

Trial Hearing
WITNESS: DAR-OTP-P-0643

(Open Session)

ICC-02/05-01/20

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Trial Hearing - Courtroom 2
9 Wednesday, 6 July 2022
10 (The hearing starts in open session at 9.35 a.m.)
11 THE COURT USHER: [9:35:11] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:35:32] Yes. Could we have the -- good morning,
15 all.
16 Could we have the case called, please.
17 THE COURT OFFICER: [9:35:38] Good morning, Madam President, your Honours.
18 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
19 Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05-01/20.
20 And for the record, we're in open session.
21 PRESIDING JUDGE KORNER: [9:35:59] Yes. Appearances for the Prosecution,
22 please.
23 MR NICHOLLS: [9:36:02] Good morning, Madam President. Good morning, your
24 Honours. Good morning, counsel.
25 Same as yesterday. Thank you.

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1 PRESIDING JUDGE KORNER: [9:36:09] Yes. Defence.

2 MR LAUCCI: [9:36:11] Good morning, Madam President, your Honours, colleagues.
3 Same as yesterday.

4 PRESIDING JUDGE KORNER: [9:36:19] Mr Shah for the victims.

5 MR SHAH: [9:36:19] Yes. Good morning, Madam President, your Honours.
6 Also the same as yesterday. Thank you.

7 PRESIDING JUDGE KORNER: [9:36:23] Yes. We are in open session. I just want
8 to be clear that that's -- nobody thinks that may cause a problem, as we discussed this,
9 and particularly when we give a ruling.

10 MR JEREMY: [9:36:43] I mean, I think it will be necessary to emphasise the way that
11 this witness is able to recognise the accused.

12 PRESIDING JUDGE KORNER: [9:36:55] Yeah, well, that's -- I said open session, and
13 obviously, we should always start in open session. But it does seem to me that, in
14 order to look at the detail of this, we will be touching on matters which may identify
15 him, so -- well, let's see how we go for the moment.

16 Mr Laucci and Mr Edwards, thank you very much for the very helpful skeleton
17 argument, which sets out all the agreements. Do you want to add anything to it?
18 And if you do, is that likely to touch on his evidence?

19 MR EDWARDS: [9:37:42] I'm going to be particularly careful not to over speak.
20 No. I mean, it's skeletal, so there's some flesh to put on the bones, but I don't
21 anticipate that my submissions are going to touch on anything that could identify the
22 witness. In fact, it's almost the contrary. My submissions are based on what this
23 witness doesn't say.

24 PRESIDING JUDGE KORNER: [9:38:15] All right. Well, then, perhaps you'd to
25 then say what you want to add to what's in your, as I say, very helpful, skeleton

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1 argument.

2 MR EDWARDS: [9:38:24] Thank you, your Honour.

3 It occurs to me that, seeing as we are in public session -- I'm not going to read through
4 *my skeleton, but can I just set out in introductory format what the issue is and what
5 we say about it, without taking up too much time.

6 Your Honours, the Prosecution seek to show this witness two documents, and it's
7 anticipated that the witness will say that he identifies or recognises from one
8 document a passport photo, this defendant, and from the other document, a video
9 clip, the person that he refers to as Ali Kushayb. Those are at, respectively, tabs 27
10 and 54 of the Prosecution's lists of materials.

11 And our submission, in a nutshell, is this: That the probative value is so low, if the
12 witness were to give that evidence, and it's prejudicial value would so outweigh that
13 probative value -- prejudicial effect would outweigh that probative value to such an
14 extent that the Trial Chamber should simply not allow that exercise to be undertaken.

15 I start briefly by making this point because we fully anticipate the Prosecution will
16 say, this is a case of recognition, not of identification, strict or sense -- in the strict
17 sense of the word. And, indeed, it's a point that your Honour made yesterday.

18 What I urge your Honours to do is to take a step back, put the brakes on a little, and
19 to look at the particular facts of this case. Whether identification is made on the
20 basis of a classic identification, i.e., an identification by a person who does not have
21 prior knowledge of the subject, or whether it is recognition in the truest sense of the
22 word, caution must, nevertheless, be -- be given to this process. The courts, of
23 course, treat recognition evidence qualitatively differently to identification evidence.
24 But, nevertheless, nevertheless, Trial Chambers of other international courts have
25 warned that there are difficulties inherent in the identification process by virtue of,

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1 and I quote, "the vagaries of human perception and recollection." And this is a factor
2 that everyone in this courtroom is going to be very familiar with.

3 And in Haradinaj at the ICTY, the Trial Chamber in its judgment acknowledged that
4 those vagaries applied just as much to identification as recognition.

5 Why do we have to be careful? Well, throughout history, and around the world,
6 criminal courts have had the experience of defendants being wrongly convicted based
7 on mistaken identification, and very often mistaken identification made by otherwise
8 entirely honest witnesses who are absolutely convinced that their identification is a
9 good one. And the point has been made in many jurisdictions. I pointed out just
10 one. It's a Canadian case of Hibbert from the Supreme Court of Canada 2002.

11 PRESIDING JUDGE KORNER: [9:42:51] I'm sorry to interrupt you, Mr Edwards, but,
12 fortunately, Judge Alexis-Windsor is the possessor of the law of evidence in Canada,
13 despite having no connection, as I know, with Canada.

14 But what you didn't refer to, which is footnoted here, is the following words, which
15 were at page 778 of the volume, where it starts with quoting the case of Hibbert.

16 And says: "The jurisprudence distinguishes between non-expert opinion evidence of
17 identity of persons who had no previous acquaintance with the accused from persons
18 who were previously acquainted with the accused."

19 And that's in line, I think, with most countries and most authorities.

20 MR EDWARDS: [9:43:47] Yeah. I don't take issue with that. Of course that's right.

21 Of course there is a qualitative difference to be made between identification, in the
22 strict sense of the word, and recognition. I don't resile from that at all.

23 But the point in Hibbert is that, in fact, in terms of the correctness of an identification,
24 the -- there's a very weak link between the confidence level of a witness and the
25 accuracy of their statements. So I don't resile from that point.

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1 But my submission is this: There is a risk that in the circumstances of this case -- and
2 I'm going to come on to the particularities in a moment. There's a risk of *too stark a
3 distinction being made. There's a risk of there being -- of the Trial Chamber being
4 rather *too sanguine about the admissibility of recognition evidence, when, in fact,
5 there is a real risk for there to be a mistaken identity.

6 And, of course, I go further. I don't simply say the caution -- there must be great
7 caution before allowing in this evidence of identification. We take it further. We
8 say that you should determine that no evidence can be adduced at all through the use
9 of these exhibits because the purported recognition evidence is of such low value and
10 the prejudicial effect would be so great. We ask you to take that second step.

11 Relating then -- regarding the passport photo, we say that the witness's recognition of
12 the passport photo is frankly zero. It is nugatory.

13 Firstly, at no point did the (Redacted)

14 (Redacted) over the course of I think nine days, total, at no point did they ask for
15 a -- an initial description of the person that this witness describes as Ali Kushayb.

16 The Defence has absolutely no idea what this witness says Ali Kushayb looks like.

17 Not a clue. That is the first step. It is essential. Because if we don't have that, we
18 cannot objectively, dependently compare the initial description with what ultimately
19 the witness says or the value of an ultimate recognition. We can't cross-examine on
20 any potential differences or similarities.

21 Secondly - and I submit that this is important - the evidence seems to be that the
22 witness hasn't seen Ali Kushayb for very many years. So when an identity -- a
23 recognition, rather, was made just a couple of days ago of the passport photo and
24 when in 2000 and -- well, let me focus on the photo for a moment. There's a chasm
25 of time between the last sighting of Ali Kushayb, which must have been in about 2005

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1 or 2006, according to his evidence from yesterday, and that must be a factor to take
2 into account in terms of how credible an identification can -- can be.

3 Thirdly - this is equally important - the witness himself says in a -- in his second
4 statement, his statement of April 2021, that he has seen television coverage of these
5 proceedings.

6 PRESIDING JUDGE KORNER: [9:48:08] And says he instantly recognised him.

7 MR EDWARDS: [9:48:12] Well, he says that, yes. But, of course, he -- he's also seen
8 and was aware of the arrest of the accused, which he also describes as having been
9 widely reported on Sudanese television.

10 Well, if we just consider that for a moment, the Prosecution's case has always been
11 that Mr Abd-Al-Rahman and Mr Ali Kushayb -- and Ali Kushayb are the same person.
12 That's what is going to have been broadcasted. So the Trial Chamber has to be sure
13 that there's no contamination on the part of the witness in respect of this -- this risk of
14 preconditioning that -- that we're talking about the same person.

15 And, of course, in jurisdictions all around the world, the extent to which witnesses
16 who are being asked to undertake an identification procedure, the extent to which
17 they've been exposed to media coverage, to wanted posters, to "Have you seen this
18 man?" prior to the identification is something that is taken into the account. At the
19 very least, it must be noted. We got that note, we know that it's happened, but the
20 reason why it's important is because of this very risk of contamination.

21 Thirdly, and it's in the way in which the passport photo was shown to the witness in
22 the course of preparation sessions. Can I make it very clear, I think I did in the
23 skeleton, but I will in open session, I make absolutely zero criticism of my learned
24 friend who showed the passport photo to the witness last -- last week. It was done
25 in an entirely neutral, entirely unleading way. I've seen the video. I have no

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1 criticism to make whatsoever.
2 But, what's the circumstances in which the passport is shown? He's in The Hague.
3 He's about to give evidence. He's about to give evidence against
4 Mr Abd-Al-Rahman. He knows this. He's about to give evidence in the case of
5 Abd-Al-Rahman, coverage of which he's already seen. So there -- there must be a
6 risk. There's a degree of preconditioning. A degree of expectation, even if only
7 subliminally, that the image is going to be of Mr Ali Muhammad Ali Abd-Al-Rahman.
8 Coupled with the fact that it was the only photo that was shown to him throughout
9 the entire witness preparation session. Again, I make no criticism, but it's a fact to be
10 taken into account. So there is this risk of preconditioning. And even if entirely
11 inadvertently -- I'm not even going to say "even if", I've no doubt it was entirely
12 inadvertently, but the effect is not unlike that of a leading question, in showing one
13 photo, "Who is this person?" or "Have you seen this person before? Can you identify
14 this person?"
15 That is a risk. I'm not suggesting that the Prosecution ought not to have been
16 entitled to go through that sort of process. But the way to have done it, even though
17 it's a recognition case, is by way of a controlled identification procedure, with a photo
18 board, with -- in full respect of the -- the highest international standards, involving an
19 array of photos, including foils, proper foils. If that was done, I'd have had no
20 complaint, frankly, but it wasn't. And again, it may well be in due course that the
21 Prosecution say, "Well, in recognition cases, we don't have to do a photo board. It's
22 not necessary. It's recognition." But here we suggest, even in recognition cases,
23 except in the clearest of cases, minimum international standards, I would submit,
24 would suggest that a photo board process should be done. It is done in many
25 jurisdictions, including ours in the UK, Code D.

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1 And indeed, your Honours will recall the evidence of a witness, P-120 from 29 April,
2 was saying even in Sudan they use the photo board process for identification
3 involving 10 to 12 photos. This is the transcript of 29 April 2022, page 69.

4 So there it is. We say that the -- the circumstances of the witness's recognition in the
5 photo is so unreliable that it is entirely devoid of any probative value. And,
6 obviously, the prejudicial effect outweighs even any residual probative value.

7 I'll make -- I'll make another point, which is the witness is -- is obviously going to give
8 evidence of having seen these proceedings. I really can't object to that. And I ask
9 this rhetorically: If he gives evidence of video footage from these proceedings, and
10 saying "I recognise the person in the dock as Ali Kushayb", what's the point in
11 showing him the passport photo? What does that add?

12 PRESIDING JUDGE KORNER: [9:54:18] Are you suggesting, Mr Edwards, that's the
13 course that the -- if I allow this -- this evidence in - if we allow this evidence in - are
14 you suggesting that's the course the Prosecution should take, rather than -- than the
15 photo?

16 MR EDWARDS: [9:54:34] Well, your Honour, my -- my point, I think, is this:

17 I -- I -- (Overlapping speakers)

18 PRESIDING JUDGE KORNER: [9:54:44] I mean he says --

19 MR EDWARDS: (Overlapping speakers)

20 PRESIDING JUDGE KORNER: Sorry, I interrupted you. But, I mean, he does say
21 "I saw him on television and I recognised him."

22 MR EDWARDS: [9:54:48] Yes. And -- and, procedurally, I don't think I have much
23 of an argument to prevent that from happening. But, procedurally, I do have an
24 argument in respect of the passport photo, for the reasons that I've set out.

25 And -- and my submission would be that if the one is allowed in, then the second is

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1 rather otiose.

2 PRESIDING JUDGE KORNER: [9:55:07] All right. Well, can you pause there. I
3 know you want to say something about the video, but I -- having heard that,
4 whichever it is, Mr Jeremy, Mr Nicholls, or both of you, if the -- the Defence say they
5 can't object to that, isn't that the better way of doing it, rather than the passport photo?
6 As -- as has been pointed out, he's already said "I've seen on television and I
7 recognised him."

8 MR JEREMY: [9:55:47] Yeah. Our position, Madam President, is that he should
9 also be able to speak to the passport photo, and the Prosecution would like that to
10 come --

11 PRESIDING JUDGE KORNER: [9:55:56] Why?

12 MR JEREMY: -- into evidence.

13 PRESIDING JUDGE KORNER: [9:55:59] Why, if you can show him a clip - indeed
14 the first appearance, because that's what he says in the statement is what he
15 watched - why would you want to show him the passport photograph? Explain that
16 to me, Mr Jeremy, would you.

17 MR JEREMY: [9:56:16] Yeah. So I thought that you were asking me if we can
18 simply rely on what the witness had said about seeing the previous proceedings, and
19 on that basis we would not show the passport photo. But --

20 PRESIDING JUDGE KORNER: [9:56:30] No, I'm -- I'm -- I'm saying that, rightly, in
21 our view, the Defence say we can't object because he said that. And the value of it is
22 a completely different matter that we -- you know, we bear that in mind. But why
23 would you then want to show him a passport photograph?

24 MR JEREMY: [9:56:50] No, I think if we can show him footage of the previous
25 proceedings, or an image of those previous proceedings, and he identifies, recognises

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1 Ali Kushayb, Abd-Al-Rahman, in those proceedings, then -- then we would not also
2 need to show the passport photo.

3 PRESIDING JUDGE KORNER: [9:57:07] Right. Thank you.

4 Yes. I haven't ruled yet, Mr Edwards. But on that basis, you can -- you can take it
5 that, if we admit either one of these, it won't be the passport photograph.

6 Yes. You want to say something about the -- no, no, Mr Laucci. I'm sorry,
7 Mr Laucci, you can't have both of you on this.

8 MR LAUCCI: [9:57:31] It's just a correction of the transcript.

9 MR EDWARDS: [9:57:37] Sorry, I said -- I said 29 April earlier, the evidence of
10 witness 120. It was 28 of April. And Mr Laucci was -- was --

11 PRESIDING JUDGE KORNER: [9:57:47] Oh, I see. All right.

12 MR EDWARDS: [9:57:49] -- very helpfully correcting that.

13 I saw Mr Nicholls on his feet. I don't know if I should continue.

14 PRESIDING JUDGE KORNER: [9:57:57] Yeah. Do you want to add anything else
15 on that aspect?

16 MR JEREMY: [9:58:14] I mean, the only -- the only concern, Madam President, is -- is
17 we are not quite sure what footage it was that the witness watched.

18 PRESIDING JUDGE KORNER: [9:58:22] Well, we can ask him, when he comes into
19 court.

20 MR JEREMY: [9:58:25] Yeah, we can ask him. And if he makes an
21 identification -- makes a recognition from -- on the basis of that footage, and then it
22 comes into evidence, then that would be acceptable. But if he -- if he does not, then
23 we would still like to use the passport photo.

24 PRESIDING JUDGE KORNER: [9:58:40] Yes, all right.

25 MR NICHOLLS: [9:58:41] Your Honour, I know it's both of us, but may I say

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1 something?

2 PRESIDING JUDGE KORNER: [9:58:48] Well, having stopped Mr Laucci --

3 MR NICHOLLS: All right.

4 PRESIDING JUDGE KORNER: [9:58:45] I'm sorry, having stopped Mr Laucci, I

5 really don't think, Mr Nicholls, I can do that. I think there has to be equality of arms,

6 as Mr Laucci would tell me.

7 MR NICHOLLS: [9:58:58] Could we have one second then?

8 PRESIDING JUDGE KORNER: [9:59:02] Yes, you can.

9 MR EDWARDS: [9:59:04](Microphone not activated)

10 PRESIDING JUDGE KORNER: [9:59:45] Yeah, Mr Edwards, all right. And, okay,

11 can we move on then to the -- the actual video, if you don't want to say anything else,

12 Mr Jeremy, on -- simply on that aspect of the passport photograph versus the witness

13 identifying -- being shown whichever hearing he says he watched? All right.

14 Anything else you want to add?

15 MR JEREMY: [10:00:07] No, Madam President.

16 PRESIDING JUDGE KORNER: [10:00:09] Right. Thank you.

17 Right, Mr Edwards, the second matter, which is the internet video.

18 MR EDWARDS: [10:00:15] The internet video.

19 PRESIDING JUDGE KORNER: [10:00:18] Yeah. I hadn't realised he -- he actually

20 sent it to the Prosecution himself, did he, in December?

21 MR EDWARDS: [10:00:22] Yes, that's right. We have an investigator's note to that

22 effect. And it is a slightly abbreviated version of the video that is already within the

23 Prosecution's holding and that I think the Trial Chamber has -- has actually had a

24 glimpse of.

25 The Trial Chamber may remember the quality of the video, may remember just how

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1 poor the quality is. May remember just how --

2 PRESIDING JUDGE KORNER: [10:00:48] Sorry, can I just -- this is not the one in
3 military uniform? It's the other one --

4 MR EDWARDS: No.

5 PRESIDING JUDGE KORNER: -- where he's surrounded by the person who's
6 speaking. Is surrounded by military, but surrounded by other people.

7 MR EDWARDS: [10:01:03] It's -- it's the video that we have described as the
8 "military video" --

9 PRESIDING JUDGE KORNER: Oh, it is the military one.

10 MR EDWARDS: -- as opposed to the "teacher video".

11 There's the teacher video, which was -- which was excluded for the purposes of that
12 particular witness some time ago.

13 PRESIDING JUDGE KORNER: Yeah. Yeah.

14 MR EDWARDS: [10:01:16] This is the military video. It's entitled "Kushayb at
15 Um-Sory". Now, we don't know who's entitled it "Kushayb at Um-Sory". We don't
16 know who took that video. We don't know who uploaded it to YouTube. We don't
17 know what the chain of custody was between the author of the video and the
18 uploading.

19 PRESIDING JUDGE KORNER: [10:01:40] But, I'm sorry, all of that, Mr Edwards,
20 goes to whether the video eventually becomes admissible, as such. It doesn't go to
21 the issue of whether he can look at it and say "That is the man I knew as Ali
22 Kushayb."

23 MR EDWARDS: [10:01:59] Yeah. Perhaps provenance, no. I'm -- I'm teeing it up,
24 though, to place the entirety of the video into its -- its context. But we say that
25 the -- the lack of evidence of provenance nevertheless casts doubt on its -- on the

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1 video's probative value, and then, in turn, the probative value of the witness saying,

2 "I recognise Ali Kushayb from it."

3 Perhaps of more interest to your Honours is what I started to say about the quality of

4 the video. It's incredibly poor quality. It dates -- we're not talking about video

5 taken from, you know, a modern iPhone, for example. You know, TV quality.

6 The -- the metadata suggests that the video dates from 29 September 2015, and then

7 processed by the OTP a year later. And the Trial Chamber -- in fact, I wouldn't seek

8 to dissuade your Honours from observing it before ruling, because the first part of the

9 video shows a man who's speaking, the man that the Prosecution says is Ali Kushayb,

10 against a bright sun. That's backlit. So the face and the features are very, very dark.

11 Virtually nothing to distinguish the features of the speaker.

12 Moreover, in the first half of the video, the footage is taken from behind and slightly

13 to the side. We don't even have a full-on profile of the speaker. It's more of a

14 quarter profile, which is useless, in my submission, in terms of identification. And

15 any identification would be dangerous.

16 And then, in respect to the second half of the video, there's a lot of jiggling around.

17 And for a good part of the second half of the video, the speaker is actually decapitated

18 by the framing of the video. So there are two things.

19 If the witness saw the video from YouTube directly or, indeed, if he saw it from

20 Facebook - I think he says that it was sent to him on Facebook - with the title that we

21 think it was given to it, "Kushayb at Um-Sory", there's a risk that he's preconditioned

22 already to expect that the video is going to contain Ali Kushayb speaking. And that

23 is a risk that is an important one, in my submission. And it's that risk that not only

24 goes to a question of weight, it's a risk that is so acute that we would ask you to find

25 that its probative value is very much outweighed by the prejudicial effect of the

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1 evidence coming in.

2 Your Honour, I think that pretty much covers everything I wanted to say. Do you or
3 your colleagues have any questions for me?

4 PRESIDING JUDGE KORNER: [10:05:37] Apart from everybody's estimate of time,
5 thank you very much, Mr Edwards.

6 Yes. Right. Mr Jeremy.

7 MR JEREMY: [10:05:49] Thank you, Madam President. Yeah, I'll make a few
8 points.

9 So it's clear that the Defence appeared to accept that this is a case of recognition rather
10 than identification. But, nevertheless, those two concepts are confused in their
11 submissions, which ultimately, ultimately will go -- should go to the weight that this
12 Chamber decides to place on the witness's recognition of the video and the photo, if
13 we're able to show both or either. And in the Prosecution's submission, the
14 probative value that will be provided by a witness who is as familiar with Ali
15 Kushayb as this witness is, clearly significantly outweighs any, any prejudicial effect
16 that your Honours may -- may identify.

17 The Defence urges you to exercise caution. Of course, when you admit any evidence,
18 you will exercise caution in that process, but the degree of caution that you must
19 exercise is necessarily lower in a case of recognition, as is this case, than in the case of
20 identification.

21 The Defence refers to the vagaries of human perception. Now, they are significantly
22 outweighed in a recognition case of this type where we have a witness who has
23 known Ali Kushayb for a number of years. And I'll try and remain in public session.
24 But we have heard the testimony of the various different contexts, the different
25 situations, the different places, the different times, the different circumstances in

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1 which he directly interacted with Ali Kushayb, who he also knew by the name
2 Ali Muhammad Ali Abd-Al-Rahman.

3 The case law that the Defence refers to, the Hibbert case, for example, which your
4 Honours mentioned, we understand that to be a case relating to identification where
5 the -- it was a rape case where the perpetrator was not known to the victim. And the
6 circumstances here are clearly completely different.

7 Now, in terms of the argument made by the Defence that the witness has not
8 provided a -- a description of Ali Kushayb, well, (Redacted) at

9 that point there was no expectation that this identification defence would be raised
10 and, therefore, descriptions were not at the forefront of the investigator's mind at that
11 time.

12 Harun was also discussed, for example, in the context of the witness's evidence, and a
13 description of him was not requested, particularly given how well the witness knows

14 Ali Kushayb. "I knew him by both names." As I've said, (Redacted)
15 (Redacted)

16 (Redacted) he referred to Ali Kushayb as
17 Muhammad Ali Kushayb.

18 And then as we have heard, the witness then sent a video of Ali Kushayb to the
19 Prosecution in (Redacted) in which he says, "Here is Ali Kushayb in this video."

20 So -- and then he identified or recognised Ali Kushayb in court proceedings before the
21 ICC.

22 (Redacted) it would have been

23 nonsensical at that point to ask for a description of Ali Kushayb, because the witness
24 had clearly provided it pursuant to the video of Kushayb that he sent to the

25 Prosecution and his identification of Kushayb in the ICC proceedings.

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1 PRESIDING JUDGE KORNER: [10:10:54] Sorry, just interpreting there for a minute,
2 Mr Jeremy. He was first interviewed (Redacted); is that right?

3 MR JEREMY: [10:11:05] That's right.

4 PRESIDING JUDGE KORNER: [10:11:07] And -- (Redacted)
5 (Redacted)

6 MR JEREMY: [10:11:09] Sorry, (Redacted) he sent the video.

7 PRESIDING JUDGE KORNER: [10:11:13] Right. Yes. Okay, thank you.

8 MR JEREMY: [10:11:18] But my point is that, when he was then interviewed again,
9 after this mistaken identification defence had been first raised in 2020, (Redacted)
10 (Redacted) and by that point, to ask him for a description of Kushayb
11 would have been completely superfluous given that he had sent us a video in which
12 he says he recognises Kushayb. And he says he recognises Kushayb in the ICC
13 proceedings. And in sending that video to the Prosecution in December 2019, he
14 said that his objective was to show who Ali Kushayb was and what his actions were.
15 Now, in relation to the photo, the Prosecution's position is that that was shown to him
16 in a completely non-leading manner. It was placed before the witness, and he was
17 asked if he recognised the person in the photo. A photo lineup in the circumstances
18 of recognition is not appropriate in the same way it would be in a case of
19 identification.

20 In relation to the video, the Prosecution's position is that provenance is irrelevant.

21 Mr Edwards seems to be less fixed on that point.

22 PRESIDING JUDGE KORNER: [10:12:53] I mean, that's only because I think the
23 provenance and everything else, whether this video comes in at all is a different
24 argument.

25 In other words, it is admissible for the purposes, if it is, of the witness making the

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1 identification of the man he says is Mr Rahman. And in that sense, I suppose that
2 part of the video is, if we find it to be, admissible. But the actual rest of it and what's
3 said is a different matter.

4 MR JEREMY: [10:13:36] Yes. But for the purpose of the witness identifying Ali
5 Kushayb, Abd-Al-Rahman in that video and for the purpose of him saying whether
6 the video that we intend to show him is the same video as the one that he sent to the
7 Prosecution, then we submit that provenance is not relevant to that issue at this stage.
8 The arguments that the witness -- the witness's recognition of Kushayb is somehow
9 swayed by the title of the video, I mean, they must be weighed against the fact that
10 the witness -- how well the witness knew Ali Kushayb. And I won't go back into
11 though details. But it was clearly extremely well.

12 In relation to the quality of the video, yes, we accept the video is not high quality, but
13 there are other factors that should be emphasised aside from merely the image, such
14 as the voice of the speaker, which is clearly audible, the tone and the demeanour, and
15 in addition, the axe that the speaker, Ali Kushayb, appears to be holding, which
16 happens to match a sketch of the axe that the witness has previously provided. All
17 those factors add to the reliability of the video and any eventual recognition by this
18 witness.

19 PRESIDING JUDGE KORNER: [10:15:22] He doesn't actually touch on the axe at all.
20 I was wondering what the drawing had to do with anything.

21 MR JEREMY: [10:15:26] Well --

22 PRESIDING JUDGE KORNER: [10:15:27] You haven't asked him about the axe.

23 MR JEREMY: [10:15:30] -- we're coming to the axe as part of the -- as part of the
24 video. I mean, yeah, the witness has previously drawn a sketch of the axe, which --

25 PRESIDING JUDGE KORNER: [10:15:43] When?

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1 MR JEREMY: [10:15:43] He drew it in -- when he was interviewed in 2021.

2 PRESIDING JUDGE KORNER: [10:15:48] After he'd seen the video.

3 MR JEREMY: [10:15:51] Well, after he'd seen the video, but the -- we can ask the
4 witness, but the axe is -- was not visible to us previously until -- for a different
5 purpose we were absolutely going through that video frame by frame for when we
6 first saw the axe. So --

7 PRESIDING JUDGE KORNER: [10:16:10] But when does -- so far, he has never said
8 he saw Ali -- the man he knew to be Ali Kushayb with an axe. So I didn't
9 understand how he came to drawn an axe at all before he saw the video.

10 MR JEREMY: [10:16:28] He told us in the witness preparation session that the reason
11 he drew this axe is because he saw Ali Kushayb carrying this axe during meetings
12 that he attended and in his location during a relevant period.

13 PRESIDING JUDGE KORNER: [10:16:39] And why didn't you ask him that when
14 you were asking about the meetings?

15 MR JEREMY: [10:16:43] Well, because I've designed it -- the examination in a
16 different way for when I would be talking about the axe.

17 PRESIDING JUDGE KORNER: [10:16:59] All right.

18 MR JEREMY: [10:17:00] In addition, in relation to the video, it was also of sufficient
19 quality for the Netherlands Forensic Institute to submit it to expert analysis when it
20 extracted frames from that video and compared them to biometric images that were
21 taken of the accused.

22 A few submissions in relation to the photo. And an important point that I should
23 emphasise and which goes towards why we would like to show that photo to the
24 witness, and the point is this: It's the closest known photo that we have of
25 Abd-Al-Rahman to the event in question. The photo dates from 2006. The

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1 passport -- it comes from a passport that was issued in 28 October 2006, and it's the
2 most contemporaneous photo that we have. And on that basis, we submit that the
3 probative value of a witness recognising Ali Kushayb, Abd-Al-Rahman, in that photo
4 is higher than recognising him in footage of these current proceedings.

5 PRESIDING JUDGE KORNER: [10:18:34](Microphone not activated)

6 I hadn't appreciated it. Where does it say 2006?

7 MR JEREMY: [10:18:38] In the passport itself, Madam President. And I can get the
8 reference for you.

9 PRESIDING JUDGE KORNER: [10:18:50] I've got -- I've got the photograph here at
10 tab 25, but I -- is it written in Arabic then? (Redacted)

11 (Redacted)

12 (Pause in proceedings)

13 MR JEREMY: [10:20:00] Just the Court's indulgence for a moment, Madam
14 President.

15 Thank you, Madam President. So it's -- it's the stamp in the original in tab 25. You
16 see the stamp at the bottom of the -- the page with the title "Passport, The Republic of
17 The Sudan, Ministry of Interior" and at the bottom you see the stamp 28 October 2006.

18 PRESIDING JUDGE KORNER: [10:21:10] Yes, I -- I'm afraid I hadn't appreciated
19 that it -- that it is 2006.

20 So, Mr Edwards, you can come back on that one, I think.

21 Anything else, Mr Jeremy?

22 (Counsel confer)

23 MR JEREMY: [10:21:45] No, I'll conclude with those comments. Thank you,
24 Madam President.

25 PRESIDING JUDGE KORNER: [10:21:49] Yes. In fact, Judge Alexis-Windsor has a

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1 question for both sides.

2 So I think we start with you, Mr Edwards.

3 JUDGE ALEXIS-WINDSOR: [10:21:59] Right, Mr Edwards, in recognition -- in
4 recognition cases, should there be -- should there be an identification process such as
5 a photo board or an identification parade, is there not a danger that is recognised in
6 law? I seem to remember the name of the case being Goldstone. It was a case that
7 emitted from Jamaica, and for some reason I remember that the name of the
8 identification witness was Claudette, in which it was stated that if a witness knows
9 the person very well before and there is an identification process, there is actually a
10 disadvantage to the accused because there is a danger that the witness adds further to
11 the wrong recognition by saying "this is the person," whereas, what the person
12 is -- what the witness is actually saying is, "this is the person whom I recognise," and
13 it does not add any and anything to whether -- not that this is the person the witness
14 recognised, but that this is the person who committed the offence, you see? So what
15 do you say in relation to that? Because you have stressed that there should have
16 been a photo board, but in recognition cases, does it have the same evidential value?

17 MR EDWARDS: [10:23:36] If the case that your Honour is referring to is a privy
18 council case --

19 JUDGE ALEXIS-WINDSOR: [10:23:40] I believe so.

20 MR EDWARDS: [10:23:45] -- I think I know that case. It's a case where there had
21 been no identification proceedings, there had been by -- and the defendant himself
22 towards the end of the case insisted that there be a dock ID and the two witnesses
23 who had not previously identified him, contrary to all expectations of the defendant,
24 did in fact pick him out in the (Overlapping speakers)

25 JUDGE ALEXIS-WINDSOR: [10:24:07] The problem was she didn't know his really

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1 name, she knew his nickname.

2 MR EDWARDS: [10:24:16] Yeah. I think the privy council, though, in that case,
3 nevertheless found that the trial judge -- the crown in that case said, "Too bad. He
4 asked for the dock ID. He got a dock ID. He didn't get the decision he liked, but
5 he's stuck with it." The privy council, if we're thinking about the same case --

6 JUDGE ALEXIS-WINDSOR: [10:24:36] I don't think we're thinking about the same
7 case.

8 MR EDWARDS: Ah, okay.

9 JUDGE ALEXIS-WINDSOR: [10:24:36] I will find it and get back to you.

10 MR EDWARDS: [10:24:45] All right. I'm not necessarily -- perhaps I can
11 short-circuit matters. I'm not necessarily saying that we are asking the Prosecution
12 to go away and to conduct a photo board case with this witness now. That -- that
13 (Overlapping speakers)

14 PRESIDING JUDGE KORNER: [10:24:59] You can take it -- no, you can take it,
15 Mr Edwards, that we understand that. Yeah.

16 MR EDWARDS: [10:25:04] But to come back -- but to come back to your -- to Your
17 Honour's original point: Should photo board procedures be conducted in
18 recognition cases? I think that's it in summary. Absolutely, absolutely they should
19 be, because the risk of misidentification in recognition cases, even in recognition cases,
20 is still a risk that exists. And it's a risk that the courts should also be aware of. And
21 in some jurisdictions, in the UK, for example, under the Codes of Practice, Code D of
22 the Police and Criminal Evidence Act, even in, even in recognition cases, even in most
23 recognition cases, I think the test is except in the most exceptional circumstances.
24 Even in recognition cases, yes, a photo board procedure or a -- or a -- or a viper -- a
25 video procedure should still be carried out.

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1 So I've gone about saying yes to Your Honour's question in a very long-winded and
2 roundabout way, but my answer is yes, it should. The risk is too great.

3 JUDGE ALEXIS-WINDSOR: [10:26:31](Microphone not activated)

4 Oh, so sorry.

5 I did have a question or two for the Prosecutor *as well.

6 Mr Jeremy, you said that in a recognition case, the Trial Chamber does not have to be
7 as cautious, if I am understanding you correctly. But is that not the essence of the
8 difficulty? In a recognition case, an honest witness -- taking the evidence at its
9 highest, an honest witness in a recognition case can indeed be a very convincing
10 witness and can be equally wrong. Is there not a responsibility on a Chamber, even
11 in a recognition case, not only to be cautious, but to relate the -- the particular
12 difficulties of the identification recognition to whether or not it is admissible and, if it
13 is, what weight should be ascribed to it?

14 MR JEREMY: [10:27:51] Thank you, Madam Judge, your Honour. I -- perhaps it
15 was -- I should not have expressed it as saying not as cautious with recognition
16 evidence as you need to be with identification evidence, but rather, the same
17 safeguards that are required for identification evidence are not always
18 appropriate -- not usually appropriate in cases of recognition cases. And in a case
19 such as this one, in relation to this issue of whether a photo board, photo lineup
20 should have been put to this witness, the Prosecution's position is where you have a
21 witness as familiar with an individual as this witness is, and in addition, where you
22 have a witness who has seen this -- the accused in this trial, has seen him in the open
23 source and sent a video, then in those circumstances, it would be nonsensical to
24 prepare a photo lineup and I don't think that the Police and Criminal Evidence Act, I
25 don't think the CPS guidelines suggest that in those circumstances a lineup should

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1 have been required in the same way in a recognition case.

2 PRESIDING JUDGE KORNER: [10:29:18] I rather think you check -- okay,
3 Mr Jeremy, you've been out a long time. It is suggested that even where it's
4 recognition, there should be photo boards.

5 MR JEREMY: [10:29:32] My understanding is that in cases of recognition, single
6 photos can be shown, single videos can be shown. Now, around the showing of
7 those videos some directions should be made suggesting that possibly in this photo,
8 in this video, you may not recognise anybody, but those -- but my understanding is
9 that they -- and I looked at them recently, is that that is permissible.

10 JUDGE ALEXIS-WINDSOR: [10:30:02] Sorry, one more question, Mr Jeremy. You
11 spoke about voice identification. Can you point us to where in your evidence we
12 have fodder for voice identification? Voice identification is a different creature.

13 MR JEREMY: [10:30:20] Well, I mentioned voice identification in terms of the
14 witness's ability to recognise the -- Ali Kushayb in that video. My learned friend has
15 said that the quality of the video is not strong, but we -- we have heard from this
16 witness that through -- that he had multiple interactions with Ali Kushayb where he
17 heard his voice. We have heard -- well, we heard (Redacted)

18 (Redacted) So my
19 suggestion is that, given that this witness knows Ali Kushayb's voice from (Redacted)
20 (Redacted), he'll also be able to recognise that same voice when he watches a video
21 and in which the voice is clearly audible.

22 JUDGE ALEXIS-WINDSOR: [10:31:18] All right. Thank you, Mr Jeremy.
23 And thank you, Madam President.

24 JUDGE ALAPINI-GANSOU: [10:31:32](Interpretation) Thank you,
25 Chairman -- President. I would like to ask a question linked to the video.

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1 The -- my colleague, Judge Alexis-Windsor, asked a similar question, but I would
2 nevertheless like to come back to this. You say that the video is of poor quality. Is
3 that not the case?

4 MR JEREMY: [10:32:01] Yes, the video is not at the quality we would like, yeah.

5 JUDGE ALAPINI-GANSOU: [10:32:12](Interpretation) Judge Alexis-Windsor raised
6 a question about other factors you mentioned, particularly with regard to the voice.
7 There was a question of tone and conduct, but I'd like to put the question differently.
8 Why this video and not a different video? Why do we have to see this video, rather
9 than another, given the difficulties inherent in this video?

10 PRESIDING JUDGE KORNER: [10:33:05] Sorry. Mr Jeremy, yes, why don't you
11 answer that.

12 MR JEREMY: [10:33:07] Yes, your Honour. The significance of this particular video
13 that we are aiming to show to the witness is that (Redacted)
14 (Redacted)
15 (Redacted) So that's the reason why -- why we want to show
16 that video to him.

17 JUDGE ALAPINI-GANSOU: [10:33:40](Interpretation) One final question: What
18 will showing this video add to all the elements that you have in the case file and the
19 statements made by the witness?

20 MR JEREMY: [10:34:10] The position of the Prosecution is that this video shows the
21 accused in a position of authority, albeit one after the events. It also shows him
22 holding an axe. And that corroborates this witness's evidence about seeing
23 Ali Kushayb holding an axe during the relevant period. The witness also drew a
24 sketch of the axe, which matches, I would say, perfectly the axe that we see in the
25 video.

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1 And in addition, in due course, the Prosecution will submit an expert report from the
2 Netherlands Forensic Institute which describes the process by which the Netherlands
3 Forensic Institute extracted images from this video and compared them against
4 biometric photos of the accused, and drew the conclusion that there was a substantial
5 likelihood that they were the same person.

6 And in addition, in relation to this -- the point of the axe, which is a key part of
7 testimony of a lot of witnesses in this case, witnesses refer to seeing Ali Kushayb
8 strike people in the head with this axe. We will hear from other witnesses who also
9 draw sketches of the axe, which again, the Prosecution will say, match the axe that
10 Ali Kushayb, Abd-Al-Rahman, is holding in this particular video.

11 PRESIDING JUDGE KORNER: [10:36:02] Mr Edwards.

12 MR EDWARDS: [10:36:03] I really only want to talk about two things. In fact, one
13 of those thing your Honour has already got the point, the axe was described and
14 drawn by the witness after he'd seen the video. Whether he spotted the axe in the
15 frame or not, I don't know. But the point is, it was before him before he even drew
16 the axe.

17 Anyway, that's not really my best -- my principal point. My principal point is this,
18 because my learned friend has made a great deal about the Netherlands Forensic
19 Institute report to say, actually, the quality is not that bad at all because it was enough
20 for them to make the necessary comparison.

21 And I'd like, if I may, to bring up that Netherlands Forensic report, just for the
22 purposes of making the point that I wish to make. Now, the learned court officer
23 doesn't have the document on Ringtail. I have no idea why it's not on Ringtail,
24 because it does have an ERN. But with your Honour's permission, I've emailed your
25 Honours a copy of the report. It's -- it's pretty heavy, but it's only 11 pages long.

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1 And I've also emailed the court officer. So if it's technologically possible, perhaps
2 that can be brought up on everyone's screen, just to show you the images from this
3 video that the Dutch Forensic Institute --

4 PRESIDING JUDGE KORNER: [10:37:38] Well, I suppose we can all open
5 email -- we can all open email.

6 MR EDWARDS: Okay.

7 PRESIDING JUDGE KORNER: Oh, well I haven't -- you sent it to the legal -- can
8 somebody forward it? Oh, right. Oh, you have. Yeah, got it.

9 MR EDWARDS: [10:37:50] While -- while that's being done, can I put it in to some
10 sort of context. The way in which the Dutch Forensic Institute compared biometric
11 data photos of this defendant to the video is by comparing the two videos, the
12 military video - this one that we're taking about - and the teacher video, and the
13 Dutch operated from an assumption that the speaker in both videos is the same
14 person. The quality of the teacher video is far superior to the quality in the military
15 video.

16 And by way of illustration, if your Honours have that document up, and I don't know
17 if it's being --

18 PRESIDING JUDGE KORNER: [10:38:42] Well, we've got -- certainly, I've got it up --

19 MR EDWARDS: [10:38:47] Well, if I could invite your Honours to turn to -- oh, right,
20 yes -- to PDF page 6. It's on the evidence channel now. Page 6, figure 2.

21 There we are. There's a frame of a quarter profile of the speaker of this military
22 video. Just to give you an idea of the quality. There's that, and then there are two
23 other videos of the hands of the speaker, and it's based on certain particularity -- this
24 is at page 8 of the document. And the forensic -- the Dutch forensic investigators do
25 a compare and contrast of certain particularities, as they see it, of the speaker's hands

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1 and say that that's similar to the hands of Mr Abd-Al-Rahman. But here, I
2 mentioned earlier about how in the second half of the video the speaker is essentially
3 decapitated by the framing, and this is what we see.

4 In terms of the quality of the head, the face of the speaker, the first image, the image
5 which is still on your screen, tells you all you need to know. And this witness says
6 he identified Ali Kushayb from this video.

7 Those are my submissions.

8 PRESIDING JUDGE KORNER: [10:40:26] Yes, thank you.

9 Well, as I say, both sides' timekeeping is absolutely terrible, or time estimates in
10 advance, I should say. And I think the witness needs to be apologised to by
11 the Court. But what I think we'll do now is we'll take the break and we'll extend it a
12 little bit so that we can discuss the submissions made before coming to a ruling.

13 I think we'll say - it's now 20 to 11 - we'll sit again at 20 past 11. I think what we will
14 do is say what our ruling is in public session, but then go into private session in order
15 to give the reasons for it. As people have been watching the argument, I think we
16 should give the ruling and then we'll go into private session thereafter. So we'll sit
17 again at 20 past 11.

18 Sorry, Judge Alexis-Windsor is going to tell Mr Edwards something.

19 JUDGE ALEXIS-WINDSOR: [10:41:38] Right, Mr Edwards, Goldson and McGlashan
20 [2000] UKPC, page 9. I'm happy to see that it is indeed Claudette.

21 MR EDWARDS: [10:41:52] Thank you very much, your Honour.

22 PRESIDING JUDGE KORNER: [10:41:54] Yes, okay, we'll sit again at 20 past 11.

23 THE COURT USHER: [10:41:58] All rise.

24 (Recess taken at 10.42 a.m.)

25 (Upon resuming in open session at 11.26 a.m.)

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1 THE COURT USHER: [11:26:10] All rise.
2 Please be seated.
3 PRESIDING JUDGE KORNER: [11:26:43] Yes. As we indicated before the break,
4 we will give the ruling in open session, and then for the reasons we will go into
5 private session as -- sorry -- as those reasons may affect the identity of the witness.
6 The Prosecution seeks to put in evidence two pieces of material, namely, a passport
7 photograph taken in 2006 of the accused and a video taken -- it is not clear
8 when -- but which the Prosecution say shows the accused in a military uniform
9 addressing a crowd.
10 The reason that they seek to put it in evidence is that they say -- and, indeed, that is
11 apparently part of the evidence contained in the interviews of the witness -- that he is
12 able to identify the accused through his previous knowledge of him.
13 The Defence argue that the pieces of evidence should not be shown to the witness and
14 as effectively -- although conceding that it is recognition as opposed to identification,
15 they say that the dangers of these recognition -- of this recognition evidence still
16 remains and that the prejudicial effect outweighs any probative value thereof.
17 The Prosecution did not seek to put into evidence the part of the filmed proceedings
18 at this court which was seen by the witness at the beginning of the various
19 appearances the accused has made. But during the course of legal argument, the
20 Defence conceded that, were the video of the proceedings, once properly identified by
21 the witness, to be played, they could not have the same, effectively, arguments as to
22 admissibility.
23 For reasons which we, as I say, we will give in private session, we have decided that
24 the evidence of the photograph, being -- from the passport, may be shown to the
25 witness; that the video shown also to the witness; and additionally, because it seems

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1 to me that that is in one sense the best evidence of recognition, and also because, as I
2 say, the Defence do not seek to raise any argument in respect of it, we also say that the
3 witness should be shown, if it can be identified, that part of the proceedings which he
4 saw and which he says he recognised the accused as Ali Kushayb. Therefore, we
5 admit that evidence.

6 For the purposes of the public, I should say straightaway, as I will explain, that
7 admission is a totally different aspect to the weight which is attached to the evidence,
8 and, of course, I say in parentheses, if it is given by the witness when he is shown
9 these items.

10 Yes. We will now, therefore, go into private session.

11 (Private session at 11.31 a.m.)

12 THE COURT OFFICER: [11:31:52] We are in private session, Madam President.

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

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1 (Redacted)

2 (Open session at 11.54 a.m.)

3 THE COURT OFFICER: [11:54:21] We're back to open session, Madam President.

4 MR JEREMY: [11:54:27] Thank you, your Honours.

5 QUESTIONED BY MR JEREMY: (Continuing)

6 Q. [11:54:32] And good morning, sir.

7 So, as Madam President has told you, sir, we are in public session, but to remind you
8 the public cannot see your face and the public cannot hear the sound of your voice.

9 They can -- they will be able to hear your words, but if your words you feel will
10 identify you, then we can move back into private session.

11 Is that clear to you, sir?

12 A. [11:55:02] Clear.

13 Q. [11:55:12] Okay. Sir, did you previously send a -- a video clip that you found
14 on the internet to an OTP -- an investigator from the Office of the Prosecutor in
15 December 2019?

16 A. [11:55:39] Yes, that happened.

17 Q. [11:55:41] And do you recall what was on this video clip that you sent to the
18 Office of the Prosecutor?

19 A. [11:55:59] I sent that video to confirm to the investigator the identity of Ali
20 Kushayb and also for the investigator to know about his actions because the talk that
21 was contained in that confirmed what the person's actions were.

22 Q. [11:56:33] And, sir, do you recall where you found this video?

23 A. [11:56:49] I found that video in the public domain in the different media
24 available.

25 Q. [11:57:01] Okay. Sir, I now want to play you a version of that video.

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1 And the evidence reference number is DAR-OTP-0220-4835.

2 (Viewing of the video excerpt)

3 PRESIDING JUDGE KORNER: [12:04:08] Mr Jeremy, can you pause this for a
4 moment.

5 MR JEREMY: [12:04:11] Can we pause it, please.

6 PRESIDING JUDGE KORNER: [12:04:12] For some reason, I'm told, having said that
7 this evidence should be given in public, the public isn't able to see this video and
8 apparently it's marked confidential.

9 MR JEREMY: [12:04:26] The public -- the video can be played (Overlapping
10 speakers)

11 PRESIDING JUDGE KORNER: [12:04:28] Well, I know. It's off the internet, so
12 obviously it can --

13 MR JEREMY: [12:04:32] Yeah, I thought that we communicated that instruction, but
14 that's my -- my fault.

15 PRESIDING JUDGE KORNER: [12:04:35] Well, why was it ever marked confidential
16 at all? Well, all right, don't bother about that, but it -- I don't want to ask -- it's quite
17 a long one. Can we make sure it's -- can it now be transmitted to the public gallery.
18 Yeah, all right.

19 How much -- how much more is there?

20 MR JEREMY: [12:04:56] There's a couple of minutes more.

21 PRESIDING JUDGE KORNER: [12:04:58] All right. Thank you.

22 (Viewing of the video excerpt)

23 MR JEREMY: [12:08:36]

24 Q. [12:08:36] Sir, I'm now going to ask you a few questions in relation to that video
25 that we just saw.

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1 My first question is, do you recall when you first saw it?

2 A. [12:08:57] I watched that video two years ago.

3 Q. [12:09:05] And did you recognise anyone in the video that you just watched?

4 A. [12:09:11] Yes, I recognised one person and he is Ali Kushayb.

5 Q. [12:09:21] And can you -- can you describe the person that you recognised in the
6 video? What were they doing in the video?

7 A. [12:09:38] The speaker who was wearing the uniform of *the central reserve
8 forces, with the rank of warrant officer, as to what he was doing, he was among his
9 group in the area south of Um Dukhun, and he was talking with them. He visited an
10 area and he was among his people. He was talking to them.

11 Q. [12:10:22] Okay. For -- for clarity, what I would like to do now is to play the
12 video again, sir, and when you -- when you see the person that you've referred to as
13 Ali Kushayb, I'd like you to raise your hand and then for us to stop the video at that
14 point, please.

15 (Viewing of the video excerpt)

16 MR JEREMY: [12:11:15] Okay, so for the record, the witness has raised his hand and
17 the video has stopped at 25:01 seconds of playing.

18 Q. [12:11:30] Now, sir, you said that -- when I asked you about the video that you
19 previously sent to the investigator, a version of which we've just watched now, you
20 said that you sent that video for the investigator to know about his, and I assume to
21 be referring to Kushayb's, actions because the talk that was contained in that
22 confirmed what the person's actions were.

23 Can you just explain what you meant by that?

24 A. [12:12:12] What I meant, first, is to confirm his identity and to show what kind
25 of acts he did. He himself confessed in the video that he had killed a lot of people

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1 and that he will still kill more people. That is what he said in the video. So I
2 wanted to show that for him, death means nothing. That is how he acts.

3 Q. [12:12:56] Okay. Sir, I'd like to now show you a portion of the same video
4 which we have slowed down.

5 This is DAR-OTP-0220-5453.

6 And I'd like --

7 (Viewing of the video excerpt)

8 MR JEREMY: [12:13:22] Sorry, can we pause it, please.

9 And it can be broadcast to the public, please. And -- sorry, can you pause, please.

10 So when we play the video, you'll see a red arrow, and the Office of the Prosecutor
11 has affixed that red arrow onto the video, and when you see it, I'd like you to -- the
12 court officer to please stop at that point.

13 (Viewing of the video excerpt)

14 MR JEREMY: [12:14:17] Can we go back one second, please. Yeah, there. So we're
15 now paused at 09:09:19 on this video.

16 Q. [12:14:33] Now, sir, my question is do you have any comments on what you see
17 on the screen before you?

18 A. [12:14:51] On the screen I can see the arrow pointing to an axe and in Sudanese
19 we call it *farrar*.

20 Q. [12:15:03] And is this an axe that you recognise, sir?

21 A. [12:15:09] Yes, this is a small axe.

22 Q. [12:15:28] Now, sir, you've previously drawn a sketch of an axe which I would
23 like to show you. I think we can leave --

24 PRESIDING JUDGE KORNER: [12:15:39] Did you draw the sketch after you'd seen
25 this video?

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1 THE WITNESS: [12:16:01](Interpretation) I drew the axe because it was one of the
2 tools that Ali Kushayb always carried with him, but I did not see it in the video. I
3 was not focused.

4 PRESIDING JUDGE KORNER: [12:16:16] Yes, I see. So you're saying that on -- are
5 you saying that at the time you watched the video, before you sent it to the Office of
6 the Prosecutor, you had not noticed the axe?

7 THE WITNESS: [12:16:33](Interpretation) Yes, I did not notice the axe in the video.
8 I just focused on the person.

9 PRESIDING JUDGE KORNER: [12:16:39] Yes. All right.

10 MR JEREMY: [12:16:45] Sorry. Can we -- can we have the still of the axe back on
11 our screens, please. It's left mine, maybe it's just me.

12 Q. [12:17:04] So, sir, I just want to take a look at the sketch that you made of the axe.
13 We don't need to call it up on our screens. I think we can go to our binders. It's
14 tab 20 in the binders. ERN DAR-OTP-0218-0651.

15 Sorry, I'm not asking for it to be called up. If we can leave that there.

16 Now, sir, you said in answer to a question from Madam President that you -- you
17 drew the axe because it was one of the tools that Ali Kushayb always carried with
18 him.

19 Can you tell us when you saw Ali Kushayb carrying that axe?

20 A. [12:18:31] (Redacted) he would be
21 carrying the axe in his hand. Many people carry a stick. However, he always
22 carried an axe.

23 THE INTERPRETER: [12:19:00] A note from the interpreter: Previously when
24 Mr Witness was recognising the defendant on the screen, he said that he was wearing
25 a military uniform and he added his rank, and the rank is *musa'id*, which is warrant

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1 officer.

2 PRESIDING JUDGE KORNER: [12:19:31] I think that -- can you confirm that, please,
3 Mr Jeremy.

4 MR JEREMY: [12:19:41] Yeah.

5 Q. [12:19:42] Sir, can I confirm with you that when you -- when you were watching
6 the video and you identified Ali Kushayb, you also said that he was wearing a
7 military uniform and that his rank was *musa'id*; is that correct?

8 A. [12:20:06] Yes, I confirm that. He was wearing a military uniform and his rank
9 is warrant officer, *musa'id*, because he had the insignia on his shoulder.

10 PRESIDING JUDGE KORNER: [12:20:23] Sir, (Redacted)

11 (Redacted)

12 THE WITNESS: [12:20:44](Interpretation) (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 MR JEREMY: [12:21:20] And I think, for the record, we'll need to call up the sketch
17 of the axe very briefly. It's DAR-OTP-0218-0651.

18 PRESIDING JUDGE KORNER: [12:21:35] Well, are you going -- sorry, Mr -- are you
19 going to go back to the video or was that it? Because there is a question that I want
20 to ask about it. But whether we can find it, I don't know.

21 MR JEREMY: [12:21:46] I was finished with the video.

22 PRESIDING JUDGE KORNER: [12:21:49] All right. Can we -- well, we'll see how
23 we go.

24 Sir, during the playing of this video, the speaker who you identify as being Ali

25 Kushayb talks about some radio talking about him. I think it was Radio Daud (phon)

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1 or something like that. I couldn't -- I haven't got a transcript here so --

2 MR JEREMY: [12:22:13] Radio Dabanga.

3 PRESIDING JUDGE KORNER: [12:22:15] Dabanga.

4 MR JEREMY: [12:22:16] Yeah.

5 PRESIDING JUDGE KORNER: [12:22:17] Do you know what that referred to at all?

6 And if you don't know, please say so straightaway.

7 THE WITNESS: [12:22:34](Interpretation) He was referring to his people to one fact,
8 that as he was accused by the Radio Dabanga that he is a killer, he is confirming that.

9 And it is a popular radio station in Sudan, and the radio station had a broadcast
10 saying that Ali Kushayb did this and that, and he wanted to confirm to his people that
11 what Radio Dabanga said was true.

12 PRESIDING JUDGE KORNER: [12:23:06] Did you hear that broadcast in which the
13 radio station accused him of being a killer or not?

14 THE WITNESS: [12:23:20](Interpretation) Unfortunately, I did not listen to this
15 broadcast. I only learned that from the video.

16 PRESIDING JUDGE KORNER: [12:23:28] Yes, thank you. Yes, thank you,
17 Mr Jeremy, that's all I wanted to know.

18 MR JEREMY: [12:23:38] Okay. So I'd like to briefly show the image of the axe that
19 the witness drew. It's DAR-OTP-0218-0651. I would like to broadcast it publicly, if
20 that's possible. Thank you. But it should be the redacted version that doesn't show
21 the -- yeah.

22 Q. [12:24:03] Sir, do you recognise this drawing? Do you see the drawing on the
23 screen before you?

24 A. [12:24:15] Yes, I recognise it.

25 Q. [12:24:17] And can you tell us what this drawing is, please?

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1 A. [12:24:25] This is a drawing of the axe which I drew. This is the small axe, the
2 handheld axe.

3 PRESIDING JUDGE KORNER: [12:24:36] When exactly was it drawn? I know he
4 said he hadn't spotted the video -- he hadn't spotted the axe on the video when he
5 drew it.

6 MR JEREMY: [12:24:50] It was an annex to his witness statement, Madam President,
7 (Redacted).

8 Q. [12:25:05] And, sir, just for the record, whose axe were you drawing in this
9 diagram?

10 A. [12:25:22] This axe -- would you please repeat the question.

11 Q. [12:25:26] Yes. Who did this axe belong to?

12 A. [12:25:41] I drew this axe in order to illustrate what Ali Kushayb held in his
13 hand.

14 Q. [12:25:58] Okay. I'd like to move on now to a -- to a photo that was shown to
15 you in -- or to a photo.

16 Could we please have DAR-OTP-0222-0037. And it can be broadcast to the public.
17 Perhaps the witness can be shown the hard copy as well. It's tab 27 in his -- in his
18 binder, please.

19 And, sir, we're just waiting to get that image on our own screens, I think.

20 Now, sir, do you recognise the person in this photograph?

21 A. [12:28:12] Yes, I recognise this person. This is the picture of
22 *Ali Muhammad Ali Abd-Al-Rahman, Ali Kushayb.

23 Q. [12:28:30] Okay. I'm finished with that exhibit. Thank you.

24 Now, sir, following the arrest of Ali Kushayb in 2020, did you see him again on TV?

25 A. [12:29:08] Yes, I did. I saw him on TV.

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1 Q. [12:29:10] And can you tell us what you -- what you saw of Ali Kushayb on TV?

2 A. [12:29:26] I saw him wearing red clothes. And there was a piece of news that
3 Ali Kushayb was handed over to the court in The Hague.

4 Q. [12:30:08] Okay. I'd like to show you, sir, an image now.

5 I believe it's been sent to the court officer. Otherwise, we have a hard copy.

6 THE COURT OFFICER: [12:30:33] Can counsel please clarify the ERN.

7 MR JEREMY: [12:30:36] It doesn't have an evidence reference number because we've
8 just obtained it during the last session. Perhaps we can email it to you again.

9 Sir, perhaps you can take your headphones off for a moment, please.

10 So it's been sent to the court officer, but the name is "Red shirt".

11 Q. [12:31:24] Sir, do you recognise this image?

12 A. [12:31:44] I do. I recognise it also as that of Ali Muhammad Ali
13 Abd-Al-Rahman, Ali Kushayb.

14 Q. [12:31:53] And is this the image that you're referring to of Kushayb in the red
15 T-shirt?

16 THE COURT OFFICER: Apologies, counsel. Is the document confidential?

17 MR JEREMY: [12:32:03] No, it's public.

18 THE WITNESS: [12:32:23](Interpretation) Yes, it is the one.

19 PRESIDING JUDGE KORNER: [12:32:25] What is that exactly, Mr Jeremy? Is that
20 him -- it looks like him at the detention unit.

21 MR JEREMY: [12:32:31] It's -- yes, Madam President, it's an image and the open
22 source of when he was arrested. I understand it was in Central African Republic.

23 PRESIDING JUDGE KORNER: [12:32:48] All right.

24 MR JEREMY: [12:32:50]

25 Q. [12:32:51] Sir, following the arrest of Ali Kushayb in 2020, did you see any other

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1 images of him or was this the only image?

2 A. [12:33:12] I saw other photos on TV, his pictures while in court.

3 Q. [12:33:27] And do you recall what he was wearing in those photos, the other
4 images you saw, in court?

5 A. [12:33:39] Yes, in court I saw him in a suit with a tie.

6 Q. [12:33:50] Okay. I'd now like to show you another image, please, sir.

7 And that's the second of the two images that we sent to the court officer a short
8 moment ago. It can be broadcast to the public, please.

9 Sir, do you recognise the person in this image?

10 A. [12:34:38] I recognise him. That's Ali Muhammad Ali Abd-Al-Rahman, Ali
11 Kushayb.

12 Q. [12:34:47] And is this the image that you were referring to when you say you
13 saw him in court?

14 A. [12:34:58] That is the one I saw on TV of him in court.

15 MR JEREMY: [12:35:07] Okay. We're finished with that. Thank you.

16 I'm moving now to a different area of my examination which will require private
17 session.

18 PRESIDING JUDGE KORNER: [12:35:22] Back into private session, please.

19 (Private session at 12.35 p.m.)

20 THE COURT OFFICER: [12:35:39] We're in private session, Madam President.

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

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- 20 (Upon resuming in open session at 2.34 p.m.)
- 21 THE COURT USHER: [14:34:11] All rise.
- 22 Please be seated.
- 23 PRESIDING JUDGE KORNER: [14:34:48] Yes, Mr Shah.
- 24 MR SHAH: [14:34:53] Yes. Thank you, Madam President. Good afternoon.
- 25 PRESIDING JUDGE KORNER: [14:34:57] Sorry, just a moment.

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1 Are we in open or private? Okay.

2 Mr Shah, for your questions, do we need to go into private session?

3 MR SHAH: [14:35:08] I think I can ask my questions in a manner in which we can
4 stay in public, but I will instruct or advise the witness if he believes that he'll give
5 information that may identify him, that we can go into closed session. But I would
6 like to stay in public if I can.

7 PRESIDING JUDGE KORNER: [14:35:27] Yes, all right.

8 Sir, you heard that. If at any stage you feel that an answer you give to Mr Shah,
9 who's asking questions on behalf of the victims, would reveal your identity, then you
10 can say so and we'll go into private session again.

11 QUESTIONED BY MR SHAH:

12 Q. [14:35:54] Good afternoon, sir. You may recall that we met in this courtroom
13 briefly last week, but as the Presiding Judge has indicated, and let me -- I'll note my
14 name again for the record. My name is Anand Shah, and I am one of the lawyers
15 who is representing the victims in these proceedings. And on behalf of our clients,
16 I would like to ask you just a few questions.

17 A. [14:36:30] Yes. Please go ahead.

18 Q. [14:36:34] Sir, I'd first like to ask you about your hometown, the place that you
19 grew up. Please don't mention the name of your town. You can just refer to it as
20 your hometown since we're in public session.

21 Prior to the start of the conflict in 2003, could you roughly tell us what was the size of
22 the population of your hometown?

23 PRESIDING JUDGE KORNER: [14:37:14] Yes. It doesn't look as though we're
24 going to get very far with public session. All right. Let's go into private session
25 and we'll see if we can go back into public later.

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1 (Private session at 2.37 p.m.)

2 THE COURT OFFICER: [14:37:32] We're in private session, Madam President.

3 (Redacted)

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