

Trial Hearing  
WITNESS: DAR-D31-P-0016

(Open Session)

ICC-02/05-01/20

1 International Criminal Court  
2 Trial Chamber I  
3 Situation: Darfur, Sudan  
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali  
5 Kushayb") - ICC-02/05-01/20  
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and Judge Althea Violet  
7 Alexis-Windsor (absent pursuant to Rule 140 *bis* of the Rules of Procedure and  
8 Evidence)  
9 Trial Hearing - Courtroom 2  
10 Wednesday, 25 October 2023  
11 (The hearing starts in open session at 9.31 a.m.)  
12 THE COURT USHER: [9:31:00] All rise.  
13 The International Criminal Court is now in session.  
14 Please be seated.  
15 PRESIDING JUDGE KORNER: [9:31:14] Yes, good morning, all.  
16 We'll start in open session and then, once the introductions have taken place, we'll go  
17 straight into private session.  
18 Yes. Start again with the Defence. Is it the same as yesterday and the day before?  
19 MR LAUCCI: [9:31:36] Yes, plus Madam Audrey Mateo, our legal adviser.  
20 PRESIDING JUDGE KORNER: [9:31:44] Right. Thank you.  
21 Yes, Prosecution, same as yesterday?  
22 MR NICHOLLS: [9:31:47] Good morning, Madam President. Good morning  
23 everybody in the courtroom, your Honour. Yes, same as yesterday.  
24 PRESIDING JUDGE KORNER: [9:31:52] And Ms Von Wistinghausen, you're slightly  
25 less this morning.

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1 MS VON WISTINGHAUSEN: [9:31:54] For us it's a minus. Yes, good morning,  
2 Madam President. Good morning, your Honour. Good morning, colleagues.  
3 Same as yesterday, minus our case manager, Saif Kassis. So we are just two this  
4 morning. Thank you.

5 PRESIDING JUDGE KORNER: [9:32:07] All right.

6 Yes. Good morning to you, sir. And we will go straight in to private session,  
7 please.

8 (Private session at 9.32 a.m.)

9 THE COURT OFFICER: [9:32:29] We're in private session, Madam President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

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1 (Open session at 12.11 p.m.)

2 THE COURT OFFICER: [12:11:06] We are in open session, Madam President.

3 PRESIDING JUDGE KORNER: [12:11:09] Yes, right. Now, Mr Edwards, you are  
4 submitting that various documents from which the Prosecution wish to cross-examine  
5 the witness should not be put?

6 MR EDWARDS: [12:11:15] Yes.

7 PRESIDING JUDGE KORNER: [12:11:16] Right.

8 MR EDWARDS: [12:11:17] And if I can go from the general, to the principled, to the  
9 concrete, dealing specifically with some of the documents on the Prosecution's list,  
10 they relate to -- on the face of it -- all right, perhaps I can take them, take item 7,  
11 Booklet on Implementation of IHL, and item 15 and 16.

12 PRESIDING JUDGE KORNER: [12:12:16] (Microphone not activated)

13 THE INTERPRETER: [12:12:18] Mic, please, your Honour.

14 PRESIDING JUDGE KORNER: [12:12:20] Sorry. Is 15 the original and 16 the  
15 translation?

16 MR EDWARDS: [12:12:28] Yes. The reason why I group these two documents  
17 together - or three documents, but one is a translation of one of the documents - is  
18 that these are both documents that were on the Prosecution's list of evidence, but  
19 which, for whatever reason, they chose not to seek to submit -- to be recognised as  
20 formally submitted.

21 The document at 15 and 16 entitled "The Law of Armed Conflict" was specifically  
22 associated with a Prosecution witness, P-0103. This was a witness that the  
23 Prosecution sought to have admitted under Rule 68(3). This was in their tenth  
24 application to seek to introduce evidence under Rule 68(3), and your Honours ruled  
25 in your decision number 660 of 4 April 2022, that P-0103 was a witness that provided

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1 unique and detailed evidence and for various reasons ruled that, no, this is a witness  
2 whose evidence merited being heard entirely viva voce.  
3 So, 0103 turns into a viva-voce witness. The Prosecution relied on 0103 in numerous  
4 other Rule 68 motions as amounting to a corroborating witness because of his position,  
5 because of the evidence that he could give. But then, the Prosecution, by way of an  
6 email dated 18 November of last year, indicated that they were withdrawing him.  
7 The document at 15 and 16 -- the "Law of Armed Conflict" document -- it's a book,  
8 actually, was not then sought to be introduced by way of a bar table motion or  
9 through any other witness, and so when the Prosecution closed its case, that  
10 document simply wasn't in the case file.  
11 Now, were the Prosecution to try and suggest now, well, this whole issue of  
12 international humanitarian law and how it is taught and how it is applied in the  
13 Sudanese Armed Forces, its existence within the framework of armed forces law in  
14 Sudan at the relevant time, is only a subject that has recently become clear to us, it's  
15 only something that the Defence has recently raised as a point that we now have to  
16 deal with. If that is the Prosecution case, it simply doesn't stand up to scrutiny  
17 PRESIDING JUDGE KORNER: [12:16:18] No, sorry, I see -- you're anticipating the  
18 Prosecution's argument, because it's been clear throughout that you've been saying  
19 that no training in IHL was given to lower ranks anyhow.  
20 MR EDWARDS: [12:16:37] Exactly. And not just before your Honour's court -- not  
21 before your Honour's Chamber, but Mr Laucci made the point clear beyond any  
22 doubt at the confirmation of charges hearing, back on 26 May of 2021, transcript  
23 number 9, and I'm just going to quote for a moment from page 5 of that transcript.  
24 Mr Laucci says this:  
25 "And on that basis, and that's the real point of departure of my presentation this

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1 morning, we have no information, no start of evidence that either Mr Abd-Al-Rahman  
2 or Ali Kushayb, or both of them, followed the slightest military training, or any  
3 training or awareness raising with respect to international humanitarian law [...] or [...]  
4 any awareness raising in the principles of the distinction between combatants and  
5 non-combatants."

6 And, in fact, if your Honours were to read further down in the transcript from the  
7 confirmation of charges hearing, you will see that Mr Laucci relied on an expert  
8 report, essentially, relating to the place of IHL in Sudan. I think it was a fairly short  
9 report prepared by someone that we are all familiar with, Linda Murnane.  
10 So there can be absolutely no basis for any Prosecution argument that, well, this is  
11 a new matter that we didn't know anything about. So, so much for those  
12 documents --

13 PRESIDING JUDGE KORNER: [12:18:48] Well, just a moment. So the witness with  
14 whom they were supposed to be introduced is the one that they, in the end, did not  
15 call.

16 MR EDWARDS: [12:18:55] Yes.

17 PRESIDING JUDGE KORNER: [12:18:56] So that opportunity was gone. But you're  
18 saying, are you, that they should have put it into -- sorry, they should have sought its  
19 admittance through the bar table motion.

20 MR EDWARDS: [12:19:11] Yes, if they were -- they ought to have known that they  
21 were going to have to deal with this Defence argument, so to pre-empt --

22 PRESIDING JUDGE KORNER: [12:19:26] Sorry, I'll just stop you there, Mr Edwards.  
23 At that stage, they have not the faintest idea who you are calling as a Defence witness.

24 MR EDWARDS: [12:19:31] It doesn't matter. It doesn't matter in the slightest bit.  
25 They knew that it was going to be a point taken by the Defence -- it was going to be

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1 a fundamental point to be taken by the Defence. They should have introduced  
2 the -- whatever evidence they have about the place of IHL in Sudanese Armed Forces  
3 law during the course of their case.

4 PRESIDING JUDGE KORNER: [12:19:55] Okay.

5 MR EDWARDS: [12:19:56] They ought to have got their house into order, they  
6 ought to have had material on the record in the case file in order to be able to deal  
7 with the point when the Defence in evidence raises it. Because they could -- because  
8 they could not have said, "We didn't realise that this is going to be raised".

9 PRESIDING JUDGE KORNER: [12:20:19] Well, yes, it's raised as part of  
10 your -- certainly it was raised and it has been clear, as you say, right from the  
11 beginning, that that was part of what you were arguing. But without a witness to  
12 explain these documents, how were they supposed to have put them in? Simply in  
13 advance of the fact that you might have called one?

14 MR EDWARDS: [12:20:54] Your Honour, the Prosecution sought admission of all  
15 kinds of documents by the bar table that they didn't pretend for a moment required  
16 the intervention of a Prosecution witness to get in.

17 PRESIDING JUDGE KORNER: [12:21:12] Is it --

18 MR EDWARDS: [12:21:12] That was -- that was a major argument in the bar table  
19 motion, we don't need -- we don't need to call witnesses to get a large number of these  
20 documents in and the case law of this Court does not require us to bring  
21 documentation in, bring exhibits in, through a witness. We can do it through the bar  
22 table and it saves time, and dah, dah, dah, dah, dah, you know, the standard  
23 arguments.

24 So in answer to your Honour's --

25 PRESIDING JUDGE KORNER: [12:21:52] Is it also --

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1 MR EDWARDS: [12:21:53] Forgive me, but just in answer to your Honour's question,  
2 that they could have done it via the bar table, because they did it with a bunch of  
3 other documents.

4 PRESIDING JUDGE KORNER: [12:21:58] Is it also your contention that they may  
5 not cross-examine this witness about the contents of the documents even if the  
6 documents themselves don't go in?

7 MR EDWARDS: [12:22:08] It would be my contention that they can't even use these  
8 documents.

9 PRESIDING JUDGE KORNER: [12:22:14] Why?

10 MR EDWARDS: [12:22:15] For the same reasons that -- for the same reasons that I  
11 have alluded to, that it's artificial to create a distinction between documents that can  
12 be used with a witness in cross-examination and documents that then go in as  
13 exhibits -- qua exhibits for the consideration of the Trial Chamber in due course.

14 PRESIDING JUDGE KORNER: [12:22:39] But, Mr Edwards, one of the things about  
15 this witness which has been quite odd, actually, is that you didn't seek to put him  
16 forward as an expert but, as I remarked yesterday, {ICR: (Redacted)  
17 (Redacted)} and, is it your

18 contention that the Prosecution should not be allowed to explore with him the various  
19 manuals that were in existence at the time - one of which appears to be a Sandhurst  
20 manual translated into Arabic - to test that knowledge or to assist in the Court's  
21 determination? Is that your argument?

22 MR EDWARDS: [12:23:39] Well, whilst -- and I repeat myself -- whilst I certainly  
23 can't say that there is a blanket prohibition, when it comes to documents that have  
24 never been disclosed to the Defence before --

25 PRESIDING JUDGE KORNER: [12:23:58] But you said that these have been

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1 disclosed; they were going to go in with the witness who disappeared, or who wasn't  
2 called?

3 MR EDWARDS: [12:24:05] No, no, the law of -- the law of armed conflict document,  
4 which is a tome, is originally an Arabic document -- it's an Arabic book, I think.

5 PRESIDING JUDGE KORNER: [12:24:22] I'm sorry, which one are you looking at?  
6 The booklet on the implementation?

7 MR EDWARDS: [12:24:31] No.

8 PRESIDING JUDGE KORNER: [12:24:32] Which one is it, then?

9 MR EDWARDS: [12:24:33] It's number 15, DAR-OTP-0107 --

10 PRESIDING JUDGE KORNER: [12:24:39] I've got 16, I've haven't got 15.

11 MR EDWARDS: [12:24:44] Well, 15 is the Sudanese original and 16 is the translation  
12 of that.

13 PRESIDING JUDGE KORNER: [12:24:49] Right.

14 MR EDWARDS: [12:24:51] Is that the document you say comes from Sandhurst?

15 PRESIDING JUDGE KORNER: [12:24:54] Yes, I thought it was Sandhurst, yes.

16 Sorry, (indiscernible). Sorry, you are quite right. Yes, 16, okay, that's never been  
17 disclosed to you?

18 MR EDWARDS: [12:25:03] No, that one has been disclosed --

19 PRESIDING JUDGE KORNER: [12:25:07] Right. Which one hasn't then? The  
20 booklet on the implementation?

21 MR EDWARDS: [12:25:19] The Booklet on the Implementation of International  
22 Humanitarian Law was on the list of exhibits, but never admitted.

23 PRESIDING JUDGE KORNER: [12:25:26] Okay. So that's disclosed as well.

24 MR EDWARDS: [12:25:28] Yes.

25 PRESIDING JUDGE KORNER: [12:25:29] What hasn't been disclosed before.

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- 1 MR EDWARDS: [12:25:31] The documents that weren't on the original list of  
2 evidence is -- I'll just say the English translation rather than -- it's the document at 10.  
3 PRESIDING JUDGE KORNER: [12:25:51] I'm sorry, I thought for the moment we  
4 were simply sticking to these two tomes, if you like, that you were addressing us on.  
5 MR EDWARDS: [12:26:01] Yes.  
6 PRESIDING JUDGE KORNER: [12:26:01] Right.  
7 MR EDWARDS: [12:26:03] We'll stick with --  
8 PRESIDING JUDGE KORNER: [12:26:04] But those two have been disclosed to you  
9 and were originally on the Prosecution list of exhibits?  
10 MR EDWARDS: [12:26:07] Correct, yes.  
11 PRESIDING JUDGE KORNER: [12:26:08] All right.  
12 MR EDWARDS: [12:26:10] Yes, and we were anticipating dealing with them when  
13 P-103 comes to testify. But we simply couldn't because the Prosecution chose not to  
14 call him.  
15 PRESIDING JUDGE KORNER: [12:26:25] Yes, okay.  
16 MR EDWARDS: [12:26:26] But in terms of the -- so I have addressed you in terms of  
17 the documents that were on the list of evidence, but never submitted for -- or never  
18 admitted, but then in terms of documents that were not on the list of evidence - and, it  
19 follows, obviously, never submitted by the Prosecution - are the documents at lines  
20 8 --  
21 PRESIDING JUDGE KORNER: [12:27:02] The press article?  
22 MR EDWARDS: [12:27:05] Yes. 10, 12, 14, 17, 27 and 37. And apart from the last  
23 two, at 27 and 37, being the English translation, the other documents we received for  
24 the first time yesterday.  
25 PRESIDING JUDGE KORNER: [12:27:55] Sorry, can you just list those for me?

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- 1 MR EDWARDS: [12:28:00] Yes, 8, 10, 12, 14 and 17.
- 2 PRESIDING JUDGE KORNER: [12:28:12] Okay, so --
- 3 MR EDWARDS: [12:28:14] I'm --
- 4 PRESIDING JUDGE KORNER: [12:28:16] Those you've never had disclosed to you  
5 before.
- 6 MR EDWARDS: [12:28:20] Yes.
- 7 PRESIDING JUDGE KORNER: [12:28:21] 27 and 37 you have, but they weren't on  
8 the Prosecution's list.
- 9 MR EDWARDS: [12:28:25] Correct. And really, when -- all of these documents in  
10 fact --
- 11 PRESIDING JUDGE KORNER: [12:28:27] So this is --
- 12 MR EDWARDS: [12:28:28] I was about to say -- I was about to say all of these  
13 documents deal with the IHL in Sudan point, they don't -- many do, but in terms of  
14 the ones that don't deal with our argument about IHL in Sudan --
- 15 PRESIDING JUDGE KORNER: [12:29:02] Okay. Can we -- I think we just need to  
16 go through them. So 8 is -- looks as though it comes from the website of the ICRC.
- 17 MR EDWARDS: [12:29:12] Yes.
- 18 PRESIDING JUDGE KORNER: [12:29:13] Right. 10, does it say what it is? It  
19 doesn't. Courses run by the ICRC --
- 20 MR EDWARDS: [12:29:30] Yes.
- 21 PRESIDING JUDGE KORNER: [12:29:32] 12, I'm not -- well, again, as you say, it's  
22 ICRC --
- 23 MR EDWARDS: [12:29:47] Yes.
- 24 PRESIDING JUDGE KORNER: [12:29:49] 14 --
- 25 MR EDWARDS: [12:29:55] ICRC.



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1 PRESIDING JUDGE KORNER: [12:29:57] Yes.

2 MR EDWARDS: [12:29:59] 17 is different. 17 is a document dated 31 March 2002  
3 and it's entitled: Agreement between the Government of the Republic of Sudan and  
4 the Sudan People's Liberation Movement to Protect Noncombatants Civilians.

5 PRESIDING JUDGE KORNER: [12:30:17] Yes. I'm afraid that doesn't seem to have  
6 made its way into my binder.

7 MR EDWARDS: [12:30:26] Can I hand up my copy of it.

8 PRESIDING JUDGE KORNER: [12:30:28] It has, no, I'm sorry, beg your pardon.

9 Agreement between the Government of the Republic of Sudan -- well, the Sudanese  
10 Liberation Movement is the insurgents, is it?

11 MR EDWARDS: [12:30:46] Yes.

12 PRESIDING JUDGE KORNER: [12:30:47] Right.

13 MR EDWARDS: [12:30:48] So I confess I'm at something of a disadvantage, because  
14 we don't know precisely the use to which the Prosecution wants to put this document,  
15 and this may be one of those documents where, undesirable though it is, we are going  
16 to have to deal with it when it becomes clearer what the Prosecution wants to do with  
17 it.

18 PRESIDING JUDGE KORNER: [12:31:10] Okay, all right, and 27.

19 MR EDWARDS: [12:31:17] 27 is an unofficial translation of a -- yes, it's an order  
20 establishing the Special Criminal Court on the Events in Darfur.

21 PRESIDING JUDGE KORNER: [12:31:40] Is this what the Chief Justice was referring  
22 to when he talked about the special court?

23 MR EDWARDS: [12:31:46] He did -- well, he did give evidence about a special court  
24 being established. Again, I don't know if it's -- I don't quite know what the  
25 Prosecution will -- (Overlapping speakers)

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1 PRESIDING JUDGE KORNER: [12:31:59] All right. And 37?

2 MR EDWARDS: [12:32:01] And 37 is a partial translation of --

3 PRESIDING JUDGE KORNER: [12:32:03] A statement. Is this one of the ones taken  
4 by the Sudanese?

5 MR EDWARDS: [12:32:13] Yes, I think this -- this comes from what is -- what has  
6 come to be called the Darfur file.

7 PRESIDING JUDGE KORNER: [12:32:31] Oh, I see. There's a huge number of them,  
8 I see.

9 MR EDWARDS: [12:32:35] That's right. So on the -- on the Prosecution's list of  
10 evidence, but not -- not admitted. And in a way I understand why not, because the  
11 entire Darfur file -- well, 99 per cent of it is --

12 PRESIDING JUDGE KORNER: [12:32:52] Didn't you -- didn't you object to the  
13 admission?

14 MR EDWARDS: [12:32:55] Probably. I don't know.

15 PRESIDING JUDGE KORNER: [12:32:57] And didn't we -- this -- this one where we  
16 agreed that we wouldn't admit them, was it part of the bar table motion?

17 MR EDWARDS: [12:33:09] No, I think -- I think the Darfur - I'm looking to my  
18 friend - I think -- I think the entirety of the Darfur file is quite irrelevant, because  
19 it -- there are one or two pages from it that are conceivably relevant, but the entire  
20 thing is a document of many hundreds of pages and the entire thing hasn't been  
21 admitted into evidence.

22 PRESIDING JUDGE KORNER: [12:33:34] Yeah, well, it just goes to show, isn't it,  
23 that what -- I go back to what Judge Antonetti had to say, if the Prosecution were  
24 allowed to put in all the evidence on which it wished to rely, the case file would be  
25 tripled, or quadrupled, in file.

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1 MR EDWARDS: [12:33:51] Well, it's pleasing that the Prosecution has approached  
2 its task with a degree of discrimination by not throwing in the kitchen sink, but why  
3 they are now seeking to introduce some additional pages from that Darfur file now,  
4 again, we're -- we're just not sure at this stage, so --

5 PRESIDING JUDGE KORNER: [12:34:15] All right.

6 MR EDWARDS: [12:34:17] -- I am at some disadvantage.

7 But really it's the principles and the factors that we invite your Honours to take into  
8 account as discussed in Ntaganda, which -- Ntaganda and Bemba et al. Bemba et al.  
9 is cited in paragraph 16 of the Ntaganda decision. These are relevant considerations  
10 for your Honours to apply.

11 PRESIDING JUDGE KORNER: [12:34:51] Yeah. All right. Well, I mean we've  
12 certainly taken those on board.

13 Yes, all right,

14 Yes, Mr Nicholls, you're going to deal with this, are you?

15 MR NICHOLLS: [12:35:04] Yes. Very briefly, your Honour, I'll try to. I know  
16 there's a sort of one lawyer per argument thing, I may have to consult with  
17 Mr Edwards on a couple of the specific exhibits, but, I mean, I'll try to keep this brief,  
18 but just from the beginning, there is no prohibition in the Statute, there's no  
19 prohibition or general principle that supports what he says in the Rules, there's no  
20 Appeals Chamber decision on this which would bind you in any way.  
21 Our conduct of the proceedings in this case, paragraph 44, also anticipates and  
22 understands that undisclosed items may be used in cross-examination and that's why  
23 it includes that those should be sent by email.

24 And I'll try not to repeat what your Honour said, although some of it I had written  
25 down, but I do not believe that Ntaganda is citing Hadžihasanovic with approval. I

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1 would advocate that that is not a good decision, it was not followed in other  
2 chambers at the ICTY. And what the Chamber in Ntaganda is saying, that even in  
3 that case the Prosecution was still allowed to introduce these types -- new evidence  
4 that was not on the exhibit list, had not been used before, in order to test the  
5 responsibility of the accused.

6 The -- my friend's argument really comes down to only the principle, which is, if it  
7 exists, not a good one.

8 The example of P-103 is a good one. Now, we wanted to call that witness, we didn't  
9 not bother to call him.

10 PRESIDING JUDGE KORNER: [12:37:04] Is he the one you couldn't get hold of?

11 MR NICHOLLS: [12:37:06] Well, I --

12 PRESIDING JUDGE KORNER: [12:37:07] Or there was all sorts of toing and froing, I  
13 remember.

14 MR NICHOLLS: [12:37:12] In open session, I will say that we were not able to obtain  
15 his testimony -- is, the Defence asked to speak to that witness and he refused to speak  
16 to them when we, according to the protocol, approached him.

17 So he -- he could not be called by either of us and it was not a question of not  
18 bothering to put him in.

19 But again, these documents may have been listed with him, they would relevant for  
20 that witness, P-103.

21 This witness - again, in open session, without saying it in ways which would reveal  
22 him - talks about these same types of documents, refers to them in his statement, and  
23 it's absolutely proper cross-examination material. We would not have known that  
24 they would have called this person or that they would go through this type of detail.  
25 And this is just normal that we use materials that are relevant, that come out of the

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1 witness's statement and testimony, for cross.

2 It's possible we would try to use an -- and it should be admissible, a document not  
3 even on our list before the witness started if something comes up in the direct  
4 examination that we didn't anticipate and couldn't have.

5 And what my friend hasn't pointed out to you is any prejudice whatsoever from any  
6 of these documents. I mean, the number -- number 7 is directly related to the  
7 witness, he discusses that. The same with number 16. He talks about those  
8 documents and those issues and the Defence doesn't want you to be able to hear  
9 cross-examination on it.

10 If you look at the --

11 PRESIDING JUDGE KORNER: [12:39:11] You say he talks about it in his statement  
12 that he made to the Defence.

13 MR NICHOLLS: [12:39:16] I'm looking at Mr Jeremy, but I believe so.

14 Yes, he's referred to the manual in his statement and in the course of his direct  
15 examination, and they don't want us to be able to use it on cross. I mean, it's -- it's  
16 bordering on ridiculous at that point.

17 If you look at the Bemba et al. oral decision, which my friend helpfully sent out, the  
18 test there --

19 PRESIDING JUDGE KORNER: [12:39:52] Just a moment. Where is that? I just  
20 need to get that oral decision.

21 MR NICHOLLS: [12:39:57] It's labelled annex 4, confidential.

22 PRESIDING JUDGE KORNER: [12:40:02] Oh, right.

23 MR NICHOLLS: [12:40:04] Well, confidential, this -- this ...

24 But I think if your Honours look at paragraphs 5 and 6 --

25 PRESIDING JUDGE KORNER: [12:40:16] Yes.

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1 MR NICHOLLS: [12:40:17] The last sentence at paragraph 5, the  
2 "items tendered by the Prosecution [...] must, in principle, have a genuine and not  
3 pretextual connection to [...]" the cross.  
4 Well, of course. And that's true with items on direct as well.  
5 So, yes, there -- I can see an objection to having missed some huge issue in your case  
6 and trying to shovel in tonnes of documents through an unrelated witness. That's  
7 not what's happening here and it's not happened in any case I've worked on.  
8 And then if you see in paragraph 6, part of the test is documents which are not  
9 sufficiently linked should not, you know, may not be admitted. But again, that just  
10 common sense and the way it is with every document a party tries to submit.  
11 So I would also make the point that --

12 PRESIDING JUDGE KORNER: [12:41:13] Can I -- just before you leave that,  
13 Mr Nicholls, did he refer -- you're right, he referred to the implementation of  
14 international humanitarian law. Did he also refer to the manual? Yes, he did, I  
15 think. Okay. Yes.  
16 Actually, not the book. He referred to the manual, but didn't refer to the Booklet on  
17 the Implementation of International Humanitarian Law.

18 {ICR: (Redacted)}

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)}

24 MR NICHOLLS: [12:41:59] I don't know if - oh, he's sitting  
25 down - Mr Abd-Al-Rahman was standing up. I didn't know if he had a problem.

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1 PRESIDING JUDGE KORNER: [12:42:07] Thank you.  
2 Yes, we'd better redact that part. Okay.  
3 MR NICHOLLS: [12:42:09] And again, I would say that this was litigated in Popovic.  
4 In fact, it's always raised and litigated and it's always denied. It was raised in  
5 Popovic that the defence - I believe it was for Nikolic - said that nothing should be  
6 used that wasn't, you know, except for in exceptional circumstances, nothing that  
7 wasn't on your exhibit list or used in evidence could be used for cross.  
8 Same in Karadzic and in -- I don't have the decisions at hand, but that that was not the  
9 practice there adopted, despite being the same court as Hadžihasanovic, and it's for  
10 the very good reason that purpose of cross-examination is to test the evidence to get  
11 to the truth.  
12 And this is really just an effort to hamper us at doing that and being able to provide  
13 you with a proper cross-examination, because he has not been able to point to any  
14 prejudice -- our case has been crystal clear from the beginning against this accused.  
15 Our theory hasn't changed. This case hasn't evolved over time into why -- who he is,  
16 or why he is responsible and for which crimes. That has been crystal clear all along.  
17 So there is no prejudice in any of these documents in the terms of my friend began  
18 with "we need to know the case". Well, he does know the case and none of these  
19 documents contradict any part of our theory or what we're doing. This is exactly  
20 what you would expect us to put to a witness on cross-examination.  
21 PRESIDING JUDGE KORNER: [12:43:43] I suppose the question, though, and  
22 certainly one that Mr Edwards raised, Mr Nicholls, is this: When it came to the bar  
23 table motion, as you were aware, clearly, that there was an issue, to the extent at least  
24 that the -- the lower ranks of the army, that is to say anybody who was  
25 a non-commissioned officer didn't get any training, why you didn't put these two

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1 documents in as part of the bar table?

2 MR NICHOLLS: [12:44:16] I'm not sure -- you know, I can't remember why these in  
3 particular, but it's something your Honour mentioned, something my friend  
4 mentioned is that we do try not to -- this has been a fairly tight, concise case in terms  
5 of witnesses and documents and we have not tried to take the approach of shovelling  
6 everything in. If there is this rule, then the Prosecution will have to put everything  
7 that might ever possibly be used on a bar table motion because of this gotcha game.  
8 And it's also in terms of putting in evidence that may be relevant. I can't say that we  
9 will try to put in every single document that could potentially -- that even if it is  
10 relevant if we think -- and we've gotten through and we've -- we've presented our  
11 case adequately.

12 However, if they call witnesses to testify to these points, it's hard to describe how  
13 perfectly normal it is that we will use these documents which are relevant to  
14 cross-examination. And so again, he -- the bar that my friend is trying to raise is  
15 really just this matter of principle, because there is no prejudice and unfairness.

16 And what it comes down to is that my friend's in this case - and it happens in these  
17 international courts - trying to depart from the way it works in domestic jurisdictions,  
18 which is when you put on your case, you put on a defence. You don't have to put on  
19 a defence, but when you do put on a defence there's cross-examination. And, you  
20 know, evidence that doesn't help you may come in on cross. That's the way it  
21 happens outside this building, that's the way it happened at the ICTY, but there's  
22 always, for some reason, this effort to create this special rule here that probably ties  
23 mainly back to this Hadžihasanovic decision.

24 And the last point I would make is we do have the submission system here and so  
25 this evidence coming in just allows you to view it at the end and decide what weight,



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1 if any, to give to it. So unless it doesn't pass the test of not being connected to the  
2 witness's testimony, for some reason being grossly prejudicial, it should be included  
3 whether it was previously on the witness list, previous exhibit list, previously in  
4 evidence or previously disclosed.

5 Thank you.

6 PRESIDING JUDGE KORNER: [12:46:53] Yeah, well, Mr Nicholls, and it may be that  
7 Mr Jeremy probably ought to deal with it, is the purpose for the non -- the documents  
8 that have never been disclosed before, the first which is -- sorry -- that's 8, which is the  
9 ICRC website.

10 MR NICHOLLS: [12:47:12] Yes, I don't mean to interrupt you, your Honour, just we  
11 may need-- it may be better to go into private to discuss how these documents are  
12 relevant to the testimony.

13 PRESIDING JUDGE KORNER: [12:47:22] Yes, all right, we'll go back.  
14 Yes, Mr Edwards.

15 MR EDWARDS: [12:47:25] Before we do that, while we are still in public --

16 PRESIDING JUDGE KORNER: [12:47:27] Yes.

17 MR EDWARDS: [12:47:28] -- can I just respond before getting into the nitty-gritty.  
18 I don't know if your Honour's ever seen the 1973 film, The Wicker Man, Christopher  
19 Lee and -- I can't remember --

20 PRESIDING JUDGE KORNER: [12:47:38] It was actually filmed very close to where  
21 we live.

22 MR EDWARDS: [12:47:42] I feel we are in The Wicker Man now, in the sense that  
23 Mr Nicholls has filled this room full of straw men. I have not -- perhaps he wasn't in  
24 the room when I was making my submissions, I thought he was -- I have not sought  
25 to argue that there is a blanket ban. I think I have even said it two, if not three times,

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1 in the course of my submissions. I have not suggested that there is a blanket  
2 prohibition on the use of new documents. All I have said is that it is not unlimited.  
3 It is not unfettered the right of the Prosecution to use new documents and that in  
4 deciding whether that right should be fettered or not, there are three principles,  
5 essentially, that the Court should take into account. That's all.

6 Mr Nicholls has turned this into something much, much broader than it ever started  
7 out as being.

8 When he says that, "Well, it's not the case that we didn't bother to bring P-103" - well,  
9 whilst we might have sympathy that they had difficulty getting one witness to come  
10 to Court, in particular - it doesn't matter how hard they tried or whether they really  
11 wanted him or not. The fact is, he didn't come. That's what's important. Not  
12 what the Prosecution's deepest desires were in terms of how lovely it would be if the  
13 witness came or not.

14 And then as far as prejudice is concerned, it is a matter of principle. That's all.

15 Now at this point, I can't point to any --

16 PRESIDING JUDGE KORNER: [12:49:58] Well, what is --

17 MR EDWARDS: [12:49:59] I can't point to any prejudice, because we don't know yet  
18 what the documents are going to be used for, so I might have to deal with the  
19 question of prejudice in a moment.

20 But, finally, my learned friend makes this point, we were careful, this was a tight case,  
21 we didn't just shovel everything in. And that may be right, but to suggest that these  
22 IHL documents -- IHL in Sudan documents would have amounted to a shovelling in  
23 of wildly irrelevant, as it were, kitchen sink evidence, it's my submission that the  
24 Prosecution is very wide of the mark. This was a critical issue that was raised at the  
25 confirmation of charges hearing. It was crucial and no doubt that's why the

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1 Prosecution wanted 103 to come in the first place, perhaps amongst other things.

2 But to suggest that -- if it were to be suggested that this was only ever a peripheral  
3 issue that falls out with the tight framework of the Prosecution's case, that simply  
4 doesn't stack up at all.

5 IHL was fundamental, it was at the heart of this case from the beginning.

6 PRESIDING JUDGE KORNER: [12:51:19] Well, that is, I think, a slight exaggeration,  
7 because it's not really. The heart of this case is whether or not the accused is, in fact,  
8 the man known as Ali Kushayb --

9 MR EDWARDS: [12:51:34] Yes.

10 PRESIDING JUDGE KORNER: [12:51:35] -- and, if so, whether he committed the  
11 acts that have been described.

12 But certainly as an incidental but clearly important issue you have raised from the  
13 beginning, that warrant officers of his rank did not --

14 MR EDWARDS: [12:51:53] Yes.

15 PRESIDING JUDGE KORNER: [12:51:54] Warrant officers, if he was Ali Kushayb,  
16 didn't get any IHL training, not that -- it hasn't really gone into the nuts and bolts of  
17 what that IHL training was, other than to say -- I think you asked two witnesses,  
18 maybe more, as to whether -- who got the training and when it was.

19 MR EDWARDS: [12:52:20] Yes, were there manuals and were exams -- and that sort  
20 of thing. I think one witness said something along the lines of "We were given  
21 a booklet and it was left up to us whether we read it or not".

22 PRESIDING JUDGE KORNER: [12:52:33] But I perfectly accept, and I think the  
23 Prosecution do, that it's been an issue.

24 MR EDWARDS: [12:52:37] Yes. And even if it wasn't clear in the course of the  
25 confirmation of charges hearing, your Honours will know that the Appeals Chamber

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1 in delivering its decision on our appeal against the confirmation of charges --

2 (Counsel confers)

3 MR EDWARDS: [12:52:56] Sorry, against jurisdiction --

4 PRESIDING JUDGE KORNER: [12:52:59] Was this your -- when you applied for  
5 a reconsideration of the original --

6 MR EDWARDS: [12:53:03] Yes.

7 PRESIDING JUDGE KORNER: [12:53:04] Yes.

8 MR EDWARDS: [12:53:05] And your Honours recall the essence of the finding of the  
9 Appeals Chamber in terms of foreseeability of criminality when we are talking about  
10 a country that is not a state party to the ICC.

11 PRESIDING JUDGE KORNER: [12:53:28] Yes, okay. All right, I think -- well, yes,  
12 we are not going to be sitting at quarter past 2, I don't think, so we'll have to get  
13 a message to the witness somehow.

14 Right, Mr Jeremy or Mr Nicholls, can you just go through the other documents to  
15 which objection is taken -- as to what purpose they are being used for and where they  
16 come from -- oh, in private session, sorry, we will go into private session. Yes.

17 (Private session at 12.54 p.m.)

18 THE COURT OFFICER: [12:54:05] We are in private session, Madam President.

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

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- 17 (Recess taken at 1.01 p.m.)
- 18 (Upon resuming in open session at 2.31 p.m.)
- 19 THE COURT USHER: [14:31:31] All rise.
- 20 Please be seated.
- 21 PRESIDING JUDGE KORNER: [14:31:47] We are in open session simply for this part
- 22 of the afternoon.
- 23 The Defence have raised objections to a number of the documents about which
- 24 the Prosecution wish to ask the witness.
- 25 We have carefully considered the application over the adjournment and we have

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1 concluded that, as far as documents 8, 10, 12, 14, 15 and 16 and 27 are concerned,  
2 the Prosecution may ask the witness about those documents.

3 As far as 17 and 37 are concerned, I hope I have got the numbers right, we will await  
4 the actual moment of when the Prosecution wishes to put the documents, because it's  
5 not entirely clear to us at present what the purpose of these documents is.

6 And we will give reasons for our decision at the beginning of the next big session of  
7 evidence, in other words, November.

8 Yes, so can we go back into private session, please.

9 (Private session at 2.33 p.m.)

10 THE COURT OFFICER: [14:33:47] We are in private session, Madam President.

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

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- 18 (The hearing ends in private session at 3.56 p.m.)