

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou
7 and Judge Althea Violet Alexis-Windsor
8 Trial Hearing - Courtroom 2
9 Tuesday, 24 January 2023
10 (The hearing starts in open session at 9.33 a.m.)
11 THE COURT USHER: [9:33:23] All rise. The International Criminal Court is now in
12 session. Please be seated.
13 PRESIDING JUDGE KORNER: [9:33:48] Yes, good morning all. I won't call the case.
14 Appearances, please, from the Prosecution.
15 MR NICHOLLS: [9:33:59] Good morning, your Honour. Good morning to everybody
16 in the courtroom. Julian Nicholls with Claire Sabatini, Diana Saba, and Rachel
17 Mazarella. Thank you very much.
18 PRESIDING JUDGE KORNER: [9:34:11] Thank you.
19 The representatives of victims.
20 MS VON WISTINGHAUSEN: [9:34:15] Yes, good morning, Madam President, your
21 Honours. Good morning to everyone in and around the courtroom. The victims this
22 morning are represented by my associate counsel Anand Shah, our case manager Idriss
23 Anbari, and behind me our two interns, Nur Mahameed and Randa Bellahdid. Thank
24 you.
25 PRESIDING JUDGE KORNER: [9:34:34] Thank you.

1 Yes, and the Defence, please.

2 MR LAUCCI: [9:34:36](Interpretation) Good morning, Madam President. Good
3 morning, Judges, dear colleagues. Beside Mr Ali Muhammad Ali Abd-Al-Rahman in
4 the room today, we have Marguerite Rémy, who is our new inter; Mr Mohammad El
5 Rahi, who is the assistant for evidence; and also we have Ahmad Issa, my colleague;
6 and Iain Edwards; and I also, Cyril Laucci, lead counsel.

7 PRESIDING JUDGE KORNER: [9:35:08] I understand before the next witness comes in
8 you want to address us, Mr Nicholls.

9 MR NICHOLLS: [9:35:14] Yes, your Honour. Very briefly. And for that, could we go
10 into private session, please. Just one minute.

11 PRESIDING JUDGE KORNER: [9:35:20] Yes, private session please.

12 (Private session at 9.35 a.m.)

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22 (Open session at 9.53 a.m.)

23 THE COURT OFFICER: [9:53:28] We're back in open session, Madam President.

24 PRESIDING JUDGE KORNER: [9:53:31] Right. Sir, you reported to your team leader.

25 Were you the most junior investigator in the Darfur team?

1 A. [9:53:46] No, the team --

2 PRESIDING JUDGE KORNER: [9:53:58] The answer, if you weren't, (Redacted), just
3 say so.

4 A. [9:54:07] Yeah, it is difficult to say because the team had expanded. The case -- the
5 Darfur case was not that active. It became active when he -- when the suspect
6 surrendered.

7 PRESIDING JUDGE KORNER: [9:54:24] All right.

8 A. [9:54:25] And -- but, I think, at that time, I -- I recall there are many other -- other
9 junior investigators, but I have a lot of experience in the case.

10 PRESIDING JUDGE KORNER: [9:54:43] Okay. So it would appear by and large the
11 investigation was shelved after the issue of the arrest warrants and, as you say, the
12 surrender of Al-Rahman in 2020.

13 Did you work on any other investigations in the meantime?

14 A. [9:55:11] From 2019 and onward or?

15 PRESIDING JUDGE KORNER: [9:55:24] No, from when -- the arrest warrants were
16 issued, I think, in 2007. Between 2007 and 2019, were you doing other investigative
17 work?

18 A. [9:55:33] Yes.

19 PRESIDING JUDGE KORNER: [9:55:36] All right. Let's move now then to the events
20 which are the subject of this particular submission.

21 You made a statement, thank you very much, yesterday. I appreciate it was your first
22 day back. You say in that statement that you were contacted on 26 December 2019
23 whilst you were travelling. Do you have your statement with you.

24 A. [9:56:29] I'm looking for it, honourable Judge.

25 MR NICHOLLS: [9:56:37] Tab 1. It should be right in the front.

- 1 THE WITNESS: [9:56:48] Yes, I have it.
- 2 PRESIDING JUDGE KORNER: [9:56:51] And you say that whilst travelling, or on
3 arrival, you saw that the intermediary 869 had tried to contact you.
- 4 A. [9:57:07] Correct.
- 5 PRESIDING JUDGE KORNER: [9:57:08] How did he get your telephone number?
- 6 A. [9:57:09] I find out later that he got it from another person known to me.
- 7 (Redacted)
- 8 * PRESIDING JUDGE KORNER: [9:57:38] So you're saying this is completely -- hang
9 on. Were you aware of the e-mail that 869 had sent to the Court?
- 10 A. [9:57:49] At the time, I recall, I wasn't aware of the e-mail. I was travelling. He
11 sent the e-mail on the 26th to the Court, and I was -- I was in a boat, and I had no
12 connection. After I had spoken with him, I had realised that he had sent an e-mail to
13 the Court. I was also, I think, approached by my team to get in touch with him, and I
14 said that I already I had contact with -- with this person.
- 15 PRESIDING JUDGE KORNER: [9:58:44] So at the same time you had a phone call from
16 one of the members of your team to contact the intermediary?
- 17 A. [9:58:52] After -- after I had spoken with the intermediary. I saw that people were
18 trying to call me, so many missed calls, and I was getting ready to -- to leave the boat
19 and do the checkout. And I do not recall whether he managed to call me right away or
20 I returned his call, and that was the first time that I learned about the intermediary.
21 That was my first introduction to him. I wasn't aware of the e-mail that he had sent.
22 He did tell me that he attempted to contact people from the Court and that he got my
23 number from someone else. And, hence, that he was trying to call me.
- 24 PRESIDING JUDGE KORNER: [9:59:54] Okay. So was it at that stage, in that first call,
25 that you, when you returned the call, that you told him that the Prosecution required

1 confirmation that he, the intermediary, was in contact with Al-Rahman?

2 A. [10:00:27] Yes, correct.

3 PRESIDING JUDGE KORNER: [10:00:34] And who told you to say that, if anybody?

4 A. [10:00:36] No one had told me, but I know, based on my experience, and the team

5 trusts me to interact with the -- with external. And I was prepared for this kind of

6 scenario. We were pursuing another line of investigation related to the same subject, so

7 I had in mind how to deal with such approach and what is needed to confirm whether

8 the contact is genuine, to confirm whether is he the -- is he in contact directly with a

9 suspect or through other person. Many people would say they know the suspect, but it

10 appears, based on my experience, they don't know the suspect. They just contacted

11 other people who were close to the suspect.

12 So my first reaction is to try to establish is he really in contact with the suspect, does he

13 know the suspect. Basically, making an assessment for myself to make sure is it a line

14 of investigation which is worth pursuing and making it a priority activity or not. Is he

15 -- does he hold the information that he claims to have or is he making it up?

16 So that is -- and I -- right away, it struck me that he is knowledgeable, that the

17 intermediary is knowledgeable about the suspect and his whereabouts, corroborating

18 my impression and my knowledge of the case from my exposure with -- with

19 witnesses, with other parties. So he struck me as someone that he's telling -- possibly

20 telling the truth, but I couldn't determine whether he is really in contact with him.

21 He said that -- I asked him whether he engaged directly with the -- with the suspect. I

22 asked him where he lives, whether he ever met him, whether he is a relative of the

23 suspect. I had a lot of questions were not really fully answered. I think to a point I was

24 asking a question that the intermediary got annoyed with me trying to determine

25 whether he is really in contact with the suspect.

1 But I explained to him if he wants to make sure that we should take up the matter to a
2 next level, that I need -- I need to know his closeness to the suspect.

3 PRESIDING JUDGE KORNER: [10:04:12] I'm going to stop you now. And can I -- I
4 don't imagine you've ever testified before; is that right? This is your first time in court?

5 A. [10:04:20] Correct, this is my first time.

6 PRESIDING JUDGE KORNER: [10:04:23] Okay. Can I then give a word of advice: If
7 you just answer the question that you're asked, if anymore information is required,
8 then a further question will be asked. I think Mr Edwards, when he gets to ask you
9 questions, will explain the same thing.

10 But the question simply was, from me, who told you to say that, and you said -- and
11 the answer is nobody. This was you acting on your own initiative. Is that right?

12 A. [10:04:53] That's right. And based on my previous experience.

13 PRESIDING JUDGE KORNER: [10:04:56] Had you ever spoken to someone before who
14 said he was in contact with a suspect?

15 A. [10:05:06] Yes.

16 PRESIDING JUDGE KORNER: [10:05:11] Is that the other person who you were doing
17 negotiations with?

18 A. [10:05:15] Yes, correct.

19 PRESIDING JUDGE KORNER: [10:05:17] Do I understand this: At no stage did you
20 say -- who was it who informed you of the e-mail to the Court? Can you remember?
21 Was it (Redacted)

22 A. [10:05:34] I think my -- my team leader at that time. Possibly he tried to call me,
23 and I think I checked later and -- my e-mail when I was able to have internet
24 connection checking my e-mails, and I saw that -- I saw that e-mail about the -- the
25 intermediary -- or being sent by the intermediary.

- 1 PRESIDING JUDGE KORNER: [10:05:58] Okay. It didn't, therefore, occur to you to ask
2 your team leader: How should I deal with the intermediary? Is that what you're
3 telling us?
- 4 A. [10:06:18] No. By that time, I already had contact with the -- with the
5 intermediary before I've seen such e-mail.
- 6 PRESIDING JUDGE KORNER: [10:06:32] I appreciate that. But wouldn't it have been
7 more sensible before -- I ask, wouldn't it have been more sensible before taking steps
8 which might result in the apprehension of a suspect to check with your superiors?
- 9 A. [10:07:01] Yes, definitely.
- 10 PRESIDING JUDGE KORNER: [10:07:08] But you decided not to?
- 11 A. [10:07:10] As I said, the -- the call was unsolicited by myself.
- 12 PRESIDING JUDGE KORNER: [10:07:18] All right.
- 13 A. [10:07:19] I happened to -- to deal with the call. And if maybe I can add
14 something extra. I know I have to stick to the question. My team leader had approach
15 me to contact the person later on.
- 16 PRESIDING JUDGE KORNER: [10:07:40] Yes, all right. But you were taking steps to
17 progress this, weren't you, by asking for proof that he was in contact with the suspect?
- 18 A. [10:07:51] Correct.
- 19 PRESIDING JUDGE KORNER: [10:07:56] May I ask then next why you didn't record
20 the contents of this conversation in the investigations log or whatever it's called?
- 21 A. [10:08:09] I was on -- on leave at that time. I returned to work later on. And I did
22 inform my colleague, who is in the headquarters, about the content of the conversation.
23 And at the time --
- 24 PRESIDING JUDGE KORNER: [10:08:43] When did you --
- 25 A. [10:08:45] -- I -- yes?

- 1 PRESIDING JUDGE KORNER: [10:08:50] Well, firstly, who is your colleague?
- 2 A. [10:08:52] (Redacted)
- 3 PRESIDING JUDGE KORNER: [10:08:54] And at what stage do you say you told him
4 about the contents of this conversation?
- 5 A. [10:08:58] I think there -- the next day, once I was settled in -- in my destination I
6 told him about the conversation of -- the content of the conversation, and it was
7 reported to the -- to the rest of the team or at -- to those -- the decision maker within the
8 team.
- 9 PRESIDING JUDGE KORNER: [10:09:27] Was he in The Hague when you spoke to
10 him? I mean, this was around -- this was the Christmas break.
- 11 A. [10:09:38] Yes, I believe so. I think he was in The Hague.
- 12 PRESIDING JUDGE KORNER: [10:09:43] But you didn't think of saying to him: Look,
13 I can't access the investigation log, but can you make a note for me?
- 14 A. [10:09:51] No, I did not ask him to make a -- make a log. It was discussed with the
15 ...
- 16 PRESIDING JUDGE KORNER: [10:10:06] All right. Now on 27 December, you
17 received the audio file from the intermediary; is that right? If you go to your statement
18 at paragraph 9.
- 19 A. [10:11:03] Yes, I received an audio file from -- the intermediary did send me
20 through WhatsApp an audio file.
- 21 PRESIDING JUDGE KORNER: [10:11:14] Right. Apparently this audio file was a part
22 recording of a conversation that the intermediary was having with somebody else.
- 23 A. [10:11:36] Correct.
- 24 PRESIDING JUDGE KORNER: [10:11:37] Did you report to anyone the receipt of that
25 audio file?

1 A. [10:11:45] No.

2 PRESIDING JUDGE KORNER: [10:11:55] And why didn't you do that?

3 A. [10:11:58] I thought it wasn't that important because at that time trying to assess
4 whether he is in contact with the -- with the suspect. And from the audio file, I didn't
5 see that he -- he was in contact with the suspect.

6 PRESIDING JUDGE KORNER: [10:12:29] But this was material you were receiving in
7 connection with, potentially, the surrender of a suspect. Didn't you think it was
8 important to let your superiors know?

9 A. [10:12:52] First of all, I mean, the audio file was at parts unintelligible to me. It
10 was a discussion that -- that he recorded, and he didn't explain me that he was going to
11 record a discussion and send it -- and send it through, what's the content of that
12 discussion. So it wasn't quite clear to me the content of the audio file to be able to make
13 a good assessment.

14 PRESIDING JUDGE KORNER: [10:13:42] You've mentioned the WhatsApp, and let's
15 deal with that. We've all seen you had a number of exchanges on WhatsApp between
16 you and the intermediary. Did you tell your superiors about those exchanges on
17 WhatsApp?

18 A. [10:14:03] Not everything. I -- I did forward the most important. There were
19 certificates of the suspect -- related to the suspect which the intermediary did send and
20 which I -- I sent right away to my colleague, (Redacted), so they can be shared and
21 then looked at with the team. Basically, at that time my assessment was these are
22 important documents related directly to the suspect, and it should be shared and acted
23 on it.

24 MR NICHOLLS: [10:14:59] I'm very sorry, your Honour. Just I wonder if the witness
25 could be reminded about saying the names of colleagues in open session.

1 PRESIDING JUDGE KORNER: [10:15:10] Yes, I think it's my fault because I think I
2 mentioned it first of all.

3 MR NICHOLLS: [10:15:14] I apologise for interrupting.

4 PRESIDING JUDGE KORNER: [10:15:15] Yes. The trouble is, if we refer to the other
5 investigator, there are two potentials. All right.

6 Now, sir, we are in open session now, so if you could be careful about mentioning
7 names, and if you just talk about the team leader and the other investigator who was
8 involved in all of this. And it's my fault, I accept.

9 Were there no instructions, to your knowledge, that all communications, particularly of
10 this nature, which might be relevant to the surrender of a suspect, should be recorded?

11 A. [10:16:00] There are instructions that these communications should be reported.

12 And I -- I am aware of that. Except sometimes, because of the heavy work schedule,
13 the recording get delayed, but I do share the content of such important interaction with
14 -- with other parties within the team.

15 PRESIDING JUDGE KORNER: [10:16:45] All right. Are there any other conversations
16 that you had with either the intermediary or directly with Al-Rahman which were not
17 recorded?

18 A. [10:17:09] There are no other conversations that I had with the suspect which were
19 not recorded. As for the intermediary, there might be other conversation that I had
20 with him which were not recorded. These are mainly conversation that have, like, a
21 preparatory nature. For the logistics of the call, for example, with the suspect, making
22 arrangement for it to happen, consulting with him so we have a most focused
23 conversation with the suspect.

24 PRESIDING JUDGE KORNER: [10:18:12] And do I understand that nobody explained
25 to you, as an inexperienced investigator, the importance of any conversation in a

1 situation like this at least the fact of the conversation being recorded somewhere?

2 A. [10:18:40] This was, for me, the first time dealing with the -- with the suspect. And
3 I think that all contact should be recorded.

4 PRESIDING JUDGE KORNER: [10:19:09] Yes, all right. At the stage at when these
5 negotiations were going on, were you aware that apparently an arrest warrant had
6 been issued by the Sudanese authorities for Al-Rahman otherwise known as Ali
7 Kushayb?

8 A. [10:19:36] Yes, I was aware, but only from open source, and I cannot verify
9 whether it is real or not.

10 PRESIDING JUDGE KORNER: [10:19:52] But before -- at the time of all these
11 conversations, that is, going through the early part of 2020, you did know about it?

12 A. [10:20:02] I'm trying to follow the activities of -- make an assessment of the
13 situation of the suspect. And I believe I have seen in the open source that he might be
14 wanted by the new Sudanese authority, but I was in -- I had * no way or no other office
15 to confirm whether it is true or not.

16 PRESIDING JUDGE KORNER: [10:20:47] All right. Finally, the two videos were
17 supplied to the Office of the Prosecutor by the intermediary of Al-Rahman confirming
18 that he was the suspect and he was Ali Kushayb. At any stage in any conversation did
19 you request that such a video be produced?

20 A. [10:21:20] No, I did not request or give instruction that such a video should be
21 made. I was discussing with the intermediaries, exploring ways how to possibly
22 confirm the -- the identity of the suspect, whether he's in existence and he's there and
23 he's willing to cooperate with the Court. And there are different ways of doing that. I
24 had no script to tell the intermediary what he should do or not. This was the first call --

25 PRESIDING JUDGE KORNER: [10:22:20] No, no --

1 A. [10:22:22] Yes.

2 PRESIDING JUDGE KORNER: [10:22:22] Don't worry about the first call --

3 A. [10:22:25] Yes.

4 PRESIDING JUDGE KORNER: [10:22:25] -- for the moment. I mean, you explained
5 that to us, that you asked for proof of his contact, but did you ever, well, either in that
6 call, because it's not recorded, or in any subsequent calls before the video was sent, ask
7 for a video?

8 A. [10:22:41] No, I just followed up the matter. He said there might be a video.
9 They're working on something. I just wanted to know an update where he is with his
10 contact with the suspect mainly to get confirmation that the suspect is willing to
11 cooperate and possibly surrender himself.

12 PRESIDING JUDGE KORNER: [10:23:13] Once the certificates were received, were you
13 and your superiors satisfied that there was sufficient proof that he was in contact with
14 Al-Rahman?

15 A. [10:23:30] For me, yes, I believe that that was a sufficient proof that he is in contact
16 with Mr Abd-Al-Rahman but not conclusive. I have seen these certificates from
17 different source.

18 PRESIDING JUDGE KORNER: [10:24:03] Well, if it wasn't conclusive in your view, did
19 you take any other steps to obtain conclusive evidence?

20 A. [10:24:14] For me, the conclusive evidence is that we are in a position to interact
21 directly, as OTP, with the suspect and to facilitate that. That would remove any doubts
22 that the person is not -- is not telling us what he's -- what he should know -- what he
23 knows or not. I mean -- I mean by that, that you want to hear from the suspect, directly
24 from him, that he is willing to cooperate. Some other person may tell me that the
25 suspect has this and this intention. Unless you get confirmation from the suspect

1 directly, you cannot act, especially in a situation or in a country where we haven't been
2 there. We are not in a position to travel there. The communication is very difficult to
3 establish contact with the suspect.

4 PRESIDING JUDGE KORNER: [10:25:47] Well, I understand what you say, sir, but
5 then can I ask you what in your view would have been conclusive evidence?

6 A. [10:25:59] When the video came showing the suspect identifying himself, that was
7 for me conclusive. That was for me the point, and I think also for the team, to take this
8 intermediary seriously and seriously start making plans to facilitate the surrender of
9 the suspect.

10 PRESIDING JUDGE KORNER: [10:26:41] But you stand by your answer, do you, you
11 never asked for that video?

12 A. [10:26:50] No, I did not ask specifically for that video. I asked for corroborations,
13 or, yeah, proof that he is in contact with the suspect. I explained -- mainly he asked me
14 questions about the situation, the suspect's status. Basically, he is -- there's an arrest
15 warrant for him, and whether if he wanted to testify and how it'd work. And I said,
16 "All these things cannot be discussed with you. It has to be discussed with the
17 suspect," directly with him.

18 PRESIDING JUDGE KORNER: [10:27:34] Yes, well, I have no further questions, but my
19 colleagues may have questions for you.

20 JUDGE ALEXIS-WINDSOR: [10:27:52] Good day, sir.

21 A. [10:27:55] Good day.

22 JUDGE ALEXIS-WINDSOR: [10:27:59] I have only a few questions for you, I think. If
23 you would look at your statement, please. Look at paragraph 7, where it says: "...
24 which I stressed to him," and the sentence ends with "steps."

25 A. [10:28:18] Yes.

1 PRESIDING JUDGE KORNER: [10:28:19] In your mind, what did you conceive as
2 proof to authenticate identity? What were you thinking of? What were the means that
3 you envisaged?

4 A. [10:28:37] I think the first thing that might come up to my mind is at that time a
5 picture of the suspect with his ID card or copy of his passport with something showing,
6 like a newspaper showing the date of -- time, a direct phone number of the suspect to
7 facilitate a direct call with him, but that would be, like, with -- with image and a call
8 that would show ID of the suspect, possibly a video of the suspect talking that, "I am
9 the suspect with this name and willing to cooperate with the Court."

10 JUDGE ALEXIS-WINDSOR: [10:30:00] And these methodologies of proof that you
11 thought of, did you communicate them to the intermediary?

12 A. [10:30:06] I recalled the intermediary is -- is knowledgeable about the situation.
13 He is -- he is a lawyer, and he said that he was exposed to the Court before. And he
14 was aware of such methods to prove the ID of the suspect.

15 JUDGE ALEXIS-WINDSOR: [10:30:49] All right. Look at -- so before I go to that. So
16 that is on 27 December; yes?

17 A. [10:30:56] Yes.

18 JUDGE ALEXIS-WINDSOR: [10:30:58] Now look at paragraph 9. Look at the first
19 sentence ending with the word "planning."

20 A. [10:31:16] Yes.

21 JUDGE ALEXIS-WINDSOR: [10:31:18] Have you done so?

22 A. [10:31:19] You mean further planning?

23 JUDGE ALEXIS-WINDSOR: [10:31:32] Yes. Wait don't answer yet any questions. I
24 haven't asked you any actual question. You've read this sentence?

25 A. [10:31:40] Yes.

1 JUDGE ALEXIS-WINDSOR: [10:31:42] Very well. After the 27th then, am I to
2 understand, after 27 December that you continued to stress that there was a need to
3 authenticate identity; is that so?

4 A. [10:32:00] Correct.

5 JUDGE ALEXIS-WINDSOR: [10:32:03] By what means did you so stress: By phone
6 calls, by WhatsApp messages, by what means?

7 A. [10:32:10] I just followed up to see if there is any development. He -- the
8 intermediary contacted me. It was upon his own initiative. And he said that the
9 suspect is willing to -- to cooperate. I just wanted to know if there is a further
10 development regarding that matter.

11 I have to say also at that time we were pursuing a similar line of investigation and
12 possibly the priority was with another source.

13 JUDGE ALEXIS-WINDSOR: [10:32:58] Okay. Remind me, please. You said that you
14 received these certificates?

15 A. [10:33:10] Correct.

16 JUDGE ALEXIS-WINDSOR: [10:33:11] Remind me of when you received the
17 certificates, please?

18 A. [10:33:14] I think I received them on the 27th in the evening, late in the evening.

19 JUDGE ALEXIS-WINDSOR: [10:33:24] 27 December?

20 A. [10:33:25] Yes.

21 JUDGE ALEXIS-WINDSOR: [10:33:27] I see.

22 A. [10:33:29] 2019.

23 JUDGE ALEXIS-WINDSOR: [10:33:37] Do you recall how many times after 27
24 December 2019 that you were in contact with the intermediary?

25 A. [10:33:46] Do you mean after the time that the suspect had surrendered or --

1 JUDGE ALEXIS-WINDSOR: [10:34:00] Up until the time of the video. Between 27
2 December 2019 and the provision of the video.

3 A. [10:34:13] I do not recall how many times.

4 JUDGE ALEXIS-WINDSOR: [10:34:15] Did you record any of these conversations or
5 contacts?

6 A. [10:34:19] I -- I do not -- I do not recall that I've recorded them. I wasn't able also
7 to check my -- my e-mails before coming to -- to testify.

8 JUDGE ALEXIS-WINDSOR: [10:34:43] All right. Tell me something. If you are in
9 contact with someone, let's say an intermediary, or the person is in contact with you,
10 and you are not in the office, what is the standard operating procedure when you get
11 back to the office as an investigator? Do you or are you supposed to make a record that
12 such-and-such conversation or such-and-such contact had been made to you?

13 A. [10:35:14] I know -- because this contact is very important, it relates to a very
14 important matter, I acted quickly by informing those within the office who should
15 know. There were also subsequent meeting to discuss the plans and going forward.
16 But, correct, in relation to the manual, when I am back I should record these -- this
17 contact. Often my -- or I ask my colleague, who is in the office, to record such contact.
18 Often I would send, like, an e-mail with a summary of the contact and it would be -- it
19 would be logged.

20 JUDGE ALEXIS-WINDSOR: [10:36:35] I'm not sure you answered my question. So am
21 I to take it then, if I were to understand your answer, that, first of all, there was a
22 standard operating procedure that on return to the office you should make a record of
23 conversations or contacts that had been made?

24 A. [10:36:52] Yes.

25 JUDGE ALEXIS-WINDSOR: [10:36:58] Did you?

1 A. [10:36:58] Even at that time, you ask somebody in the office who can create a log
2 for you.

3 JUDGE ALEXIS-WINDSOR: [10:37:07] Okay. Did you, in fact, do so after 27 December
4 2019 when you returned to the office?

5 A. [10:37:13] No.

6 JUDGE ALEXIS-WINDSOR: [10:37:16] Why not?

7 A. [10:37:17] I think I was busy with other tasks and I kind of let it -- let it go. Things
8 were moving at such a speed. I am an investigator who's been solicited a lot with
9 external contacts and often I act on -- right away on any contact and -- leaving me not
10 much time to record contact on -- in a timely manner. But I do discuss it always with
11 the team.

12 JUDGE ALEXIS-WINDSOR: [10:38:16] Very well. One moment, please. All right.

13 Those were all my questions. Thank you.

14 JUDGE ALAPINI-GANSOU: [10:38:35](Interpretation) Thank you, Madam President.

15 Madam President, I have two concerns with regard to the witness.

16 Good morning, Mr Witness. Do you hear me?

17 I have two concerns with regard to all the questions put to you. The first question --
18 the first concern, rather, is that I would like to know, here, we are facing your first
19 experience in the area of investigations in the Court? I know that you have been an
20 assistant and you are an assistant and you have worked with people. But in terms of,
21 you know, your responsibilities, this is your first experience?

22 A. [10:39:43] This is the first experience in relation to the arrest of -- of a suspect,
23 indeed.

24 JUDGE ALAPINI-GANSOU: [10:39:56](Interpretation) And, secondly, what is your
25 own understanding of what is happening within the framework of the investigation

1 which you have undertaken.

2 A. [10:40:14] I -- (microphone not activated).

3 THE INTERPRETER: [10:40:34] The witness turned off his microphone.

4 THE WITNESS: [10:40:40] I beg your pardon, your Honour. I did not understand the
5 question or the translation of it.

6 JUDGE ALAPINI-GANSOU: [10:40:47](Interpretation) How do you understand what
7 is happening within the framework of the investigation which you have conducted?

8 A. [10:40:55] If I may give an answer. We have arrest warrants that have been issued
9 against some suspect. And we were conducting an investigation and trying to prepare
10 ourselves and get ready for the time that a suspect would be arrested or surrendered.
11 This Darfur case took quite long time since the time the warrants were issued up until
12 the time that one suspect had surrendered himself.

13 Investigatively, I was searching and I was also informing my superiors about the need
14 to remain focused and jump on the -- an opportunity that might arise and that we in --
15 in a case that one of the suspect would surrender.

16 I was reading the security and political development in the country Sudan and
17 assessing that the situation would change and had changed not in favour for the
18 suspect, and, therefore, as investigator, the OTP should be ready to act on such
19 opportunity.

20 By doing so, I was also trying to promote that it is important to have the case active. I
21 believe before 2019, there were no cooperation from the country of Sudan. There was --
22 they were hostile to us. So the likelihood for someone to surrender is almost nil,
23 especially because we also are not able to go to the field there and interact directly with
24 personnel out of field that you -- even remotely, interacting with a possible
25 intermediary can put people in danger. Up until the change, I think around April 2019,

1 I started seeing an opportunity that we might get a suspect, and we need to do -- to do
2 our best to try to engage with them or their entourage to encourage them to -- to
3 cooperate with the Court.

4 I'm not sure whether this answer is what you are expecting from me.

5 JUDGE ALAPINI-GANSOU: [10:45:08](Interpretation) Mr Witness, I will re-word my
6 question. Are you happy to be here testifying before the Court on an investigation
7 which you yourself have conducted?

8 A. [10:45:23] Yes, I'm happy to -- to come here and testify. This is my duty. And this
9 is also an honour for me to tell you about the investigation and also to inform you
10 about my activities in relation to the arrest of the suspect. For me, this was like a major
11 step in my career. I have acted in good faith throughout my dealing with the suspect
12 and his entourage. And even before, I tried to create a situation where we can engage
13 directly with the suspect, so I can explain and also relay the office -- the procedure and
14 to convince him that it's really best for him to surrender himself.

15 I knew that him being at large in Sudan it might put the suspect at risk and we might
16 lose an important evidence. The situation is changing. The security situation is
17 changing in Sudan, and I'm happy that the suspect at the end surrendered himself and
18 we were able to bring him to safety and able to explain to him that it's important to
19 cooperate.

20 So with that in mind, I see this as an honour for me to be called to come and testify and
21 answer your questions.

22 JUDGE ALAPINI-GANSOU: [10:47:52](Interpretation) Madam President, I am
23 satisfied. So I will stop there, thank you.

24 PRESIDING JUDGE KORNER: [10:47:55] Thank you.

25 Mr Nicholls, do you have any questions?

- 1 MR NICHOLLS: [10:48:03] Yes. A few, your Honour.
- 2 QUESTIONED BY MR NICHOLLS:
- 3 Q. [10:48:10] Good morning, Mr Witness.
- 4 A. [10:48:12] Good morning.
- 5 Q. [10:48:13] Just at the very beginning, I won't say his name, but your colleague, the
6 investigator you've referred to, testified here. You did not watch his testimony; is that
7 correct?
- 8 A. [10:48:27] That's correct.
- 9 Q. [10:48:27] And immediately afterwards, you were informed not to read the
10 transcripts of his testimony either, and you did not do so; is that right?
- 11 A. [10:48:40] That's right. I confirm.
- 12 Q. [10:48:43] Thank you. And, again, you've been out about four months, five
13 months? How long is it?
- 14 A. [10:48:53] Four months.
- 15 Q. [10:48:54] Thank you. I wanted to just ask you a couple questions about some
16 reports in this case. First of all, let me just put it this way. The questions you've
17 answered, we agree, record keeping of conversations with P-0869 was not perfect in
18 this case? It could have been better; right?
- 19 A. [10:49:24] Yes, correct. It could have been better.
- 20 Q. [10:49:31] And many of these interactions should have been logged right away in
21 the investigative management system as soon as possible; right?
- 22 A. [10:49:41] Yes, right.
- 23 Q. [10:49:43] Could you look at tab 2, please.
- 24 MR NICHOLLS: [10:49:51] Your Honours, that's DAR-OTP-0215-7063.
- 25 Q. [10:50:01] And that's the first report by your colleague. You've read that report;

1 right?

2 PRESIDING JUDGE KORNER: [10:50:10] That's the one in October.

3 MR NICHOLLS: [10:50:16] That's the one from 7 December.

4 PRESIDING JUDGE KORNER: [10:50:18] December, sorry. Yes, 7 December.

5 THE WITNESS: [10:50:22] Yes, I read it.

6 MR NICHOLLS: [10:50:24]

7 Q. [10:50:24] And if you can look at tab 3, that's another report by your same
8 colleague investigator. That one dated 26 February 2021. I won't read out the ERN.

9 A. [10:50:40] Yes, I have it in front of me.

10 Q. [10:50:41] And actually in your statement I believe you say you reviewed those?

11 A. [10:50:47] Correct.

12 Q. [10:50:50] And you reviewed them yesterday in the time you were in the office?

13 A. [10:50:54] Yes, I reviewed them yesterday. I was given a binder. I tried to go
14 through everything, despite the --

15 Q. [10:51:05] Okay.

16 A. [10:51:05] -- time constraints.

17 Q. [10:51:07] And my question is these reports are not authored by you, but they
18 contain information of interactions between you and P-0869?

19 A. [10:51:23] Correct.

20 Q. [10:51:28] Now, do you recall -- when the investigator who was writing these
21 reports up wrote them, did you discuss the creation of the reports with him? Did he
22 talk to you about what had happened when he was making these reports?

23 A. [10:51:42] Yes, I believe.

24 Q. [10:51:48] And just very quickly, having reviewed them yesterday, I'm not asking
25 about every word and comma, but are these largely correct in the chronology and the

1 information, or did you notice any real mistakes?

2 A. [10:51:59] Yes, I -- I confirm it's largely correct. There may be minor things, but it's
3 up to -- it's small inconsistencies, such as the contact of 26 December, because it relates
4 to a contact that has been started on the 26th, and I was travelling and arrived on 27th.
5 So it's a minor inconsistency, but the content is -- is correct.

6 Q. [10:52:41] Okay. And you've just brought it up, but the first contact with P-0869
7 on the telephone on 27 December, that was the first time you'd ever spoken or heard of
8 this -- you'd ever spoken to this person; right?

9 A. [10:53:02] Yes, it is the first time that I have spoken with this person.

10 MR EDWARDS: [10:53:07] Can I -- I'm not objecting at this stage. But so far, almost all
11 of my friend's questions to the witness have been leading questions. Although strictly
12 speaking, my learned friend is addressing the witness and examining the witness in
13 response to your Honours' questions, this is not cross-examination and should not be
14 cross-examination in the traditional sense because, to all intents and purposes, this is a
15 witness who is supportive of my learned friend's position.

16 PRESIDING JUDGE KORNER: [10:53:50] Well, Mr Edwards, obviously, the same
17 thought had occurred to me, but I worked on the basis that, as it's the Chamber who
18 has called the witness, Mr Nicholls is entitled to put leading questions to him. Whether
19 those leading questions are doing him any good is only he can work out, but I think he
20 is entitled strictly to do it.

21 Well, you've raised it, Mr Nicholls, so I may as well say this.

22 Sir, in the reports that were prepared by your colleague, there's no mention of 869
23 having contacted you first and you then responded. Do you know -- it suggests that
24 you made the first contact with 869. Do you know how the other investigator came to
25 do that record?

Trial Hearing
WITNESS: DAR-OTP-P-1049

(Open Session)

ICC-01/14-01/21

- 1 THE WITNESS: [10:55:03] In relation to 26 December?
- 2 PRESIDING JUDGE KORNER: [10:55:06] Yes.
- 3 THE WITNESS: [10:55:07] If I can read it.
- 4 PRESIDING JUDGE KORNER: [10:55:10] Yes.
- 5 THE WITNESS: [10:55:11] If I allow me.
- 6 PRESIDING JUDGE KORNER: [10:55:13] Certainly.
- 7 THE WITNESS: [10:55:15] An OTP investigator --
- 8 PRESIDING JUDGE KORNER: [10:55:16] Well, don't read it out.
- 9 THE WITNESS: [10:55:18] Then --
- 10 PRESIDING JUDGE KORNER: [10:55:19] Just read it to yourself.
- 11 THE WITNESS: [10:55:21] -- contacted P-0869 and informed him that he required proof
- 12 that this e-mail was genuine and proof of identity.
- 13 PRESIDING JUDGE KORNER: [10:55:33] Yes, that suggests that the first contact with
- 14 P-0869 comes from you. But you say no, he had -- you were unaware of the e-mail at
- 15 the time that you rang 869 back. That's what you told us earlier this morning.
- 16 THE WITNESS: [10:55:51] Yes, I was at that time unaware of the e-mail. I was later on
- 17 after the call I became aware of the e-mail. The paragraph relates to an e-mail that has
- 18 been sent on 26 December, and then it relates to me contacting or having contact with
- 19 869. But that * could have been amended and explained in more details.
- 20 PRESIDING JUDGE KORNER: [10:56:32] All right.
- 21 Yes, all right, Mr Nicholls.
- 22 MR NICHOLLS: [10:56:35] Thank you.
- 23 Q. [10:56:36] And the phone call when you're getting off the boat, this phone call
- 24 with 869, the first one, approximately how many minutes was it?
- 25 A. [10:56:51] I -- I think at that time I was a bit in a rush. I would estimate between

- 1 five to ten minutes.
- 2 Q. [10:57:08] Thank you. Very quickly, could you look at tab 35 please, Mr Witness.
- 3 MR NICHOLLS: [10:57:23] Your Honours, that's 00000837.
- 4 PRESIDING JUDGE KORNER: [10:57:31] (Microphone not activated).
- 5 MR NICHOLLS: [10:57:34] It's the e-mail sent on 28 December.
- 6 Q. [10:57:49] Do you have that in front of you, sir?
- 7 A. [10:57:51] Yes, I do.
- 8 Q. [10:57:52] And you can see there that your colleague has sent this e-mail out on
- 9 the morning at about quarter after 10.00 on 28 December 2019?
- 10 A. [10:58:10] Correct.
- 11 Q. [10:58:11] And if you look at the first bullet point:
- 12 "Lawyer," I won't say the name, "is forwarding material ... (certificates/military ID's etc)
- 13 to authenticate that he is in contact with Kushayb's family and/or associates."
- 14 A. [10:58:39] Correct.
- 15 Q. [10:58:39] So that reflects what you told your colleague shortly after the call?
- 16 A. [10:58:42] Yes, that reflects that I have shared with him the content of the
- 17 conversation and the certificates.
- 18 Q. [10:58:51] And the second bullet point that starts:
- 19 "The lawyer has indicated that Kushayb may provide a version."
- 20 A. [10:59:02] Correct.
- 21 Q. [10:59:03] That's something else you told your colleague?
- 22 A. [10:59:04] Yes.
- 23 Q. [10:59:07] And that's P-0869 telling you that the person, Ali Kushayb, may make a
- 24 witness statement?
- 25 A. [10:59:25] Yeah, it reflects that they may make a video material.

1 Q. [10:59:28] And that's the file that was sent to you, or that he would make a
2 statement? By file meant to you, I mean the audio file.

3 A. [10:59:44] Yes, that's, I think, based on my understanding of the audio file that
4 they make -- he might make an audio recorded statement.

5 MR NICHOLLS: [11:00:03] I'd have a few more, your Honour but, we're ...

6 PRESIDING JUDGE KORNER: [11:00:07] (Microphone not activated).

7 MR NICHOLLS: [11:00:10] Well, I think I may need a little more than just the three
8 minutes.

9 PRESIDING JUDGE KORNER: [11:00:14] (Microphone not activated).

10 THE COURT USHER: [11:00:21] All rise.

11 (Recess taken at 11.00 a.m.)

12 (Upon resuming in open session at 11.33 a.m.)

13 THE COURT USHER: [11:33:17] All rise. Please be seated.

14 PRESIDING JUDGE KORNER: [11:33:42] Yes, Mr Nicholls.

15 MR NICHOLLS: [11:33:44] Thank you, your Honours.

16 Q. [11:33:52] Okay, Mr Witness. About 10 minutes, maybe 15.

17 Going back to December 2019. I'm talking about not P-0869 but the other intermediary
18 or avenue that you were talking about that you were pursuing at the time. Do you
19 follow me who I'm talking about?

20 A. [11:34:18] Yes.

21 Q. [11:34:19] Yes.

22 A. [11:34:21] I get it.

23 Q. [11:34:22] Was part of that effort or process that had been undergone through that
24 other avenue to obtain a statement from the suspect if he would not surrender?

25 A. [11:34:35] Can you repeat the question? The last part that you said? Sorry.

1 Q. [11:34:49] Yes, I apologise for that. Sorry. The other person, not 869, the OTP had
2 been in contact, and primarily through you, with that person for some time; is that
3 right?

4 A. [11:35:03] Correct.

5 Q. [11:35:04] Was part of the goal of pursuing -- speaking to that person, not 869, in
6 order to get a statement from the suspect even if he ultimately would not -- refused to
7 surrender?

8 A. [11:35:20] Yes, indeed. The other line of inquiry I was directly in contact with, we
9 are actually -- we were progressing getting possibly a statement or getting the suspect
10 to surrender, and it -- when the intermediary 0869 got involved, it corroborated more
11 or less the first line of inquiry.

12 Q. [11:36:05] (Microphone not activated).

13 THE INTERPRETER: [11:36:13] Mic, please.

14 MR NICHOLLS: [11:36:16]

15 Q. [11:36:17] Turning now to the WhatsApp messages. Those are in -- I'm not going
16 to go through them, but those are in tabs 11 and 12, the translation in tab 12. Did you
17 review those -- well, did you have time to review those yesterday at all?

18 A. [11:36:40] Yes, I had the time to look at them yesterday.

19 Q. [11:36:46] Okay. And you provided those to the other investigator while you were
20 out on leave?

21 A. [11:36:50] Yes, correct.

22 Q. [11:36:53] And just to be very clear, other than the ones in the binder before you,
23 were there any other WhatsApp messages between yourself and P-0869 before the
24 receipt of the video on 20 March?

25 A. [11:37:14] No, there is no other WhatsApp messages. I shared everything I had in

1 my WhatsApp with my colleague.

2 Q. [11:37:30] Thank you. And regarding the existence of an arrest warrant for the
3 suspect issued by the Government of Sudan - so, in other words, a GoS arrest warrant -
4 I think you said you learned of that from open source, is that right, or did you learn of
5 it a different way, the report that GoS had an arrest warrant for him?

6 A. [11:38:02] Yes, I think at some stage I learned from open source that the GoS are
7 looking for him, but also I learned from other contacts, including the line of inquiry,
8 that the suspect is in a difficult situation.

9 Q. [11:38:33] Okay. It's not in your binder, but could we please bring up DAR-OTP-
10 0215-2766.

11 MR NICHOLLS: [11:38:48] That can be broadcast. This is the media article that was
12 attached to our filing.

13 Q. [11:39:10] Could you just take a look at that article, sir.

14 A. [11:39:15] It doesn't show up.

15 MR NICHOLLS: [11:39:19] Can we assist. Maybe ...

16 THE WITNESS: [11:39:35] Thank you.

17 MR NICHOLLS: [11:39:36]

18 Q. [11:39:36] You don't need to read the whole thing, but just take a moment and
19 look at it. So just the question is - again, you don't need the whole thing - but have you
20 seen this before? Do you remember? If you don't remember, it's okay.

21 A. [11:40:24] Yeah, I recall I have seen it before.

22 Q. [11:40:26] Now, when you learned - and I'm trying to be precise here - of a report
23 of an arrest warrant, not just of people looking for the suspect but of an actual arrest
24 warrant having been issued by the Government of Sudan, was that from this article or
25 from before or from a different article, if you remember?

- 1 A. [11:40:47] I think it was from a different article, an Arabic open source.
- 2 Q. [11:41:00] Okay. And was it before or after this one, which was issued on -- this is
3 from June 11th, 2020, so after his surrender?
- 4 A. [11:41:19] I think it might be before.
- 5 Q. [11:41:24] Do you remember when?
- 6 A. [11:41:25] I don't know. I don't recall now when exactly.
- 7 Q. [11:41:32] Okay. All right. Let me just move on now to when the office had calls
8 with the suspect starting in April 2020. That's what I'm going to ask you about now,
9 okay?
- 10 A. [11:41:51] Yes.
- 11 Q. [11:41:52] Now, I'm going to ask you about -- these are tab 25. We're not going to
12 go through every phone call. But on 7 April 2020, there was a phone call with the
13 suspect; correct?
- 14 A. [11:42:15] Correct.
- 15 Q. [11:42:28] Again, I won't go through all of them. But from the very beginning of
16 the OTP speaking with the suspect, what was our position on how quickly he should
17 surrender, how quickly we wanted him to come?
- 18 A. [11:42:45] I think at that time, mindful of the security situation, our intention was
19 to get him to move to a safe location as quick as possible before being harmed.
- 20 Q. [11:43:13] Okay. Thank you. And it should be at your tab 25. This is DAR-OTP-
21 0215-8935, at page 8943.
- 22 MR NICHOLLS: [11:43:42] If we could go to lines 228 to 230.
- 23 Q. [11:43:47] And here we see:
24 "And because things on the ground in different parts of the world are unpredictable
25 and circumstances change, it's best to act as soon as possible when there's a way to

1 move safely."

2 Do you remember us saying that to him?

3 A. [11:44:07] Yes, I recall that.

4 Q. [11:44:17] And if we can go to page 8945, lines 320 to 328:

5 "OK, well, again I thank you for speaking with us and taking that step and what's

6 important now is that we keep the process going and that we're able to meet you as

7 you said, hear your ... we'll hear what you have to say and talk about closing this case."

8 Do you remember us saying that to him?

9 A. [11:44:51] Yes, I remember.

10 Q. [11:44:53] All right. I'll move through this a little bit more quickly.

11 MR NICHOLLS: [11:45:07] Can we go to the call 10 April 2020.

12 Q. [11:45:12] That's at your tab 26, sir.

13 MR NICHOLLS: [11:45:15] DAR-OTP-0215-8950 at 8956.

14 Q. [11:45:35] And I'll direct you, sir, if you have that page, it would be in front of you
15 at lines 165 to 168.

16 "And what I would suggest is that you can speak to ..."

17 And then there's your name there. I won't read it out loud. Right?

18 A. [11:46:04] Yes, correct, I see my name.

19 Q. [11:46:06] "... a bit about the logistics and how you can make this journey as soon
20 as possible ..."

21 Correct?

22 A. [11:46:14] Correct.

23 Q. [11:46:14] And did you discuss then with the suspect our view that he should

24 come as soon as possible? I don't mean right then, but did you have those discussions

25 with him conveying that the logistics should be set up so that he could come as soon as

1 possible?

2 A. [11:46:32] Yes, I did discuss that with him. And --

3 Q. [11:46:40] Well, wait for the question. You discussed it with him. And now just --
4 I'm not going to go through the points, but was the suspect willing to come as quickly
5 as possible? Did he give you any reasons why he wouldn't come?

6 A. [11:46:57] The suspect was willing to come. I recall that he wanted to spend the
7 month of Ramadan with his family before leaving, and I take it from there that he was
8 preparing for his journey. He was preparing for his -- for him crossing to the -- to CAR
9 to come and see us.

10 Q. [11:47:51] Okay. And the conversation we just looked at was 10 April. You met
11 him in CAR in June * 2020, right, in Birao?

12 A. [11:48:07] Correct.

13 Q. [11:48:09] And that's when he was willing to come?

14 A. [11:48:13] Yes, he was willing to come, but he had, like, small condition that we
15 had to discuss and remove so he can move as quick as possible.

16 Q. [11:48:32] All right. Thank you. Give me one second.

17 (Prosecution counsel confer)

18 MR NICHOLLS: [11:48:53]

19 Q. [11:48:54] If you could go to tab 4 of your binder. That's a report of the interaction
20 you had with the suspect in Birao when he ultimately surrendered.

21 A. [11:49:19] Correct.

22 Q. [11:49:20] Now, I don't know if you had a chance to review this yesterday, or if
23 you remember if you reviewed it yesterday or not?

24 A. [11:49:30] Yes, I had a look at it yesterday.

25 Q. [11:49:32] Okay. So what I would like you to do, just very briefly, you finally meet

1 the suspect, who's in the courtroom, in Birao. You go and meet him in this house,
2 right, near the UN base? Is he willing to come with you right away? What's his
3 attitude? Is he running for the helicopter saying, "Let's go"?

4 A. [11:49:58] Yeah, there were -- there were issues preventing him coming and
5 moving right away. I was alerted to it a day before, when I called him once I was in
6 Bangui to make sure that he had arrived and that -- to go through the script of what
7 will happen the next day. And the suspect mentioned that he wanted to travel with his
8 bodyguards. And I told him that everything has been set up, the logistics, chartered
9 flight, and because of the COVID situation there is basically no way that we can
10 accommodate that.

11 During this phone call with him on the 6th, I did not want to engage too much, not to
12 possibly make him uncooperative, and we have agreed that I will come, I will see him
13 the next day and we do as planned.

14 On the 7th, I met him in a place that was -- he felt that was the safest place for him, not
15 necessarily for myself. I explained to him that we took some risk to come and see him,
16 believing his words, believing that he is willing to surrender, and that the time is of
17 essence, that he should move as quick as possible.

18 I came in to the place where -- of the (Redacted), and I saw him there, waiting. And I asked
19 him before coming over the phone that he should be alone as to remove any other
20 influences on him, so I can have a direct conversation without other people interfering
21 or deciding for him what should be done or not.

22 During the conversation, he insisted that he was with his -- I found out he was with his
23 two sons and two bodyguards, and he insisted that they should travel with him all the
24 way to the Netherlands. And I told him that's impossible. It cannot be done now. And
25 that it will delay the whole matter or the whole operation, and this operation might

- 1 falter if he insists on that.
- 2 I explained to him also for his own --
- 3 PRESIDING JUDGE KORNER: [11:53:30] I'm really sorry, but what's this really
4 relevant to?
- 5 MR NICHOLLS: [11:53:34] Well, I'll stop it, your Honour. But what it's relevant to is
6 the arguments my learned friend made in their submissions before you sometime ago
7 that the OTP delayed and that the suspect should have come straightaway.
- 8 PRESIDING JUDGE KORNER: [11:53:53] I know but -- I know that was the argument,
9 but the full blow-by-blow description of what was said --
- 10 MR NICHOLLS: [11:54:02] No, I was --
- 11 PRESIDING JUDGE KORNER: [11:54:02] Yes --
- 12 MR NICHOLLS: [11:54:03] -- I was going to stop it.
- 13 PRESIDING JUDGE KORNER: [11:54:06] -- stop it.
- 14 MR NICHOLLS: [11:54:08] So I'll move along -- sorry.
- 15 MR LAUCCI: [11:54:12] No. If it can help, this argument is related to the period
16 running from December to March, not after.
- 17 MR NICHOLLS: [11:54:18] So we'll move it along.
- 18 Q. [11:54:23] And just try to focus on my question and answer it. Did one of the
19 bodyguards say something about whether or not the suspect should leave, that you
20 recall?
- 21 A. [11:54:32] I recall in particular one bodyguard insisted that he would not -- he
22 should not leave without him, and the suspect was paying attention to that and saying
23 that, yeah, it's then difficult for me to leave them behind. I cannot leave them behind.
24 My first interaction with the suspect was --
- 25 Q. [11:55:02] Okay. Sorry. You answered the question.

- 1 MR NICHOLLS: [11:55:04] Your Honour, could we go into private session for one
2 question. One minute.
- 3 PRESIDING JUDGE KORNER: [11:55:10] Private session, please.
4 (Private session at 11.55 a.m.)
- 5 THE COURT OFFICER: [11:55:22] We're in private session, Madam President.
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Open session at 11.56 a.m.)
- 17 THE COURT OFFICER: [11:56:00] We are back in open session, Madam President.
- 18 MR NICHOLLS: [11:56:02] Thank you. I think I'm wrapping up, thank you. I won't go
19 further on the surrender.
- 20 Q. [11:56:09] Just this: You've interviewed many, many civilians and citizens from
21 Darfur in connection with this investigation?
- 22 A. [11:56:22] Correct.
- 23 Q. [11:56:24] Including shopkeepers, merchants, different kinds of trades people?
24 A. [11:56:29] Yes.
- 25 Q. [11:56:30] How many of them had bodyguards?

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1 A. [11:56:31] None of them.

2 Q. [11:56:44] Thank you.

3 PRESIDING JUDGE KORNER: [11:56:46] That completes your questions?

4 MR NICHOLLS: [11:56:50] Yes, your Honour, thank you.

5 PRESIDING JUDGE KORNER: [11:56:51] Yes, Mr Edwards.

6 QUESTIONED BY MR EDWARDS:

7 Q. [11:57:04] It's still just about the morning, so good morning, Mr Witness. We met
8 yesterday briefly. But just to remind you, my name is Iain Edwards and I'm one of the
9 lawyers for Mr Abd-Al-Rahman.

10 Do you know that in December of last year, just before the Christmas break, there were
11 legal arguments relating to the video that you received from the intermediary?

12 A. [11:57:44] Yes.

13 Q. [11:57:48] Did you know that those arguments were taking place before they took
14 place? Did you know that they were going to happen in December before they actually
15 started?

16 A. [11:58:05] No.

17 Q. [11:58:07] You only learned that these arguments took place after they happened?

18 A. [11:58:12] Yeah, I think so.

19 Q. [11:58:15] You didn't watch those arguments being broadcast live via the Court's
20 web site?

21 A. [11:58:25] Yeah, I don't recall. I did not pay much attention to it, but I know that
22 there is argument about the video.

23 PRESIDING JUDGE KORNER: [11:58:44] Sorry, sir, it's a fairly straightforward
24 question: Did you watch the proceedings when the argument took place in December
25 of last year?

1 THE WITNESS: [11:58:59] I think I watched the -- the proceeding, but not in its
2 entirety. I have other activities. And when I have time, I try to watch.

3 MR EDWARDS: [11:59:14]

4 Q. [11:59:15] Okay. But even if you had watched the proceedings for a matter of a
5 few minutes, it was entirely clear to you that the arguments related to your very first
6 interactions with Mr Abd-Al-Rahman, correct, whether direct or indirect?

7 A. [11:59:46] Yes.

8 Q. [11:59:47] But you didn't watch all of the proceedings?

9 A. [11:59:55] No, not all of it.

10 Q. [11:59:57] And you started watching them, you had, you know, logged onto the
11 web site and you brought up the -- you clicked the button that brings up the screen,
12 and you're watching it because it was something that was of interest to you
13 professionally and personally; correct?

14 A. [12:00:20] I did not approach it in that manner, that I should watch this
15 proceeding. No one told me that I should watch it because it is of interest to me.

16 Q. [12:00:38] I'm not suggesting that anyone should tell you to watch it, but the fact
17 of the matter is it was something of interest to you; right? That's why you took the
18 steps to click on the button and bring up the screen and follow what was going on,
19 even if not all of it?

20 A. [12:01:00] Me watching the proceeding is no different than watching my witnesses
21 --

22 Q. [12:01:10] Yes.

23 A. [12:01:10] -- coming --

24 Q. [12:01:12] Yes.

25 A. [12:01:12] -- and testifying.

- 1 Q. [12:01:15] I accept that.
- 2 A. [12:01:16] So --
- 3 Q. [12:01:17] That's fine.
- 4 A. [12:01:19] -- there is no more relevance than the usual one.
- 5 Q. [12:01:22] Okay. And then you subsequently knew that that hearing was
- 6 adjourned and resumed last Monday with the evidence of your colleague?
- 7 A. [12:01:39] Are you referring to a proceeding in December?
- 8 Q. [12:01:47] No, I'm --
- 9 A. [12:01:48] December --
- 10 Q. [12:01:50] -- talking about the proceedings from last Monday when your colleague
- 11 testified.
- 12 A. [12:01:54] Okay. Let me rectify. I think I might not have -- got this wrong. I think
- 13 I was thinking about the proceeding in 2000 -- not this year, the year ago.
- 14 Q. [12:02:11] No, sorry.
- 15 A. [12:02:12] In December, I haven't --
- 16 Q. [12:02:14] No. Let me just make it clear. I started asking you about proceedings in
- 17 December.
- 18 A. [12:02:19] In December. Which year?
- 19 Q. [12:02:21] Last year, just before Christmas break.
- 20 PRESIDING JUDGE KORNER: [12:02:27] Just a moment. Mr Nicholls is on his feet.
- 21 MR NICHOLLS: [12:02:29] I apologise. There's no objection, but there's an immense
- 22 amount of talking over. And for the transcript, both people are talking at once. And I
- 23 apologise for interrupting, but it will be difficult.
- 24 MR EDWARDS: [12:02:42] Thank you. Mea culpa.
- 25 Q. [12:02:47] All right. In December of last year, 2022, there were legal arguments

- 1 relating to the admissibility of the video, the Abd-Al-Rahman video, and other
2 recordings. Did you watch those legal arguments --
- 3 A. [12:03:14] No --
- 4 Q. [12:03:14] -- online.
- 5 A. [12:03:15] -- I did not watch those arguments. I did not follow the proceeding.
- 6 Q. [12:03:23] Did you know that those arguments were going to take place last
7 December?
- 8 A. [12:03:26] No, I knew that the issue might be brought up, but I didn't know when.
- 9 Q. [12:03:39] After those arguments you were contacted - I'm not going to go into
10 detail - but you were contacted about your availability, whether you would be working
11 at some point in January of this year; right?
- 12 A. [12:03:57] Yes.
- 13 Q. [12:03:57] And it was explained to you that the Court wanted to hear from you
14 and/or your colleague who testified last week?
- 15 A. [12:04:09] Yes.
- 16 Q. [12:04:11] And there was regular communication between staff of the Court and
17 you about your availability to testify; correct?
- 18 A. [12:04:26] Yeah, through * medical.
- 19 Q. [12:04:31] Yes. And in the course of these communications, were you ever told
20 that your colleague was to testify last Monday?
- 21 A. [12:04:44] Yes.
- 22 Q. [12:04:48] You were never told before last Monday that you should not watch the
23 proceedings?
- 24 A. [12:05:05] I was told that I should not watch the proceedings --
- 25 Q. [12:05:12] When?

1 A. [12:05:13] -- that I should not. When I was informed that I will be testifying this
2 Thursday and that my colleague is going to testify on the 16th. And I said I have no
3 interest in watching the proceeding.

4 Q. [12:05:39] You had no interest watching the proceeding?

5 A. [12:05:41] No interest, and I will abide by the instruction.

6 Q. [12:05:46] Okay.

7 A. [12:05:46] And for my own benefit, I was not following and I did not want to -- I
8 was not in a situation to follow the proceeding.

9 Q. [12:06:03] What do you mean you weren't in a situation to follow the proceeding?

10 A. [12:06:06] I was in a sick leave, and I was focusing on my recovery to come back as
11 soon as possible and to be able to testify.

12 Q. [12:06:19] Was it someone from the Office of the Prosecutor who told you before
13 last Monday that you should not watch the proceedings?

14 A. [12:06:27] Yes, my team leader.

15 Q. [12:06:34] All right. And you told us earlier that you also haven't read the
16 transcript --

17 A. [12:06:43] No.

18 Q. [12:06:44] -- of the proceedings?

19 A. [12:06:45] No. I have -- I have to clarify. When you said "last year," I -- my
20 thinking went to really last year, year ago. But if you could have said last December,
21 last month, then I would have put things -- I would have answered better. But just to
22 clarify again, in December, in November, I wasn't following any proceeding, even up
23 till the day of today.

24 Q. [12:07:17] Okay. The statement that you prepared, dated yesterday, did you sit
25 down and draft this yourself, or was this statement produced in answer to questions

1 that someone asked you?

2 A. [12:07:34] There was an outline for the statement, and I produced it myself. I am
3 not, up to yesterday, aware of the main issue they think that I should testify about. So I
4 came more or less blank, with -- open-minded. I was given some guidance as to the
5 issue that I have to focus on on my statement to be able to produce it in short time.

6 Q. [12:08:13] Okay.

7 A. [12:08:14] In addition to reading the whole binder and familiarising myself with
8 the -- with the Court.

9 Q. [12:08:22] And what was the guidance that you were given as to the issues you
10 should focus on in your statement?

11 A. [12:08:27] It's my -- my first interaction with -- with the intermediary 869.

12 Q. [12:08:51] Anything else?

13 A. [12:08:52] And the investigative report that had been produced, DAR-OTP-0215-
14 9698 and DAR-OTP-0215-7063 and the security situation of the accused. These are the
15 materials received from 869, confirm whether I have received them and I provided
16 them to --

17 Q. [12:09:26] Were you asked to explain how long your first telephone call with P-
18 0869 was, how long it lasted?

19 A. [12:09:39] No.

20 Q. [12:09:57] One of the things that you were asked to look at was the security
21 situation of the accused, and we see that that's set out in paragraphs 10 to 12 of your
22 statement. I just want to deal with that very, very quickly.

23 MR EDWARDS: [12:10:13] Can we please have up again on the screen DAR-OTP-0215-
24 2766. This is the press article. And if we can just zoom in and look at the third
25 paragraph.

1 Q. [12:10:51] The last line of the third paragraph down that reads:

2 "An arrest warrant was issued for him on 2nd December 2019."

3 Do you see that?

4 A. [12:11:06] Yes.

5 Q. [12:11:07] Is that consistent with the information that you were receiving from
6 your sources in Sudan?

7 A. [12:11:16] Yes, more or less I was receiving information that he had -- he was shot
8 in his area of * living by some forces.

9 Q. [12:11:38] Was that pretty big news in Sudan at the time?

10 A. [12:11:41] I'm not sure it was a big news, but the bigger news is there was, like,
11 tribal clashes between his tribe and his involvement with another -- with other tribes in
12 November of 2019.

13 Q. [12:12:03] November 2019. Okay.

14 PRESIDING JUDGE KORNER: [12:12:06] Can you just scroll down to see the date on
15 the article of the arrest warrant. Wait. I'm just seeing where it is. Where did you see
16 the date?

17 MR EDWARDS: [12:12:24] It's the last line of paragraph 3.

18 PRESIDING JUDGE KORNER: [12:12:28] Oh, yes. I'm sorry. Yes, thank you.

19 MR EDWARDS: [12:12:35]

20 Q. [12:12:35] And the fact that his arrest warrant -- an arrest warrant was issued for
21 him on 2 December 2019, that's consistent with what you were told by the other line of
22 inquiry, right, in December of 2019; correct?

23 A. [12:13:03] Yes, * that confirmed my understanding of the situation.

24 Q. [12:13:10] Okay. So several months after this and several months after your first
25 contact with 0869, you've told us that -- actually, no. We're going to bring it up.

1 MR EDWARDS: [12:13:39] Let's bring up the e-mail, please, that was sent from your
2 colleague to your team leader on 28 December, DAR-OTP-837, which is at tab 35,
3 please. So that's the document we're talking about. What I want to focus on now is the
4 last page, so the next page along. Thank you.

5 Q. [12:14:28] And do you see the middle paragraph:

6 "Kushayb is believed to be hiding or keeping a low profile for fear of being arrested ..."

7 Right? Do you see that?

8 A. [12:14:43] Yes.

9 Q. [12:14:44] Okay. And that's information that you had received from at least one
10 source; right?

11 A. [12:14:48] Yes.

12 Q. [12:14:49] So he wasn't living in the open, carrying on his life as normal, as far as
13 you understand it?

14 A. [12:14:58] Correct.

15 Q. [12:15:02] And the information that you had before his actual surrender is that he
16 wanted to spend Ramadan with his family. That's what you told us in answer to
17 questions from Mr Nicholls a few moments ago; right?

18 A. [12:15:20] Yes, and we accepted that with a view that he was going to prepare as
19 best as possible for his dangerous journey, crossing to CAR.

20 Q. [12:15:35] And the fact, is this fair, that this could well be the last Ramadan he ever
21 spends with his family at home?

22 A. [12:15:44] Yes.

23 Q. [12:15:45] The month of Ramadan being an incredibly important period for people
24 living in, at the very least, in Sudan? It's the holy month.

25 A. [12:16:02] Correct.

1 Q. [12:16:02] And presumably it didn't surprise you very much that he may have
2 wanted to spend his last Ramadan with his family?

3 A. [12:16:16] No, it did not. So I -- I was able to understand it. And for the team, we
4 were trying to assess whether is he really genuine about surrendering himself, not -- up
5 till the point that he would have surrendered, he might be playing us and not -- not
6 genuine. But I explained that the month of Ramadan, I do understand his -- his
7 position, and that we have to be guided by what he told us.

8 Q. [12:16:56] Yes. Now, you told us in answer to her Honour's, the Presiding Judge's
9 question this morning, that you worked on the Darfur case for many years.

10 A. [12:17:21] Correct.

11 MR EDWARDS: [12:17:25] Your Honour, could we move into private session just for a
12 couple of moments, please.

13 PRESIDING JUDGE KORNER: [12:17:29] Yes, private session.

14 (Private session at 12.17 p.m.)

15 THE COURT OFFICER: [12:17:47] We're in private session, Madam President.

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 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Open session at 12.19 p.m.)
- 11 THE COURT OFFICER: [12:19:36] We're back in open session, Madam President.
- 12 MR EDWARDS: [12:19:40]
- 13 Q. [12:19:42] I know you didn't say that you were pessimistic, but I'm just asking you
- 14 a question, you understand. Realistically, up until April 2019, when the political
- 15 situation in Sudan started to change, realistically, did you think there was a very great
- 16 chance of anyone actually being arrested and brought to this Court?
- 17 A. [12:20:06] Realistically, I believed that if there's anyone who might surrender and
- 18 come to the Court, that would be the suspect Mr Ali Abd-Al-Rahman --
- 19 Q. [12:20:37] Okay.
- 20 A. [12:20:38] -- and because of my interaction with people who are close to him, and
- 21 this, earlier than 2019.
- 22 Q. [12:20:49] All right. But from April 2019 the situation starts to change, and that
- 23 chance that he would surrender increases, doesn't it?
- 24 A. [12:21:02] Yeah, I would say from 2019 the prospect of him surrendering was more
- 25 favourable, but the situation on the ground is moving so quick that an opportunity

1 would be missed. As quick as possible.

2 Q. [12:21:21] And, therefore, you appreciated the importance of things to move as
3 quickly as possible?

4 A. [12:21:31] Yes.

5 Q. [12:21:32] And then in December 2019, you're told about the contact made by the
6 intermediary 0869. And even if the evidence is not conclusive, your gut feeling is that
7 this is a very good development for the OTP? Is that fair?

8 A. [12:22:03] Yes, it was. Yeah, it was a very good development confirming previous
9 line of inquiry.

10 Q. [12:22:10] And professionally for you, this was a big deal if you could play a role
11 in securing the surrender of Mr Abd-Al-Rahman; is that fair?

12 A. [12:22:27] Yes. It would not have changed my attitude to do the work before or
13 after. I am dedicated to the case.

14 Q. [12:22:48] Yes. So you have the telephone conversation on 27 December 2019.
15 Now, in answer to a question from Judge Alexis-Windsor, and I summarise, but you
16 stated that you knew at that time that of all of the ways in which a person could prove
17 his identity, a video would be a pretty strong piece of evidence; right?

18 A. [12:23:43] A video would confirm that -- that he is willing to cooperate within that
19 framework --

20 Q. [12:23:53] Okay.

21 A. [12:23:54] -- to take it further.

22 Q. [12:23:56] Yes. Okay. So if the -- we know that you were sent a diploma and a
23 nursing certificate with a photo of Mr Abd-Al-Rahman on it. This was pretty good
24 evidence but nowhere near as good as a video?

25 A. [12:24:19] Yes, I have seen them before.

- 1 Q. [12:24:26] Yes, you said that this morning, but --
- 2 A. [12:24:29] I don't know. I don't know. Around the same time.
- 3 Q. [12:24:32] Right. Okay. So somebody else had sent you these certificates; is that
- 4 right?
- 5 A. [12:24:36] Yes, I received the same from another person.
- 6 Q. [12:24:42] And when was that?
- 7 A. [12:24:43] It was around the same time. A matter of days.
- 8 Q. [12:24:54] Okay. Is that the P-0541?
- 9 A. [12:24:57] Yes.
- 10 Q. [12:25:10] And from your statement, paragraph 7, you state that in that first
- 11 conversation of 27 December 2019, 0869 informed you that his acquaintances who were
- 12 in direct contact with the accused were preparing some video material. Right?
- 13 A. [12:26:07] Yes.
- 14 Q. [12:26:14] But if we look at paragraph 9, you're a bit more specific.
- 15 "... I do recall that I ..."
- 16 So during this conversation:
- 17 "... I do recall that I have stressed to him that we need to authenticate the identity of the
- 18 suspect to be able to make further planning. I do recall that ... P-0869 had said that
- 19 there is a video material of the suspect which could be shared."
- 20 That's something that he said to you during that telephone call?
- 21 A. [12:26:56] Yes.
- 22 Q. [12:27:00] You remember that?
- 23 A. [12:27:01] Yeah. Not exact -- the exact words, but there was something along this
- 24 line.
- 25 Q. [12:27:10] So I just want to be very clear. Your very first contact with 0869, the

- 1 issue of a video being shared was discussed.
- 2 A. [12:27:36] Yes.
- 3 Q. [12:27:39] Now, you --
- 4 A. [12:27:41] But not -- not in details, but --
- 5 Q. [12:27:44] No, not in details.
- 6 A. [12:27:46] He volunteered --
- 7 Q. [12:27:48] He volunteered it?
- 8 A. [12:27:49] -- that information to me. Yeah. And I have to say, if you will allow me
- 9 to expand.
- 10 Q. [12:28:02] Please. Hang on just one second.
- 11 (Defence counsel confer)
- 12 MR EDWARDS: [12:28:19]
- 13 Q. [12:28:19] Yes, please. Carry on.
- 14 A. [12:28:21] This was the first contact I had with this person. And because he struck
- 15 me as someone who is knowledgeable and also smart, knowing what he's doing, it was
- 16 easier to discuss with him. He picked up idea quickly. As when I mentioned to him
- 17 that it's -- it is important for us to confirm that he is in direct contact with the witness
- 18 and we need proof for that, he got it easy.
- 19 Q. [12:28:57] No, I understand. That's fine. Thank you. But he tells you during that
- 20 conversation that there is a video that he can share?
- 21 A. [12:29:03] Yeah, it wasn't clear to me whether there is a video or he's going to
- 22 make a video. It was going a bit back and forth.
- 23 Q. [12:29:09] Okay. And no doubt during this conversation you must have said to
- 24 him, "That's a brilliant idea. That would be very strong evidence to prove what we
- 25 want you to prove, that you're in touch with Abd-Al-Rahman," the name you said was

1 Ali Kushayb, "and that it's really of him"?

2 A. [12:29:40] I don't recall what I said to him, but I think I stressed that it's very
3 important that he can prove that he's in contact with the suspect to the extent that I
4 think he got annoyed with me. I'm asking him how he came to know about the
5 suspect, did he meet him before, what is -- when was the last time that he might have
6 spoken with him. And in my -- he got annoyed with that, and he explained to me that
7 he is in a position that developed, that he worked -- he was involved before in the
8 Court, and that he's aware of the situation.

9 Q. [12:30:27] Okay. No, that's fine. I understand that. But I really, because it's very
10 important, you see, I want to come back to this point: Even if it was 0869 who first
11 raised the issue of video, you must have said to him something along the lines of, "Yes,
12 that would be a great idea"? Do you accept that?

13 A. [12:31:03] Yeah, I would -- yeah, I would say that's something that would prove
14 his contact. That's a good piece of evidence.

15 Q. [12:31:11] Yes. You certainly wouldn't have said, "Oh, no, don't bother with a
16 video. We won't need that," for example?

17 A. [12:31:21] No, I wouldn't -- I wouldn't have said that.

18 Q. [12:31:25] Okay. And then when you had the discussion with your colleague, the
19 colleague who gave evidence last week, did you discuss with him that you had
20 discussed with 0869 the possibility of a video being sent to you, proving that the
21 intermediary was in contact with Abd-Al-Rahman?

22 A. [12:31:56] Yeah, I mentioned that a video material could be produced by them to
23 prove that they are in contact with the suspect.

24 PRESIDING JUDGE KORNER: [12:32:09] Then, are you saying, that you mentioned it
25 to your fellow investigator?

- 1 THE WITNESS: [12:32:18] Yes.
- 2 PRESIDING JUDGE KORNER: [12:32:19] And when do you say you mention that?
- 3 THE WITNESS: [12:32:30] It was the next day?
- 4 PRESIDING JUDGE KORNER: [12:32:32] After the phone conversation.
- 5 MR EDWARDS: [12:32:39] So let's bring back, then, the document at tab 35. It's the
- 6 second page, please. And I want to focus on the bottom-most paragraph, the one that's
- 7 highlighted.
- 8 Q. [12:33:06] It's the second sentence, starting on line 1. This is your colleague
- 9 writing to your team leader about next steps:
- 10 "We should recommend to the lawyer," i.e., the intermediary, "that he obtain a
- 11 recording confirming Kushayb is willing to speak with OTP."
- 12 Yes?
- 13 A. [12:33:32] Yes.
- 14 Q. [12:33:34] And this is because -- this line exists in this note because you had
- 15 already spoken to your colleague that obtaining a video recording of the man you
- 16 describe as Kushayb was a possibility; right?
- 17 A. [12:33:50] Yes.
- 18 Q. [12:33:51] And did your colleague express any concerns about obtaining a video
- 19 from the person you describe as Ali Kushayb to prove his existence, the fact that he
- 20 was alive, and so on?
- 21 A. [12:34:22] No, I'm not aware about concerns.
- 22 Q. [12:34:28] No.
- 23 A. [12:34:29] As long as it was within the framework, his confirmation of ID, and his
- 24 willingness to speak with the OTP.
- 25 Q. [12:34:37] Just pausing there for a moment. The accused, the suspect is referred to

- 1 throughout in this e-mail as Kushayb. You see that?
- 2 A. [12:34:48] Yes, correct.
- 3 Q. [12:34:51] And it was certainly the practice within the OTP to refer to the suspect
- 4 by his nickname Kushayb; right?
- 5 A. [12:35:02] Yes.
- 6 Q. [12:35:02] Did you ever refer to him as Abd-Al-Rahman?
- 7 A. [12:35:05] In speaking directly with him?
- 8 Q. [12:35:07] No, within the OTP.
- 9 A. [12:35:09] No, we usually referred to him as Kushayb. Yes.
- 10 Q. [12:35:17] Okay. So that was your sort of default term for him. And in your
- 11 contacts with P-0869, presumably you also spoke about Kushayb rather than Abd-Al-
- 12 Rahman. Is that likely to be the case?
- 13 A. [12:35:36] Yeah, that's likely to be the case. Yeah, he mentioned Ali Kushayb to
- 14 introduce himself and to introduce the person that he's talking about.
- 15 Q. [12:35:45] Now, let's now turn to the WhatsApp messages.
- 16 MR EDWARDS: [12:35:58] DAR-OTP-00000591.
- 17 THE WITNESS: [12:36:07] Which tab?
- 18 MR EDWARDS: [12:36:09] Oh, yes, I'm sorry. It is tab -- well, if you don't mind, we'll
- 19 work off the translation, and it's at tab 12.
- 20 Q. [12:36:29] And we'll start at the beginning. Yes, 591. So there's the first contact on
- 21 -- very late on the 26th, possibly 27th. All right? And then turn over the page - not for
- 22 public broadcast - this is P-0869 sending you his Facebook page to prove who he is.
- 23 Sorry, the next page is 593.
- 24 THE COURT OFFICER: [12:37:33] Could counsel let us know if it's 592 or 593?
- 25 MR EDWARDS: [12:37:38] Yes, 592's a whole -- yes, 592. You're right. Thank you.

1 Forgive me. There we are. Okay.

2 Q. [12:38:18] I'm going to come on to a few more questions about the WhatsApp
3 messages. Let me just ask you about the circumstances of your first phone call with
4 0869. You're on a boat, travelling from one country to the next, and - have I got this
5 right - it's as you're arriving at the dock or approaching the dock, you start getting
6 messages, missed calls, what have you?

7 A. [12:38:50] Yes.

8 Q. [12:38:51] And did you know who the missed call was from?

9 A. [12:38:53] No, I didn't know the person.

10 Q. [12:38:58] No. So it was an unknown number and you thought, well, I'll just ring
11 this person and see what they want?

12 A. [12:39:04] Yeah, it's maybe more likely that he -- I picked up the phone call, but I
13 cannot say that for -- with conviction now.

14 Q. [12:39:20] Right. Because that's exactly the point. Because, you know, as you're
15 trying to organise your family to get off the boat and all the rest of it and you see an
16 unknown number, that's not something you would naturally ring up if you didn't
17 know what it was about, is it?

18 A. [12:39:35] I think when I left -- when I left it, the situation, I was on leave, and
19 there was this possibility for surrender of the suspect. So any phone call is important. I
20 was all the time checking possibly acting on any approach. It's a time of essence.

21 Q. [12:40:08] (Redacted)

22 (Redacted)

23 A. [12:40:16] Yes.

24 Q. [12:40:17] Did that set alarm bells ringing for you?

25 A. [12:40:23] About the person?

- 1 Q. [12:40:24] Yes.
- 2 A. [12:40:25] No, I don't know him.
- 3 Q. [12:40:29] Would it be fair to say that this was not the best time for you to be
4 having a detailed in depth discussion about the potential surrender of an accused as
5 you're trying to arrange your family and disembark from the boat?
- 6 A. [12:40:54] Yes, it's not -- it's not a suitable situation.
- 7 Q. [12:41:01] No.
- 8 A. [12:41:01] But --
- 9 Q. [12:41:03] You're multitasking?
- 10 A. [12:41:09] Multitasking. Once he mentioned the issue of the arrest, I expanded a
11 little bit. Yeah. I took his message. I listened.
- 12 THE INTERPRETER: [12:41:20] Message from the interpreter: Can we observe pauses,
13 please.
- 14 PRESIDING JUDGE KORNER: [12:41:24] You must leave your earphones on because
15 the interpreters are complaining again about the no pause.
- 16 MR EDWARDS: [12:41:34] Forgive me.
- 17 PRESIDING JUDGE KORNER: [12:41:37] Likely you've got to wait and then ask the
18 next question.
- 19 MR EDWARDS: [12:41:45] My apologies again.
- 20 Q. [12:41:48] So you're in this distracting situation, getting off the boat, sorting out
21 your family. Did you say to the intermediary, "Look, this really isn't a great time. Let
22 me call you back in a couple of hours or tomorrow when I can sit down quietly? We
23 can have a proper chat"?
- 24 A. [12:42:15] I do not recall that I told him that we should speak another time quietly.
25 I tried to understand and get from him what -- what's his message.

1 Q. [12:42:31] Yes. But, you see, he, obviously, has something very important to tell
2 you. You can't engage fully at that moment because of the distractions. Isn't it highly
3 likely that that's exactly what you did? You said, "Listen, now's not a great time. I'll
4 speak to you a bit later"?

5 A. [12:42:54] Well, I mean, as I said before, the person is a well educated person, and
6 he was able to pass on the message. He was able to express himself. And with a little
7 guidance, I think he understood our position as what is needed to confirm, why we
8 need to confirm the identity of the person. So in that context, it was not really difficult
9 for me to engage with him even with a limited amount of time.

10 Q. [12:43:43] Of course, there would have been nothing wrong, would there, if you
11 had said to him, "Just send me that video that you're telling me about"?

12 A. [12:43:59] If there is a video in existence, of course, I would be more than happy to
13 receive it.

14 Q. [12:44:25] But it's a bit more than that. There's no reason why you wouldn't have
15 asked him to send that video, is there?

16 A. [12:44:32] Can you repeat the question, please?

17 Q. [12:44:39] There's no --

18 A. [12:44:40] It's not clear to me what -- yes.

19 Q. [12:44:42] If you place yourself back in that moment in December 2019 when
20 you're on the phone with P-0869, there's no reason at all why you would not have said
21 to him, "Yes, send me that video"?

22 A. [12:45:04] Yes.

23 Q. [12:45:25] And then --

24 A. [12:45:27] But for me --

25 Q. [12:45:30] Yes.

1 A. [12:45:31] -- the most important is really to check whether that person is, indeed,
2 in -- as an investigator, I do not get excited quickly. Often I get approached by people
3 who say they can do this and this, but then the reality will show that it is difficult to do
4 so. The situation on the ground, the communication, there is many, many obstacles,
5 and especially in relation to our suspect.

6 PRESIDING JUDGE KORNER: [12:46:07] Don't worry about that, sir. You've agreed
7 with Mr Edwards there's no reason why you wouldn't have asked for the video to be
8 sent. The question is did you? Did you ask the intermediary at that stage when he
9 mentioned a video to send it to you?

10 THE WITNESS: [12:46:32] If the video is done, then we are --

11 PRESIDING JUDGE KORNER: [12:46:42] No, no, no. Don't -- no, no. Just concentrate
12 on the question. Did you, in that conversation on 27 December, ask the intermediary to
13 send you the video? It's really not a difficult question.

14 THE WITNESS: [12:47:10] I think the focus here is too much on the video.

15 PRESIDING JUDGE KORNER: [12:47:12] No, no -- I'm sorry.

16 THE WITNESS: [12:47:18] Yes.

17 PRESIDING JUDGE KORNER: [12:47:19] You really aren't here to guess or second-
18 guess what's important to us and what isn't. I simply want you to answer the question.
19 Did you, in that conversation of 27 December, ask the intermediary to send you the
20 video?

21 THE WITNESS: [12:47:47] I do not recall, but I am more inclined to be receptive for the
22 video to be sent.

23 PRESIDING JUDGE KORNER: [12:47:58] I'm sorry, I don't understand what that
24 means. What does "I am more inclined to be receptive for the video to be sent" mean?

25 THE WITNESS: [12:48:10] Yes, I am favourable to the idea of receiving a video if it is in

1 existence.

2 PRESIDING JUDGE KORNER: [12:48:18] Okay. And you did express your
3 favourability to the intermediary?

4 THE WITNESS: [12:48:32] Yes, it might be that I have expressed my favourability to
5 that.

6 PRESIDING JUDGE KORNER: [12:48:41] Okay, thank you.

7 Mr Edwards.

8 MR EDWARDS: [12:48:42]

9 Q. [12:48:52] And then, sure enough, we have the audio recording that the
10 intermediary sent you on the -- it was the next day, wasn't it, still on 28 December,
11 where he's essentially proving to you that the gentlemen who are with Ali Kushayb are
12 being advised that that's what they need to do, prepare a video; yes?

13 A. [12:49:23] Yes.

14 Q. [12:49:23] And, again -- well, let's bring that up.

15 MR EDWARDS: [12:49:30] 481, please. This is at tab 13. Tab 13, please.

16 Q. [12:50:14] And, I'm sorry, we've got the English translation of the document, sir,
17 but we'll work off that for now.

18 MR EDWARDS: [12:50:22] Can we go to page 3.

19 Q. [12:50:38] So the recording starts partway through a conversation between the
20 intermediary and a person off camera, as it were, that can't be heard. Right?

21 A. [12:50:53] Yes.

22 Q. [12:50:54] And you've listened to this recording, haven't you?

23 A. [12:51:03] Yes, I've listened.

24 Q. [12:51:05] And you recognised the voice of the intermediary as the speaker in this
25 first paragraph that's on the screen; right?

1 A. [12:51:14] Correct.

2 Q. [12:51:15] And the intermediary is saying to the other side of the conversation: "...
3 if he could create recorded material, if you managed to film him for two or three
4 minutes, if he appears in recorded material saying, 'I'm ...' I mean, 'Ali Kushayb,' and so
5 on and so forth, 'I'm not accused by the Court. I didn't do these things and I'm ...'" and
6 so on and so forth.

7 That reflects the conversation that you had had with the intermediary the day before;
8 right?

9 A. [12:52:16] Yeah, partly I would say, as I wouldn't mentioned to him that he should
10 say "I am not accused." That's his own feeling of the script of the video.

11 Q. [12:52:41] Yes. No, I understand. It may be that I have no further questions, but if
12 you would just bear with me for a moment.

13 (Defence counsel confer)

14 MR EDWARDS: [12:53:27] Sorry, I'm just going to have to detain you for a short while
15 longer, but I'll be done by lunch. Can we go back to the WhatsApp messages, please.
16 Tab 12. And if we go to the document at 596 at page 2, please. Thank you.

17 Q. [12:54:26] So after receiving the photos of the diplomas and certificates and this
18 audio recording, you tell the intermediary "Thank you," and then you say:

19 "Let us follow-up on the issue. I'll keep an eye on [the issue] at all times."

20 Do you see that? You're not saying to the intermediary, "Great, these certificates, these
21 diplomas, that's perfect. That's exactly what we need. No need to send any further
22 proof"?

23 A. [12:55:03] No, I'm not saying that.

24 Q. [12:55:04] Over the page, 1 December. Sorry, not over the page. It's 597. This has
25 been paginated in a unuser-friendly way, I'm afraid.

- 1 MR EDWARDS: [12:55:27] 597, page 2.
- 2 Q. [12:55:38] So there are New Year's greetings. Do you see that?
- 3 "Many happy returns to you and the family.
- 4 "Are there any developments on the issue?"
- 5 But by that you're talking about video, aren't you? You're saying: You going to send
- 6 the video?
- 7 A. [12:56:01] Yeah, I was waiting to get feedback from him.
- 8 Q. [12:56:06] Yes. And then over the page -- sorry, not over the page.
- 9 MR EDWARDS: [12:56:16] 598, page 2.
- 10 Q. [12:56:18] We move on a couple of weeks to 16 January.
- 11 MR EDWARDS: [12:56:39] 598, page 2.
- 12 Q. [12:56:44] "May peace be upon you. I'm sorry to disturb you, Sir. When can I call
- 13 you?"
- 14 That's the message you send to the intermediary; right?
- 15 A. [12:56:56] Yes.
- 16 Q. [12:56:56] And did he call you in response to this message?
- 17 A. [12:56:59] I don't recall.
- 18 Q. [12:57:05] Did you call him shortly after this message?
- 19 A. [12:57:12] No, I -- again, I don't -- I don't recall that I called him.
- 20 Q. [12:57:20] Is it fair to say that you may have done, but because it's not noted you
- 21 can't be sure?
- 22 A. [12:57:24] Yes.
- 23 Q. [12:57:26] Well --
- 24 A. [12:57:27] Well, I know -- what I know is that the contact was a bit cold. It went --
- 25 it went a little bit cold with -- with the intermediary. He might have wanted to come to

1 the -- to the office to discuss this face to face. And still at that stage, we are in a stage of
2 assessing the importance of his -- the interaction with the suspect.

3 Q. [12:58:03] Did he tell you -- sorry, I'm just going to pause. Did the intermediary
4 tell you that he wanted to come to the office for a face to face meeting?

5 A. [12:58:18] No, but I think he hinted that -- he hinted that he would like that.

6 Q. [12:58:21] Yes, because then on 15 February, so a month between 16 January and
7 15 February, you get the video of the intermediary actually in front of the Court.

8 MR EDWARDS: [12:58:36] So let's go over to ERN 600, please. 600.

9 Q. [12:59:09] The intermediary, indeed, is at the Court and sends you this message, to
10 which you respond -- if we turn, this is going to be the last page I'm interested in, 601.
11 You thank the intermediary for sending you that video asking him if he's still in the
12 Netherlands.

13 MR EDWARDS: [12:59:52] Document 601, page 2.

14 THE WITNESS: [12:59:59] Correct.

15 MR EDWARDS: [1:00:03]

16 Q. [13:00:05] No, I want you to see the text. It's fair to you to be able to see the text.
17 And then you say this. This is the last thing that you say before receiving the video:
18 "And is there a message for us from one of the wanted individuals requiring our
19 follow-up?"

20 Do you see that?

21 A. [13:00:23] Yes.

22 Q. [13:00:27] And when you're talking about one of the wanted individuals, you're
23 only talking about one person. You're only talking about Abd-Al-Rahman, aren't you?

24 A. [13:00:39] Yes, I'm -- I'm referring to Abd-Al-Rahman.

25 Q. [13:00:42] And even though you're asking in a slightly oblique way, you're

1 chasing, by this message, the intermediary to send you that video?

2 A. [13:00:55] I -- I learned from the message that he was in the Netherlands --

3 Q. [13:01:02] Yes.

4 A. [13:01:03] -- and because he was here all the thing -- the first thing came to my
5 mind, we could see him. If he's around, then we could meet him and indeed discuss in
6 person. But, unfortunately, he returned to -- to his country.

7 Q. [13:01:20] Well, there two things, aren't there: "Are you still in the Netherlands?"
8 one question. And then a second question: "And is there a message for us ... requiring
9 our follow-up?" Yes?

10 A. [13:01:39] Yes.

11 Q. [13:01:40] That second question is essentially you chasing the intermediary for this
12 video that's been long-promised; right?

13 A. [13:01:47] Yes.

14 Q. [13:01:47] Thank you.

15 A. [13:01:50] And trying to understand also the -- the message that he had sent to me,
16 the video that he made of himself in front of the --

17 Q. [13:02:00] Yes.

18 A. [13:02:01] -- Court.

19 Q. [13:02:05] We get that. Okay.

20 (Defence counsel confer)

21 MR EDWARDS: [13:02:37]

22 Q. [13:02:39] Yes, thank you very much, sir. Thank you for answering my questions.

23 A. [13:02:43] If I may say -- add something.

24 PRESIDING JUDGE KORNER: [13:02:47] Yes, just a moment, sir. Before you say
25 anything -- and it's not usually helpful for witnesses to volunteer information. Can I

1 give you that warning.

2 FURTHER QUESTIONED BY THE COURT:

3 PRESIDING JUDGE KORNER: [13:03:05] As part of your training, were you told about
4 the rights under Article 55 of the Statute?

5 A. [13:03:10] Yes.

6 PRESIDING JUDGE KORNER: [13:03:14] In your judgement, and I suppose we better
7 say at this period in 2019, when did those rights have to be administered?

8 A. [13:03:25] When you're in -- the suspect is about to give a statement to the Court.

9 PRESIDING JUDGE KORNER: [13:03:41] In your view, whether right or wrong, and I
10 simply want to know what your view is, did any of the conversations about the video
11 that was going to be provided entail giving the intermediary - or, indeed, the accused -
12 directly his rights? Well, it's the intermediary because you don't have direct contact
13 with the accused until after the video.

14 A. [13:04:18] It -- it could be. In assessing this situation, if the person is -- is going to
15 give a statement about his own -- about his action, then he definitely he should -- he's
16 entitled to his rights. But I think we were guiding the -- the matter. It is only in
17 relation to his willingness to cooperate with us and to just identify himself.

18 I thought through about that too, and it was discussed also within the team.

19 It is something -- I mean, it's really difficult to get in touch with a person. Even, you
20 can see it from my first contact with the suspect. Starting about rights and procedure
21 and over phone call remotely, it might complicate his desire to cooperate. He might
22 not understand it. It's not a right situation where I am calling him trying to as covert as
23 possible and not discuss things in -- in details.

24 For me, it is important to make sure that he is not engaging with us with a view to
25 provide a statement about -- about the accusation, about the -- his own involvement in

1 the -- in Darfur.

2 PRESIDING JUDGE KORNER: [13:06:12] And so this was the OTP trying to persuade
3 him to surrender, wasn't it.

4 A. [13:06:21] Yes.

5 PRESIDING JUDGE KORNER: [13:06:24] And, therefore, what you've just said about
6 cooperation and the like, in what sense do you mean cooperation?

7 A. [13:06:38] In the sense of coming forward and accepting to meet us and be in a
8 situation that we could explain his -- his rights, his status, if he has any -- any questions
9 about that, in a fair -- in fair circumstances for him as a suspect. It's a judgement
10 whether you -- you want to go that road and passing on information to other people.
11 I think I have explained to the intermediary the position of assessing that there is
12 nothing required from him, only confirming his identity, confirming that he's willing to
13 cooperate with us. Any other matter will be discussed at a later stage.

14 PRESIDING JUDGE KORNER: [13:07:49] Well, okay. There are two things there.
15 Were your conversations with the intermediary in respect of the video, were they to do
16 with his identity or his cooperation generally?

17 A. [13:08:10] The intermediary, I think both. The intermediary informed that he is
18 willing to cooperate, and we wanted to confirm that he is really, indeed, willing to
19 cooperate. We wanted to make sure that it's correct. It's accurate.

20 PRESIDING JUDGE KORNER: [13:08:37] And just again tell us what you mean by
21 "cooperate"?

22 A. [13:08:45] Coming forward and meeting us and possibly surrendering himself. I
23 think he has a lot of questions he -- he wanted to ask. And we -- these questions, if
24 they're asked by him directly, then we will be able to deal with that.

25 Your Honour, as you can see from the first phone call with the suspect, he took the

1 position that he understood our procedure and that we are -- we are only working on
2 getting him to come to another safe place where he could move on to the Netherlands
3 and be in a safe -- most safest position, then we can discuss all, I mean, his rights as a
4 suspect and so forth.

5 PRESIDING JUDGE KORNER: [13:10:01] Yes, all right.

6 Well, sir, thank you for coming to testify. I appreciate that it's not been easy on your
7 first day back at work after a lengthy absence. I think that whatever the outcome of
8 this, can I give a word of advice, and that's if anything like this happens again, you
9 don't act without discussing with colleagues more senior to you what the procedure
10 should be. Yes, thank you very much.

11 THE WITNESS: [13:10:54] Thank you.

12 PRESIDING JUDGE KORNER: [13:10:55] Yes, you can leave the Court.

13 (The witness exits the courtroom)

14 PRESIDING JUDGE KORNER: [13:11:13] Right. I apologise to the interpreters, who I
15 think have had a difficult morning of it, but we shouldn't be more than a few minutes
16 now.

17 Mr Edwards and Mr Nicholls, we'll hear final submissions on this aspect on
18 Wednesday after -- tomorrow after the Dutch expert has testified.

19 MR NICHOLLS: [13:11:38] I expect, I defer to my friend, that he'll be brief. We'll be
20 brief on our side.

21 PRESIDING JUDGE KORNER: [13:11:44] Yes.

22 MR NICHOLLS: [13:11:45] I think there should be time. It shouldn't be an issue.

23 PRESIDING JUDGE KORNER: [13:11:50] Yes. No, and I'm assuming the expert's not
24 going to be that long either.

25 MR EDWARDS: [13:11:56] Neither the expert will be long nor will my submissions, no.

- 1 MR NICHOLLS: [13:12:00] Sorry, I may not have been clear. That's what I meant is the
2 expert. It's not my witness. But it's not going to be long.
- 3 PRESIDING JUDGE KORNER: [13:12:05] No, well, it didn't seem to me he was going
4 to be long either. And it didn't seem to me really now that there was going to be much
5 dispute about this.
- 6 MR EDWARDS: [13:12:12] Well, again, I think I raised that --
- 7 PRESIDING JUDGE KORNER: [13:12:15] Testing.
- 8 MR EDWARDS: [13:12:16] -- it's a question of testing.
- 9 PRESIDING JUDGE KORNER: [13:12:19] Yes, all right. Now, sorry, then, Mr Nicholls,
10 that's it for this week, is it? No other witnesses available this week?
- 11 MR NICHOLLS: [13:12:30] No.
- 12 PRESIDING JUDGE KORNER: [13:12:31] Right. Is Monday's witness, please,
13 confirmed? Because it's a videolink one, isn't it?
- 14 MR NICHOLLS: [13:12:42] Yes.
- 15 PRESIDING JUDGE KORNER: [13:12:43] And is that now confirmed?
- 16 MR NICHOLLS: [13:12:45] It's as confirmed as anything can be confirmed. Yes, we are
17 expecting to go. We're expecting to start. We have no reason to think that anything
18 terrible is going to happen.
- 19 PRESIDING JUDGE KORNER: [13:12:58] All right.
- 20 MR NICHOLLS: [13:12:59] So, yes, no indication that there is a problem.
- 21 PRESIDING JUDGE KORNER: [13:13:02] And then in theory, there's 885 the following
22 week?
- 23 MR NICHOLLS: [13:13:08] No, your Honour. We sent an e-mail on that. And without
24 going into detail, we no longer anticipate him coming based on what has happened.
- 25 PRESIDING JUDGE KORNER: [13:13:22] Yes, you did. So, effectively, next Monday's

1 witness is the last?

2 MR NICHOLLS: [13:13:30] No, your Honour. Sorry, we also have P-0131 who is the
3 witness off somewhere else, if we're in open session, where the videolink is a bit
4 complicated.

5 PRESIDING JUDGE KORNER: [13:13:41] Oh, yes, yes.

6 MR NICHOLLS: [13:13:43] And that's something.

7 PRESIDING JUDGE KORNER: [13:13:44] When is that? Yes, you're quite right.

8 MR NICHOLLS: [13:13:49] That is now February 13 is when we've scheduled him. He,
9 absent a miracle, will be the last witness. I cannot guarantee you, hand on my heart,
10 that that will happen, but we haven't given up. We are in better contact. It's difficult.
11 VWS will be setting up the videolink. We are still hoping to get a passport and travel
12 documents and get him here, and we're working on that. I think that will happen but
13 that --

14 PRESIDING JUDGE KORNER: [13:14:20] Well, the country he's in can surely be
15 counted upon to give assistance.

16 MR NICHOLLS: [13:14:24] Well, we've tried that, and we've followed their advice, and
17 it also still requires cooperation from the witness that has not -- that he has not
18 followed through on.

19 PRESIDING JUDGE KORNER: [13:14:41] All right. So one way or another, it's not
20 going to be before February 13th?

21 MR NICHOLLS: [13:14:49] No, and I would say, even if things did move up, we have
22 the 6th and 7th, but the 8th, 9th, and 10th are off. And this witness could go over two
23 days on direct and cross - I see my friend nodding - so we would not want to break for
24 almost a week --

25 PRESIDING JUDGE KORNER: [13:15:08] So you say the 13th?

1 MR NICHOLLS: [13:15:12] Is a Monday. So that's the plan and he will take a week.

2 PRESIDING JUDGE KORNER: [13:15:16] No, no, I agree. It's very bitty up until then

3 because of the very, sort of, administrative matters that the Judges have to deal with.

4 All right. In that case that brings me to what I'm now going to call the motion for

5 acquittal that you have mentioned, Mr Edwards.

6 MR EDWARDS: [13:15:34] Before you do, forgive me for interrupting, can I just say

7 that in respect of that last witness, 131, there are time zone issues --

8 PRESIDING JUDGE KORNER: [13:15:44] I know.

9 MR EDWARDS: [13:15:45] -- that could well require awkward sitting times, either --

10 well, yes. And I simply raise that to highlight the fact that ordinarily I suspect he

11 would be a two-day witness. But if we're not able to sit smoothly, and if we're unable

12 to use, what is it, four and a half hours every day, then it might take a bit longer.

13 PRESIDING JUDGE KORNER: [13:16:13] Well, I think the most desirable, obviously, is

14 that he gets here.

15 MR EDWARDS: [13:16:18] Yes.

16 PRESIDING JUDGE KORNER: [13:16:21] I mean, there is no question about that. And,

17 as I say, the country in which he's in is noted for its support to the Court, so I can't

18 understand why it's proving so difficult. So I'll just leave it up to you, Mr Nicholls.

19 Right.

20 As far as the actual procedure for what has been called up to now "no case to answer"

21 but by general consent is now going to be called a "motion for acquittal," we're going to

22 issue an addendum to the, whatever it's called, the conduct of proceedings today,

23 which will set out the procedure. In effect, we gave you until 5 March. It has been

24 decided by agreement, certainly amongst, we hope, the Trial Chambers that the period

25 will be shortened. The important thing about this is to deal with this as expeditiously

- 1 as possible so everybody knows where they are, apart from anything else.
- 2 And so you will see that it's going to reduce the period. Between the formal closing of
- 3 the Prosecution case and an application for leave to present a motion for acquittal, it's
- 4 going to be five days. But I don't think it's actually going to make a huge amount of
- 5 difference by the sound of it. It may be a week earlier because I think we gave you
- 6 until the beginning of March originally.
- 7 MR EDWARDS: [13:18:12] But it's certainly going to be something that requires leave.
- 8 PRESIDING JUDGE KORNER: [13:18:17] Yes, it is. You need to ask for leave.
- 9 MR EDWARDS: [13:18:25] Yes. We look forward to receiving the addendum.
- 10 PRESIDING JUDGE KORNER: [13:18:29] Yes, you'll get it this afternoon.
- 11 MR LAUCCI: [13:18:32] And if I may ask you, Madam President, what is the reference
- 12 date where the days would start running? Is it the appearance of the last witness, or
- 13 what is it?
- 14 PRESIDING JUDGE KORNER: [13:18:41] No, it's the formal closing --
- 15 MR LAUCCI: [13:18:45] Okay.
- 16 PRESIDING JUDGE KORNER: [13:18:46] -- of the Prosecution case as opposed to the
- 17 appearance.
- 18 MR LAUCCI: [13:18:49] Okay, thank you.
- 19 PRESIDING JUDGE KORNER: [13:18:50] Because although Mr Nicholls is going to
- 20 stand up and say that's it, he's also apparently got to file something in writing. So it
- 21 would be from that -- the time will run from then.
- 22 MR EDWARDS: [13:19:00] There's a significant quantity of documents whose
- 23 admission is being sought from the bar table.
- 24 PRESIDING JUDGE KORNER: [13:19:10] Yes.
- 25 MR EDWARDS: [13:19:11] That's litigation that's going to have to be completed.

- 1 PRESIDING JUDGE KORNER: [13:19:13] Do I understand there's going to be an
2 objection to some of them?
- 3 MR EDWARDS: [13:19:18] To some of them, yes.
- 4 PRESIDING JUDGE KORNER: [13:19:19] All right. Well, obviously -- exactly. So, as I
5 say, I don't think the end result is going to be much different from what we actually
6 anticipated. But, as I say, I reiterate, yes, you need to ask for leave. Thank you.
7 Yes, very well. So, again, my apologies to the interpreters. And tomorrow morning at
8 9.30 please.
- 9 (The hearing adjourned in open session at 1.19 p.m.)