecutor
3 concludes, here I quote: (Speaks English) "the Prosecution did not at any time request
4 that the Accused identify himself by the name 'Ali Kushayb' or otherwise encourage
5 or direct him to send a video to that effect in order to produce 'evidence of the alias' as
6 the Defence inaccurately asserts. The Prosecution would have been satisfied if
7 P-0869 had merely provided, for example, a copy of the Accused's passport, other
8 identification or arranged a telephone call with the accused to confirm identity, and
9 indeed, it was content with the certificates provided on 27 December 2019."

10 (Interpretation) End of quote.

11 These four quotes from the Office of the Prosecutor's response betray the commitment
12 made by the *senior trial lawyer and the confidence given by lead counsel not to call
13 the investigator to testify.

14 The Office of the Prosecutor states that --

15 PRESIDING JUDGE KORNER: [10:01:46] Stop. Stop for a moment, Mr Laucci,
16 because this is quite important. I -- as you know, we had a discussion right at the
17 beginning as to whether the investigator was going to be called, and we were all
18 informed that the investigator was long-term sick, and I made a few remarks about
19 what was required of that.

20 Are you now saying that you want to cross-examine the investigator? Because you
21 should have said that when you received the response.

22 MR LAUCCI: [10:02:29](Interpretation) Absolutely not, Madam President. We are
23 keeping to the response given to the colleague last week by telephone, namely, that if
24 the version of the facts set out in the two investigative notes are not contested by the
25 Office of the Prosecutor, then we do not have need to call upon the investigator, to

1 cross-examine the investigator. But I note --

2 PRESIDING JUDGE KORNER: [10:03:00] I don't know what your -- what are you
3 complaining about then?

4 MR LAUCCI: [10:03:06](Interpretation) I regret having read in the response of the
5 Prosecutor of Friday, 2 December, that this version of the facts, as expressed clearly in
6 the investigative notes, is presently called into question.

7 PRESIDING JUDGE KORNER: [10:03:21] All right. I -- I raised -- mentally raised
8 my eyebrows when I read the part that said the Prosecution would have been content,
9 because there is no evidence of that. But the rest of these paragraphs that you have
10 referred to does in fact, does it not, reflect what is shown on the records of the
11 telephone conversations and the WhatsApp messages?

12 MR LAUCCI: [10:03:59](Interpretation) Madam President, you're referring to the
13 transcript -- transcripts of telephone conversations and WhatsApp messages, and I
14 regret that this telephone communication was recorded following the explicit
15 commitment of the Office of the Prosecutor that it would not be presented as evidence.
16 This commitment is mentioned in the investigation note DAR-OTP-0215-9698. And
17 at the top of the page 9700, and here I read it:

18 (Speaks English) "It was also decided that the accused would be informed at the
19 commencement of the call that the OTP did not intend to ask any questions in relation
20 to the substance of the case and phone discussions would be of a non-evidential
21 nature."

22 (Interpretation) So given that this commitment was made, I regret that it wasn't
23 respected and that you could have had the opportunity to look at these notes, these
24 transcripts of calls and WhatsApps, and that would have quite simply never have
25 happened -- that that should never have happened.

1 PRESIDING JUDGE KORNER: [10:05:37] But, sorry, Mr Laucci, if at the stage that
2 these calls are being made, which is way before the first appearance of Mr Al-Rahman,
3 nobody was aware, were they, that -- well, I mean, he may have been aware - no, well,
4 he obviously wasn't - but there was no reason for the Prosecution to know that you
5 were going to be challenging on his behalf, or he was going to be challenging, the fact
6 that he, Al-Rahman, was also known as Ali Kushayb.

7 MR LAUCCI: [10:06:22](Interpretation) Your Honour, I will take -- I take up this
8 argument in my presentation, of course. But to answer precisely and quickly to your
9 question, we have all the elements to demonstrate that the Office of the Prosecutor
10 was perfectly informed of its burden of proof with regards to the alias since 2007.
11 And so we do not -- the fact that Mr -- with regards to what he said during his initial
12 appearance was perhaps a new element. But the Office of the Prosecutor cannot
13 pretend to have ignored its burden of proof with regards to the alias previously.

14 PRESIDING JUDGE KORNER: [10:07:12] Yeah, all right. All right. Yes. Well,
15 I'm sorry, Mr Laucci. You carry on. So you're still saying you don't require the
16 investigator or anybody to give evidence?

17 MR LAUCCI: [10:07:23](Interpretation) Given that the version of the facts in the
18 investigation notes is accepted, then we don't need to cross-examine the investigator.

19 PRESIDING JUDGE KORNER: [10:07:34] Yes, all right.

20 MR NICHOLLS: [10:07:38] Sorry. I'll wait. I'll wait.

21 PRESIDING JUDGE KORNER: [10:07:43] Mr Nicholls, I think -- I interrupted
22 Mr Laucci in his -- his introduction, but I thought that we really better establish that.
23 But for the rest, you can respond later.

24 Yes, Mr Laucci.

25 MR LAUCCI: [10:07:58](Interpretation) Thank you, Madam President, dear

1 colleagues.

2 The Office of the Prosecutor states, (Speaks English) "the Prosecution did not at any
3 time request that the Accused identify himself by the name 'Ali Kushayb'"
4 (Interpretation) in the submissions of 2 December, whereas the investigator note
5 DAR-OTP-0215-9698 clearly states, and here I quote, (Speaks English) "the OTP
6 required proof that his email was genuine and proof of the identity of the suspect
7 referred to as Kushayb." End of quote.

8 (Interpretation) This rewriting of the facts by the Office of the Prosecutor does not
9 furthermore stand up to scrutiny.

10 Firstly --

11 MR NICHOLLS: [10:08:52] Excuse me. I'm sorry. Could we read the quote from
12 the report accurately, to the end of the sentence.

13 PRESIDING JUDGE KORNER: [10:08:59] I'm sorry, which one is it? Sorry, it's no
14 good quoting numbers at me. Could we have the date, Mr Laucci, please.

15 MR LAUCCI: [10:09:07](Interpretation) 26 February 2021, and I can quote it in its
16 entirety.

17 PRESIDING JUDGE KORNER: [10:09:19] Just a moment. Just a moment. I'd like
18 to find it.

19 MR LAUCCI: [10:09:23](Interpretation) Please excuse me.

20 PRESIDING JUDGE KORNER: [10:09:45] Sorry, the investigator's note, can you -- I
21 tell you what, could we have it up on the screen, please, because I'm not sure -- I've
22 got lots of conversations.

23 MR NICHOLLS: [10:09:50] It should not be broadcast, please, just because of some
24 of the names that show.

25 PRESIDING JUDGE KORNER: [10:09:54] No. Okay, not broadcast, but can we

1 have it up on the screen.

2 THE COURT OFFICER: [10:10:00] Will counsel repeat the ERN number, please.

3 MR LAUCCI: [10:10:04] DAR-OTP-0215-9698.

4 (Trial Chamber confer)

5 THE COURT OFFICER: [10:10:46] The document is displayed on the evidence 1
6 channel.

7 PRESIDING JUDGE KORNER: [10:10:54] Thank you very much.

8 MR LAUCCI: [10:10:56] And if you can zoom in on 26 December 2019. Yes.

9 So I read again the sentence: "An OTP investigator [...] then contacted P-0869 and
10 informed him that the OTP required proof that his email was genuine and proof of
11 the identity of the suspect referred to as Kushayb in his email."

12 PRESIDING JUDGE KORNER: [10:11:27] Well, do you see, Mr Laucci, in English
13 that's different? It's -- it is the intermediary P-869 who is referring to Kushayb.

14 MR LAUCCI: [10:11:41](Interpretation) I don't contest that, Madam President.

15 PRESIDING JUDGE KORNER: [10:11:44] I know, but you -- I know, but you need to
16 be careful, because it sounded as though the OTP had said, "We want proof that this
17 man is Ali Kushayb."

18 MR LAUCCI: [10:12:01](Interpretation) To be sure that we understand it perfectly,
19 what I take from this sentence is that the investigator (Speaks English) "required proof
20 [...] of the identity of the suspect referred to as Kushayb in his email."

21 (Interpretation) If we all agree with that, then I think that the issue is dealt with.

22 MR NICHOLLS: [10:12:25] No problem. And I'm sorry to have interrupted, but
23 what I objected to was the "end quote" without referring to "in his email", "referred to
24 [...] in his email".

25 MR LAUCCI: [10:12:39](Interpretation) Thank you for this clarification.

1 Madam President, if I can continue. So the statement that the identification as Ali
2 Kushayb hadn't been called for doesn't stand up to scrutiny. And why not?
3 Firstly, the Office of the Prosecutor does not disclose any communication from the
4 investigator confirming that the documents received on 27 December 2019 were
5 considered to be sufficient proof of the identity of Mr Abd-Al-Rahman. * The Office
6 of the Prosecutor confirmed that on 2 December 2022, but we have no proof of it, and
7 the burden of proof for this element is therefore not met.
8 Secondly, if, as the Office of the Prosecutor claims, it had been satisfied as early as
9 27 December 2019 of the identity of Mr Abd-Al-Rahman, how can it be the case that
10 the first contact is only made on 6 April 2020? What happens -- or what happened
11 from December 2019 to April 2020? If the Prosecutor was satisfied, the Office of the
12 Prosecutor should have been diligent and arranged Mr Abd-Al-Rahman's surrender
13 as early as January 2020, without waiting for the video to be sent in March 2020 in
14 order to take action.
15 Thirdly, there were numerous telephone contacts that took place between December
16 2019 and March 2020 between the OTP investigator and intermediary P-0869.
17 According to the Office of the Prosecutor, they were not recorded. We therefore
18 have no record of them. But the investigator's notes tell us about their content, and,
19 in particular, the fact that the Office of the Prosecutor requested on obtaining proof of
20 identification from Mr Abd-Al-Rahman as the "suspect referred to as Kushayb".
21 Fourthly, and finally, the Office of the Prosecutor did not take action after receiving
22 the 27 December documents and did not arrange the initial contact until after the
23 video was received. As such, it's rewriting history to claim that it was not solicited.
24 It was, and it was from December 2019 to March 2020.
25 The video received on 21 March 2020 was followed by a series of telephone calls

1 recorded by the Office of the Prosecutor between 6 April and June 4, 2020. These
2 telephone communications are summarised in the investigator's notes referenced
3 above. Investigator note DAR-OTP-0215-9698 sheds light on the circumstances of
4 these communications.

5 PRESIDING JUDGE KORNER: [10:17:01] Mr Laucci, don't just quote the numbers.
6 Give us the date.

7 MR LAUCCI: [10:17:06](Interpretation) Yes. 26 February 2021.

8 What we have on the screen, and I would once again quote. No, it wasn't read out,
9 so I'll quote it, I'll read it out again. So I'm on page * 9699, and perhaps could we
10 have 9700 on the screen. That would help us.

11 (Speaks English) Not for broadcast.

12 (Interpretation) So I'll start by reading from the page:

13 (Speaks English) "Given the security situation in Darfur and the need to understand
14 exact information provided by the accused pertaining to logistics of any possible
15 surrender, the audio recording would ensure that there would be no ambiguity as to
16 what the accused and OTP had said and agreed on. It was also decided that the
17 accused would be informed at the commencement of the call that the OTP did not
18 intend to ask any questions in relation to the substance of the case and phone
19 discussions would be of a non-evidential nature."

20 (Interpretation) And I'll continue.

21 (Speaks English) "For these reasons and due to the possible short time frame where a
22 phone call could be made covertly, OTP would not provide a 55(2) warning at the
23 commencement of these audio recorded phone conversations."

24 (Interpretation) Then the investigator's note continues and it provides a summary of
25 the telephone calls which took place between 7 April and 7 June 2020, and this

1 summary makes no mention of the notification under Article 55(2) of the Statute.
2 The recording and the transcripts of these communications have been disclosed and
3 confirm the summary contained in the investigator's note. No notification under
4 Article 55(2) was given.

5 From these two investigator's notes, the following facts emerge: Firstly, video was
6 produced in response to the request of the Office of the Prosecutor for evidence
7 identifying Mr Abd-Al-Rahman to suspect Ali Kushayb.
8 Secondly, Mr Abd-Al-Rahman did not receive prior notice under Article 55(2) of the
9 Statute before this video was recorded, nor prior to the exchange of telephone -- nor
10 prior to the notice of telephone exchanges in the investigator's note.

11 Furthermore, he was not afforded the assistance of counsel prior to recording the
12 video, nor did he waive it either.

13 Fourthly, the Office of the Prosecutor undertook not to use in evidence the telephone
14 exchanges summarised in the investigator's notes.

15 For the reasons discussed below, the Defence submits that this undertaking
16 necessarily extends to the video as well.

17 PRESIDING JUDGE KORNER: [10:21:52] Can I -- can I just ask you one more time to
18 pause, please, Mr Laucci.

19 When you say the video was produced in response to the request of the Office of the
20 Prosecutor for evidence identifying Rahman as Ali Kushayb, is it your contention that
21 the Prosecution specifically asked him to send a video?

22 MR LAUCCI: [10:22:21](Interpretation) I -- or, nobody has the record of these
23 conversations. We know that they took place. What we don't know is if it was a
24 video or anything else that was asked for. I would limit myself to saying what the
25 note says, namely, (Speaks English) "proof of the identity of the suspect referred to as

1 Kushayb."

2 PRESIDING JUDGE KORNER: [10:22:47] Yes, but I'm sorry -- I'm sorry, that's not
3 enough, Mr Laucci. If you are going to be submitting to us that we can be satisfied
4 that the -- or, on the balance of probabilities, that the video was sought by the
5 investigator, then you will have to put that to the investigator.

6 MR LAUCCI: [10:23:19](Interpretation) I'm in your hands, Madam President. It
7 would seem to me that the investigator's notes, if they are not contested, constitute
8 sufficient evidence. But if you have another opinion.

9 PRESIDING JUDGE KORNER: [10:23:34] No. Well, that's why I say, where do you
10 see in those notes a request that the video be supplied in which he identifies himself
11 as Rahman, otherwise known as Ali Kushayb? Where do you see that? Because --

12 MR LAUCCI: [10:23:58](Interpretation) There is no reference to a video. The
13 important word for me is the word "proof". That could be a video. It could be
14 anything else.

15 PRESIDING JUDGE KORNER: [10:24:07] Yeah, all right. Thank you.

16 MR NICHOLLS: [10:24:09] Could I -- sorry, your Honour. Could I also ask for the
17 reference of these phone calls that he is talking about that are not mentioned in the
18 report and are not in the WhatsApp. He's -- there's this -- you know, he's agreed
19 that -- and we've agreed to use these investigative reports. Where is he talking about
20 phone calls between the -- the receipt of the certificates on 28 December and a receipt
21 on the video, 31 March -- 21 March, excuse me? So this claim of phone calls we don't
22 have records for, where is that coming from?

23 MR LAUCCI: [10:24:54](Interpretation) Dear colleague, Madam President, if there
24 hadn't been telephone calls between December 2019 and 6 April 2020, what would
25 have happened? Why did the Office of the Prosecutor organise the first contact with

1 Mr Al-Rahman only on 6 April 2020, that is to say, after having received the video on
2 20 March, and not from the end of December or the month of January?

3 Firstly, I think that the proof of what happened and the diligences made by the Office
4 of the Prosecutor makes it incumbent upon the Office of the Prosecutor - and we are
5 going to provide jurisprudence in this regard - but whatever the case, the facts speak
6 for themselves. You waited to receive the video on 6 March - well, I don't know
7 exactly which date in March - in order to organise the first telephone contacts on
8 6 April. And while you didn't obtain the video on 20 March, you did not take up
9 contact with Mr Abd-Al-Rahman. And from what I deduce - and this is a deduction
10 because I don't have the proof of these contacts and recordings - that they took place
11 and that there were exchanges which finally had the effect or result that the video was
12 sent on 20 March.

13 PRESIDING JUDGE KORNER: [10:26:37] All right. So you are saying, are you, that
14 we should draw an inference from what we do know, that there must have been
15 telephone calls in between?

16 I can see Mr Edwards on the screen nodding.

17 MR LAUCCI: [10:26:51](Interpretation) I'm saying that. And thank you to my
18 colleague for being in agreement. That is what I'm saying. And I would say
19 furthermore that the burden of proof which otherwise would be incumbent on the
20 Office of the Prosecutor.

21 PRESIDING JUDGE KORNER: [10:27:07] Well, Mr Nicholls, I mean -- you can, I
22 think, let Mr Laucci finish. That's what he says and you can respond to that.

23 MR NICHOLLS: [10:27:15] I just want, on a point of clarity, we're talking about
24 phone calls between 26 December and 21 March '20, which is when the video was
25 received; 26 December is when the email arrived from P-0869. So is that the period

1 we're talking about? That even though we've agreed on using these notes - and we
2 will call in the investigator - the argument is now that the notes are incomplete and
3 it's somehow unfair?

4 All right. Thank you.

5 PRESIDING JUDGE KORNER: [10:27:51] Yes.

6 MR LAUCCI: [10:27:56](Interpretation) Well, I finished with the presentation of the
7 facts. I'll go on to the legal part, which I will summarise as follows:

8 Given that these are the conditions, the video should be excluded from the record in
9 this case because its admission would violate the basic text of the Court under

10 Article 21(1) of the Statute; principles recognised in International Human Rights Law,

11 Article 21(1)(b) of the Statute; general principles of law derived from national laws

12 representing the different legal systems of the world, Article 21(1)(c) of the Statute;

13 and the jurisprudence of the Court and other international criminal tribunals.

14 Once the violation is established, the Defence will submit that the only adequate and

15 appropriate response is to safeguard the fairness of proceeding, thereby the outright

16 exclusion of the video of -- and other related documents from the record of the case

17 under Article 69(7) of the Statute.

18 I will come on to the violation of the basic text of the Court.

19 Article 55(2) of the Statute requires that, where there are grounds to believe that a

20 person has committed a crime within the jurisdiction of the Court and that person is

21 to be questioned either by the Prosecutor, or by national authorities pursuant to a

22 request under chapter 9, that person -- that person shall have the following rights of

23 which he shall be informed prior to being questioned:

24 This will be the right to keep silent, without that silence being taken into

25 consideration for the determination of guilt or innocence;

1 (c) to be assisted by the legal counsel of his own choosing;

2 (d) the right to be examined in the presence of his counsel unless he or she has
3 voluntarily waived the right to be assisted by counsel.

4 Since the issuance of the first arrest warrant for Mr Abd-Al-Rahman on 27 April 2007,
5 the Court considered that there are reasonable grounds to believe that he committed
6 one or more crimes within the jurisdiction of the Court. The condition for the
7 application of Article 55(2) of the Statute was there undoubtedly met.

8 Mr Abd-Al-Rahman was a person with respect to whom there were grounds to
9 believe that he had committed one or more crimes within the jurisdiction of the Court.

10 The request made for "confirmation that [P-0869] was in contact with the suspect" or
11 "proof of the identity of the suspect referred to as Kushayb" was therefore a
12 communication seeking to obtain information of any kind from Mr Abd-Al-Rahman.

13 The fact that this communication was not direct and went through an intermediary
14 does not change the fact that information was requested from Mr Abd-Al-Rahman.

15 Unless it deprives the guarantee of Article 55(2) of the Statute of most of its useful
16 effect, such a request for information must necessarily fall into the category of
17 questioning -- or, interrogation to which Article 55(2) of the Statute applies. There is
18 no reasonable justification for excluding reasonably the request that the person
19 seeking the Court's protection was a "suspect" or "Ali Kushayb" from the scope of
20 Article 55(2) of the Statute.

21 * And although it's a bit further on in my notes, I will mention immediately the
22 excerpt of the decision of the Pre-Trial Chamber III in the Bemba case, and it's
23 decision ICC-01/05-08/73 of 21 August 2008, paragraph 45.

24 And for the interpreters, I am at paragraph 53 within my notes.

25 PRESIDING JUDGE KORNER: [10:34:15] Is this one of the authorities mentioned in

1 your --

2 MR LAUCCI: [10:34:18](Interpretation) Yes. And it's explicitly mentioned in
3 response to the Office of the Prosecutor and there's a note in -- there's a footnote
4 which goes thereto.

5 In this case --

6 PRESIDING JUDGE KORNER: [10:34:36] Sorry, just as a matter of interest, do you
7 say that the Pre-Trial Chamber's decision has any bearing on this matter, given it's a
8 Pre-Trial Chamber decision?

9 MR LAUCCI: [10:34:48](Interpretation) Because it goes into the issue of whether
10 information gathered during a verification of identity and in the absence of
11 notification under Article 55(2) can be received into evidence.

12 PRESIDING JUDGE KORNER: [10:35:08] Is this -- but, sorry, wasn't this dealt with
13 by the Appeals Chamber in Bemba?

14 MR LAUCCI: [10:35:15](Interpretation) What I retained from it was this quote from
15 the Pre-Trial Chamber. I have to admit, Madam President, that I'm not certain that
16 there was an appeal on the decision, but it's a decision which was explicitly
17 mentioned by the Office of the Prosecutor in its Friday response.

18 PRESIDING JUDGE KORNER: [10:35:35] All right.

19 MR LAUCCI: [10:35:37](Interpretation) So the Pre-Trial Chamber was addressing
20 the issue of the nature of questioning under 55(2) * and the consequences of the
21 absence of counsel, and its response is as follows, and I quote:

22 "Concerning the arrest warrant of 23 May 2008, the nature of the interview conducted
23 by the investigating judge on 25 May 2008 is not very clear."

24 PRESIDING JUDGE KORNER: [10:36:11] Mr Laucci, you must -- when you're
25 reading and quoting, you must slow down, even though they've got a copy. You can

1 hear them speeding up.

2 MR LAUCCI: [10:36:19](Interpretation) Thank you very much, Madam President.

3 And sorry to the interpreters. I will start again.

4 "Where it concerns the arrest warrant of 23 May 2008, the nature of the interview

5 conducted by the investigating judge on 25 May 2008 is not very clear. Was it an

6 'interrogation' in the meaning of Article 55(2)(d) of the Statute or was it simply an

7 interview to establish Jean-Pierre Bemba's identity and to inform him of his rights?

8 Apparently, it was more of a simple interview, in which case the alleged absence of

9 any counsel during that interview would, under Article 69(7) of the Statute" - and this

10 is the important passage - "only result in a possible exclusion of evidence obtained

11 during that interview."

12 So what the Pre-Trial Chamber is telling us is that you can verify the identity of a

13 suspect without the presence of a lawyer, and that is admissible without the

14 guarantee of Article 55(2)(d). However, if the obtain is generated, it is inadmissible

15 under Article 69(7) of the Statute.

16 PRESIDING JUDGE KORNER: [10:38:04](Microphone not activated) I'm sorry, I

17 don't see that. What are you saying? "You can verify the identity of a suspect

18 without the presence of a lawyer, and that is all right without Article 55(2)(d).

19 However, if" -- sorry, what is -- "if obtain is generated, it is inadmissible under

20 Article 69(7)."

21 MR LAUCCI: [10:38:28](Interpretation) It's an issue of interpreting.

22 If during this interview on the verification of the identity from the evidence -- well,

23 they have evidence which is generated therefrom which is relevant to the case, then it

24 should be excluded. It is inadmissible under Article 69(7) of the Statute if there has

25 been no notification of Article 55(2).

1 PRESIDING JUDGE KORNER: [10:39:01] Okay. But that only applies, therefore,
2 not to the video, but to the conversation where your client twice identifies himself as
3 Al-Rahman known as Ali Kushayb.

4 MR LAUCCI: [10:39:17](Interpretation) The video, Madam President, is the
5 response by Mr Abd-Al-Rahman to a request put to him through an intermediary.
6 The fact that this exchange was not a direct exchange between the Office of the
7 Prosecutor and Mr Abd-Al-Rahman, from our point of view, does not impact on the
8 fact that the information was requested.

9 PRESIDING JUDGE KORNER: [10:39:47] Well, yes, it may well be that identity was
10 requested. But, as you point out, the video -- and you accept, sorry, as I understand
11 it, you accept that the OTP is entitled to establish the identity of the person who they
12 are told by an intermediary is a suspect.

13 MR LAUCCI: [10:40:14](No interpretation)

14 PRESIDING JUDGE KORNER: [10:40:16] Wait. Wait. Right. Okay.
15 If the OTP -- and even if the OTP had asked the intermediary, but there's no
16 suggestion here that they did, this was the intermediary's own brilliant idea to get
17 your client to make this video to prove his identity to the OTP. But how can the OTP
18 be said to be responsible for the making of that video?

19 MR LAUCCI: [10:40:46](Interpretation) Madam President, with all due respect, I
20 believe the fact that saying the making of the video was the intermediary's idea is a
21 supposition for which we have no proof. What is clear is that this idea, whoever it
22 came from, meets a clear desire to have proof of the identification of the suspect as Ali
23 Kushayb.

24 PRESIDING JUDGE KORNER: [10:41:20] So we're going back again, are you, to
25 your saying that we should draw the inference that there were other phone

1 conversations not recorded in which the investigator made the request for the video?

2 That's what you're saying, is it?

3 MR LAUCCI: [10:41:37](Interpretation) It is sufficient to look at the investigator's

4 notes to see that that was requested. How and in what way, by phone, with what

5 help is not important. The important aspect here is what is in the investigator's notes.

6 This proof was requested.

7 PRESIDING JUDGE KORNER: [10:42:04] Unless you want to correct a misquote,

8 Mr Nicholls, you're going to be able to respond to all this.

9 MR NICHOLLS: [10:42:12] Well, no, I know. Again, it's just in his statement. And

10 what happened here was, I spoke to my friend and said, "Do you want us to call the

11 investigator or not?" I have the medical certificate for the one investigator. Was

12 prepared to call a second investigator who worked closely on this and who could, you

13 know, answer most of these questions.

14 My friend said, "No, not if you stand by what is in these two investigative reports."

15 We said, "Of course, we stand by our reports." Fine.

16 Now, again, there's this kind of wishy-washy dancing around it. They're trying to

17 say that the reports are not accurate or that there were more phone calls. And to me,

18 that that is not -- I object to that, because he has agreed to follow these. We've

19 disclosed and given all the communications we have.

20 And I'll just say also that P-869 - again, this is relevant at this point - was not an OTP

21 intermediary at this time that we had tasked. And he joined the Defence team. He

22 became part of the Defence team. So this mystery about what phone calls may have

23 been had between a member of their team or somebody they call a resource person,

24 it's a bit much to make that argument.

25 PRESIDING JUDGE KORNER: [10:43:25] Well, I'm beginning to think, Mr Nicholls,

1 I'm afraid, that this is getting out of hand.

2 Firstly, you haven't sent us any -- I appreciate why; you say that agreement was
3 reached with the Defence that it wasn't required. But we haven't seen any medical
4 certificate for this investigator. And I made it clear that there are medical conditions
5 which make people unable to give evidence, and there are medical conditions which
6 may be separate.

7 But it may well be that if there's another investigator who worked closely with him,
8 although it's secondary evidence, which is unhelpful -- I mean, not unhelpful, but it's
9 not as good the original investigator, who appears all over these papers, by the way,
10 that's one thing.

11 And equally, Mr Laucci, I think it's incumbent upon you, of course it's for the
12 Prosecution to disprove the case, but if P-869 is on your team, you can call him to say
13 that, if that is what is being suggested. If you don't -- of course, it's a matter for you.
14 If you don't call him, then certain conclusions can be drawn.

15 MR LAUCCI: [10:44:47](Interpretation) Madam President, I -- if this is necessary,
16 well, we felt that the two investigator's notes and the agreement not to dispute them
17 would make it not necessary. But if it turns out to be necessary, then we will
18 undoubtedly have to call people who were firsthand witnesses to what happened
19 between December and March.

20 PRESIDING JUDGE KORNER: [10:45:18] Mr Laucci, this is because you are
21 suggesting without, really, any hesitation that there must have been phone calls in
22 between the ones that are recorded, in which, as you assert, the intermediary -- your
23 client's lawyer, I gather, apart from anything else. I'm assuming "son" doesn't mean
24 he's his actual son, as appears in these calls, it's just a polite form, is it, of
25 Sudanese -- just say it. But nobody's suggested that.

1 MR LAUCCI: [10:46:07](Interpretation) Madam President, what is in the
2 investigator's note is that the investigator requested proof of the identity of
3 Mr Abd-Al-Rahman, a suspect of Ali Kushayb, but we have no record of that. So
4 this request mentioned in the note must have been subject to some form of
5 intermediary. And then again telephone, whether it was in person, that is not
6 important. * What is important, and from the point of the Defence, the only
7 important thing here, is that this request was formulated by the Office of the
8 Prosecutor and the OTP did not accept contacting Mr Abd-Al-Rahman until he had
9 received the video of 20 March.

10 So if there are elements missing here, factual elements missing, then of course we can
11 call people to have additional information. But I don't think that's necessary. The
12 essential aspects are in the investigator's notes, and we don't need anything further to
13 demonstrate that the video was acquired in conditions that render it inadmissible.
14 Maybe if I can continue with my presentation, you will have more information
15 allowing you to reach the same conclusion, Madam President.

16 I will pick up paragraph 13, Rule 112 of the Rules of Procedure and Proof set out
17 certain modalities of notification related to Article 55(2) of the Statute and the
18 preservation of a sound or video recording with a view to its later use as proof. In
19 particular:

20 The person should be informed that the recording is being made with a view to using
21 it as proof -- as evidence. The fact this information is given and the response of the
22 person concerned should be noted in the record, which is Rule 112(1)(a). This was
23 not the case with regard to the video under discussion. The proof of identity of
24 Mr Abd-Al-Rahman with the suspect Ali Kushayb was requested without him being
25 informed that it could be used in evidence against him.

1 Secondly, the person should be able to have a private conversation with their lawyer
2 before giving the replies, if there is a lawyer. This is Rule 112(1)(a). Or the
3 declaration by which the person concerned renounces the presence of a lawyer should
4 also be noted and, if possible, registered on the sound or video material, 112(1)(b).

5 None of this happened in the present case before the arrival of Mr Abd-Al-Rahman in
6 The Hague and the appointment of a duty counsel on 12 June 2020 for his initial
7 appearance.

8 Norm 41 of the Rules of the OTP includes the obligation for information under Article
9 55(2) of the Statute and Rule 112.

10 PRESIDING JUDGE KORNER: [10:50:31] Forty-one has come out of something and
11 I didn't understand what you said.

12 MR LAUCCI: [10:50:35] Forty-one of the Rules of the Office of the Prosecutor.

13 PRESIDING JUDGE KORNER: [10:50:38] Sorry, what are you talking about? What
14 is the Rules of the Office of the Prosecutor?

15 MR LAUCCI: [10:50:45](Interpretation) This is the rules --

16 PRESIDING JUDGE KORNER: [10:50:47] Yes, but where are -- where are they?

17 MR NICHOLLS: [10:50:49] It's actually regulations --

18 MR LAUCCI: [10:50:51] Right, regulations.

19 MR NICHOLLS: [10:50:53] -- of the Office of the Prosecutor.

20 PRESIDING JUDGE KORNER: [10:50:54] Okay. Well, where are the regulations?
21 Where's the page you're referring to?

22 MR LAUCCI: [10:51:01](Interpretation) The core text were not included in the
23 authorities because they are the Court's core text which we work with every day. I
24 didn't mention the Statute or the Regulations of the OTP either in my list.

25 PRESIDING JUDGE KORNER: [10:51:22] We don't -- we don't tend to work every

1 day with the OTP's regulations, Mr Laucci.

2 Can we see it, please, on the screen.

3 MR LAUCCI: [10:51:38](Interpretation) This is on page 21 of the regulations, I am
4 told. Regulation 45.

5 THE COURT OFFICER: [10:51:47] If you would allow a few minutes.

6 MR LAUCCI: [10:52:37](Interpretation) And I would like to point out that I'm going
7 to use to -- refer also to the Code of Conduct. So if I could see now Regulation 41.
8 Well, I think we've got that up.

9 PRESIDING JUDGE KORNER: [10:53:09] That just states the obvious. Thank you.
10 And it's actually in the Statute. It doesn't add anything.

11 MR LAUCCI: [10:53:19](Interpretation) I'm trying to get the fullest possible
12 presentation of the core text on this, Madam President.

13 I would now like to have up on the screen, if possible, the Code of Conduct of the
14 OTP, section 69.

15 THE COURT OFFICER: [10:53:52] Do you mean page 69?

16 MR LAUCCI: [10:53:56](No interpretation)

17 (Interpretation) It's a paragraph, not a section. Page 18.

18 PRESIDING JUDGE KORNER: What is this?

19 MR LAUCCI: [10:54:30](Interpretation) This is the Code of Conduct for the Office of
20 the Prosecutor. The obligation to inform them of their rights under 55(2) and their
21 right to have assistance from a counsel. This is mentioned in paragraph 69(b) and (d)
22 of this Code of Conduct.

23 So this information as set out in the investigator's note, DAR-OTP-0215-9698, this not
24 having been given is an error on the part of the Prosecutor.

25 So if we could now look at paragraph 27 of the same document. Respecting this

1 obligation is the -- encompassing.

2 If we could see paragraph (d) here, please, by scrolling down a little.

3 (Speaks English) Scroll down a little bit. *Merci*. Stop.

4 (Interpretation) Respect for the principles is a -- goes to a concerted effort to prevent

5 benefitting from them again indicates a failure to observe this by the Office of the

6 Prosecutor. Faithful conduct means respecting the principles of this code and a

7 concerted effort to prevent, oppose and address any departure therefrom.

8 So oppose and address any departure therefrom, oppose and address the section of

9 the Code of Conduct and Regulation 41 of the OTP Regulations and Article 55(2) of

10 the Statutes means not trying to benefit from this violation but, rather, banish from

11 the procedure in order to avoid this being compromised. This is a very different

12 attitude.

13 So we see from the Prosecution the notion of using the video and conversations

14 obtained in violation of the previously mentioned articles.

15 So I would now like to look at applicable international law.

16 PRESIDING JUDGE KORNER: [10:58:00] All right. Well, before you do that, we'll

17 take the break at this stage, Mr Laucci.

18 MR LAUCCI: [10:58:04](No interpretation)

19 PRESIDING JUDGE KORNER: [10:58:06] All right. Just, again, I just want to make

20 sure I understand this. Your premise that the video is obtained in contravention of

21 the various articles that you've just quoted to us is based on the premise that the

22 investigator specifically asks for the video.

23 MR LAUCCI: [10:58:32](Interpretation) Yes. And without notification of

24 Article 55(2).

25 PRESIDING JUDGE KORNER: [10:58:38] No, I understand that. All right. Okay.

1 Thank you.

2 Yes, all right. 11.30, please.

3 THE COURT USHER: [10:58:45] All rise.

4 (Recess taken at 10.58 a.m.)

5 (Upon resuming in open session at 11.31 a.m.)

6 THE COURT USHER: [11:31:22] All rise.

7 Please be seated.

8 MR LAUCCI: [11:31:55](Interpretation) Thank you, your Honour.

9 Before continuing with the sources of international law, I would like to make a small
10 clarification in reference to something that you said during the first session. That's
11 on page 35 of the transcript, line 6, where you suggested that the intermediary, 869,
12 was the counsel of Mr Abd-Al-Rahman. Just so that things are indeed clear on this
13 point --

14 PRESIDING JUDGE KORNER: [11:32:38] It's all right. I'm not suggesting --

15 MR LAUCCI: [11:32:41] Okay.

16 PRESIDING JUDGE KORNER: [11:32:41] -- that he was a lawyer who was
17 appointed to represent him under the -- he is an intermediary who happens to be a
18 lawyer.

19 MR LAUCCI: [11:32:54](Interpretation) Absolutely. This is indeed clear.

20 (Speaks English) Happens to be a lawyer who is not qualified to be a lawyer before
21 this Court.

22 PRESIDING JUDGE KORNER: [11:33:01] No. I'm sure that's right. Yeah.

23 MR LAUCCI: [11:33:06](Interpretation) The clarification has been made.

24 So with regard to -- in the presentation of the legal elements, I shall therefore go on to
25 the presentation of the violation of applicable treaties and principles and rules of

1 customary international law, Article 21(1)(b) of the Statute. The aim of my
2 presentation is to persuade the Chamber to recognise the value of the principles,
3 general principles of international customary law of the right to receive assistance of a
4 counsel and the right to silence.

5 The Defence submits that the conditions under which the video and the associated
6 documents were collected and the request for their use as evidence in the trial are all
7 in violation of the rules of international law as set out in the applicable international
8 treaties and the rules of customary international law.

9 The International Covenant on Civil and Political Rights of 1966, which entered into
10 force for Sudan in 1986, sets out in Articles 14(3)(b) and 14(3)(g) thereof the right of
11 anyone charged with a criminal offence to have time and facilities for the preparation
12 of their defence and to communicate with counsel of their own choosing, as well as
13 the right not to be compelled to testify against themselves or to confess guilt.

14 The general observation number 13 of the United Human Right Committee -- the
15 general comment number 13 on Article 14 of the covenant states in its paragraph 14
16 that the law should provide that evidence obtained but by such methods, or any other
17 form of coercion, is inadmissible in its entirety.

18 The African Charter on Human and People's Rights, the Banjul Charter, of 27 June
19 1981, which entered into force for Sudan in 1986, also protects the right of any person
20 being prosecuted to be assisted by a Defence counsel of his or her choice. That's
21 Article 7(1)(c) of the Charter.

22 PRESIDING JUDGE KORNER: [11:36:27] I don't want to stop you, but can I say, you
23 can take it as read that we are thoroughly familiar with all the various spread over
24 human rights legislation, as it were, of the right of someone to be represented by
25 counsel and to be cautioned before they are interviewed.

1 What we would like you to address us on is this: Interviewing means questioning
2 about an offence, does it not? In what -- in what -- what do you say in this case, in
3 the conversations that were held about his surrender, amounts to questioning about
4 the offences with which he is charged?

5 MR LAUCCI: [11:37:28](Interpretation) Yes, I understand your question,
6 Madam President. The presentation of international law is no doubt more general
7 than that. This question obviously is dealt with in my presentation and, in particular,
8 on the basis of Bemba jurisprudence, which I have already cited.

9 I'm in your hands, Madam President. I have no doubt of your familiarity with all
10 these rules. On our side, there is a concern of putting it on record.

11 PRESIDING JUDGE KORNER: [11:38:11] Go ahead then, Mr Laucci. Right.

12 MR LAUCCI: [11:38:14](Interpretation) Very well. Thank you, Madam President.

13 So I was saying that the jurisprudence of the African Court of Human Rights
14 stipulates that this right -- this gives this right to any person accused of -- to any
15 person accused of a criminal offence without that person having been obliged to
16 request it, whenever the interest of justice so require. That's a judgment of the
17 African Court of Human Rights of 26 September 2019 in the case Vedastus v.
18 Tanzania (funds and reparations), and, namely, paragraph 69 thereof.

19 The right to a fair trial is also protected by Article 6 of the European Convention for
20 the Protection of Human Rights and Fundamental Freedoms. The jurisprudence of
21 the European Court excludes the use of evidence obtained by coercion or pressure, or
22 in disregard of the will of the person prosecuted. And here I quote --

23 PRESIDING JUDGE KORNER: [11:39:59] Can I just stop you? You can do the
24 quote in a moment, but can I just stop you for a moment. What do you say is the
25 coercion?

1 MR LAUCCI: [11:40:06](Interpretation) I'm very well able to respond to this
2 question, Madam President. In these -- Friday -- in its Friday comments, the Office
3 of the Prosecutor stated that the situation in which Mr Abd-Al-Rahman was when
4 he -- when he contacted the Court to be under its protection was without importance
5 and it had no relevance, whatever the case. And once again, the report of the
6 investigators attest thereto. The Office of the Prosecutor is informed as of
7 26 December 2019 that Mr Abd-Al-Rahman wishes to submit himself to the protection
8 of the Court as a witness.

9 And it is also mentioned in the note of 26 February 2021, and, namely, page 96, 97 and
10 99 thereof, that the suspect, (Speaks English) "The suspect currently has issues in
11 Sudan with ...",
12 (Interpretation) and because we are in open session, I'm not going to mention which,
13 but two Sudanese tribes. Page 96 and 99.

14 The Prosecutor has in his possession the information that Mr Abd-Al-Rahman claims
15 puts him in a situation of coercion or constraint in the month of December. And the
16 time passes. That he pretends to be in a situation -- or claims to be in a situation
17 whereby he wants to be in the protection of the Court as a witness. Further time
18 passes, December to the month of April, and even to the month of June, without this
19 request being replied to, without any action being taken by the Office of the
20 Prosecutor. And they say it's not relevant because, with regards to this time that
21 passes, whereas Mr Abd-Al-Rahman claims that he's in a difficult situation, and from
22 our point of view, this is an element of constraint or coercion. And the fact that the
23 Office of the Prosecutor ultimately only took action on 6 April, after having received
24 the video on 20 March, makes us believe that the video was provided to end this
25 attempt and to ensure that the protection that was required materialised.

1 PRESIDING JUDGE KORNER: [11:43:13] Okay. Well, there are two things. First,
2 you're saying, are we, that -- you're saying, are you, that the fact that he mentions he's
3 got trouble with a couple of tribes, whoever they may be, should make the Office of
4 the Prosecutor realise that there is some kind of coercion?

5 And second, I don't think you can have it both ways, because you say that they don't
6 get in touch with him or do anything, but you've been telling us that we should draw
7 the conclusion that there has been contact in between January and March.

8 MR LAUCCI: [11:44:00](Interpretation) * There was certainly contact via
9 intermediary P-0869, but no action was taken by the Office of the Prosecutor in order
10 to meet Mr Abd-Al-Rahman and to take action. The action that was taken was to
11 arrest him, to apprehend him, and without any other form of putting him in
12 protection of the Court. No actions taken.

13 And that's what's important.

14 We have somebody, whether it's true or not, there are objective elements here which
15 make it possible to say that. In particular, the fact that, from December 2019,
16 Mr Abd-Al-Rahman is subject to an arrest warrant in Sudan. He is sought. And
17 that's the reason why he flees and he contacts the Court.

18 PRESIDING JUDGE KORNER: [11:45:06] I'm sorry, what's the evidence that the
19 OTP was informed he was the subject of an arrest warrant?

20 MR LAUCCI: [11:45:14](Interpretation) I'll try to find it at the moment. I will find
21 it, your Honour.

22 PRESIDING JUDGE KORNER: [11:45:20] All right. You can come back to that,
23 Mr Laucci. All right. You carry on then because you wanted to quote the part.

24 MR NICHOLLS: [11:45:26] Sorry, your Honour, just standing up to correct a
25 misstatement. Page 43, lines 24, to 44, line 3, that it's mentioned in the note of the

1 investigator that the Office of the Prosecutor is informed that Mr Abd-Al-Rahman
2 wishes to submit himself to the protection of the Court. That's the way -- again, this
3 is a matter of my friend interpreting things in a way that are not written down. It's
4 not verbatim. At no point on the 26 -- sorry, on the 26 or 27 December did we
5 receive -- did the Prosecution receive any notice that he wished to submit himself for
6 protection. It's not in the reports. It's not in any of the messages.

7 PRESIDING JUDGE KORNER: [11:46:28] Yeah. I think that's something, I seem to
8 recall, that Mr Abd-Al-Rahman said himself at some stage.

9 MR NICHOLLS: [11:46:41] I don't recall that. I don't believe so. But it certainly
10 wasn't at the point that Mr Laucci was talking about, as right from the beginning here.

11 PRESIDING JUDGE KORNER: [11:46:50] I do recall something about -- it may have
12 been the intermediary in one of the conversations. I do recall something about the
13 protection of the Court.

14 Well, there's the -- Mr Al-Rahman, in one of the -- in the conversation on 6 April, at
15 the end, says: "I'm wrongly -- I'm someone who's been wronged, against whom false
16 charges have been brought. I want to voluntarily present myself to the Court so I
17 can be shown my rights." But I think somewhere I did read ...

18 MR NICHOLLS: [11:47:41] Your Honour, there's certainly discussions about security
19 and protection and family members in those calls. I stood up though because what
20 Mr Laucci said was as of the 26th.

21 PRESIDING JUDGE KORNER: [11:47:55] I understand. Yeah.

22 Yeah. No. I got that. Yeah.

23 All right. Mr Laucci, I think that is right.

24 MR LAUCCI: [11:47:59](Interpretation) Yes. And, your Honour, on the question of
25 the arrest warrant of December 2019, I don't find the reference, but I will

1 communicate it to the Chamber perhaps during the lunch break. It will be in the
2 submissions of the Office of the Prosecutor in submissions to the Pre-Trial Chamber, I
3 would think.

4 PRESIDING JUDGE KORNER: [11:48:20] No. What we're discussing at the
5 moment is not anything that was said to the Pre-Trial, but how the Office of the
6 Prosecutor in the discussions between December and March is supposed to know that
7 an arrest warrant had been issued by Sudan, because I don't think there's any
8 reference to that anywhere.

9 MR LAUCCI: [11:48:41](Interpretation) Precisely. And this is the reference that I
10 propose to put during the lunch break. This was written by the Office of the
11 Prosecutor. And I will find this reference that in December 2019 an arrest warrant
12 was issued by the Sudanese authorities for Mr Abd-Al-Rahman.

13 PRESIDING JUDGE KORNER: [11:49:07] Fine. It may well have been. What you
14 need to establish is that the Office of the Prosecutor knew that between December and
15 March, when the video was sent.

16 MR LAUCCI: [11:49:21](Interpretation) Very well, Madam President.

17 I would repeat, nevertheless, that from the perspective of the Defence, what is
18 important here is not the material nature or the reality of the constraint or coercion
19 under which Mr Abd-Al-Rahman claims he was under, but the fact that he
20 communicated to the Office of the Prosecutor his wish and need to be under the
21 protection of the Court. There is a request that is made based -- claiming to be based
22 upon a constraint or coercion. Perhaps not, but the request is made. Time passes,
23 and it goes to April, without any action being taken. This is, from our perspective,
24 an element of coercion or constraint.

25 It doesn't come from the Office of the Prosecutor. It's not the Office of the Prosecutor

1 that is doing harm, or could have done harm to Mr Abd-Al-Rahman during this
2 period, but Mr Abd-Al-Rahman said, "I have a need", and that need met with no
3 answer, until eventually it was.

4 PRESIDING JUDGE KORNER: [11:50:34] Do you -- do you accept that the
5 authorities that you're going to refer us to say that the coercive element has to come
6 from the Office of the Prosecutor?

7 MR LAUCCI: [11:50:46](Interpretation) No, no.

8 Once again, if we are speaking about the threat of being arrested by the Sudanese
9 authorities, that did not come from the Office of the Prosecutor. We all agree with
10 that. But the fact of not being looked after, not put under the protection of the Court,
11 while the evidence of Ali Kushayb was not given, that is an element that necessarily
12 resulted in a form of coercion.

13 So I was dealing with the European Convention for Human Rights, Article 6, and the
14 case law of the European Court.

15 Yeah, I was going to quote it, but in order to save time I'm not going to do so in an
16 exhaustive way. I'll just refer in particular to the materiality of this law and the
17 judgment of the Chamber of the European Court of Human Rights of 17 December
18 * 1996 in the Saunders v. the United Kingdom case, application number 19187/91, and
19 paragraph 68 thereof.

20 Now, within the framework of Mr Abd-Al-Rahman, this is the discussion that we've
21 had with regards to that need mentioned by Mr Abd-Al-Rahman to put himself in the
22 protection of the Court in the absence of action taken until the video was obtained,
23 and this delay led to pressure on Mr Abd-Al-Rahman to get under the protection of
24 the Court. And according to the European jurisprudence in the Saunders case, it is
25 excluded to take into account any evidence taken under such conditions.

1 Now, the -- when it comes to the European Court of Human Rights, it also excludes
2 evidence taken during questioning when the person has not been able to receive the
3 assistance of a lawyer. And this comes from the Chamber of the European Court
4 dated 27 November 2008 in *Salduz v. Turkey*, from the Grand Chamber of the
5 European Court of Human Rights. This is number 36391/02, paragraph 55 thereof.

6 And here I quote:

7 "It is in principle that there is a harm to the rights of the defence when incriminating
8 statements made during a police interview where there is not the -- in principle, the
9 rights of the defence are irremediably infringed when incriminating statements made
10 during police questioning without the possibility of an assistance by a lawyer are
11 used as the basis for conviction."

12 So it's clear that Mr Abd-Al-Rahman was not offered any opportunity to seek the
13 assistance of counsel before being asked to provide evidence identifying himself as
14 the suspect Ali Kushayb. Admitting this video provided as evidence would
15 therefore irreparably damage the rights of the Defence under the *Salduz*
16 jurisprudence.

17 Finally, the Inter-American Convention on Human Rights, the Pact of San José de
18 Costa Rica of 22 November 1969 also provides the right to receive the assistance of
19 defence counsel and not to be compelled to testify against oneself or to declare oneself
20 guilty in its Articles 8(2)(d) and 8(2)(g).

21 The jurisprudence of the Inter-American Court clarified that the right to counsel
22 applies at trial, but also in all proceedings -- proceeding or accompanying the trial.
23 That is to say, including interactions between the accused and the police or
24 prosecuting authorities. And here I'm referring to the judgment of the
25 Inter-American Court of Human Rights of 27 November 2003 in the case of *Maritza*

1 Urrutia v. Guatemala, and namely paragraph 120 thereof.

2 The United Nations Basic Principles on the Role of Lawyers, adopted in 1990 in
3 Havana by the Eighth United Nations Congress on the Prevention of Crime and the
4 Treatment of Offenders, states in particular the right of any person being prosecuted
5 to be informed without delay of their right to be assisted by a lawyer of their own
6 choice or choosing, paragraph 5, and to have without delay, without censorship or
7 interception - and this is paragraph 8 - access to such a lawyer.

8 So with regard to the rules of customary international law, the Court's jurisprudence
9 has recognised the report of the International Committee of the Red Cross on
10 customary international law as an expression of customary international law, and that
11 is in the decision on the confirmation of charges issued by the Pre-Trial Chamber I in
12 the Abu Garda case, decision ICC-02/05-02/09-243, paragraph 88.

13 The report of the International Committee of Human Rights is therefore a source of
14 rules of international customary law which makes its report much easier to follow.
15 This report concludes that the rule of customary international law number 100 reads:
16 "No one shall be convicted or tried, except by virtue of a fair trial affording all
17 essential judicial guarantees". And the report identifies, among these essential
18 judicial guarantees, the right to receive the assistance of a defence counsel. And that
19 is from pages 479 to 480 thereof; the right to communicate freely with one's lawyer,
20 that's page 481 of the report; and the prohibition of forcing accused persons to testify
21 against themselves or to confess guilt, that is pages 486 to 487 of the report. And the
22 report states, "This prohibition appears in several military manuals and in most, if not
23 all, of national legislation." In particular, the report refers to military manuals of
24 Argentina, Canada, Colombia, United States, New Zealand, Sweden and Switzerland,
25 as well as the national legislation of Bangladesh, Georgia, India, Ireland, Kenya,

1 Mexico, Norway and Russia.

2 On the basis of the International Committee of the Red Cross report, it can therefore
3 be said that the right to receive the assistance of and communicate freely with a
4 lawyer, and the prohibition on forcing accused persons to testify against themselves
5 are principles of customary international law.

6 PRESIDING JUDGE KORNER: [12:00:22] So are you saying it doesn't apply, in your
7 list of countries, to Australia, for example?

8 MR LAUCCI: [12:00:32](Interpretation) I'm just mentioning the references used in
9 the report of the International Committee of the Red Cross. Personally, I will base
10 myself on Australia and the other countries that are in the list of authorities in the
11 following demonstration, which is that of the general principles of law under the
12 Statute.

13 PRESIDING JUDGE KORNER: [12:00:57] Okay. Can I then ask you this: At what
14 stage, on the facts of this case, do you say that the right to consult with counsel and
15 also to be told of his rights kicks in? At what stage?

16 MR LAUCCI: [12:01:27](Interpretation) I'm sorry, your Honour. I'm told that
17 there's no interpretation in Arabic.

18 The various sources give different replies to the exact question you've just put,
19 Madam President, but in all cases, we are in the as soon as possible, without delay,
20 and some sources are more details prior to any interaction, questioning by the
21 authorities. So that would be the -- well, earliest possible stage.

22 And again, with regard to the right rules of the Court, the perfect and adequate reply
23 of the Court is in the Bemba jurisprudence that I quoted.

24 Yes, there can be questioning without the presence of a lawyer, but if other
25 information or evidence comes up at the question of identity, if there is no lawyer and

1 if he has not been given the notification of 55(2), then this evidence is not admissible.

2 PRESIDING JUDGE KORNER: [12:03:12] Yeah. I'm afraid, Mr Laucci, that that
3 won't do. It's a lovely general answer, but you're trying to persuade us at the
4 moment that we should exclude the evidence of the video and the subsequent
5 conversations about his surrender, and presumably the WhatsApp messages as well.
6 So I am asking you: Are you saying that from the moment that the email by the
7 intermediary to the Court was received, the investigator should have told the
8 intermediary - because he never has any direct contact with your client until the
9 phone conversation - that -- what -- what should he have -- what are you saying that
10 the investigator should have told the intermediary, and when?

11 MR LAUCCI: [12:04:11](Interpretation) The best thing to do, Madam President,
12 would have been, from as early as 26 December, to organise direct contact with the
13 person claiming to be Abd-Al-Rahman and to give him the notification of
14 Article 55(2). That would have been the safest for -- thing to do for the Office of the
15 Prosecutor. Because once that's been done, everything acquired is admissible.
16 Since this was not the case, the consequence is that nothing that was said can be
17 received as evidence.

18 There was a point raised in the skeletal argument of last week, I believe, relating to
19 what the OTP should have done for all this to be admissible, and what was not done.

20 PRESIDING JUDGE KORNER: [12:05:18] All right. So is your answer that, from
21 26 December, the OTP should have declined to have any dealings with the
22 intermediary and should have insisted that they speak directly to whoever this
23 person was who he said he knew, and then -- and then given him his rights?

24 MR LAUCCI: [12:05:46](Interpretation) I confirm that the best thing to have done
25 would be have direct contact and notify Article 55(2) as soon as possible. If the

1 intermediary was at that point the only person to whom they could speak, they
2 should have taken advantage of this to organise things as quickly as possible.

3 PRESIDING JUDGE KORNER: [12:06:09] But, I'm sorry, how were they to have
4 direct contact? Because all the intermediary was saying was he was in contact with
5 somebody whom he claimed was Al-Rahman.

6 MR LAUCCI: [12:06:25](Interpretation) Madam President, I think that what was
7 done on 6 April could have been done on 26 December, or shortly afterwards, in the
8 same conditions. There were no changes in the working conditions of the OTP, as
9 far as we know, between 26 December and 6 April. The only difference is that, in the
10 meantime, this video had been made.

11 PRESIDING JUDGE KORNER: [12:06:56] So, effectively, you're saying they should
12 have declined to have any further conversation with the intermediary, insisted on
13 speaking to the person who was claiming to be Al-Rahman, and then read him his
14 rights?

15 MR LAUCCI: [12:07:14](Interpretation) I think that the intermediary could have
16 been used to arrange that. So he needn't have been excluded, but he would have
17 had to have him for this direct interaction and the reading of the rights.

18 PRESIDING JUDGE KORNER: [12:07:34] Yeah, I'm still trying to grasp when you
19 say, however, that -- so you're saying there should have been no more further -- so
20 even if the intermediary said, "No, I'm the intermediary, and I'm going to go on
21 dealing with him until you're satisfied that this is the man", the OTP should have said
22 no? Is that what you're saying?

23 MR LAUCCI: [12:07:59](Interpretation) I believe that the best reply would have been
24 to say, "We need to speak to Mr Al-Rahman as soon as possible."

25 PRESIDING JUDGE KORNER: [12:08:12] You still haven't quite answered my

1 question. So you're saying that it's the -- it's the use of the intermediary in those
2 months that should not have happened. But that doesn't -- but you're not saying
3 the -- all right. You're not saying the intermediary should have been read rights as
4 well.

5 MR LAUCCI: [12:08:41](Interpretation) No, no.

6 PRESIDING JUDGE KORNER: [12:08:44] Right. So it's the first conversation
7 directly, then, between the accused and the investigator that his rights kick in. Is
8 that -- is that what you're saying?

9 MR LAUCCI: [12:08:59](Interpretation) Yes. The notification should have been
10 given at that -- on that occasion, because if it had been done, then everything would
11 be admissible. But it wasn't done.

12 PRESIDING JUDGE KORNER: [12:09:14] But -- but that's what I'm -- you see, there's
13 a slight disconnect. Accepting for a moment that we accept your argument that,
14 from the moment they had direct contact with him, they should have read him his
15 rights. They have no direct contact with him. So all the authorities you're quoting
16 to us only kick in when they have direct contact with him.

17 MR LAUCCI: [12:09:43](Interpretation) Now I understand your question. I'm sorry
18 if I'm a bit slow to pick this up.

19 So the important thing is, through an intermediary or not, there is a request for
20 information from the OTP addressed to Mr Al-Rahman. Mr Al-Rahman replies,
21 responds to the request in the video of March. This exchange in itself, independent
22 of the fact that there is an intermediary, qualifies as an exchange during which 55(2)
23 should have been raised. Because there was no notification of 55(2), so all the
24 information obtained as part of this exchange is inadmissible.

25 PRESIDING JUDGE KORNER: [12:10:57] 55(2), Mr Laucci, is fairly straightforward.

1 The "person is about to be questioned either by the Prosecutor, or by national
2 authorities". It doesn't say contact is going to be established with the suspect. It's
3 questioning. So 55(2) does not apply, does it, to the investigator's dealings with the
4 intermediary?

5 There may be other aspects of the matter, but it's not 55(2). It is absolutely plain, on
6 the face of it, it's questioning of the person who's suspected who has committed a
7 crime is about to be questioned.

8 MR LAUCCI: [12:12:08](Interpretation) One moment, Madam President. If I could
9 just check the jurisprudence here.

10 My reply to your question, Madam President, is that what we are trying to say is that
11 any request for information addressed to a suspect, be it directly or through an
12 intermediary, is covered by Article 55(2), and it is allowable to check identity, and so
13 on. But if information is requested by the OTP which could be incriminatory for the
14 suspect or another person, then - and this is in Bemba - this information is not
15 admissible.

16 PRESIDING JUDGE KORNER: [12:13:04] Well, whatever may be in the Pre-Trial
17 Chamber's decision in Bemba, it's not exactly binding. But -- in any event. But,
18 Mr Laucci, in order for anything to kick in to do anything, you've accepted the
19 Prosecutor has to be sure that the person is someone who is suspected of committing
20 a crime.

21 MR LAUCCI: [12:13:28](Interpretation) I am not contesting that.

22 PRESIDING JUDGE KORNER: [12:13:33] Okay. But as I say, I mean, it may be
23 under the general head of behaviour which is contrary, I think as you put it in part of
24 your argument, to -- well, it's actually in Rule 69. Sorry. Just a moment. Sorry.
25 Yes, 69 said that, "The admission of the evidence would be antithetical" - I can never

1 say that word in English - "to and would seriously damage the integrity of the
2 proceedings."

3 I mean, that's what you are really arguing, isn't it? It's not Article 55(2).

4 MR LAUCCI: [12:14:24](Interpretation) Yes. Sixty-nine is used as the consequence
5 of the absence of 55(2). I'm sorry, again. But --

6 PRESIDING JUDGE KORNER: [12:14:52] No, no, it's not used as a consequence of
7 the absence. It's a general prohibition on admitting evidence where there's been a
8 violation of one or other of the principles. All right.

9 MR LAUCCI: [12:15:10](Interpretation) You anticipated the rest of my presentation,
10 which is not entirely surprising.

11 One thing, the reference -- we found the reference which shows that the OTP was
12 informed about. The Office of the Prosecutor received a letter on 9 December 2006
13 from the Sudanese ministry of justice, according to which -- no, no, no, it's not the
14 same reference. I'm sorry. I'll come back to it. I'll come back to it.

15 PRESIDING JUDGE KORNER: [12:15:59] Yeah. You carry on, Mr Laucci.

16 MR LAUCCI: [12:16:02](Interpretation) So, yes. So I was coming to the point
17 where I wanted to cover various sources of international law in order to satisfy the
18 Chamber that the right to a lawyer and right to silence are general principles of law
19 under 21(1)(c) of the Statute. We have identified national sources from 23 different
20 countries, from different legal systems. I'll try to get through this part as quickly as
21 possible.

22 I am quoting these countries in alphabetical order.

23 South Africa: French alphabetical order.

24 Article 35(1) of the South African Constitution of 1996 states:

25 (Speaks English) "Everyone who is arrested for allegedly committing an offence has

1 the right (a) to remain silent; (b) to be informed promptly of (i) the right to remain
2 silent; and (ii) the consequences of not remaining silent; (c) not to be compelled to
3 make any confession or admission that could be used in evidence against that
4 person."

5 (Interpretation) And Article 35(2) adds:

6 (Speaks English) "Everyone who is detained [...] has the right [...] (b) to choose, and to
7 consult with, a legal practitioner and to be informed of this right promptly."

8 (Interpretation) Argentina: The Argentinian Penal Code in its Article 65(c) and 65(d)
9 contains the right of any person suspected of having committed a crime to remain
10 silent and to receive help from a lawyer from the first stage of the procedure.

11 Article 70 of the same code states that a declaration of the person being prosecuted
12 should be, to be valid, be carried out in the presence of their lawyer and, if in writing,
13 be signed.

14 Before proceeding to a declaration, Article 71 of the same code states that the person
15 in question must have been made aware of their rights to remain silent and any other
16 right.

17 Article 74 of the same code states that not complying with these rules, even with the
18 consent of the person in question, prohibits the use of information obtained in this
19 way.

20 So, in our case, the video was made without Mr Abd-Al-Rahman having had the
21 opportunity to consult a lawyer, without him having been made aware of his right to
22 do so, or his right to remain silent. Therefore, under Article 74 of the Argentinian
23 Penal Code, this information cannot be used against him.

24 Belgium: The International Pact on Civil and Political Rights, mentioned earlier,
25 applies directly to Belgian internal law. The 11th Chamber of the Brussels appeal

1 court confirmed this in a judgment of 21 May 2012. All evidence collected in
2 contravention of the right to have a lawyer and not to incriminate oneself are accepted
3 as the work accomplished and the statement operated on the basis of these.

4 Benin: Article 59 of the Benin Penal Code includes the obligation for police officers
5 to inform anyone in custody of their right to consult a lawyer. The right to be
6 assisted by a lawyer applies from the very -- from the preliminary investigation and
7 in all the acts of the procedure covered by Article 74 of this code. Should this not be
8 complied with, Article 64 of the Benin Penal Code lays down the elimination of the
9 report of the custody.

10 Canada: Article 10(b) of the Canadian Charter of Rights and Freedom states that, in
11 the case of arrest or detention, the right to have assistance from a lawyer immediately
12 and to be informed of this. The jurisprudence of the Canadian Supreme Court also
13 lays down the admissibility of declarations made by a suspect to a person in authority.
14 This is R v. Grandinetti, 2005. And this jurisprudence applies also before and after
15 the arrest, see R v. Oickle in 2000. Where potentially incriminating statements have
16 been provoked by representatives of the authorities for whatever reason,
17 Supreme Court of Canada applies the following test, which I will quote in English, R
18 v. Herbert, 1990:

19 (Speaks English) "the focus under the Charter shifts to the conduct of the authorities
20 *vis-à-vis* the suspect. Was the suspect accorded the right to consult counsel? Was
21 there other police conduct which effectively and unfairly deprived the suspect of the
22 right to choose whether to speak to the authorities or not?"

23 (Interpretation) In this case, Mr Abd-Al-Rahman had been fleeing from Sudanese
24 authorities for some months by the time the OTP investigator asked him to record the
25 video identifying Ali Kushayb. He describes his situation as precarious and he

1 expressed the need to place himself urgently under the protection of the Court. He
2 therefore had --

3 PRESIDING JUDGE KORNER: [12:24:37] But you assert, and there's no evidence of
4 this, that I know of, that Mr Abd-Al-Rahman had been fleeing from the Sudanese
5 authorities for some months. There is no evidence, firstly, that that's right.
6 Second, that the OTP knew about this.

7 MR LAUCCI: [12:24:59](Interpretation) Madam President, I maintain the proposal
8 that I made earlier to find the reference whereby the bureau of the Prosecutor had the
9 information about the Sudanese authorities. But I also refer again to the
10 investigator's note, which is -- contains a reference on page DAR-OTP-0215-9699.
11 I'm being very cautious here. I'm not stating --

12 PRESIDING JUDGE KORNER: [12:25:53] Your reference.

13 MR LAUCCI: [12:25:56](Interpretation) The reference is 9699, fourth point in the list.

14 PRESIDING JUDGE KORNER: [12:26:05] Yeah, but -- but this is -- this is -- I'm sorry,
15 this is the intermediary saying: "He has spoken to the suspect over the phone and
16 [he] is aware the suspect currently has issues in Sudan with the Salamaat and
17 Falata ..."

18 Where does that amount to fleeing the Sudanese authorities for some time?

19 MR LAUCCI: [12:26:36](Interpretation) Once again, Madam President, we'll find
20 this in the lunch break, I can assure you. But I would like to insist on this point.
21 We have to understand correctly. I'm not saying -- and I'm not saying anything
22 about the material nature of this risk at the point -- or when Mr Abd-Al-Rahman was
23 subjected to it. What I'm trying to demonstrate is that this information was given by
24 Mr Al-Rahman or his intermediary to the Office of the Prosecutor. So the OTP had
25 this information which suggests --

1 PRESIDING JUDGE KORNER: [12:27:21] No. Stop, Mr Laucci. What
2 information?

3 MR LAUCCI: [12:27:26](Interpretation) "I'm under pressure, so I need to be under
4 the protection of the Court."

5 PRESIDING JUDGE KORNER: [12:27:31] And where is that, please? Or is that
6 what you are going to find after lunch?

7 MR LAUCCI: [12:27:40](Interpretation) What I will find after lunch is the reference
8 to the arrest warrant of December 2019.

9 PRESIDING JUDGE KORNER: [12:27:48] The arrest warrant is not the same thing as
10 saying, "I am under pressure and throw myself on the protection of the Court." And
11 even if there was an arrest warrant, you've got to show that the OTP was aware of
12 that. That's the first thing.

13 And, secondly, Mr Laucci, you said again that the investigator insisted -- where are
14 we? Sorry.

15 "... by the time the OTP asked him to record the video ..." What is the evidence that
16 the OTP asked him?

17 MR LAUCCI: [12:28:45] To record the video?

18 PRESIDING JUDGE KORNER: [12:28:48] Yeah.

19 MR LAUCCI: [12:28:49] No. The evidence is that the OTP requested proof of the
20 identity of Mr Abd-Al-Rahman as the suspect Ali Kushayb. Video -- I don't know if
21 a video was requested. It doesn't matter.

22 PRESIDING JUDGE KORNER: [12:29:01] Well, then you must be accurate. What
23 they actually said, apparently, was that they wanted to -- proof that this man
24 was -- where is it?

25 MR LAUCCI: [12:29:16] The suspect Kushayb.

1 PRESIDING JUDGE KORNER: [12:29:19] That his email was genuine and proof of
2 the identity of the suspect.

3 MR LAUCCI: [12:29:26] Referred to as Kushayb.

4 PRESIDING JUDGE KORNER: [12:29:28] Yes, referred to as Kushayb in the
5 intermediary's email.

6 Right. So you must be accurate when you're quoting, Mr Laucci.

7 Now the other thing is, if you're winding up this, you said there was no contact in the
8 intervening months until March, but the WhatsApp messages, which were retrieved
9 rather late, it seems to me, show that there was contact throughout this period with
10 the intermediary.

11 MR LAUCCI: [12:30:05](Interpretation) No, but the contact which didn't take place
12 between December and the month of April is the direct contact with

13 Mr Abd-Al-Rahman in April. And I would be astonished that this contact wouldn't
14 be initiated once the video is obtained.

15 PRESIDING JUDGE KORNER: [12:30:32] Well, it is initiated once the video -- they
16 get the video in March. And then -- and then there's --

17 MR LAUCCI: [12:30:39](Interpretation) Yes, perhaps.

18 I see Judge Alexis-Windsor perhaps has a problem of interpretation. But what I said,
19 that it was the Office of the Prosecutor only organises the contact, direct contact with
20 Mr Abd-Al-Rahman on 6 April, once it obtained the video on the 20th, and not before.

21 PRESIDING JUDGE KORNER: [12:31:07] Sorry, just remind me. Do the
22 documents that were sent up have a photograph of Mr Abd-Al-Rahman? The
23 medical certificate.

24 MR NICHOLLS: [12:31:18] They do, your Honour. Both of them.

25 PRESIDING JUDGE KORNER: [12:31:22] Thank you very much. Yes. Yes.

1 All right, Mr Laucci. Yeah.

2 MR LAUCCI: [12:31:25](Interpretation) So I will continue. Thank you very much,
3 Madam President.

4 The following reference is still relating to Canada, namely, the province of Quebec,
5 and this is Article 29, Charter of Human Rights and Freedoms for Persons, which
6 provides that any person arrested or detained has the right, without delay, to the
7 assistance of a lawyer and must be properly informed of his right promptly.

8 In Chile, the Article 93(b) of the Chilean Code of Criminal Procedure provides the
9 right to assistance, to counsel, from the first acts of the investigation, knowing that
10 Article 7 of the same Chilean code defines these first acts as including all the steps of
11 an investigative or custodial nature taken by a court, the public prosecutor's office or
12 the police, in relation to a person who is suspected of an offence.

13 The Swiss Confederation: The right to remain silent and not to testify against oneself
14 is one of the rights of which any person who is deprived of liberty is entitled to be
15 informed immediately under Article 31, paragraph 2 of the Federal Constitution of
16 the Swiss Confederation.

17 You have in the table of authorities a judgment of 4 October 2010 of the Court of
18 Criminal Law of the Swiss Federal Court. And it makes this duty to inform an
19 independent procedural guarantee and it excludes from the declaration -- it excludes
20 from the procedure the statement if he did not have his right to keep quiet.

21 In Spain you have Article 17(3) of the Spanish Constitution of '78 enshrines the right
22 of any arrested person to be informed immediately of his or her rights and to receive
23 the assistance of a lawyer at all stages of the proceedings, including before the police.
24 It prohibits also compelling an arrested person to make statements.

25 The right not to self-incriminate is furthermore also enshrined in Article 24 of the

1 Constitution and Article 118(1)(g) and (h) of the *Ley de Enjuiciamiento Penal*, Code of
2 Criminal Procedure. And Article 520 of the same law also -- 520(2) also enshrines
3 the obligation to immediately inform any detainee of his or her rights, including the
4 right (a) to remain silent and not to answer questions put to him or her, (b) not to
5 testify against him or herself and not to confess guilt and (c) the right to receive
6 without delay the assistance of a lawyer.

7 In its judgment 21/2021 of 15 February 2021, the Spanish Supreme Court found a
8 violation of the right to silence which is constitutionally protected when a prosecuted
9 person is forced to present evidence against themselves or to testify against
10 themselves.

11 In the United States of America: In the case *Rhode Island v. Innis*, 12 May 1980, the
12 US Supreme Court extended the guarantees of the right against self-incrimination and
13 to receive counsel.

14 Under the 5th and 6th amendments to the US Constitution, which it previously
15 recognised in its *Miranda* judgment, *Miranda v. Arizona* of 1966, as any questioning
16 defined as, and here I quote: (Speaks English) "not only express questioning, but also
17 words or actions that the police should know are reasonably likely to elicit an
18 incriminating response". (Interpretation) End of quote.

19 As the Office of the Prosecutor investigator asked Mr Abd-Al-Rahman to identify
20 himself as the suspect Ali Kushayb in court, his request undoubtedly had the
21 character of an action that he should have known would be reasonably likely to elicit
22 an incriminating response.

23 MR NICHOLLS: [12:37:01] Sorry. Sorry, I'm just asking for a cite for us.

24 Asking -- I've lost it. Ask -- "the Office of the Prosecutor investigator asked

25 Mr Abd-Al-Rahman to identify himself as the suspect Ali Kushayb in court". Where

1 is that from, please?

2 MR LAUCCI: [12:37:27](Interpretation) Investigator's note:

3 (Speaks English) "... the OTP required proof that his email was genuine and proof of
4 the identity of the suspect referred to as Kushayb in his email."

5 MR NICHOLLS: [12:37:38] Okay. Once again, a misstatement.

6 MR LAUCCI: [12:37:43](Interpretation) I'm sorry?

7 THE INTERPRETER: [12:37:48] For the record, neither the English interpreter nor
8 the French transcript caught the references.

9 PRESIDING JUDGE KORNER: [12:37:57] Mr Laucci, you're going much too fast
10 again. It's the trouble when you're reading from a prepared script, so they haven't
11 got the references down that you've been referring to.

12 THE INTERPRETER: [12:38:07] For the previous document.

13 PRESIDING JUDGE KORNER: [12:38:12] For the previous document.

14 I may say, Mr Laucci, I will repeat for the second time, you can take it as read that all
15 three of us accept the principles of -- enshrined in Article 6 of the ECHR. And
16 quoting American cases from 1980 doesn't really advance the matter much more.

17 MR LAUCCI: [12:38:37](Interpretation) Very well, Madam President.

18 The hope of the Defence is to ensure that it is recognised by the Chamber as a general
19 principle of law under Article 21(1)(c). If you tell me that the demonstration has
20 been sufficiently made with references already given, then I can stop. And you have
21 the table of authorities anyway.

22 PRESIDING JUDGE KORNER: [12:39:06] Well, (a), you've given us all the
23 authorities. (b), the principle that a person who is accused of an offence has a right
24 to have a lawyer present when questioned, and to be informed of his right to remain
25 silent, is accepted by every lawyer and judge in the whole of this building, I would

1 imagine. The only point that you have to address us on is whether what was
2 happening was questioning, and questioning in relation to the offence with which he
3 is charged.

4 MR LAUCCI: [12:39:53](Interpretation) Very well, Madam.

5 Just, Madam President, a small precision. What the Defence wishes to have
6 recognised as a general principle of law is not simply the right to be informed of the
7 right to have a lawyer and to remain silent before being questioned, but the right
8 immediately and as soon as possible. That is to say, including before questioning to
9 have that right. And that's a nuance.

10 I am disposed to not go through all the rest of the international law.

11 PRESIDING JUDGE KORNER: [12:40:36] Of course it's before questioning. It
12 wouldn't make any sense if it wasn't before questioning.

13 But the issue is, or what it comes down to is, or part of what it comes down to is, is a
14 conversation about the mechanics of an accused person who's going to surrender
15 himself, how that is to be achieved, is that questioning which comes under that
16 prohibition, if you like?

17 And, secondly, at what stage do these rights kick in?

18 MR LAUCCI: [12:41:21](Interpretation) Well, I will be very clear with regards to
19 these two questions, your Honour. We know what question we're putting. We
20 don't know what answer we will get. The only way to be sure that the answer that
21 we obtain, if it has any type of admissible -- evidentiary value is admitted, is through
22 the diligence of Article 55. If it hasn't been done, then never mind, that's the
23 occasion that's been lost to obtain the evidence.

24 But if a notification didn't take place, in that case, then everything given by way of
25 answer to the question, however anodyne and innocent it might appear, cannot be

1 admitted into evidence. This is a principle of precaution, precautionary principle.

2 If we want to lose nothing, we have to proceed with identification.

3 Now, there was another aspect which I wanted to respond to you on, but I have
4 forgotten. I'm just going to check.

5 Once again, as soon as possible. And while it hasn't been done, those are lost
6 opportunities to do so.

7 PRESIDING JUDGE KORNER: [12:42:52] Sorry, can I just follow through on your
8 point. So let us take the first telephone conversation where the intermediary
9 introduces your client, which is the one of 6 April. Yeah, 6 April. I'm not quite
10 clear who (Redacted) is in all of this. But is that the intermediary, (Redacted)?

11 MR NICHOLLS: [12:43:40] No. No, your Honour.

12 PRESIDING JUDGE KORNER: [12:43:41] Who's (Redacted) when he's at home?

13 MR NICHOLLS: [12:43:43] We're -- we're not exactly sure, your Honour. It's
14 somebody at the other end of the line.

15 PRESIDING JUDGE KORNER: [12:43:50] Oh, I see, okay. All right.

16 And then at the top of the second page, your client comes on the line. Do you have
17 that? It's OTP-0215-6966.

18 MR LAUCCI: [12:44:16](Interpretation) I fear not. Could you repeat.

19 PRESIDING JUDGE KORNER: [12:44:25] 6966.

20 MR LAUCCI: [12:44:37](Interpretation) No, I fear I don't have it with me.

21 PRESIDING JUDGE KORNER: [12:44:37] All right. Well, it's the -- it's the
22 conversation of 6 April 2020.

23 MR NICHOLLS: [12:44:49] Your Honour, are you looking for the ERN of the page?

24 PRESIDING JUDGE KORNER: [12:44:53] Isn't that the ERN?

25 MR NICHOLLS: [12:44:54] I've got DAR-OTP-0215-8927.

1 PRESIDING JUDGE KORNER: [12:45:02] Mine says 6 -- maybe it's a draft. 89 what?
2 Anyway, it's the second page of the transcript. I've got a completely different ERN
3 number on it.
4 Have you got it?
5 MR LAUCCI: [12:45:43](Interpretation) Apparently we're not able to open it.
6 MR NICHOLLS: [12:45:49] Well, your Honour, I think one way to bring this up is
7 DAR-OTP-0215-8924, and then we'll just have to go ahead a few pages.
8 PRESIDING JUDGE KORNER: [12:46:03] Right.
9 Oh, yes, sorry. I see there's two versions of it. One is a draft. For some reason I've
10 got it. It was the corrected version. That's right. So it's 8927.
11 THE COURT OFFICER: [12:46:34] Would you like the Registry to publish the
12 document?
13 PRESIDING JUDGE KORNER: [12:46:50] There is the investigator -- there's no -- we
14 don't want this to go out to the public - saying who he is and "Can you please confirm
15 your identity for me."
16 And so at that stage you're saying, are you, he should have said two things: Firstly,
17 do you want to have a lawyer present during this conversation? Second, you're not
18 obliged to answer any questions.
19 MR LAUCCI: [12:47:26](Interpretation) To say the truth, the entire notification 55(2)
20 and the elements that you've mentioned, just because this document is in front of us, I
21 would have to reiterate the position of the Defence, which is that this document,
22 including all other transcripts of telephone conversations, can only be admitted into
23 evidence -- or cannot be admitted into evidence because there was a specific
24 commitment on the part of the Office of the Prosecutor before 6 April,
25 DAR-OTP-0215-9700, (Speaks English) "any questions in relation to the substance of

1 the case and phone discussions would be of a non-evidential nature."

2 (Interpretation) So shouldn't be admitted into evidence before this Court. So I have
3 to regret that the Office of the Prosecutor, despite this undertaking from April 2020,
4 found it useful and appropriate to submit it to your attention.

5 PRESIDING JUDGE KORNER: [12:48:31] But on an argument such as this,
6 Mr Laucci, how could they not? How were we to proceed if we didn't actually see
7 the terms of the conversation? We have to decide on your application to exclude,
8 and we have to therefore look at all the evidence that surrounds it. We couldn't do
9 anything else.

10 MR LAUCCI: [12:48:55](Interpretation) Your Honour, that's the reason why the
11 Defence says and repeats that the evidence -- the only relevant evidence, and which
12 answers the question, is provided by the two investigator notes which establish that
13 the request was made by the investigator of the Office of the Prosecutor to report the
14 evidence of the identity of Mr Abd-Al-Rahman either as suspect - and that is in the
15 note 0215-7063 - or Mr Abd-Al-Rahman as (Speaks English) "the suspect referred to as
16 Kushayb in his email."

17 (Interpretation) That's document DAR-OTP-0215-9698.

18 These elements are admitted into evidence. They're in front of you and they are
19 probative. All the more so given that the Office of the Prosecutor has taken -- made
20 an undertaking not to contest the content of these investigative notes. And it's on
21 that basis that we accepted that it wasn't necessary to call the witness.

22 All the other transcripts of communications, WhatsApps, telephone calls, et cetera,
23 fall under the undertaking of the Office of the Prosecutor, which are not admitted into
24 evidence. And we are currently discussing it as evidence, what was said, what
25 wasn't said, and we have to rely on the investigative notes in this regard.

1 PRESIDING JUDGE KORNER: [12:50:32] But we couldn't possibly, Mr Laucci, rely
2 on the investigative because they tell us absolutely nothing. You argue that, as a
3 matter of principle, all of this should be excluded because it falls foul of all the
4 principles of fairness, the rights of the accused, and all the rest of it. How could we
5 possibly do that on a summary of the evidence to which it relates? You couldn't.
6 So that is an objection. You might well have an objection on the basis that the
7 disclosure was late, but that's something else.

8 But what I'm at the moment trying to establish is this: It's at that stage, if not
9 before - and I know you say before - that the investigator should have read him his
10 rights, at the beginning of this conversation when he explained who he was.

11 MR LAUCCI: [12:51:38](Interpretation) The investigator reads him his rights when
12 he wants to. But when he hasn't done so, nothing is admissible.

13 PRESIDING JUDGE KORNER: [12:51:47] But let us say, for example, that was -- that
14 had been done, and your client had said, "Okay, well, in that event, despite the fact
15 that I really want to surrender, I'm not going to say another word to you about how
16 that surrender should be achieved. But I really, really want to surrender, but I
17 understand what you say." What then?

18 MR LAUCCI: [12:52:18](Interpretation) Your Honour, I'm also tempted to put
19 myself in the shoes of the Office of the Prosecutor at this time, and I have to say that I
20 can understand one of the reasons why the notification of Article 55(2) of the Statute
21 was not given. From December 2019 to June - not even April - June 2021,
22 Mr Abd-Al-Rahman is -- well, he expressed his wish to come and present before the
23 Court -- present himself as a witness. He'd been -- but if his answers in a clear and
24 non-ambiguous way by a notification under Article 55(2), he is told in a very clear
25 way that it is not in the capacity as a witness that the Court will accept, but only in the

1 capacity as a suspect. And furthermore --

2 PRESIDING JUDGE KORNER: [12:53:24] Don't -- sorry --

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 MR LAUCCI: [12:56:21] Certain. But that's not a notification under 55(2). And by
8 somebody who has no knowledge, background, a legal background or knowledge in
9 the case in point who thinks, while he knows that there is an arrest warrant against
10 him issued by the Court, he thinks that he can come as a witness without any doubt.
11 This is an error worse than a beginner's error, because he wasn't even a beginner.

12 PRESIDING JUDGE KORNER: [12:56:57] All right. Okay, is there anything else,
13 Mr Laucci, you want to add, other than checking the references?

14 MR LAUCCI: [12:57:06] I will check the references and answer to that.

15 (Interpretation) What I would propose is to leave the end of the presentation, jump
16 the national legislation, skip that part, and to go on to -- or to review the
17 jurisprudence which is relevant of the Court and the International Criminal Tribunals
18 on the issue. I have already mentioned the decision, the Bemba decision, 73 of
19 paragraph 45. I won't go back to that one.

20 And I will draw the attention of -- or to the decision issued in the case Katanga and
21 Ngudjolo, 22 May 2008, decision ICC-01/04-01/07-416, page 9 and 10, where the
22 Pre-Trial Chamber II states the following: "... the rights expressed in Article 55(2) of
23 the Statute must be exercised immediately, prior and during the interview with the
24 witness concerned".

25 This is a witness here in question, but this is a witness for whom there is a risk of

1 incrimination, so Article 55(2) is applicable.

2 "And we wish to stress that in the future, the Prosecution, when it informs a suspect
3 in application of 55(2) of the Statute, must clearly explain to the person who is being
4 questioned his capacity as a suspect and the rights guaranteed under 55(2) of the
5 Statute, in particular the right to remain silent and to be assisted by a counsel".

6 We're in May 2008, Madam President, your Honours.

7 PRESIDING JUDGE KORNER: [12:59:21] Yes. Could you just tell us what -- what
8 paragraph were you quoting?

9 MR LAUCCI: [12:59:26](Interpretation) Page 9 and 10.

10 PRESIDING JUDGE KORNER: I know. Paragraph?

11 MR LAUCCI: [12:59:26](Interpretation) There's no paragraph, I think, in this
12 decision.

13 PRESIDING JUDGE KORNER: [12:59:33] Sorry. This is the decision of 24 June,
14 decision on the admission of material from bar table.

15 MR LAUCCI: [12:59:42](Interpretation) No, 22 May 2008, Katanga and Ngudjolo,
16 01/04-01/07.

17 So we're in May 2008. Already at the time, the Office of the Prosecutor is reminded
18 that they must clearly explain to the person questioned that person's capacity as a
19 suspect and rights under 55(2) immediately prior to and during the interview. And
20 that was not done in 2020.

21 Another reference, Bemba and others, Pre-Trial Chamber VII, decision

22 ICC-01/05-01/13-1948 of 14 July 2016, paragraph 33 thereof. This reference, and it is
23 in this decision that a reference is made to Article 69(7) of the Statute, the Chamber

24 notes the identical language used in Article 69(7)(b) of the Statute of the Court and in
25 Rule 95 of the Rules of Procedure and Evidence of the International Criminal Tribunal

1 for the former Yugoslavia. And the Chamber retains a number of factors to take into
2 consideration to evaluate the impact of the violation of the Statute on the entire
3 procedure and the following points, in English:

4 (Speaks English) "... the nature of the violation in question and the fault, or lack
5 thereof, of the Prosecution. The Chamber also remains mindful of the general
6 guidance of the European Court of Human Rights that the proceedings as a whole,
7 including the way in which evidence was obtained, must remain fair."

8 (Interpretation) In the case in point, the norms violated, 55(2) of the Statute,
9 correspond with a provision of the Statute of the Court which announces one of the
10 essential guarantees of a fair trial. And the fault is entirely incumbent on the Office
11 of the Prosecutor, which as the note -- the investigator's note states in page
12 DAR-OTP-0215-9700, that it deliberately chose not to proceed with the notifications
13 required under 55(2) of the Statute, while it was perfectly possible so to do.
14 According to the jurisprudence that I have just cited, the criteria of excluding -- of its
15 exclusion from evidence are perfectly met.

16 And finally, the Office of the Prosecutor on Friday based itself on a passage,
17 paragraph 50, of the Ongwen judgment of 4 February 2021, ICC-02/04-01/15-1762. It
18 based itself on an isolated sentence of this judgment, and I will quote it, and this is in
19 paragraph 50:

20 (Speaks English) "The Chamber notes that Article 55(2) of the Statute and the rights
21 enumerated therein only apply when the person concerned is questioned in the
22 context of an investigation by the Court."

23 PRESIDING JUDGE KORNER: [13:04:25] That's what I was putting to you,
24 Mr Laucci.

25 MR LAUCCI: [13:04:28](Interpretation) Well, I'm pleased to be able to answer it,

1 your Honour.

2 So this sentence which answered the theoretical question of the violation of the rights
3 of the defence on the occasion of an interview with Dominic Ongwen by the Ugandan
4 authorities without notification under Article 55(2) of the Statute.

5 In paragraph 54 to 55 of the judgment, the Chamber responds to this submission by
6 saying that there has not been a violation, and it basis itself on Article 59(2) of the
7 Statute which relates to questioning by the national authorities. And I think here we
8 would say this has no relevance in the case in point.

9 Now, the sentence upon which the Prosecutor based itself where it concerns the
10 admissibility of evidence taken during the interaction.

11 PRESIDING JUDGE KORNER: [13:05:34] You'll have to come back to that because
12 it's five past 1, and the interpreters have been going. I must say, your estimate of
13 timing, Mr Laucci, could not be worse this morning.

14 MR LAUCCI: [13:05:45](Interpretation) Oh, we didn't know -- we knew were we
15 were going, but not all the way.

16 PRESIDING JUDGE KORNER: [13:05:49] But I agree that you've -- you've
17 contended manfully with a number of interruptions by me.

18 All right. Genuinely, how much longer do you think you're going to be after lunch?

19 MR LAUCCI: [13:06:05](Interpretation) I'm not very far off. I'll finish today.
20 That's for certain.

21 PRESIDING JUDGE KORNER: [13:06:14] Yeah, all right, Mr Laucci. Then, in
22 which case -- yes. And I just want you to think one way -- you are not intending to
23 call the intermediary, and you may want to discuss that over lunch. But, I mean, I'm
24 just putting it --

25 MR LAUCCI: [13:06:44](Interpretation) Our position is that it's not necessary and

1 that the investigator's note is sufficient. If your Chamber is of a different opinion,
2 then we are very much ready to call the person without any problem.

3 PRESIDING JUDGE KORNER: [13:06:58] Well, I'll say this: You are saying that we
4 should adduce -- deduce from the gap that there was a request by the investigator for
5 the video.

6 MR LAUCCI: [13:07:20](Interpretation) Not a request for the video. A request for
7 evidence. Afterwards, the evidence that it produced, it happened that it was a video.
8 But what we were saying, and for that the investigator's notes tell us, that it is
9 evidence with regards to the identity of Mr Abd-Al-Rahman as the suspect Ali
10 Kushayb. It's a video. It could have been -- could have been something else.

11 PRESIDING JUDGE KORNER: [13:07:51] Yes. But, sorry, you've been asserting
12 throughout that there must have been other -- leaving aside the WhatsApps, that
13 there must have been other telephone conversations between the intermediary and
14 the investigator which led to the supply of the video.

15 And that's --

16 MR LAUCCI: Further proof.

17 PRESIDING JUDGE KORNER: [13:08:08] Yeah. And that's what you are saying we
18 should deduce from the gap in time.

19 MR LAUCCI: [13:08:21](Interpretation) More than that. More than that,
20 Madam President.

21 On that precise point, it's not just a gap in time which makes it possible to deduce it.
22 It is the fact that, for one thing, the request for the evidence figuring in the
23 investigative notes does not appear anywhere in the communications that the Office
24 of the Prosecutor submitted for your attention. While they were irreceivable as
25 evidence -- inadmissible as evidence, that means that there have been other

1 communications in which this request was made. And there's no record of it
2 because it wasn't recorded.

3 And secondly, the Office of the Prosecutor claimed on Friday that it had informed the
4 intermediary that it was satisfied with the evidence of the identity of
5 Mr Abd-Al-Rahman, the certificate. And thereto, we don't have anywhere this
6 communication, so there's no record of what was done.

7 PRESIDING JUDGE KORNER: [13:09:25] Sorry, I don't think -- sorry, Mr Nicholls.
8 I don't think they said they informed the intermediary. They just asserted, without
9 any evidence - as I've already pointed out - that they would have been satisfied. But
10 they didn't -- it's not that they say they informed the intermediary.

11 All right. The reason I raise it is this: There's got to be some evidence before us
12 from which we can extrapolate the fact that there must have been a request for this
13 video, or a form of identification, whichever it is. And at the moment there isn't any
14 evidence before us of that fact.

15 MR LAUCCI: [13:10:06](Interpretation) If you would allow me to put a question,
16 Madam President: And if this evidence is not available, what's the situation?

17 PRESIDING JUDGE KORNER: [13:10:14] Well, then, we'd simply go ahead on what
18 we've got. But, as I understand it, you're saying this -- it's not a question this
19 evidence is not available. It's just that you're saying you've taken the decision not to
20 call him.

21 MR LAUCCI: [13:10:26](Interpretation) If you're speaking about this evidence, of
22 course.

23 PRESIDING JUDGE KORNER: [13:10:29] Well, I'm simply saying that -- you are
24 asserting, contrary to the evidence that is before us, that there must have been further
25 communication. And I'm simply saying to you - and it's your decision,

1 obviously - that at the moment there isn't any evidence before us to show that there
2 was any further communication in the interview, other than, as I say, the evidence of
3 the WhatsApp messages, which again you object to.

4 MR LAUCCI: [13:11:01](Interpretation) And perhaps, if you would allow me to
5 insist, the fact that the investigator's note states that evidence with regards to the
6 identity of Mr Abd-Al-Rahman as Ali Kushayb is asked for and this request never
7 appears in the exchanges that you have obtained. And that means that it must
8 necessarily - there is no other option - it must have been communicated in another
9 communication of which we have no trace or record.

10 PRESIDING JUDGE KORNER: [13:11:30] Yes. As I understand it, Mr Nicholls
11 accepts that there's no -- there's no transcript of the phone conversation that was held
12 between the investigator, intermediary.

13 Is there a record that there was a phone conversation?

14 MR NICHOLLS: [13:11:43] It's the 26 December 2019 note that Mr Laucci's been
15 referring to.

16 PRESIDING JUDGE KORNER: [13:11:54] Yes, but that's not a -- that's not a note, is it?
17 I mean, that's not an investigator's note, because it goes on throughout "this is an
18 investigation report". Where's -- where's the note?

19 MR NICHOLLS: [13:12:06] Yeah, I misunderstood you. No, I don't believe there is
20 a note on that call. In our chronology we discussed that this call was made, and it's
21 been put in this report. The phone call was not recorded. This is what we have and
22 that my friend --

23 PRESIDING JUDGE KORNER: [13:12:21] No, but doesn't -- didn't this investigator
24 have to enter somewhere on the system that he had phoned this intermediary? Well,
25 he must have, because otherwise how is the 26 of December note -- so, (Redacted),

1 whoever he may be, must have compiled it from some sort of record.

2 MR NICHOLLS: [13:12:42] Yeah. I will check if there's some note in JADE, or some
3 other indication. But what I'm saying is, it was a -- we don't have a recording of that
4 conversation.

5 PRESIDING JUDGE KORNER: [13:12:53] No, no. I understood that, Mr Nicholls.
6 I understood it from first thing this morning. But there must, I'm assuming, for this
7 schedule to have been compiled by this investigator, a note on the system somewhere
8 as to what happened. And I cannot believe that -- well, I don't know why I said that.
9 I can believe anything. But there should be a record somewhere.

10 MR NICHOLLS: [13:13:22] Yes.

11 PRESIDING JUDGE KORNER: [13:13:23] Anyway, can that be checked.

12 All right. We've run over. So we'll sit again at quarter to 3.

13 THE COURT USHER: [13:13:30] All rise.

14 (Recess taken at 1.13 p.m.)

15 (Upon resuming in open session at 2.44 p.m.)

16 THE COURT USHER: [14:44:40] All rise.

17 Please be seated.

18 PRESIDING JUDGE KORNER: [14:45:02] Apologies to all, having said quarter to 3
19 and then 2.30, because I had forgotten about Saint Nicholas' day.

20 What I will say is, Mr Laucci, the Court would -- I think there's a sort of general - I
21 don't know what it - custom that it rises around 3. So if you can keep it reasonably
22 short, the rest.

23 And, Mr Nicholls, we'll hear you tomorrow morning.

24 I'm assuming there will not be any submissions from the representatives of the
25 victims.

1 MS VON WISTINGHAUSEN: [14:45:40] One session will be enough for us. No,
2 I'm joking. No, there will be -- there will be -- there may be two or three sentences.
3 That's it.

4 PRESIDING JUDGE KORNER: [14:45:49] Okay. Well, I think I should make it clear.
5 I don't think this is something in which the victims have any say. It's a matter of law
6 as between the Prosecution and Defence.

7 MS VON WISTINGHAUSEN: [14:46:04] Well, you know, I'm not going to fight this,
8 but I don't think it's because it's a matter of law that the victims representatives can't
9 say anything, but ...

10 PRESIDING JUDGE KORNER: [14:46:12] Well, if you want to -- yeah, all right. If
11 you want to direct our attention to any legal principles which you say are applicable,
12 then that's -- then you may. But other than that, I don't believe you do.

13 Yes. All right. Mr Laucci.

14 MR LAUCCI: [14:46:27](Interpretation) Thank you, Madam President.

15 I'm going to start with the results of the homework that was done, which consisted of
16 finding the references to the arrest warrant of 2 December 2019 against
17 Mr Abd-Al-Rahman. And this is the filing ICC-02/05-01/20-95 of 13 July 2020. And
18 this is the response of the Office of the Prosecutor to * the application under Article
19 60(2) for interim release. And here I quote paragraph 17 thereof in English. So the
20 Office of the Prosecutor writes:

21 (Speaks English) "According to Sudanese Attorney General Taj al-Ser Ali al-Hibr Ali,
22 the new transitional government issued an arrest warrant for Mr Abd-Al-Rahman on
23 2 December 2019, for charges related to various serious crimes. It is not unlikely that
24 one motivating factor in Mr Abd-Al-Rahman's surrender to the Court was his desire
25 to avoid capture in Sudan and confinement in a prison in Khartoum. In February

1 2020, a spokesman for the government announced that the ruling Sovereign Council
2 had reached an agreement with rebel leaders that included 'the appearance of those
3 who face arrest warrants before the International Criminal Court.'"

4 (Interpretation) So that's the reference of the Office of the Prosecutor that indicates
5 that the Office of the Prosecutor was informed of the Sudanese arrest warrant of
6 2 December 2019 against Mr Abd-Al-Rahman.

7 PRESIDING JUDGE KORNER: [14:49:04] But does it give a date when they were so
8 informed?

9 MR LAUCCI: [14:49:09](Interpretation) There is no precise date. There is a
10 footnote, which is an article, a press article, from the Sudan Tribune of 11 June 2020,
11 but the announcement of the Sovereign Council is from 11 February 2020. So that
12 shows 11 February 2020. For the first part, we don't have an exact date for that.

13 PRESIDING JUDGE KORNER: [14:49:54] Thank you.

14 MR LAUCCI: [14:49:58](Interpretation) So I stopped at the Ongwen judgment and I
15 was explaining why the sentence on which the Prosecutor was basing itself in on
16 Friday had no real relevance. And in particular, where the Office of the Prosecutor
17 claims that it doesn't go into the admissibility of evidence gathered during
18 interactions aiming to establish the identity of a suspect without prior notification
19 under Article 55(2) of the Statute, it is not possible to establish the identity. That's
20 under the Bemba jurisprudence which responds to that.

21 But the Trial Chamber IX in the Ongwen judgment examines the question of the
22 admissibility in evidence of a video of this interview under Article 69(7) of the Statute.
23 It recalls the principle which it finds applicable to the video of the interview with
24 Dominic Ongwen, and that is paragraph 57 of the judgment. But the Chamber
25 rejects the submissions on the grounds that the Defence submits itself on the same

1 video in its evidence and so, as such, it cannot ask for the exclusion. This is
2 paragraph 59. And I'm going to quote a sentence in English:
3 (Speaks English) "The Defence cannot claim that the admission of a video should be
4 precluded because of Article 69(7) of the Statute and at the same time also request that
5 another video recording the same event be recognised as formally submitted."
6 (Interpretation) The Defence therefore submits that the excerpt from the Ongwen
7 judgment upon which the Office of the Prosecutor relies is irrelevant to the issue
8 before this Chamber, and that paragraphs 57 to 59 of the same judgment, instead, on
9 the contrary, confirm the Defence submissions.

10 I will come to the International Criminal Tribunal for the former Yugoslavia. And it
11 examined in the Delalić and others case, or Delalić et al. case, it examined the
12 conditions under which evidence was provided voluntarily and on its own initiative
13 by an accused.

14 In its decision of 2 December 1997, (Speaks English) Decision on --

15 PRESIDING JUDGE KORNER: [14:53:18] Sorry, isn't that September?

16 MR LAUCCI: [14:53:22](Interpretation) September 2000.

17 PRESIDING JUDGE KORNER: [14:53:26] The interpreter misheard you as
18 December.

19 MR LAUCCI: [14:53:29] Okay. Okay.

20 (Interpretation) 2 September 1997, (Speaks English) Decision on Zdravko Mucić's
21 Motion for the Exclusion of Evidence, (Interpretation) in paragraph 42 the Chamber
22 stated, and this is a quote in English:
23 (Speaks English) "The burden of proof of voluntariness or absence of oppressive
24 conduct in obtaining a statement is on the Prosecution. Since these are essential
25 elements of proof fundamental to the admissibility of a statement, the Trial Chamber

1 is of the opinion that the nature of the issue demands for admissibility the most
2 exacting standard consistent with the allegation. Thus, the Prosecution claiming
3 voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is
4 required to prove it convincingly and beyond reasonable doubt."

5 (Interpretation) I'll make a break here, your Honour, to come back to the issue that I
6 allowed myself to put to you a moment ago. And if there isn't any additional
7 evidence or proof of telephone exchanges between December 2019 and June or April
8 2020, what would the answer be? And the answer, the International Criminal
9 Tribunal for Yugoslavia gave the response, the burden of proof of what -- for what is
10 done between December 2019 and June 2020 is incumbent entirely upon the Office of
11 the Prosecutor.

12 PRESIDING JUDGE KORNER: [14:55:47] Sorry, Mr Laucci. That is absolutely right,
13 but going back to the question we discussed before lunch, at the moment, on the face
14 of the evidence from the Office of the Prosecutor, there were no communications
15 between them, except as recorded, as you keep on saying, in the investigator's notes
16 and the conversations we've seen.

17 MR LAUCCI: [14:56:12](Interpretation) The only proof that I know and on which I
18 have to rely, your Honour, is indeed this mention of the request that
19 Mr Abd-Al-Rahman identifies.

20 (Speaks English) "... proof of the identity of the suspect referred to as Kushayb in his
21 email."

22 (Interpretation) That's the only proof of admissibility --

23 PRESIDING JUDGE KORNER: [14:56:38] No. No.

24 MR LAUCCI: [14:56:41](Interpretation) -- this stage.

25 PRESIDING JUDGE KORNER: [14:56:44] Mr Laucci, you keep insisting on that we

1 should draw the conclusion, or that there is sufficient evidence to support a finding
2 by us that there must have been other communications.

3 MR LAUCCI: [14:57:03](Interpretation) No, that's not what I'm asking you to do.
4 What I'm asking is that you examine this issue in light of the evidence which is
5 available and which is admissible. The evidence that's available and which is
6 admissible on this issue, to the best of my knowledge, is limited to these two
7 investigative reports.

8 PRESIDING JUDGE KORNER: [14:57:30] But you keep on asserting that, and I don't
9 understand on what basis you assert that.

10 (a) they're not -- they are -- they're not actually evidence of the investigator's notes at
11 all. They're a summary made by another investigator of documents which he looked
12 at, presumably including all of these records of telephone conversations and, at a very
13 late stage, which is deeply regrettable, the WhatsApp messages on the original
14 investigator's phones.

15 MR LAUCCI: [14:58:05](Interpretation) Very well, your Honour. If that is not
16 evidence, then the burden of proof has not been met and the only possible conclusion,
17 in light of the jurisprudence and the rules of which I've just recalled, is that all the
18 elements which have been met, in the absence of notification under Article 55(2), have
19 to be excluded from the dossier of the proceedings.

20 PRESIDING JUDGE KORNER: [14:58:27] All right. Yeah. Well, that's fairly
21 straightforward.

22 MR LAUCCI: [14:58:32](Interpretation) Oh, one last thing.

23 The consideration of the WhatsApp exchanges and transcripts that were made thereof,
24 I understand your position. You say that we need them to try and understand them
25 and establish what was done, but the Defence regrets that here this is facilitating the

1 burden of proof on the basis of the investigative report.

2 The Office of the Prosecutor had an undertaking that these exchanges would have no
3 evidentiary value and, as such, they should not be before you and to accept to
4 consider them is to facilitate, from our perspective, the burden of proof that the Office
5 of the Prosecutor has.

6 So still at the same decision in the Mucić case, the Chamber spoke about the
7 consequences of the absence of notification, and it applies rule 42 and 95 of the Rules
8 of Procedure and Evidence of the Tribunal, which are the equivalent of our Articles
9 55(2) and 69(7) of the Statute of the Court, in order to rule as follows in paragraphs 43
10 to 44, quote, in English:

11 (Speaks English) "Rule 42 embodies the essential provisions of the right to a fair
12 hearing as enshrined in Article 14(3) of the International Covenant on Civil and
13 Political Rights and Article 6(3)(c) of the European Convention on Human Rights.
14 These are internationally accepted basic and fundamental rights accorded to the
15 individual to enable the enjoyment of a right to a fair hearing during trial. It seems
16 to us extremely difficult for a statement taken in violation of Rule 42 to fall within
17 Rule 95 which protects the integrity of the proceedings by the non-admissibility of
18 evidence obtained by methods which cast substantial doubts on its reliability.
19 "The Trial Chamber is of the opinion that the surest way to protect the integrity of the
20 proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary
21 of the provisions in the Rules, which enable the exclusion of evidence antithetical to
22 and damaging, and thereby protecting the integrity of the proceedings."

23 (Interpretation) So jurisprudence -- I'll say it in French. Jurisprudence, which is
24 equivalent in the International Criminal Tribunal for Rwanda in the case the
25 Prosecutor v. Protais Zigiranyirazo (Speaks English) Decision on the Voir Dire

1 hearing of the Accused's Curriculum Vitae" (Interpretation) * on 29 November 2006.

2 In this case, Protais Zigiranyirazo had, on his own initiative, provided a document

3 entitled "Curriculum Vitae" to the Office of the Prosecutor at a time when he was not

4 being prosecuted by the Tribunal. And the Tribunal, or the Office of the Prosecutor

5 of the Tribunal, had thereafter claimed to use this curriculum vitae as evidence

6 against Protais Zigiranyirazo. And the Chamber notes that Rule 42 of the Rules of

7 Procedure and Evidence applied to Protais Zigiranyirazo, regardless of the fact that

8 he had not yet been formally indicted by the Tribunal, since the Office of the

9 Prosecutor was in possession of information suggesting that he had committed crimes.

10 And that's in paragraph 9 of the decision, 9 November 2006.

11 And the Chamber notes the absence of notification under Rule 42, paragraph 10, and

12 with regards to the remedy to be applied under such circumstances the Chamber

13 relies on Rule 95 and judges:

14 (Speaks English) "... 'in applying the provisions of Rule 95, this Tribunal considers all

15 the relevant circumstances and will only exclude evidence if the integrity of the

16 proceedings would indeed otherwise be seriously damaged'. As stated by the ICTY

17 Chamber in Delalić et al., it is difficult to imagine a statement taken in violation of the

18 fundamental right to the assistance of counsel which would not require its exclusion

19 under Rule 95 as being 'antithetical to, and would seriously damage, the integrity of

20 the proceedings'."

21 (Interpretation) Obviously, the curriculum vitae was excluded from evidence.

22 And I would hereby clarify that, yes, I made an error a moment ago in the summary

23 of the Zigiranyirazo case. The CV wasn't provided on the initiative of Protais

24 Zigiranyirazo, but it had been provided at the request of the investigator of the

25 Tribunal. Thank you for the correction.

1 I'll go -- I'll skip some of the other jurisprudence to make more progress. I'll come to
2 the analysis and conclusions.

3 In light of what precedes, the Defence ask the Chamber to take into account the
4 violation of Article 55(2) of the Statute by the Office of the Prosecutor between
5 26 December 2019 and the month of June 2020.

6 The *actus reus* of this violation is constituted by the lack of notification of the rights of
7 Mr Abd-Al-Rahman from the first contact established through the intermediary
8 P-0869. Instead of waiting until April 2020 to contact him directly, the Office of the
9 Prosecutor should have established direct contact and without delay, even by
10 telephone, and notified him of his rights under Article 55(2) of the Statute. By failing
11 to do so, the Office of the Prosecutor failed to comply with its obligations under the
12 above-mentioned basic text of the Court and the Office of the Prosecutor.

13 Article 55(2) of the Statute was applicable when, firstly, Mr Abd-Al-Rahman was a
14 suspect before the Court; and, secondly, when the Office of the Prosecutor asked him
15 to provide information identifying himself as "the suspect Kushayb", while the
16 burden of proof of this alias was upon the Prosecutor.

17 Where it concerns the *mens rea*, it's difficult to understand whether the absence of
18 notification under 55(2) of the Statute from December 2019 constituted on the part of
19 the Prosecutor mere negligence or a deliberate breach of its obligations. For the sake
20 of completeness, the Defence will quickly explore this issue, but it submits that it is
21 without consequence with regards to the materiality of the violation and the
22 obligation to exclude the result from the case file.

23 In its response of Friday, the Office of the Prosecutor claims that it was unaware until
24 the initial appearance of Mr Abd-Al-Rahman on 15 June 2020 that he intended to
25 challenge the alias -- or his alias Ali Kushayb, and that it could therefore not

1 appreciate the risk involved in verifying his identify in the absence of notification
2 under Article 55(2) of the Statute. This justification must be rejected. Even if
3 Mr Abd-Al-Rahman did contest for the first time that he was using the alias "Ali
4 Kushayb" at the initial appearance, which was his first opportunity so to do, the
5 Office of the Prosecutor knew that Ali Kushayb was an alias and knew that it was
6 incumbent upon him to prove it insofar as all of the crimes alleged against
7 Mr Abd-Al-Rahman would have been committed by him acting under that alias
8 instead of his civil status.

9 The evidence that the OTP was well aware before the initial appearance of
10 Mr Abd-Al-Rahman that the burden of proof for the alias was on the Prosecutor is
11 available in the case file. During the questioning of the witnesses, the Office of the
12 Prosecutor questioned witnesses and asked them for proof of the identity between
13 Mr Abd-Al-Rahman and the alias Ali Kushayb. The Office of the Prosecutor relied
14 on this evidence in its submissions ICC-02/05-01/20-224 of 7 December 2020 before
15 Pre-Trial Chamber II which asked it to present evidence of the alias.

16 And in paragraph 5 of its submission, the Office of the Prosecutor relies on Witness
17 P-117, who ultimately will not appear at all in the trial and in whose written
18 statements of June 2007 stated that the real name of Ali Kushayb --

19 PRESIDING JUDGE KORNER: [15:10:54] I don't know whether you're on -- back on
20 in December 2020, or do you mean the submissions from last Friday?

21 MR LAUCCI: [15:11:01](Interpretation) No, your Honour, I am referring to the
22 evidence used in December 2020 by the Office of the Prosecutor to establish the alias.
23 And so I'll go through it very quickly.

24 The Prosecutor relies on the Witness P-117 and his written statement which comes
25 from June 2017. And he is asked to say that Ali Kushayb is Ali Muhammad Ali

1 Abd-Al-Rahman.

2 And in paragraph 5(b) the Office of the Prosecutor relies on Witness P-769, who
3 testified before the Chamber from 11 to 15 November. In his written statements of
4 July to August 2018 and October 2019, the witness responds to the questions of the
5 investigators: "Ali Muhammad Ali Abd-Al-Rahman is known as Ali Kushayb."

6 In paragraph 6 --

7 PRESIDING JUDGE KORNER: [15:12:15] No. Pause. I'm sure by December '20, is
8 after your initial appearance, and this is all the pretrial proceedings. I accept what
9 you say. You are arguing that, as part of the general necessity to prove the case, they
10 would have to prove that Al-Rahman was in fact Ali Kushayb. But, as I understand
11 it, you do accept that at the stage when all these conversations are going on, or all
12 these arrangements, at no stage could the Office of the Prosecutor have known that
13 this was the major issue, if you like, the overriding issue.

14 MR LAUCCI: [15:13:06](Interpretation) I have difficulty in minimising the
15 importance of this issue, your Honour. But it's possible that the contestation of the
16 alias by Mr Abd-Al-Rahman during his initial appearance made him become -- or
17 made the Office of the Prosecutor become even more aware of the importance thereof.
18 And it's all the more possible -- or all the more probable that we were able to see
19 within this trial that there is a significant majority of witnesses who have spoken on
20 the alias, and they are witnesses who have been contacted and heard by the Office of
21 the Prosecutor after the confirmation of charges.

22 PRESIDING JUDGE KORNER: [15:13:57] Absolutely. So the concentration, apart
23 from other aspects, has been on showing that, because of what you said at the initial
24 appearance - I say "you", Mr Abd-Al-Rahman said, or you did, I suppose - that this
25 was an issue, he was denying that he was in fact Ali Kushayb.

1 MR LAUCCI: [15:14:21](Interpretation) In fact it was him.
2 So, briefly, because you've understood what I'm trying to do, the Prosecutor based
3 themselves on P-123 from April 2007 and 131 from September 2007. And we have
4 the transcript of the interview, not only the statement. And this is on page
5 DAR-OTP-0158-1094. We see the specific questions asked by the investigator and
6 the replies. And P-131 is asked to repeat the name that he claims that he saw on a
7 document, "Ali Muhammad Ali Abd-Al-Rahman Kushayb". So from September
8 2007, the OTP is clear about the importance of this information.
9 Same thing for P-129, statement July 2007; and 12, from January 2007.
10 So the OTP knew the importance of establishing the identity between
11 Abd-Al-Rahman and the alias "Ali Kushayb" before the initial appearance in June
12 2020. And also knew before December 2019 that it was up to them to prove the
13 evidence of the alias.
14 To be absolutely complete and taking this *ad absurdum*, if the Prosecutor had not
15 known, then the naivety on this point could not have been the justification for
16 admitting into evidence elements, if he'd had naive witnesses could only have been
17 obtained after advising them of the -- of Article 55(2).
18 * However, on 15 June 2020, once its burden of proof for the alias was revealed during
19 the initial appearance, the question of the identity of Mr Abd-Al-Rahman and Ali
20 Kushayb was revealed to be a key element in the case, and it was therefore important
21 that there should be no irregularity in the obtaining of this evidence. So the OTP
22 should have taken the measures of its negligence and should have renounced using
23 evidence that it should never have obtained without having advised the suspect of
24 the rights under 55(2).
25 But nevertheless, despite these failures and despite not having put in the telephone

1 conversations, there was a major deontological error by the Prosecution relating to
2 section 27(d) of the Code of Conduct. Instead of opposing and confronting, as set
3 out in the Code, the OTP tries to benefit from its negligence and its contravention of
4 Article 55(2) and Rule 41 of the Rules of the OTP, and sections 69(b) and 69(d) of the
5 Code of Conduct.

6 I will leave that there, but the OTP has at least been negligent by not advising of the
7 Rules of Article 55(2). So --

8 THE INTERPRETER: [15:19:21] I'm sorry. Could you ask Mr Laucci to repeat that
9 last bit. I've lost him. I do apologise.

10 PRESIDING JUDGE KORNER: [15:19:30] I'm not -- I'm not surprised.

11 Mr Laucci, you are going at a fair speed again. The interpreters lost you.

12 MR LAUCCI: [15:19:49](Interpretation) I do apologise, and I apologise also to the
13 interpreters. I will pick this up again.

14 I was saying that the OTP has at the very least been negligent by not advising under
15 55(2). It is not necessary to go further into the demonstration of the absence of
16 deliberation or the bad faith of the OTP. The negligence is sufficient to render the
17 video and the telephone conversations inadmissible.

18 This morning, as I said in the certain elements of the OTP, I tried to work out why
19 there had been no advisement under 55(2). I measure the risk that exist at the time
20 that this advice once given -- this notification once given could have meant that
21 Mr Abd-Al-Rahman disappeared into the bush, as it were, and reconsidered his
22 decision to cooperate with the Court. The OTP had thus understandable reasons to
23 fear that that would be the case. So the stone was not thrown.

24 However, once again, and whatever the reasons may have been, because the video
25 and the telephone conversations were not preceded by a notification under Article

1 55(2), the consequence is that the Prosecutor should have renounced their use. And
2 so, if there has been any mistake made by the OTP, it is that they claimed that they
3 wished to submit these later when they had committed themselves to not submitting
4 this evidence.

5 The consequence of this contravention of 69(7) of the Statute, which explains this to us,
6 says that the video and the telephone conversations should be excluded from the case
7 files. I can refer to the four previously quoted items of jurisprudence of the Court.
8 And I will conclude by saying that the Defence submits that all the conditions that
9 lead to excluding the video and the phone conversations have been shown -- have
10 been brought together.

11 There is one the investigator which contravenes the internationally agreed
12 agreements and the two alternative conditions, (a) and (b), whereas the article says (a)
13 or (b), but I would insist that (a) and (b) have been verified here.

14 Firstly --

15 PRESIDING JUDGE KORNER: [15:24:06] I don't think that can be -- sorry, I don't
16 think that can be right.

17 MR LAUCCI: [15:24:08] Ah, Sorry.

18 PRESIDING JUDGE KORNER: [15:24:09] No, I'm sorry. But I think the
19 interpretation is ...

20 "Article says (a) or (b) have been verified here", what does that mean? Do you mean
21 they've been contravened?

22 MR LAUCCI: [15:24:30](Interpretation) Yes, yes. It's the conditions of (a) and (b)
23 for the exclusion, which have been verified, and therefore, both have been observed,
24 both contraventions have been observed.

25 Also, the absence of the notification under Article 55(2) of the Statute immediately

1 calls into question the credibility of the video recorded by Mr Abd-Al-Rahman solely
2 for the purpose of placing himself under the protection of the Court and to put an end
3 to a difficult and dangerous situation.

4 As I said earlier, the OTP claims that the conditions of Mr Abd-Al-Rahman * in March
5 2020 are not relevant because it resulted from these conditions that
6 Mr Abd-Al-Rahman felt the need to put himself under the protection of the Court,
7 which was communicated to the OTP in the notes we have. And in as far as the OTP
8 only agreed to take them into their protection provided he agreed he was suspect Ali
9 Kushayb, there was therefore a constraint which removes all credibility from the
10 video and the telephone conversations.

11 MR NICHOLLS: [15:26:09] I'm sorry to stand up right at the end. It's a complete
12 misstatement that has no basis in anything this Court --

13 PRESIDING JUDGE KORNER: [15:26:12] Mr Nicholls, let Mr Laucci finish. You'll
14 get your chance tomorrow morning.

15 Yes, go on, Mr Laucci, finish.

16 MR LAUCCI: [15:26:21](Interpretation) And for point (b), the admission of this
17 video as evidence would gravely compromise the integrity of the procedure and the
18 respect of the right to a fair trial in as far as the fundamental guarantee of 55(2) was
19 not respected and where the Prosecution would benefit from this contravention for
20 the -- one of the items of evidence in the case file which he would have difficulty in
21 maintaining.

22 Therefore, we would -- the Defence would therefore ask the Chamber to exclude the
23 video and the telephone communications recorded between 26 December 2019 and
24 June 2020 from the case dossier.

25 PRESIDING JUDGE KORNER: [15:27:28] Okay. Mr Laucci, one question I asked

1 you this morning you said you'd deal with, and I don't think you have. You asserted
2 at page 12, line 19:

3 "The Defence accepts that verifying the identity of an individual is normal and fully
4 acceptable, but must be limited to the identity, that is to say, the civil status of the
5 person, or his first and last name, and must not include any other question relating to
6 the status of a subject or the existence of an alias."

7 And I asked you what the basis of that assertion was, namely, that to establish the
8 identity of a person, it was limited to what you call his civil status. I'm not sure what
9 that means, but never mind, I take it first and second name, date of birth, that sort of
10 thing. What's the basis for making that assertion?

11 MR LAUCCI: [15:28:41](Interpretation) So to reply to your question, your Honour, I
12 would refer you again to the Bemba decision.

13 PRESIDING JUDGE KORNER: [15:28:54] It's the Bemba decision again. Okay,
14 thank you. All right.

15 Okay. Yes. Thank you, Mr Laucci. Well, you have the right to respond, in any
16 event, to anything the Prosecution say later. But you've completed your submissions,
17 have you?

18 MR LAUCCI: [15:29:14](Interpretation) I'm very pleased to be able to confirm that I
19 have.

20 PRESIDING JUDGE KORNER: [15:29:18] Right.

21 Mr Nicholls, as I said, we'll hear you tomorrow morning. However, I would like to
22 know the status of the investigator. It is a wholly, yet again a wholly inadequate
23 medical report produced, I understand, by the doctor who's attached to this Court.
24 If the Court asks for a medical certificate, it is to contain the actual nature of the illness
25 as opposed to, (a), "he is not fit." However, it goes on to say: "The duration of the

1 serious medical condition is temporary and he may be able to testify in the future, but
2 not before the end of December."

3 Is he going to be able to testify in January?

4 MR NICHOLLS: [15:30:11] I honestly don't know, your Honour. The way medical
5 information inside this Court, my experience, is that when a staff member is out sick
6 on my team, I don't know, unless the staff members chooses to tell me on their own, I
7 have no idea what -- what the issue is, and the medical unit will not tell us. And if I
8 ask the medical unit when a staff member may be back - I'm not speaking about this
9 particular person - I'll sometimes get a "well, we can tell you a rough idea", "we
10 won't", or "we'll address". So I don't know what the medical condition is. And if I
11 ask for more detail, I am sure that I won't get it without an order or something of that
12 nature.

13 I contacted them to ask for a medical certificate and said it was necessary, and this is
14 what I got. I'll say I did not insist on knowing the nature or -- because I was sure
15 they would not say that and I don't think they will, at least not to me.

16 So I don't know if that person will be available January. I certainly hope so. It
17 looks hopeful from that, but I honestly can't answer your question.

18 PRESIDING JUDGE KORNER: [15:31:36] I'm getting to the stage where I'm going to
19 order the various doctors attached to the Court to appear, to explain to them that
20 people who are, certainly as far as accused are concerned, before the Court and those
21 who have an effect on the progress of justice, that overrides any kind of duty they feel
22 that they have to not name a medical condition.

23 I think the -- the answer is, if somebody can contact this investigator, ask if he has an
24 objection, that's the first thing. If not the exact nature of his illness, what it is that's
25 causing the problem. And also the doctor to say whether or not, if we hear him on

1 16 January, he will be able to give evidence. And I want a response that, if the
2 answer is "no", why not?

3 It is against all interests of justice that we should be frustrated at every turn by the
4 so-called medical rules. It is important that if there is a problem we know exactly
5 what the problem is.

6 It may well be -- we'll hear you tomorrow, but it may well be that we will adjourn
7 final determination until such time as -- well, at least until 16 January, when we know
8 whether this investigator is able to give evidence. Failing him, I don't know how
9 much dealings the other investigator who's named had with this, but he'd better make
10 a statement in anticipation that we may want to hear from him.

11 MR NICHOLLS: [15:33:54] Yes, your Honour. Well, I will check on the investigator
12 who is out first, who is -- to say the one who had these direct communications. He's
13 obviously better placed as far as (Overlapping speakers)

14 PRESIDING JUDGE KORNER: [15:34:08] Well, yeah, I mean he's the only one who
15 can deal with, firstly, how it is. I take it over lunch you did not find a record of --

16 MR NICHOLLS: [15:34:17] No, we were not able to.

17 PRESIDING JUDGE KORNER: [15:34:19] Right. Well, I mean, that's the first
18 question. Why wasn't the very first telephone conversation either noted somewhere?
19 I just don't understand how the other investigator was able to establish there was
20 such a conversation.

21 MR NICHOLLS: [15:34:32] I believe that by -- by speaking with the first investigator
22 and putting the report together.

23 PRESIDING JUDGE KORNER: [15:34:41] Well, that makes his condition even
24 more -- or the reason why he can't appear even more interesting, if I may say so.

25 MR NICHOLLS: [15:34:50] These are years ago, your Honour. These are not recent,

1 these reports. If that's what you're --

2 PRESIDING JUDGE KORNER: I am, yes.

3 MR NICHOLLS: [15:34:55] I mean, they're from a -- those are not, you know, in the
4 last few months.

5 PRESIDING JUDGE KORNER: [15:35:02] Well, when was it --

6 MR NICHOLLS: [15:35:09] The first one is December 2020 and the other one is 26
7 February 2021. Those are the reports that Mr Laucci has been --

8 PRESIDING JUDGE KORNER: [15:35:18] Oh, I see.

9 MR NICHOLLS: [15:35:20] Has been citing to.

10 PRESIDING JUDGE KORNER: [15:35:22] Which is the first one?

11 MR NICHOLLS: [15:35:24] There's a briefer one, DAR-OTP-0215-7063, which is from
12 7 December '20.

13 PRESIDING JUDGE KORNER: [15:35:37] Oh, right. So in February '21, are you
14 saying this investigator was -- oh, yes, he was. Anyhow, we know that because he
15 was taking statements. Yes, all right.

16 All right. Second thing is, why weren't the WhatsApp messages -- we did ask for an
17 explanation in your response, but we didn't get one, other than that's when they were
18 first looked at in October/November. Why is that?

19 MR NICHOLLS: [15:36:07] The -- we dealt with that in our --

20 PRESIDING JUDGE KORNER: [15:36:09] I don't think you did. You said there was
21 only a ...

22 MR NICHOLLS: [15:36:11] It's in footnote 11, your Honours. And we -- I mean,
23 essentially, we disclosed them after the request, and --

24 PRESIDING JUDGE KORNER: [15:36:21] Yes, but do I take it nobody looked at
25 them? Yes, exactly. So what happened before that? Twenty-fourth and

1 28 November, following -- you've known since day one of this case, if not before, that
2 there's going to be an argument. Why weren't the WhatsApp messages disclosed
3 then?

4 MR NICHOLLS: [15:36:46] Well, the -- the challenge to the video came up at the
5 opening, in April of --

6 PRESIDING JUDGE KORNER: [15:36:51] No, it came up before. Well, I mean --

7 MR NICHOLLS: [15:36:54] But that's when we tried to use it and that's when
8 the -- we got the first filing saying, "We can't believe you want to use this in
9 evidence." So that's where it -- we got that issue. And --

10 PRESIDING JUDGE KORNER: [15:37:07] Well, why didn't anybody at that stage
11 check?

12 MR NICHOLLS: [15:37:15] Well, we should have pulled those out sooner,
13 your Honour. I mean, as I say, the -- when this hearing got -- got set up, the primary
14 investigator is already on sick leave. He has been on leave a long time. And we got
15 them from him.

16 There is not a -- a -- I can't give you a better explanation than that. That once -- once
17 we got the request, we pulled them out and we disclosed them. And they -- they are
18 obviously relevant. And once we got the, you know, the filing, we got everything
19 together and disclosed it.

20 PRESIDING JUDGE KORNER: [15:37:52] Okay. Well, one of the things which I
21 think we'll want you to address us on tomorrow is why you say the conversations, in
22 the light of the fact that they are clearly marked "not to be used in evidence", are now
23 admissible.

24 MR NICHOLLS: [15:38:14] I can do that even now, your Honour, or tomorrow.

25 PRESIDING JUDGE KORNER: [15:38:17] No. We'll deal with it all in one go

1 tomorrow. We've already gone well beyond the 3 o'clock Saint Nicholas deadline.

2 Yes. All right. So 9.30 tomorrow morning, please.

3 As a matter of interest, are you going to take more than a session, do you think, in
4 response, Mr Nicholls?

5 MR NICHOLLS: [15:38:38] No, not unless there are a lot of questions and back and
6 forth. And I'll say I'm going to concentrate mainly on the facts and the outline of
7 what happened here, because I don't think the law is that complicated regarding 55(2).
8 So I --

9 PRESIDING JUDGE KORNER: [15:38:56] I agree.

10 MR NICHOLLS: [15:38:56] -- I will be prepared for questions, but I plan to try to
11 answer the factual -- the facts which we say show that there was no violation, bad
12 faith, or any other sharp practices.

13 PRESIDING JUDGE KORNER: [15:39:11] Yeah. Well, I mean, I tried to say to
14 Mr Laucci that we're well aware of the almost universal provisions as regard
15 interviewing a suspect. I suppose the real question is, do these -- does the request
16 for identification amount to a video -- does the request for identification amount to an
17 interview? Do the telephone conversations and the WhatsApp communications
18 amount to an interview with the accused? And then, as you say, factual matters.

19 MR NICHOLLS: [15:39:57] Yes. I mean, I think that's exactly it. The question is,
20 are we in questioning within the meaning of 55(2) where the warning needs to be
21 given?

22 PRESIDING JUDGE KORNER: [15:40:06] Correct.

23 Okay. Yes.

24 THE COURT USHER: [15:40:12] All rise.

25 (The hearing ends in open session at 3.40 p.m.)