

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 Monday, 16 January 2023
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: [9:32:07] All rise. The International Criminal Court is now in
12 session. Please be seated.
13 PRESIDING JUDGE KORNER: [9:32:28] Yes, good morning everyone. Happy New
14 Year, which is addressed to everyone - staff, counsel, Mr Al-Rahman. And when I've
15 sorted out my earphones, we can get going -- or we can get going.
16 Right, yes. Appearances for the Prosecution this morning, please.
17 MR NICHOLLS: [9:32:58] Good morning, Madam President. And Happy New Year to
18 you and the Bench and to everybody in the courtroom. Julian Nicholls today with
19 Diana Saba, Rachel Mazzarella, and Claire Sabatini. Thank you.
20 PRESIDING JUDGE KORNER: [9:33:10] Yes, thank you.
21 And the Defence.
22 MR LAUCCI: [9:33:12](Interpretation) My best wishes for the new year, your Honours,
23 and to my dear colleagues. This morning for Mr Ali Muhammad Ali Abd-Al-Rahman
24 here present, Ahmad Issa, case manager, my colleague Iain Edwards, and myself,
25 counsel --

1 THE INTERPRETER: [9:33:40] And one name that the interpreter probably missed.

2 PRESIDING JUDGE KORNER: [9:33:44] Yes, thank you, Mr Laucci. And finally, the
3 representatives of the victims.

4 MS VON WISTINGHAUSEN: [9:33:47] Yes, good morning, Madam President. Good
5 morning, your Honours. I wish a very healthy and hopefully more peaceful new year
6 to everyone in and around the courtroom. And the victims today are represented by
7 associate counsel Anand Shah and myself, Natalie Von Wistinghausen. Thank you.

8 PRESIDING JUDGE KORNER: [9:34:01] Yes.

9 Now, before we come to this morning's witness, in my view, it is extremely regrettable
10 that we have to start off 2023, effectively, with another instance of the Chamber's order
11 not being complied with over a medical report.

12 The Chamber ordered - and I emphasise the word "ordered" - that the investigator who
13 was in charge of this saga of the surrender of the accused to this Court should appear
14 today. If he was unable to appear, the order of the Court was that a reason should be
15 provided as to why he was unfit to testify, because in any court, and particularly a
16 criminal court where a witness is required to give evidence, and I would say in this
17 Court required by the Judges to give evidence, on a matter of some importance, then it
18 is not for the authorities to flout that order.

19 The filing by the Registry stated in paragraph 1 that on 3 January the Chamber
20 instructed the Registry's medical unit to file a report by 11 January. They do at least
21 have the grace to use the word "instructed" in that paragraph. That is, an instruction.

22 The Chamber further requested -- no, the Chamber ordered that in case the medical
23 officer determines the contrary, the report should include an explanation as to why he
24 is unable to testify.

25 The medical report, which is hearsay in any event, as Dr Maud Reddingius, or

1 Reddingius, whatever her name is, clearly has never seen this man, gives no such
2 reason. It simply states that he is not fit to testify. This, I repeat, is unacceptable.
3 It is not required that -- indeed, this medical report is filed confidentially. I cannot
4 imagine why as it contains absolutely no information whatsoever. If a Court orders it,
5 then the information is to be provided. It is not for the medical profession, without any
6 explanation, to decline to comply with a court order.

7 Now, the only thing that is preventing me from ordering the external medical specialist
8 to appear in front of us is that the report says he will be returning to work on January
9 21st with -- now, Mr Nicholls, after that diatribe, is he coming back on the 21st?

10 MR NICHOLLS: [9:38:34] Well, your Honour, I don't know. I have no more
11 information than you. Less than you, because we don't have the confidential report,
12 which, though, as you say, was not helpful.

13 We have not been told formally by the medical unit that he will be coming back. I
14 believe that he will. I hope that he will. In which case, he would be available shortly
15 thereafter. But I cannot give you a certain answer that he is coming back, because we
16 don't have --

17 PRESIDING JUDGE KORNER: [9:39:15] Are you not -- sorry to interrupt you, Mr
18 Nicholls, but are his employers, the Office of the Prosecutor, not entitled to get in touch
19 with him to ask if he's coming back?

20 MR NICHOLLS: [9:39:25] Well, we have done that, your Honour, through the team
21 leader, and that is his expectation and hope, but we don't have a certificate from the
22 medical unit or from anybody saying this investigator is now fit to return to work.
23 So I expect so, I hope so, but I simply cannot say for sure. That is what we hope for,
24 that is what the information in a telephone call was conveyed of what he expects. But
25 the way these things go, I am not speaking about this particular staff member, is they

1 are always sort of tentative and depending on further medical evaluation so -- sorry to
2 go on so long. I expect him to be back. I hope he's back. Likely when he comes back,
3 that will be on a medically restricted amount of -- it may not be full time, but we hope
4 that and expect him to be back on that day, but we do not have -- I do not have
5 anything in writing saying he is cleared.

6 PRESIDING JUDGE KORNER: [9:40:29] So 21st -- actually, the 21st is this Friday, isn't
7 it?

8 MR NICHOLLS: [9:40:35] It's actually a Saturday.

9 PRESIDING JUDGE KORNER: [9:40:38] Saturday, yes.

10 MR NICHOLLS: [9:40:40] So in effect, it will be Monday, next Monday. A week from
11 today.

12 PRESIDING JUDGE KORNER: [9:40:44] Yes. Right.

13 All right. We'll hear from his colleague as far as he can take it, which doesn't seem very
14 far, unfortunately. But I think I'm going to make it clear that if he returns to work, then
15 he must testify next week.

16 MR NICHOLLS: [9:41:22] Yes, your Honour. Thank you.

17 PRESIDING JUDGE KORNER: [9:41:25] I'm going to come on to your witness list, Mr
18 Nicholls.

19 As I understand it, you've got the other investigator this morning and that's it. No
20 other witnesses here, or ready to start, anyhow.

21 MR NICHOLLS: [9:41:49] Not for today. But we have 1061 tomorrow.

22 PRESIDING JUDGE KORNER: [9:41:54] Yes, and how long is 1061 estimated?

23 MR NICHOLLS: [9:41:57] 1061 is going to be brief. I think he'll be a session, most
24 likely.

25 And, you know, your Honour, for the full discussion of the witness --

1 PRESIDING JUDGE KORNER: [9:42:07] Do you want to go into private session?

2 MR NICHOLLS: [9:42:09] No, I was going to say that it might be better to discuss the
3 upcoming block and the witness order after we finish with the witness today because
4 literally a member of my team is talking to VWS now about what can happen. Today,
5 we're hoping for a development to hear from the field, so I might be able to give more
6 in a couple hours.

7 PRESIDING JUDGE KORNER: [9:42:41] Yes, all right.

8 But as I understand it, you're down now to four witnesses; is that right? Excluding the
9 investigator.

10 MR NICHOLLS: [9:42:56] In total?

11 PRESIDING JUDGE KORNER: [9:42:57] Yes.

12 MR NICHOLLS: [9:42:58] No, we have more than that.

13 PRESIDING JUDGE KORNER: [9:43:02] I thought you were, if I can put it that way,
14 dropping witnesses all over the place, Mr Nicholls. My last addition was something --
15 you had ten.

16 MR NICHOLLS: [9:43:13] We had nine before the break.

17 PRESIDING JUDGE KORNER: [9:43:14] Sorry, nine, yes.

18 MR NICHOLLS: [9:43:16] We've dropped two because they have unambiguously
19 refused to participate, and right up to the filing of our list we were trying to change
20 that but were not able to. One witness, who was unavailable, we have converted to
21 98(2)(c), and I thank my friends for the discussion with that witness, and we filed the
22 filing on Friday.

23 PRESIDING JUDGE KORNER: [9:43:42] 68(2)(c).

24 MR NICHOLLS: [9:43:44] 68(2)(c). Yes, sorry.

25 PRESIDING JUDGE KORNER: [9:43:50] Rule 98 as it was at ICTY may come into play

1 later.

2 MR NICHOLLS: [9:43:53] Yes, I'm slipping back. 68(2)(c). Apologies. So that's three
3 down, meaning we have six, not including the investigator coming back. So six or
4 seven. And of those, we have three who are still difficult.

5 PRESIDING JUDGE KORNER: [9:44:11] That's right. So we're down to four. That's
6 what I said.

7 MR NICHOLLS: [9:44:14] No, we have six witnesses.

8 PRESIDING JUDGE KORNER: [9:44:15] Yes, but which you said of which three are
9 difficult.

10 MR NICHOLLS: [9:44:20] Oh, yes, but we're not -- I said in the e-mail, I said at the end
11 of last year, these witnesses are at the end because they've been so difficult not -- to
12 obtain. And I don't mean personally difficult but logistically. So it hasn't been a
13 strategic choice to call these witnesses at the end. We don't intend to drag this out
14 forever, but we think their evidence is useful to the Chamber, so we're going to keep
15 trying to get them.

16 If we cannot get them this month and next month, then we will have to withdraw
17 them.

18 PRESIDING JUDGE KORNER: [9:44:54] Is one of them the witness who was supposed
19 to testify by videolink before Christmas and then changed his mind?

20 MR NICHOLLS: [9:45:01] No, he's refused.

21 PRESIDING JUDGE KORNER: [9:45:02] He's the one who's refused?

22 MR NICHOLLS: [9:45:04] He is the one -- the one who showed up, then refused, has
23 now refused full stop.

24 PRESIDING JUDGE KORNER: [9:45:10] All right. I see.

25 Yes, all right. We'll just have to see how we go at the end of today about -- because

1 what -- I find the idea that we have two witnesses this week and then two witnesses in
2 the middle of next week is not an ideal situation.

3 MR NICHOLLS: [9:45:34] Well, that's because, unfortunately, the witness who you just
4 referred to, who had shown up and then changed his mind, was the one who was
5 meant to be this week and who dropped * out during December. I mean, over the
6 break.

7 PRESIDING JUDGE KORNER: [9:45:50] All right. Is there anything else before we
8 hear from the other investigator?

9 MR NICHOLLS: [9:45:57] No, just one point I wanted to make a clarification from the
10 transcript which was that our hearing on 6 December last year at 23, your Honour
11 asked me about whether we had knowledge of the warrant in December 2019, and we
12 talked about our filing when the press article was released in July next year showing.
13 So I said we did not have knowledge of the warrant, and that's correct.

14 PRESIDING JUDGE KORNER: [9:46:22] That's what the investigator says, actually --

15 MR NICHOLLS: [9:46:24] Yes.

16 PRESIDING JUDGE KORNER: [9:46:29] -- as well.

17 MR NICHOLLS: [9:46:30] And it's correct. But I just wanted to point out that the e-
18 mail attached to the investigator's statement does show from a different source, not
19 from P869, it wasn't in that tranche of information that the accused reportedly was
20 afraid of being arrested, and that e-mail was from 28 December. So I just wanted to
21 make that --

22 PRESIDING JUDGE KORNER: [9:46:52] That's the one from the woman, it looks like?
23 Is that right?

24 MR NICHOLLS: [9:46:57] I'm not sure exactly what you mean, your Honour.

25 PRESIDING JUDGE KORNER: [9:47:00] Oh, no, I see. No, no, it's just headed -- sent to

1 somebody.

2 MR NICHOLLS: [9:47:08] Yes.

3 PRESIDING JUDGE KORNER: [9:47:08] It's the one dated 28 December, 1426 --

4 MR NICHOLLS: [9:47:15] Yes.

5 PRESIDING JUDGE KORNER: [9:47:15] * 10: 16 is the actual e-mail.

6 MR NICHOLLS: [9:47:18] So in that e-mail, the investigator who is testifying today

7 conveys that information had been received from a different source that the accused

8 was worried about being arrested or killed. So I didn't have that with me when I said

9 we don't know about the warrant, so -- and we don't know about a formal warrant, but

10 I would have noted that had I had it at the time when you asked me the question.

11 PRESIDING JUDGE KORNER: [9:47:42] As a matter of interest, just to get this into --

12 because it was raised by the Defence. When was it published in the press that there

13 was a warrant out?

14 MR NICHOLLS: [9:48:18] Yes, it was in our filing June 2020, and it's attached to our

15 filing.

16 PRESIDING JUDGE KORNER: [9:48:27] Yes, well, I haven't got that here. Just give me

17 --

18 MR NICHOLLS: [9:48:32] I can give the ERN of the article.

19 PRESIDING JUDGE KORNER: [9:48:34] Can we have it just pulled up just before we

20 start all this. I'd just like to have a quick look.

21 MR NICHOLLS: [9:48:39] Yes, that is DAR-OTP-0215-2766. And that can be broadcast.

22 There was another article from the day before, 10 June 2020.

23 PRESIDING JUDGE KORNER: [9:49:55] Without seeing -- so this is after -- sorry, after

24 his surrender?

25 MR NICHOLLS: [9:50:03] Yes, we did not know until we received it in open source in

- 1 the media, in the press, that there was a warrant.
- 2 MR EDWARDS: [9:50:10] Your Honour, I wonder if I can just interrupt.
- 3 PRESIDING JUDGE KORNER: [9:50:12] Yes.
- 4 MR EDWARDS: [9:50:14] Last line of the third paragraph down --
- 5 PRESIDING JUDGE KORNER: [9:50:19] Yes.
- 6 MR EDWARDS: [9:50:19] -- we have the attorney-general, I think it is, stating:
- 7 "An arrest warrant was issued for him on the 2nd of December 2019."
- 8 The article is June 2020. The arrest warrant, December 2019, which pre-dates by a
- 9 couple of weeks the e-mail from P0869 to the spokesperson of the Court.
- 10 PRESIDING JUDGE KORNER: [9:50:49] Yes, right. Okay. And it was issued, was it - I
- 11 mean, I don't know, maybe you're right - against Ali Muhammad Ali Abd-Al-Rahman,
- 12 known as Ali Kushayb.
- 13 MR EDWARDS: [9:51:04] Well, that I don't know. That is what the attorney-general is
- 14 stating. We haven't seen a copy of this arrest warrant. It was never, as I understand it,
- 15 served on the accused. But certainly what's of relevance is the accused's knowledge of
- 16 the existence of the arrest warrant and his, at the very least, subjective fear that he was
- 17 to be arrested and/or killed.
- 18 PRESIDING JUDGE KORNER: [9:51:31] Well, yes, but, Mr Edwards, we haven't got
- 19 any evidence of that.
- 20 MR EDWARDS: [9:51:35] Well, we do, your Honour.
- 21 PRESIDING JUDGE KORNER: [9:51:36] No, we don't have. What we -- apart from
- 22 that, it's a newspaper report. But where do we see that he knew that an arrest warrant
- 23 had been issued?
- 24 MR EDWARDS: [9:51:52] Well, if we can return, please, to the e-mail from the witness,
- 25 the investigator who is going to give evidence a bit later on today --

- 1 PRESIDING JUDGE KORNER: [9:52:06] Yes.
- 2 MR EDWARDS: [9:52:07] -- 28 December 2019, so a day or maybe two days after the
- 3 initial contact by 0869 to the spokesperson. So it's DAR-OTP- --
- 4 PRESIDING JUDGE KORNER: [9:52:17] Yes, I've got it. Where does it --
- 5 MR EDWARDS: [9:52:21] On page 2 of that e-mail:
- 6 "Kushayb is believed" -- so this is the investigator's e-mail to his team leader, stating:
- 7 "Kushayb is believed to be in hiding or keeping a low profile for fear of being arrested
- 8 and/or killed by Government of Sudan or others. According to ... 0541," who is another
- 9 intermediary, "this will increase the possibility of him being willing to surrender."
- 10 So we say --
- 11 PRESIDING JUDGE KORNER: [9:52:50] Sorry, this is another intermediary?
- 12 MR EDWARDS: [9:52:51] Yes, it's complicated, but yes. We don't know who that is.
- 13 My learned friend does, but we don't.
- 14 And, in fact, the investigator, in his statement dated 11 January, explains something of
- 15 the interactions between the OTP and that intermediary between paragraph 7 and -- at
- 16 paragraph 7.
- 17 But, anyway, to come back to your Honour's questions. From that report of an
- 18 intermediary to the investigator, which in turn is then passed on to his team leader, it
- 19 can be inferred that the -- that what is being reported, i.e., the accused's fear of being
- 20 arrested and/or killed by the Government of Sudan is (Overlapping speakers).
- 21 PRESIDING JUDGE KORNER: [9:53:42] But the fear of being arrested -- that's the
- 22 difficulty, Mr Edwards. I fully appreciate, Mr Edwards, you don't want to call him.
- 23 But the fear of being arrested could simply be because there had been yet another coup
- 24 in Sudan and a government that was favourable to him or favourable -- favourable to
- 25 the man who is Ali Kushayb had been replaced by one that was hostile towards him.

1 So that could have been the fear.

2 I mean, I appreciate the inference you'd like us to draw. But at the moment, I don't
3 think you can say that we've got evidence that he knew a warrant for his arrest had
4 been issued.

5 MR EDWARDS: [9:54:27] Well, in a sense it's immaterial. And I'll come on to this in
6 my submission in due course.

7 PRESIDING JUDGE KORNER: [9:54:34] Yes, all right.

8 MR EDWARDS: [9:54:35] His fear that he was going to find himself in difficulties, for
9 whatever reason, because of the ICC warrant, because of the Government of Sudan's
10 formal warrant, or because of the change of regime, drove him to seek, in inverted
11 commas, the protection of the ICC.

12 MR NICHOLLS: [9:54:57] Your Honour, I've got to object. I mean, your question was
13 about when was this published and we answered that. And it came up because this
14 publication of the issue of an arrest warrant was when we learned that this report was
15 an issue of arrest warrant.

16 I mean, I appreciate my friend's eagerness to jump into his argument, but I will need to
17 respond to those points.

18 PRESIDING JUDGE KORNER: [9:55:21] No, no, you're going to get the opportunity.
19 Don't worry, Mr Nicholls. I mean, I led on to that.

20 MR EDWARDS: [9:55:28] Yes.

21 PRESIDING JUDGE KORNER: [9:55:29] And I think, because it's only right, that I
22 should remind Mr Edwards, and remind the Defence, that we're not hearing, as I
23 understand it, any evidence from Mr Al-Rahman about this.

24 MR NICHOLLS: [9:55:45] No, and Mr Edwards can't testify on his behalf.

25 PRESIDING JUDGE KORNER: [9:55:47] Correct. Rather like I said to you, Mr

1 Nicholls, last time.

2 MR EDWARDS: [9:55:51] No, but, your Honour, if I may. Firstly, I was dealing with
3 this because your Honour asked me --

4 PRESIDING JUDGE KORNER: [9:55:55] Yes.

5 MR EDWARDS: [9:55:57] -- to deal with it. And I'm not testifying. As I made it very
6 clear just two minutes ago, we're inviting your Honours to draw inferences on the basis
7 of the evidence that you have before you.

8 PRESIDING JUDGE KORNER: [9:56:10] Yes.

9 MR EDWARDS: [9:56:12] And the issue of whether the accused knew of the existence
10 of an arrest warrant or not is, to a large extent, neither here nor there. The evidence
11 that is before you is that he was in fear of arrest and/or of being killed and that is what
12 is important.

13 PRESIDING JUDGE KORNER: [9:56:29] Well, yes. You can deal with it in your
14 submissions.

15 All right. If there's nothing else, let's have the investigator in. With some reluctance,
16 because I take the view that investigators, as police officers, effectively, there's no
17 reason why they shouldn't be known to the public. I understand the arguments, but
18 we'll have his personal details in closed session. But after that, it's open session on the
19 procedures that were followed.

20 Yes, all right. Let's have him in.

21 As I recall, it's us who were calling him, so we ask the questions. Then who goes first? I
22 suppose the Prosecution goes first and then the victims, if they've got any questions,
23 and then the Defence. There's no French translation apparently going on. Let me check.
24 (The witness enters the courtroom)

25 PRESIDING JUDGE KORNER: [9:58:38] Yes, sir, would you be kind enough to take the

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1 solemn declaration.

2 THE WITNESS: [9:58:44] I solemnly declare that I will speak the truth, the whole truth,
3 and nothing but the truth.

4 WITNESS: DAR-OTP-P-1048

5 (The witness speaks English)

6 PRESIDING JUDGE KORNER: [9:58:52] Yes, all right. We'll go into private session for
7 your personal details, sir.

8 (Private session at 9.59 a.m.)

9 THE COURT OFFICER: [9:59:20] We're in private session, Madam President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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24 (Redacted)

25 (Redacted)

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1 (Redacted)

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14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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19 (Redacted)

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21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Open session at 10.02 a.m.)

25 THE COURT OFFICER: [10:02:21] We are back in open session, Madam President.

1 PRESIDING JUDGE KORNER: [10:02:23] So what I'll say is, if there's any question that
2 either I or my colleagues ask you which you feel does require private session, you can
3 say so before answering.

4 I want to ask you about instructions that you received.

5 First of all, are actions recorded taken by any investigator in the course of
6 investigation?

7 A. [10:02:52] It depends on the action. There is a -- I suppose, a procedure where
8 they should be recorded on the investigation management system. However, not all
9 conversations are recorded on that. It's not a steadfast rule. It's just something that the
10 investigators should do.

11 PRESIDING JUDGE KORNER: [10:03:14] Right. Well, let's take that as a -- are there
12 written -- is there a written, what's it called, I suppose, a standard operating procedure?

13 A. [10:03:26] In relation to what part of the investigation?

14 PRESIDING JUDGE KORNER: [10:03:28] In relation to -- well, in relation, really, to
15 what investigators should be recording and should not be recording or need not report.

16 A. [10:03:37] No, I don't believe the standard operating procedures mention that. It's
17 -- I believe it's all information that is of relevance should be recorded.

18 PRESIDING JUDGE KORNER: [10:03:48] All right. What information, in your
19 understanding of whatever the instructions may be, would not be relevant?

20 A. [10:03:55] I presume it's information that won't be needed to continue the
21 investigation or to be used in future trials of court proceedings.

22 PRESIDING JUDGE KORNER: [10:04:08] Well, give us an example. In your
23 experience, in the nearly ten years you've spent with the OTP.

24 A. [10:04:19] Recordings of speaking with people of logistical matters that aren't
25 evidentially based, then they would not necessarily need to be recorded.

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1 PRESIDING JUDGE KORNER: [10:04:30] What conversations then and actions taken
2 definitely would have to be recorded?

3 A. [10:04:43] Conversations that are possibly evidentiary should be recorded. That
4 may not mean that they are actually recorded, but they should be recorded. Actions
5 that may lead to continuing of the investigation or future procedures or things that are
6 happening which were evidentially based which may be needed -- may be heard in
7 courtrooms, they should be recorded.

8 PRESIDING JUDGE KORNER: [10:05:16] All right. Let's take, for example, an initial
9 contact with someone who's a potential witness. Would that be recorded?

10 A. [10:05:27] The initial contact? It should be recorded. If it is -- if the conversation is
11 leading to what is being said and what the information is about, yes.

12 PRESIDING JUDGE KORNER: [10:05:42] Does it matter -- if you make contact with
13 someone who's a potential witness whose name you've been given, shouldn't you
14 record the fact you made contact?

15 A. [10:05:50] Yes.

16 PRESIDING JUDGE KORNER: [10:05:53] Right. And conversations with someone
17 who is a suspect of some kind or another or what used to be called insider witnesses,
18 would that have to be recorded?

19 A. [10:06:09] Yes.

20 PRESIDING JUDGE KORNER: [10:06:12] Now as I understand it -- oh, I'm sorry,
21 before I go on to that. Was every phone call that was made to someone who was either
22 a potential or actual suspect recorded?

23 A. [10:06:28] In relation to the Darfur case?

24 PRESIDING JUDGE KORNER: [10:06:35] Any case that you've worked on. What --
25 sorry, what are the standing instructions about phone conversations with potential or

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1 actual suspects?

2 A. [10:06:45] That they should be recorded.

3 PRESIDING JUDGE KORNER: [10:06:47] In your experience, why wouldn't they be
4 recorded?

5 A. [10:06:55] Unfortunately, sometimes it -- if they were not recorded, it depends on
6 the investigator who may not have recorded at the time.

7 PRESIDING JUDGE KORNER: [10:07:08] I'm asking about your personal experience.
8 Has there ever been a time when you have not recorded a telephone conversation that
9 you have initiated between yourself and someone who is a potential or actual suspect?

10 A. [10:07:21] No, I believe I've recorded all such conversations.

11 PRESIDING JUDGE KORNER: [10:07:26] Do you have any idea why the conversation
12 that your colleague had with the person who was acting as an intermediary was not
13 recorded?

14 A. [10:07:47] At the time, I'm aware the investigator was travelling during the initial
15 conversation, but it should have been recorded when he was able to record it.

16 PRESIDING JUDGE KORNER: [10:08:00] But it wasn't.

17 A. [10:08:01] The initial conversation, no.

18 PRESIDING JUDGE KORNER: [10:08:04] Do you know why the investigator did not
19 record this conversation?

20 A. [10:08:12] I presume that --

21 PRESIDING JUDGE KORNER: [10:08:19] No, no --

22 A. [10:08:22] I --

23 PRESIDING JUDGE KORNER: [10:08:22] No. Have you ever asked him why he
24 didn't?

25 A. [10:08:25] No, I have not.

1 PRESIDING JUDGE KORNER: [10:08:28] You compiled the -- as it were, the sequence
2 of events, the chronology.

3 A. [10:08:32] Yes.

4 PRESIDING JUDGE KORNER: [10:08:34] During that time, all of which I understand
5 you got from the other investigator.

6 A. [10:08:37] No, that's incorrect. I -- the sequence of events in my statement is based
7 on information that is obviously registered and information that's in the investigation
8 management system. I'm referring to the statement that I've recently submitted before
9 my evidence today.

10 PRESIDING JUDGE KORNER: [10:08:57] Yes, I'm looking at that. So I see, what you're
11 saying is that the part -- this is paragraph -- have you got your statement with you?

12 A. [10:09:12] No, I do not.

13 PRESIDING JUDGE KORNER: [10:09:14] Okay. Could he be -- apparently you have.
14 Can you turn to paragraph 5 of your statement.

15 A. [10:09:28] Yes.

16 PRESIDING JUDGE KORNER: [10:09:28] You're referring where you say, "This was
17 based on a conversation I had with the investigator," just to that simple part, are you?

18 A. [10:09:38] Yes, that is correct.

19 PRESIDING JUDGE KORNER: [10:09:42] When he told you that, did you ask him
20 where the note was?

21 A. [10:09:45] No, I did not.

22 PRESIDING JUDGE KORNER: [10:09:49] Why not? I'm sorry, am I going too fast? I
23 appreciate it's English speaking to English. But if the interpreters say if this is too fast.
24 Why didn't you?

25 A. [10:10:05] I should have. I just took it from what he said to me and added that to -

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1 - that part into the report. For that section, I didn't ask for any subsequent recordings
2 that he had made.

3 PRESIDING JUDGE KORNER: [10:10:23] When all this saga began, if I can put it that
4 way, or the potential surrender of Al-Rahman, were you involved in all the
5 negotiations?

6 A. [10:10:47] I was present during all phone calls between the OTP and the accused.
7 Phone calls between P-0869 in the OTP were in Arabic, so I was not privy to those
8 phone calls.

9 PRESIDING JUDGE KORNER: [10:11:15] But did you discuss -- first of all, I suppose I
10 ought to ask, do you speak Arabic?

11 A. [10:11:20] No, I do not.

12 PRESIDING JUDGE KORNER: [10:11:21] So you have no idea what -- I mean, the
13 phone calls, as we understand, were all conducted in Arabic.

14 A. [10:11:29] Are you referring to the phone calls with the accused and P-0869?

15 PRESIDING JUDGE KORNER: [10:11:37] Yes.

16 A. [10:11:38] Yes, they were.

17 PRESIDING JUDGE KORNER: [10:11:38] Yes, Mr Nicholls, do you want -- do you
18 want to say something?

19 MR NICHOLLS: [10:11:43] I don't want to interfere, your Honour, it's just that there's
20 two sets of calls here. There's phone calls between OTP and 0869.

21 PRESIDING JUDGE KORNER: [10:11:52] Yes.

22 MR NICHOLLS: [10:11:54] Those are pure Arabic. Phone calls with the OTP and the
23 accused are in Arabic, but there was also English spoken and some are -- you can see
24 that in the transcripts.

25 PRESIDING JUDGE KORNER: [10:12:06] No, I can see -- yes, on some occasions.

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1 MR NICHOLLS: [10:12:09] Yes, yes, that's just what I --

2 PRESIDING JUDGE KORNER: [10:12:10] No, I understand that. But the ones that --
3 for the -- when the other investigator was speaking directly to the accused, that was in
4 Arabic.

5 A. [10:12:20] That was in Arabic and it was audio recorded. And also OTP were
6 present, other staff members - myself - was present at the time, and there was
7 simulation -- or simultaneous translation by (Redacted) when he was speaking to the
8 accused.

9 PRESIDING JUDGE KORNER: [10:12:44] All right. And the phone calls between the
10 other investigator and the intermediary, whatever number he is, was anybody else
11 present at those?

12 A. [10:12:59] No, there was only one instance where Mr Nicholls, I believe, and
13 (Redacted) were involved in a teleconference with P-0689.

14 PRESIDING JUDGE KORNER: [10:13:19] All right. I suggest for the -- I don't think it
15 matters, because his name has come up over and over again, but that you avoid using
16 the other investigator's name.

17 A. [10:13:28] Yes.

18 PRESIDING JUDGE KORNER: [10:13:28] All right. When notes of the steps taken --
19 sorry. Where there were records kept of the steps taken or conversations held, were
20 those signed and dated?

21 A. [10:13:48] No, that is not the procedure when making notes. They are entered into
22 an information management system. There's no signing of a physical document.

23 PRESIDING JUDGE KORNER: [10:14:02] Yes, I see. I suppose that's probably right.

24 MR EDWARDS: [10:14:07] Your Honour, I know I'll have my opportunity in a
25 moment, but --

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- 1 PRESIDING JUDGE KORNER: [10:14:13] You will.
- 2 MR EDWARDS: [10:14:14] -- so it doesn't get lost, you asked signed and dated. The
- 3 witness has talked about signing only.
- 4 PRESIDING JUDGE KORNER: [10:14:21] Yes, all right. When -- I suppose the
- 5 electronic system automatically dates them.
- 6 A. [10:14:27] Yes, it does.
- 7 PRESIDING JUDGE KORNER: [10:14:28] Okay. At the time of these communications,
- 8 was anybody in the office aware that the Sudanese government had apparently issued
- 9 an arrest warrant for Al-Rahman, known as Ali Kushayb?
- 10 A. [10:14:57] I am unaware of an actual arrest warrant, but I'm aware that the
- 11 government -- he was conscious that the government and other tribes may arrest him --
- 12 or the government may arrest him. I'm unaware of an actual arrest warrant.
- 13 PRESIDING JUDGE KORNER: [10:15:09] All right. And finally this: Are you able to
- 14 give any explanation as to why the two videos were supplied to the OTP?
- 15 A. [10:15:32] I believe that was from the undertaking of 869 to obtain in relation to
- 16 getting a video to prove that he was in contact with the accused. I believe it's from the -
- 17 - P-0869's undertaking that he did that.
- 18 PRESIDING JUDGE KORNER: [10:16:00] At any stage, to your knowledge, were you
- 19 ever given instructions to ask for a video recording for him to prove that he was who
- 20 he said he was?
- 21 A. [10:16:15] No, there was no instructions given to me to obtain that.
- 22 PRESIDING JUDGE KORNER: [10:16:24] And were you -- you told us you were
- 23 present at all conversations between the other investigator and the accused.
- 24 A. [10:16:35] Yes, that is correct. Other than the call when they were in country just
- 25 prior to the actual --

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- 1 PRESIDING JUDGE KORNER: [10:16:42] Yes.
- 2 A. [10:16:43] -- surrender.
- 3 PRESIDING JUDGE KORNER: [10:16:44] All right. And that was after the video,
- 4 wasn't it?
- 5 A. [10:16:47] That was the day before -- yes, after the -- the 21 March video.
- 6 PRESIDING JUDGE KORNER: [10:16:54] Yes, all right. I'll just see whether either of
- 7 my colleagues have anything.
- 8 JUDGE ALEXIS-WINDSOR: [10:17:05] Good morning, sir.
- 9 A. [10:17:07] Good morning.
- 10 JUDGE ALEXIS-WINDSOR: [10:17:09] I just have a few questions for you. Do you
- 11 have your statement before you?
- 12 A. [10:17:16] Yes, I do.
- 13 JUDGE ALEXIS-WINDSOR: [10:17:17] All right. In paragraph 5, I am not calling the
- 14 names, as we are in open session --
- 15 A. [10:17:20] Yes.
- 16 JUDGE ALEXIS-WINDSOR: [10:17:22] -- but it says here that you had a conversation
- 17 with a particular investigator.
- 18 A. [10:17:34] Correct.
- 19 JUDGE ALEXIS-WINDSOR: [10:17:35] And on the basis of those conversations, and
- 20 not from a document or note, you compiled a report -- or two reports in fact. Is that so?
- 21 A. [10:17:45] That is correct.
- 22 JUDGE ALEXIS-WINDSOR: [10:17:47] Right. Can you remember when you had these
- 23 conversations with this particular investigator?
- 24 A. [10:17:54] No, I cannot. It was obviously before the drafting of the document.
- 25 JUDGE ALEXIS-WINDSOR: [10:18:01] All right. You may not remember a particular

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1 date, but are you able to give us some sort of timeframe?

2 A. [10:18:06] No, I'm not. I had frequent conversations with the investigator in
3 relation to the creation of the report, but I can't give a definitive date or time. It wasn't
4 a one-off conversation that was set that I remember.

5 JUDGE ALEXIS-WINDSOR: [10:18:33] All right. Let me try one last time on this issue.
6 In relation to the report, can you give us any approximation of how long before you
7 drafted the reports that you had last had any conversation with this particular
8 investigator on the issue?

9 A. [10:18:51] On the issue in relation to him requiring proof that the --

10 JUDGE ALEXIS-WINDSOR: [10:18:59] Yes, indeed.

11 A. [10:19:01] No, I cannot.

12 JUDGE ALEXIS-WINDSOR: [10:19:04] All right. You've said that you were a P3 and
13 this other investigator was not a P3. I believe he was a P2.

14 A. [10:19:18] Yes.

15 JUDGE ALEXIS-WINDSOR: [10:19:20] In terms of the hierarchy, did this investigator
16 report to you in any way? Were you his supervisor in any way?

17 A. [10:19:28] Not necessarily a supervisor, but I was kept apprised of significant
18 developments.

19 JUDGE ALEXIS-WINDSOR: [10:19:37] I'm sorry, you were kept apprised as in he
20 directly spoke to you?

21 A. [10:19:41] Yes. On occasions, yes, but not always.

22 JUDGE ALEXIS-WINDSOR: [10:19:43] Did he have to?

23 A. [10:19:44] No.

24 JUDGE ALEXIS-WINDSOR: [10:19:50] You've said as well that you received no
25 instruction to obtain any video.

1 A. [10:19:58] Yes.

2 JUDGE ALEXIS-WINDSOR: [10:20:00] To your knowledge, was any video requested
3 by an investigator, you or anyone else?

4 A. [10:20:10] Well, to clarify that, there were videos during the lead up to the
5 surrender where videos were requested or videos were given from the accused. That's
6 after the initial video that you're talking about. There were the transfer of money and
7 things to the accused where videos were created to confirm certain things with regards
8 to logistics. But in regards to the -- before 21 March, there was no such request for a
9 video.

10 JUDGE ALEXIS-WINDSOR: [10:20:47] Very well. Thank you.

11 PRESIDING JUDGE KORNER: [10:20:48] There is, before I ask Judge Alapini-Gansou
12 if she has any questions, were you aware of the WhatsApp messages at the time they
13 were going on?

14 A. [10:20:59] No, I was not.

15 PRESIDING JUDGE KORNER: [10:21:05] Are you telling us that there's no instruction
16 within the Office of the Prosecutor about exchanging WhatsApp messages with a
17 suspect or an intermediary?

18 A. [10:21:21] Can you repeat the question, please?

19 PRESIDING JUDGE KORNER: [10:21:26] Are there any instructions which explain that
20 if messages, because that's what they are, communications, are exchanged with, in this
21 case, an actual accused and/or anybody acting on his behalf that should be notified
22 either to a lawyer or to his senior?

23 A. [10:21:57] No, I'm unaware of any such instructions.

24 PRESIDING JUDGE KORNER: [10:22:01] Well, did he ask you whether it was a good
25 idea, given you were the senior officer, to exchange WhatsApp messages without

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1 telling anybody in the OTP that's what he was doing?

2 A. [10:22:11] No, he didn't ask me. I was aware that there was, obviously, initial
3 communication with P-0869, but I was unaware of the subsequent WhatsApp
4 messages.

5 PRESIDING JUDGE KORNER: [10:22:30] So he never spoke to you about them?

6 A. [10:22:32] About the content of them, no.

7 PRESIDING JUDGE KORNER: [10:22:34] Well, no, about the fact that he was, in fact,
8 exchanging WhatsApp, not the content.

9 A. [10:22:39] I was aware that there was WhatsApp communication between the two,
10 yes.

11 PRESIDING JUDGE KORNER: [10:22:42] You were aware of that?

12 A. [10:22:42] Yes.

13 PRESIDING JUDGE KORNER: [10:22:44] Didn't you think of instructing him then to
14 make sure those WhatsApp messages were entered into the log of events, if you like?

15 A. [10:23:02] I didn't give him specific instructions, but he should have been. Yes.

16 PRESIDING JUDGE KORNER: [10:23:09] But you assumed he knew that?

17 A. [10:23:10] Yes.

18 PRESIDING JUDGE KORNER: [10:23:20] Yes, all right.

19 JUDGE ALAPINI-GANSOU: [10:23:26](Interpretation) Thank you very much, Madam
20 President.

21 Good morning to all. I just wanted to say that it is not Ms Alapini-Gansou that had
22 asked questions earlier. It was rather Judge Alexis-Windsor. I believe that it is very
23 important to mention that to transcribe it correctly.

24 I believe, Madam President, that your last question triggered a question. It's in
25 paragraph 10 of the statement of the witness. I, in fact, had questions. I had some

- 1 doubts as to something that is mentioned in this paragraph in his statement, and he just
2 answered your questions, so I will take note of that. Thank you very much.
- 3 PRESIDING JUDGE KORNER: [10:24:24] Yes, all right. Well, that concludes the
4 Judges' questions.
5 So, Mr Nicholls.
- 6 MR NICHOLLS: [10:24:35] No questions, your Honour.
- 7 PRESIDING JUDGE KORNER: [10:24:36] Yes, well, I suppose, I ought to check. Ms
8 Von Wistinghausen, do you have any questions?
- 9 MS VON WISTINGHAUSEN: [10:24:46] No, thank you.
- 10 PRESIDING JUDGE KORNER: [10:24:47] Yes, Mr Edwards then.
- 11 QUESTIONED BY MR EDWARDS:
- 12 Q. [10:25:05] Good morning, sir. I just want to be clear, the statement that you
13 prepared for the purposes of this hearing, 11 January, you prepared having already
14 watched the legal arguments from December last year?
- 15 A. [10:25:13] Yes, that's correct.
- 16 Q. [10:25:15] And did you re-read the transcripts of the arguments from last year
17 before preparing your statement?
- 18 A. [10:25:22] Yes.
- 19 Q. [10:25:23] Did you --
- 20 A. [10:25:25] Not in full detail, but I did have a cursory look.
- 21 Q. [10:25:28] Yes. And did you write the report out yourself alone in front of a
22 computer or was your statement prepared on the basis of one or more colleagues of
23 yours asking you questions?
- 24 A. [10:25:39] No, the statement was prepared by me. I wrote the statement.
- 25 Q. [10:25:43] At paragraph 3 of your statement, you say that the statement provides

1 details of interactions that you are aware of that the Darfur team had with 869. It's fair
2 to say, though, that there were interactions that the Darfur team may have had with the
3 intermediary that you're unaware of?

4 A. [10:26:17] In regards to -- I'm unaware of any telephone calls to him, other than
5 the WhatsApp messages.

6 Q. [10:26:29] Well, we're going to have to be very clear because there's the WhatsApp
7 messages, which are text messages in nature, and phone calls.

8 A. [10:26:35] Yes.

9 Q. [10:26:36] Right. But the point is that because you used the caveat "that I am
10 aware of," you're acknowledging that there may be other communications that took
11 place that weren't recorded?

12 A. [10:26:58] Yes, it's possible, but there's none that I'm aware of.

13 Q. [10:27:00] Did you discuss with your colleague, the one who can't give evidence
14 today, the contents of your statement --

15 A. [10:27:10] No, I haven't.

16 Q. [10:27:11] -- before sending it on?

17 A. [10:27:13] No, I have not.

18 Q. [10:27:15] It's not been checked with him?

19 A. [10:27:17] No.

20 Q. [10:27:30] You're clearly a very experienced police officer and investigator. You've
21 dealt, no doubt, in your career with cases where suspects have both an official name
22 and an alias?

23 A. [10:27:45] Yes.

24 Q. [10:27:46] Or a street name or a nickname. It's not unusual in the criminal field;
25 right?

1 A. [10:27:54] Yes, it does happen.

2 Q. [10:27:58] And your experience of dealing with matters in Darfur mean that you
3 are aware that in Darfur many individuals also have a nickname.

4 A. [10:28:16] Yes.

5 Q. [10:28:22] When you're investigating criminal matters, either back in your home
6 country or here, you understand, don't you, that it's an important feature of the
7 investigation for police or investigators to link an alias to a person's real name?

8 A. [10:28:48] It's important if that would be an issue, yes.

9 Q. [10:28:53] Well, can you think of any situation where it wouldn't be an issue?

10 A. [10:28:56] When the accused provides information he is both the alias and the
11 accused's actual identity.

12 Q. [10:29:05] Well, no, sorry, that's a situation where you're -- you're talking about a
13 situation where evidence comes out where an accused person admits his alias. What
14 I'm saying is, can you think of any situation where, for the purposes of criminal
15 investigation, it's not important to link an alias to a person's real name?

16 A. [10:29:25] No, it is important.

17 Q. [10:29:27] Yes. And not just important, it's entirely standard, isn't it?

18 A. [10:29:31] Yes.

19 Q. [10:29:32] And in the Abd-Al-Rahman case, the OTP, in the course of
20 investigations, heard from numerous witnesses before his surrender that Ali Kushayb
21 was only a nickname. That Ali Kushayb was not the individual's real name.

22 A. [10:30:00] Yes, there are some witnesses that do say that.

23 Q. [10:30:05] And, in fact, even before Abd-Al-Rahman's surrender and arrest, the
24 OTP understood how important it was, when taking witness statements, to try and
25 elicit Mr Abd-Al-Rahman's real name.

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- 1 A. [10:30:31] No, that was not an issue, something that specifically had to be done.
- 2 No.
- 3 Q. [10:30:38] During your investigations, during your taking of witness statements,
- 4 did you ever ask a witness, "Okay. You're talking about Ali Kushayb. Do you know
- 5 what his real name is?"
- 6 A. [10:30:58] I don't --
- 7 Q. [10:31:01] Before his arrest.
- 8 A. [10:31:02] I don't believe I did.
- 9 Q. [10:31:03] What about your colleague?
- 10 A. [10:31:04] I can't answer for my colleague.
- 11 Q. [10:31:10] Fine.
- 12 MR EDWARDS: [10:31:17] In due course, we'll make submissions about specific
- 13 incidents where witnesses, before Abd-Al-Rahman's surrender, they were asked what's
- 14 his real name.
- 15 PRESIDING JUDGE KORNER: [10:31:32] Sorry, Mr Edwards, I'm not -- you're going to
- 16 make submissions about witnesses -- sorry, say that again? Specific incidents where
- 17 witnesses before his surrender --
- 18 MR EDWARDS: [10:31:45] Yes.
- 19 PRESIDING JUDGE KORNER: [10:31:46] Do you mean the witnesses who have
- 20 testified were asked in their statements?
- 21 MR EDWARDS: [10:31:51] Yes.
- 22 PRESIDING JUDGE KORNER: [10:31:51] I see what you mean. All right.
- 23 MR EDWARDS: [10:31:52] There are a number of them.
- 24 PRESIDING JUDGE KORNER: [10:31:54] Right.
- 25 MR EDWARDS: [10:31:55] There are some --

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- 1 PRESIDING JUDGE KORNER: [10:31:57] Yes, all right.
- 2 MR EDWARDS: [10:31:58] Yes, we'll get there.
- 3 THE WITNESS: [10:32:04] Just a correction. You're referring to if I had asked witnesses
- 4 --
- 5 MR EDWARDS: [10:32:05]
- 6 Q. [10:32:05] Yes.
- 7 A. [10:32:05] -- in regards to the name. I'm referring to myself. Not that I can recall,
- 8 no.
- 9 Q. [10:32:11] Totally understood, yes. No, that's fair enough. That's fair enough.
- 10 Now, let's first talk about the creation of the first investigator's report, so the first
- 11 chronology.
- 12 A. [10:32:21] Yes.
- 13 Q. [10:32:22] This is DAR-OTP-0215-7063.
- 14 A. [10:32:29] Yes.
- 15 Q. [10:32:30] This is an investigation report dated 7 September 2020.
- 16 A. [10:32:37] I don't have it in front of me.
- 17 MR EDWARDS: [10:32:40] Oh, right. Can that be brought up on the screen, please.
- 18 PRESIDING JUDGE KORNER: [10:32:43] I thought the investigator had the whole file
- 19 of -- no? All right.
- 20 MR EDWARDS: [10:32:48] Yes, I alerted your legal officer to the fact that we would be
- 21 taking the witness to some of these reports.
- 22 PRESIDING JUDGE KORNER: [10:32:56] No, no, we've got a full bundle. Thank you.
- 23 MR EDWARDS: [10:32:59] 0215-7063. This is the very first investigator's report which
- 24 amounts to a chronology.
- 25 THE COURT OFFICER: [10:33:07] I'm sorry, the document is not uploaded on Nuix.

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- 1 MR EDWARDS: [10:33:18] A copy is being e-mailed to you now.
- 2 I don't know if anyone from the Prosecution team has a hard copy that can speed
- 3 matters up.
- 4 MR NICHOLLS: [10:33:54] We don't have a clean one without any notes on it, so we're
- 5 trying to get some printed and brought down now.
- 6 PRESIDING JUDGE KORNER: [10:34:00] Yes, the court officer can print it.
- 7 MR EDWARDS: [10:34:04] All right. Well, I can start with a few questions.
- 8 Q. [10:34:09] Now, you were asked by Her Honour Judge Alexis-Windsor about the
- 9 preparation of this report, paragraph 5 of your statement.
- 10 MR EDWARDS: [10:34:28] I've got a clean copy. Perhaps that can be handed to the
- 11 witness. Thank you. Clean copies of both investigators' report.
- 12 Q. [10:34:51] So let me just get this right. In the creation of this report, you're dealing
- 13 principally -- or your source is principally materially in the investigation management
- 14 system; right?
- 15 A. [10:35:08] Which report are you referring to?
- 16 Q. [10:35:10] The two reports that have been handed up to you, the chronologies.
- 17 A. [10:35:15] Yes.
- 18 Q. [10:35:16] So am I right? For the most part these are created by you referring to
- 19 notes on the investigation management system?
- 20 A. [10:35:22] Yes, and also Ringtail as well.
- 21 Q. [10:35:25] And also Ringtail. Okay. And then we'll come on to the second report
- 22 in just a moment. But for the first investigation report, 7063, 7 September 2020, was
- 23 that report in any way based on conversations you had with your colleague?
- 24 A. [10:35:50] Yes, I believe it was.
- 25 Q. [10:35:58] Which parts?

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1 A. [10:36:00] I believe it would have been the part on 26 December in relation.

2 Q. [10:36:08] Well, let's be very clear. What you say in paragraph 5 is that you
3 discussed with your colleague the note relating to the 26 December 2019 entry --

4 A. [10:36:25] Yeah.

5 Q. [10:36:32] -- when compiling that second investigation report. Not the first
6 investigation report. Do you follow?

7 A. [10:36:40] No, sorry, I'm confused. I have three reports in front of me.

8 Q. [10:36:46] Okay. Let's take it one by one. There's the 7063 report --

9 A. [10:36:53] Yes.

10 Q. [10:36:53] -- which is the first in time, 7 September 2020.

11 A. [10:36:56] Yes.

12 Q. [10:36:57] There is an entry for 26 December 2019.

13 A. [10:36:59] Yes.

14 Q. [10:37:00] There is then a second --

15 A. [10:37:03] Yes.

16 Q. [10:37:04] -- report which is from February 2020 --

17 A. [10:37:06] Yes.

18 Q. [10:37:06] -- which is fuller.

19 A. [10:37:09] Yes.

20 Q. [10:37:10] The entry for 26 December 2019 contains a little bit more detail, notably
21 the sentence that you include in paragraph 5 of your statement; correct?

22 A. [10:37:28] Yes.

23 Q. [10:37:28] I'll quote --

24 MR NICHOLLS: [10:37:31] Sorry, no objection. Just for the record, the second is
25 February 21, not 20.

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1 MR EDWARDS: [10:37:40] Yes, exactly. Thank you. Nevertheless, about two months
2 after the first.

3 Q. [10:37:45] So the "OTP required proof that the e-mail was genuine and proof of the
4 identity of the suspect referred to as Ali Kushayb in his e-mail ..."

5 A. [10:37:56] Yes.

6 Q. [10:37:56] The "Ali Kushayb in his e-mail" doesn't figure in your first investigator's
7 report.

8 A. [10:38:05] No.

9 Q. [10:38:05] The "Ali Kushayb in his e-mail" part was information, according to your
10 statement, based on conversations I had with your colleague during that report -- the
11 report's creation; right?

12 A. [10:38:17] Yes.

13 Q. [10:38:18] So we're necessarily talking about the February 2021 report here, aren't
14 we?

15 A. [10:38:24] Yes.

16 Q. [10:38:24] Now, whether it's the December or the February -- December 2020
17 report or the February 2021 report, you're compiling these investigation reports either
18 12 months or 14 months after the contact between your colleague and P-0869.

19 A. [10:38:54] Yes.

20 Q. [10:38:54] Your note, based on the conversation that you had with your colleague,
21 you're asking your colleague to recall the details of a conversation 14 months after the
22 event.

23 A. [10:39:11] Yes.

24 Q. [10:39:14] For which he's made no contemporaneous record as far as you're aware.

25 A. [10:39:20] Correct.

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- 1 PRESIDING JUDGE KORNER: [10:39:24] (Microphone not activated).
- 2 Did he tell you that an e-mail -- as his effective boss, that an e-mail had been received
- 3 by the Court which suggested that a wanted man would surrender?
- 4 THE WITNESS: [10:39:56] I was aware of the e-mail, yes.
- 5 PRESIDING JUDGE KORNER: [10:39:57] So he did tell you about the e-mail?
- 6 THE WITNESS: [10:39:59] Yes.
- 7 PRESIDING JUDGE KORNER: [10:39:59] Did you then give him the instructions to
- 8 contact the intermediary?
- 9 THE WITNESS: [10:40:04] No, I didn't give him specific instructions. No.
- 10 PRESIDING JUDGE KORNER: [10:40:07] But as the senior police officer, why was he
- 11 left to do it rather than you?
- 12 THE WITNESS: [10:40:13] Because he is the Arabic speaker. He's usually tasked with
- 13 speaking to intermediaries. The e-mail was known that when it -- when it came into
- 14 the office.
- 15 PRESIDING JUDGE KORNER: [10:40:26] And are you're saying that something as
- 16 important as that wouldn't be noted?
- 17 THE WITNESS: [10:40:34] In regards to his initial conversation?
- 18 PRESIDING JUDGE KORNER: [10:40:37] Yes.
- 19 THE WITNESS: [10:40:38] Unfortunately it wasn't, no.
- 20 PRESIDING JUDGE KORNER: [10:40:41] Yes, all right.
- 21 Sorry, Mr Edwards. I just wanted to make sure I understood.
- 22 MR EDWARDS: [10:40:47]
- 23 Q. [10:40:48] And when you prepare your notes of 7 December 2020 and then
- 24 February 2021, this obviously is well after the defendant's first appearance.
- 25 A. [10:41:03] Yes.

1 Q. [10:41:04] At a time when you knew that the Defence was taking issue with Mr
2 Abd-Al-Rahman being Ali Kushayb.

3 A. [10:41:19] Yes.

4 Q. [10:41:21] And at the time that you're preparing these reports, you're fully aware
5 of the evidential significance of a video-clip in which Abd-Al-Rahman seems to
6 identify himself as Ali Kushayb; right?

7 A. [10:41:37] Yes, I'm aware it would be relevant given the issues raised by the
8 Defence.

9 Q. [10:41:40] Quite.

10 MR EDWARDS: [10:41:52] Can we just have a look now, please, at the WhatsApp
11 messages in translation. It may not be hugely important, but can we have up on the
12 screen, please, it's P-00000591 at page 2.

13 Q. [10:42:25] This is the first contact by WhatsApp text message from P-0869 to your
14 colleague.

15 MR EDWARDS: [10:42:43] This, of course, is not for public broadcast.

16 THE WITNESS: [10:42:46] Yes.

17 MR EDWARDS: [10:42:46]

18 Q. [10:42:47] So we see it's on 26 December 2019; yes? But you see the time of that
19 message, 23:46, just before midnight?

20 A. [10:42:56] Yes.

21 Q. [10:42:56] And then the next contact, the Facebook page, is the next day. That's a
22 little after 6.00 in the afternoon; yes?

23 A. [10:43:06] Yes.

24 Q. [10:43:07] So the telephone conversation that wasn't noted, it either took place just
25 before midnight on the 26th, but highly likely it would have been on 27 December;

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1 right?

2 A. [10:43:24] It's possible, yes.

3 Q. [10:43:25] Now, do you know how long that telephone conversation lasted?

4 A. [10:43:34] No, I do not.

5 Q. [10:43:37] Did you have any involvement in the creation of the OTP's chronology
6 annexed to the Prosecution's filing, its response to the Defence's submissions dated 2
7 December 2022?

8 A. [10:43:54] Sorry, can you repeat the question?

9 Q. [10:43:59] Yes. So the Court wanted written submissions on what we were going
10 to say in the course of this --

11 A. [10:44:07] Yes.

12 Q. [10:44:07] -- legal argument.

13 A. [10:44:10] Yes.

14 Q. [10:44:10] And the Defence kicked off by arguing what we had to argue, the
15 Defence then responded. And in that response, which was filed on 2 December, a very
16 helpful annex was created which contained -- which set out a very detailed chronology.
17 Have you seen that annex?

18 A. [10:44:26] I believe I have, yes.

19 Q. [10:44:27] You have. Did you have any -- did you play any role in helping create
20 this annex?

21 A. [10:44:32] In creating the actual annex, no. But there may have been questions
22 when, what date or certain aspects which information led to the creation of the annex.

23 Q. [10:44:43] Yes, thank you.

24 PRESIDING JUDGE KORNER: [10:44:44] Mr Edwards, apparently you're doing even
25 more so than I think I was doing which is that you're not leaving a pause for the

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- 1 translation to finish.
- 2 MR EDWARDS: [10:44:54] Yes.
- 3 PRESIDING JUDGE KORNER: [10:44:54] I agree.
- 4 MR EDWARDS: [10:44:56] 2023 has not started out well. I apologise. All right. I'll
- 5 slow down.
- 6 Q. [10:45:02] Because, sir, I just want to ask you about one entry in that annex for 26
- 7 December 2019.
- 8 MR EDWARDS: [10:45:10] So if that annex could be brought up on the screen. I don't
- 9 even know if it's necessary. It may be that your Honours have a hard copy of it.
- 10 PRESIDING JUDGE KORNER: [10:45:19] (Microphone not activated).
- 11 MR EDWARDS: [10:45:22] Yes, to filing 822, I think it is.
- 12 PRESIDING JUDGE KORNER: [10:45:31] (Microphone not activated).
- 13 MR EDWARDS: [10:45:34] Yes.
- 14 PRESIDING JUDGE KORNER: [10:45:36] (Microphone not activated).
- 15 MR EDWARDS: [10:45:39] Yes, that's great. If we can move to the next page of what's
- 16 on the screen. Thank you very much.
- 17 Q. [10:45:47] Do you see that on your screen, sir?
- 18 A. [10:45:50] Yes.
- 19 Q. [10:45:50] Do you see that under the third entry down under the column
- 20 "Summary" --
- 21 A. [10:45:55] Yes.
- 22 Q. [10:45:55] -- for 26 December 2019. It says this: After receiving a missed call from
- 23 the intermediary, your colleague and the intermediary briefly talk on the phone.
- 24 Where does the information come from that the talk on the phone was brief? Did that
- 25 come from you?

- 1 A. [10:46:15] No.
- 2 Q. [10:46:15] Did it come from him?
- 3 A. [10:46:17] Come from who?
- 4 Q. [10:46:20] Your colleague who's unwell.
- 5 A. [10:46:23] I mean, I will say I don't think so.
- 6 Q. [10:46:28] The long and the short of it is we have no idea how long that
- 7 conversation lasted.
- 8 A. [10:46:35] No.
- 9 Q. [10:47:02] And then sticking with the investigator's note, or the investigation
- 10 report, rather, of 7 December 2020.
- 11 A. [10:47:15] Yes.
- 12 Q. [10:47:15] Well, looking at the reference for 26 December 2019, the suspect is
- 13 referred to here as Ali Kushayb.
- 14 A. [10:47:36] Yes.
- 15 Q. [10:47:36] Also in the other investigator's report; right?
- 16 A. [10:47:44] In the paragraph of 26 December, yes.
- 17 Q. [10:47:47] Yes, 26 February. Yes. And then if we fast-forward -- sorry, I'll come
- 18 back to that in a moment. Let's do that. Let's fast-forward to the 26 February report.
- 19 MR EDWARDS: [10:48:29] DAR-OTP-0215-9698.
- 20 Q. [10:48:38] Here memorialising the contact between the investigator and the
- 21 intermediary by which the intermediary is informed that the OTP required proof that
- 22 his e-mail was genuine and proof of the identity of the suspect referred to as Kushayb
- 23 in his e-mail. So, again, this memorialises events that started about 14 months earlier.
- 24 A. [10:49:13] Yes.
- 25 Q. [10:49:13] This isn't a verbatim note of your conversation with your colleague, is

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1 it?

2 A. [10:49:17] No.

3 Q. [10:49:17] It's a summary of what you and your colleague discussed as you were
4 putting together this report in February 2021.

5 A. [10:49:30] Yes.

6 Q. [10:49:31] Is that fair? Yes.

7 A. [10:49:34] If you're referring to was there more information that -- in summary I --
8 well, "summary" is probably not the best word. It's what he -- what he has told me at
9 the time.

10 Q. [10:49:46] Yes, but it's not a verbatim account of what he's telling you.

11 A. [10:49:50] No.

12 Q. [10:49:50] Far less a verbatim account of his conversation -- sorry, a verbatim
13 account of his conversation with the intermediary. Is that fair?

14 A. [10:50:01] Yes.

15 Q. [10:50:01] There's no note of 26 December 2019 conversation although we know
16 that it took place. Do you agree with me that the lack of a note in your management
17 system is in no way determinative of whether or not there were other conversations?

18 PRESIDING JUDGE KORNER: [10:50:37] Sorry, I didn't follow that question at all, Mr
19 Edwards.

20 MR EDWARDS: [10:50:41]

21 Q. [10:50:41] The mere fact that there is no record in the investigation management
22 system of a given conversation does not mean, in any way, that a conversation didn't
23 take place?

24 PRESIDING JUDGE KORNER: [10:50:57] In other words, there could have been other
25 conversations in the same way simply not entered onto the management system.

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- 1 THE WITNESS: [10:51:05] There's none that I'm aware of but it's possible.
- 2 MR EDWARDS: [10:51:09]
- 3 Q. [10:51:09] It would be --
- 4 PRESIDING JUDGE KORNER: [10:51:10] Well, sorry, when you say there's none that
- 5 you're aware, do you mean that the other investigator hasn't told you that there were
- 6 any other conversations --
- 7 THE WITNESS: [10:51:20] Yes.
- 8 PRESIDING JUDGE KORNER: [10:51:21] Did you ask him that direct question?
- 9 THE WITNESS: [10:51:25] Yes, yes, there's been no other conversations from my
- 10 understanding from the investigator.
- 11 PRESIDING JUDGE KORNER: [10:51:30] Did you ask him that directly?
- 12 THE WITNESS: [10:51:33] Yes.
- 13 PRESIDING JUDGE KORNER: [10:51:34] All right.
- 14 MR EDWARDS: [10:51:43]
- 15 Q. [10:51:43] Now, we don't know what the conversation was in detail between your
- 16 colleague and P-0869. What we do have is a recording that was sent to your colleague
- 17 on the evening of 27 December 2019. So within 24 hours of the first contact, right?
- 18 We're going to have a look at that now.
- 19 MR EDWARDS: [10:52:13] It's DAR-OTP-00000453. That's the audio. But the English
- 20 translation is at 481.
- 21 PRESIDING JUDGE KORNER: [10:52:25] (Microphone not activated).
- 22 MR EDWARDS: [10:52:32] Correct, yes.
- 23 PRESIDING JUDGE KORNER: [10:52:35] Sorry, that's 27 December one.
- 24 MR EDWARDS: [10:52:39] Yes.
- 25 Q. [10:52:41] Let me just put this into context. The intermediary sends your colleague

- 1 an audio recording that records one half of a conversation. Does that ring any bells?
- 2 A. [10:52:52] Yes.
- 3 Q. [10:52:52] It's in Arabic. And there's no dispute. Indeed, in your witness
- 4 statement at paragraph 10 you accept that the speaker on this record is, in fact, P-0869.
- 5 MR EDWARDS: [10:53:13] There's no dispute about that, your Honour.
- 6 THE WITNESS: [10:53:15] Correct.
- 7 MR EDWARDS: [10:53:16] Can that translation come up on the screen, please, DAR-
- 8 OTP-00000481 at page 3.
- 9 Q. [10:53:38] Have you listened to the audio of this just to identify voices?
- 10 A. [10:53:41] Yes.
- 11 Q. [10:53:41] And you're familiar with the translation or the transcript of this?
- 12 A. [10:53:49] I've seen the translation.
- 13 Q. [10:53:51] Yes, okay. Have you looked at it recently?
- 14 A. [10:53:53] Yes.
- 15 MR EDWARDS: [10:54:03] Oh, it isn't up yet.
- 16 Q. [10:54:10] While it's coming up, I just want to make it clear, the reason why we're
- 17 going to look at this is because it may shine some light on what your colleague spoke to
- 18 the intermediary about less than 24 hours earlier. Do you follow?
- 19 A. [10:54:26] Yes.
- 20 PRESIDING JUDGE KORNER: [10:54:46] Has it come up yet? Because I can't see it.
- 21 THE COURT OFFICER: [10:55:27] Is there a courtesy copy you could send us?
- 22 MR EDWARDS: [10:55:31] Yes.
- 23 THE COURT OFFICER: [10:55:34] Thank you.
- 24 MR EDWARDS: [10:55:37] I've just been told that on the transcript it's come up as a
- 25 different number. I'm going to try again. It's DAR-OTP-00000481. What I want us to

1 do is to move forward to page 3 of the document. Thank you very much. Page 3.

2 Thank you. Yes, that's fine. Thank you.

3 Q. [10:56:06] So what I mean, sir, is that this is a recording of a conversation of one
4 end of a conversation. We have the speaker, who is (Redacted) -- sorry. We have the
5 speaker, the intermediary, who is speaking to someone, there's silence, and then the
6 intermediary says "yes," and then there's silence. So, you know, it's like one end of a
7 phone conversation almost, isn't it? Okay.

8 And so this is what the intermediary is saying to an unknown person:

9 "... we need him to ... just create material for you ... during the day, if he could create
10 recorded material ... if you managed to film him for two or three minutes ... if he
11 appears in recorded material saying, 'I'm ...' I mean, 'Ali Kushayb,' and so on and so
12 forth ..."

13 Do you see that?

14 A. [10:57:11] Yes.

15 Q. [10:57:12] So do you accept the logic that this is a recording sent by the
16 intermediary to your colleague in which he's demonstrating that he is passing on
17 instructions to someone else?

18 A. [10:57:27] Yes.

19 Q. [10:57:28] That a recording should be made of the suspect?

20 A. [10:57:33] Yes.

21 Q. [10:57:37] And that the suspect should say, "I'm Ali Kushayb"?

22 A. [10:57:44] Yes.

23 Q. [10:57:44] Now, this recording was sent to your colleague at, well, 8.39 p.m., the
24 day after or maybe even the same day of the first conversation between your colleague
25 and the intermediary; yes?

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1 A. [10:58:04] Yes.

2 Q. [10:58:05] As an experienced police officer and investigator reading this, do you
3 accept that the contents of this recording are consistent with the intermediary relaying
4 instructions, or at least advice, that the intermediary had received from your colleague
5 earlier that day?

6 A. [10:58:29] No, I do not.

7 Q. [10:58:31] Why not?

8 A. [10:58:32] Because --

9 Q. [10:58:36] What's inconsistent about it?

10 A. [10:58:38] It would be more probable for P-0869 to say, "The OTP has informed me
11 that I have to do this, this, and this," and that's not in the recording.

12 Q. [10:58:46] Well, that's one way it could have been interpreted. That's one way it
13 could have been said. Are you saying it is inconsistent, is that your evidence, it's
14 inconsistent with relaying of advice or instructions?

15 A. [10:58:58] There is no indication to me that that is from him asking for a video, no.

16 Q. [10:59:03] Okay.

17 MR NICHOLLS: [10:59:04] I'm sorry, I'm going to object to the question which is, I
18 mean, essentially just calling for absolute speculation. I mean, you know, this could be
19 consistent, inconsistent, consistent. I know what his argument is, but, I mean, this is
20 not the witness for that.

21 PRESIDING JUDGE KORNER: [10:59:21] He's saying in your experience as an
22 investigator, try and get that on him. But, anyhow, the investigator has given an
23 answer, so -- but you're right, I suppose. It's just really a comment that -- it's an
24 inference that Mr Edwards is going to ask us to draw.

25 MR EDWARDS: [10:59:42] And if we actually move forward to page 6 of the

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1 document.

2 Q. [10:59:45] You see that the same -- never mind who it comes from, but the same
3 instruction is given by the intermediary to the other party of the conversation at line
4 126 to 128. Do you see that?

5 A. [11:00:01] Yes.

6 Q. [11:00:28] Yes --

7 PRESIDING JUDGE KORNER: [11:00:31] I interrupt, Mr Edwards, because we have to
8 take a break.

9 MR EDWARDS: [11:00:36] I was just going to say, before we move on from this
10 conversation, if we could go to page 1 again.

11 Q. [11:00:46] Do you agree that the recording of this exchange between the
12 intermediary and an unknown person, there's no, "Hi, good morning. How are you?
13 How are the family?" The recording starts halfway through a conversation?

14 A. [11:01:04] Yes.

15 Q. [11:01:04] Or once the conversation starts. Yes, okay.

16 MR EDWARDS: [11:01:06] All right. Yes, I'm moving on to another document. The
17 document we'll be looking at after the break is the e-mail to the team leader.

18 PRESIDING JUDGE KORNER: [11:01:13] Can I just, then, before we break, ask one
19 further question which -- have you, sir, ever had a situation, either in your own home
20 jurisdiction or here, where someone has said, "I gather I'm wanted and I want to
21 surrender," or was this the first time it's happened?

22 THE WITNESS: [11:01:43] I'm aware of, from a previous occupation, of people wanting
23 to surrender, yes.

24 PRESIDING JUDGE KORNER: [11:01:57] Is that something which is considered
25 important?

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- 1 THE WITNESS: [11:02:02] Yes.
- 2 PRESIDING JUDGE KORNER: [11:02:06] And if someone says, "I am X and I want to
3 surrender," would you ask for proof that he was X and wanted to surrender?
- 4 THE WITNESS: [11:02:19] It depends. If you're talking through a proxy who says he's
5 in contact with the person, then, yes, it's a standard thing to do.
- 6 PRESIDING JUDGE KORNER: [11:02:33] So you say that's a standard procedure, that
7 if someone is contacting the authorities through an intermediary, you would ask for
8 proof that he was -- that the person that he was intermediary-ing for was the suspect?
- 9 THE WITNESS: [11:02:53] That he's actually in contact with the person, yes.
- 10 PRESIDING JUDGE KORNER: [11:02:55] Yes. All right.
- 11 Yes, thank you very much. We'll take the break then till 11.35.
- 12 THE COURT USHER: [11:03:25] All rise.
- 13 (Recess taken at 11.03 a.m.)
- 14 (Upon resuming in open session at 11.38 a.m.)
- 15 THE COURT USHER: [11:38:19] All rise. Please be seated.
- 16 PRESIDING JUDGE KORNER: [11:38:38] Yes, Mr Edwards.
- 17 MR NICHOLLS: [11:38:42] Sorry, if I can, just before we begin. I don't think this is any
18 problem in front of the witness. But just the phone recording that Mr Edwards was
19 asking questions about just before the break, it is one-sided at the beginning. But just
20 for clarity, the entire conversation is not one speaker. So in the beginning part it is. But
21 I just wanted to make that clear.
- 22 PRESIDING JUDGE KORNER: [11:39:04] For some reason I can't -- I wasn't able to find
23 it in my documents, but it doesn't matter. I'll look it up later.
- 24 I should say, Mr Edwards and Mr Nicholls, that clearly we can't have the final
25 submissions on this today because we've got to see what happens next week.

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1 MR NICHOLLS: [11:39:21] We discussed that and we're agreed and we understand,
2 yes.

3 PRESIDING JUDGE KORNER: [11:39:24] Yes. Yes.

4 MR EDWARDS: [11:39:26] That being the case, I suspect we'll be done in 15, 20
5 minutes. I don't want to be a slave to fortune, but that's my estimate.

6 Q. [11:39:44] Yes, Mr Witness, we were -- just at the break, I was just about to ask you
7 about the e-mail that you sent to your team leader. I know that's teed up and ready to
8 be brought up on the screen.

9 Now, the first striking thing is that throughout the e-mail you refer to the suspect as
10 Kushayb; right?

11 A. [11:40:13] Yes.

12 Q. [11:40:14] Not Abd-Al-Rahman. Was the suspect always referred to as Kushayb
13 internally?

14 A. [11:40:27] Yes.

15 Q. [11:40:27] In your conversations with your colleague -- sorry, I'm going to slow
16 down. In your dealings with your colleague, who can't be here today, did you always
17 refer to the suspect as Kushayb?

18 A. [11:40:42] Yes.

19 Q. [11:40:43] Have you any reason to think that your colleague would have referred
20 to the suspect as anything other than Kushayb in his dealings with the intermediary?

21 A. [11:40:58] No.

22 Q. [11:41:04] You suggest in this e-mail, bottom of the page - thank you - in the
23 highlighted part: "We cannot stop Kushayb providing/recording a version if he wants."
24 By that, you mean a version of events or a statement; is that right?

25 A. [11:41:23] Yes.

1 Q. [11:41:24] "We should recommend to the lawyer that he ... obtain a recording
2 confirming Kushayb is willing to speak with the OTP."

3 A. [11:41:36] Yes.

4 Q. [11:41:36] Is it possible here, sir, that what you're doing is getting down in writing
5 something that you had already discussed with your colleague who can't be here
6 today?

7 A. [11:42:04] No.

8 Q. [11:42:06] That what you're doing here is getting down in writing a suggestion
9 that your colleague had already made to the intermediary?

10 A. [11:42:16] No.

11 Q. [11:42:18] So even if your colleague had not made that suggestion on 27
12 December, by quarter past 10.00 in the morning, the next day, 28 December, your
13 colleague is aware that this is your view, that this would be a good idea?

14 A. [11:42:42] Based on the e-mail, yes.

15 Q. [11:42:45] And when was that recommendation passed on to the intermediary?

16 A. [11:42:56] It was not, as far as I'm aware.

17 Q. [11:43:01] As far as you're aware. How do you know?

18 A. [11:43:04] Because there is no conversations or communications from the other
19 investigator to me saying that, "I've told P-0869 to do what you suggested."

20 Q. [11:43:18] Did you follow up with your colleague about this recommendation that
21 you made?

22 A. [11:43:22] No.

23 Q. [11:43:24] Why not?

24 A. [11:43:25] Because it was a recommendation. If it was something that was
25 pursued from the team leader to do, then I would have been aware of it.

1 Q. [11:43:41] Did the team leader pursue it?

2 A. [11:43:44] No, not as far as I'm aware.

3 Q. [11:43:54] This was a very important thing that was going on in the context of the
4 investigation. Through an intermediary, you're in contact with a person who was one
5 of the most wanted people at this Court; right?

6 A. [11:44:08] Yes.

7 Q. [11:44:08] And the door has been opened by an intermediary.

8 A. [11:44:15] Yes.

9 Q. [11:44:15] Why aren't you chasing down every single potential line? Why are
10 recommendations being ignored?

11 A. [11:44:27] Well, it's a recommendation. It's not something that was pursued by the
12 team.

13 Q. [11:44:34] "We should recommend to the lawyer that he ... obtain a recording
14 confirming Kushayb is willing to speak with the OTP."

15 Now, you say that your colleague never volunteered to you that he had followed up
16 that recommendation; correct?

17 A. [11:45:01] Yes.

18 Q. [11:45:01] Have you ever asked him in terms, "Did you ever follow up that
19 recommendation"?

20 A. [11:45:07] I asked him did he ever ask for a video and he said no.

21 Q. [11:45:12] You see, if we look at your witness statement, because I just to want
22 explore that for a minute. If we look at your witness statement, paragraph 5, for
23 example, end of the paragraph, what you say is this, that:

24 "There is no other note(s) that I am aware of indicating that" your colleague "had
25 further telephone conversations with" the intermediary "up until the receipt of 21

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1 March 2020 video ..."

2 Do you see that?

3 A. [11:46:00] Yes.

4 Q. [11:46:00] What you don't say in this statement is: "And I want to make it very
5 clear that I asked him and he told me that there were no further telephone
6 conversations."

7 A. [11:46:09] Yes.

8 Q. [11:46:09] Why is that detail not included in this statement?

9 A. [11:46:13] Perhaps it should have been.

10 Q. [11:46:21] Well, it's a bit of a half answer, isn't it?

11 MR NICHOLLS: [11:46:36] What is the question exactly?

12 MR EDWARDS: [11:46:39] Well, my question is: Well, it's a bit of a half answer, isn't
13 it?

14 THE WITNESS: [11:46:47] In regards to?

15 MR EDWARDS: [11:46:49]

16 Q. [11:46:49] Paragraph 13, please. There is another point at which you have the
17 opportunity in your witness statement, a perfect opportunity to explain your
18 communications with your colleague to clarify the matter. You say this: "There was
19 no" -- so you're talking about the following up or the non-following up of your
20 recommendation.

21 "There was no communication by" your colleague "to me where he indicated that he
22 had requested" the intermediary "to obtain a recording, prior to the receipt of the 21
23 March 2020 video."

24 So the way this is phrased is rather interesting. You're suggesting in paragraph 13 that
25 your colleague never volunteered to you that he had requested the intermediary to

1 obtain a recording; right?

2 A. [11:47:59] He has never provided information to me that he did, yes.

3 Q. [11:48:02] Yes, but this was a perfect opportunity in your statement to say, "and I
4 asked him in terms whether he had," one; and then two, "and he told me in terms he
5 had made no further telephone communication with the intermediary." Do you
6 follow?

7 A. [11:48:22] Yes. In relation to -- just a correction and clarification.

8 Q. [11:48:40] Yes.

9 A. [11:48:41] You mentioned telephone calls. You were talking about video before.

10 Q. [11:48:44] Yes.

11 A. [11:48:45] And the clarification is that the -- there was no information from
12 Investigator (Redacted) when he told me that he hasn't ever asked for a video.

13 Q. [11:48:56] Yes. All right. And, well, when did he first tell you this? When was the
14 first time you did ask him in terms, "Listen, mate, did you ever actually call and request
15 the video?"

16 A. [11:49:17] I don't know the first time but -- I can't provide a date.

17 Q. [11:49:23] Isn't it likely to be in the preparation of this report -- of your statement
18 of January of this year?

19 A. [11:49:28] No.

20 Q. [11:49:41] Because that detail isn't found either, is it, in either of your investigation
21 reports of 12 months and 14 months after the first contact?

22 A. [11:49:50] If there was specific information that Investigator (Redacted)
23 specifically requested a video, then I would have included that in those reports.

24 Q. [11:50:01] Okay. One other thing. In the preparation of your investigation reports
25 of December 2020 and February 2021, did you refer to your e-mail to your team

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1 supervisor of 28 December 2019?

2 A. [11:50:23] No.

3 Q. [11:50:23] Why not?

4 A. [11:50:25] I was unaware of the e-mail during the creation of that.

5 Q. [11:50:28] Well, you couldn't have been unaware because you were the author.

6 But --

7 A. [11:50:34] Yes.

8 Q. [11:50:34] -- you had forgotten about it, had you?

9 A. [11:50:36] Yes, I was unaware. Yes.

10 Q. [11:50:38] Now, in answer to a question from the Presiding Judge just before the
11 break, you've made it clear that standard practice -- or it would be standard practice if
12 a person made contact with the Prosecution via an intermediary saying, "I would like
13 to surrender," and it would be standard practice for you to seek to obtain proof of the
14 person's identity. I followed that?

15 A. [11:51:09] Yes, I did.

16 Q. [11:51:12] Yes.

17 A. [11:51:14] And to clarify that, it depends -- I was referring to domestic jurisdiction.
18 It depends on the circumstances of the surrender. If a surrender involves a suspect
19 that's international and the intermediary is required to do things, then you would ask
20 for proof that he is actually in touch with the suspect. If it's a matter of a suspect just
21 turning up to the police station with an intermediary, then there's no real need to ask
22 for proof.

23 Q. [11:51:44] Yes. No, I --

24 PRESIDING JUDGE KORNER: [11:51:46] I think --

25 MR EDWARDS: [11:51:49] I follow.

1 PRESIDING JUDGE KORNER: [11:51:52] -- we all understood that.

2 MR EDWARDS: [11:51:54]

3 Q. [11:51:55] But as of 27 December 2019, you did have proof that the intermediary
4 was in contact with Abd-Al-Rahman; right?

5 A. [11:52:09] Via the receipt of the certificate?

6 Q. [11:52:14] Yes.

7 A. [11:52:14] Yes.

8 MR EDWARDS: [11:52:15] And these, your Honours will recall, are the certificates of
9 various medical qualifications received on 27 December 2019, the day after or even
10 possibly the day of the first contact between the intermediary and the investigator.

11 Q. [11:52:41] The submission that the Prosecution made in response to our arguments
12 of 2 December, you've read those submissions I'm guessing?

13 A. [11:52:56] Yes.

14 MR EDWARDS: [11:52:57] And in it, at paragraph 10, your Honours, my learned
15 friends state that the Prosecution was satisfied with this documentation, i.e., the
16 medical certificates, demonstrating that the intermediary was in contact with the
17 accused.

18 Q. [11:53:13] Now, the OTP didn't ask for additional documentation --

19 A. [11:53:28] No.

20 Q. [11:53:28] -- of the intermediary?

21 A. [11:53:29] No.

22 PRESIDING JUDGE KORNER: [11:53:30] Just pausing there for a moment, Mr
23 Edwards, sorry, because this is a part where I remember saying, and you'll -- I think Mr
24 Laucci's argument was that this is the Prosecution giving evidence.
25 As far as you knew, (Redacted), was the Prosecution content with the certificates as

- 1 proof that the intermediary was in contact?
- 2 THE WITNESS: [11:53:54] Yes.
- 3 PRESIDING JUDGE KORNER: [11:53:56] Thank you.
- 4 MR EDWARDS: [11:54:04]
- 5 Q. [11:54:05] But the Prosecution, whether you or your colleague or anyone else,
- 6 never conveyed to Mr Abd-Al-Rahman directly or indirectly that you were satisfied
- 7 that that proof had been provided.
- 8 A. [11:54:18] As far as I'm aware, no.
- 9 Q. [11:54:24] Well, we'll have a look at the WhatsApp messages.
- 10 MR EDWARDS: [11:54:34] Let's do that now. So can we please have up on the screen -
- 11 - well, we'll start with DAR-OTP-00000595 at page 2. This shows the photographs of a
- 12 diploma and a document sent by the intermediary.
- 13 PRESIDING JUDGE KORNER: [11:55:18] What is supposed to be the photograph or
- 14 the document that's of interest?
- 15 MR EDWARDS: [11:55:22] One is a qualification certificate relating to, I think, a
- 16 nursing qualification; and the other is some other kind of medical assistant
- 17 qualification.
- 18 PRESIDING JUDGE KORNER: [11:55:32] No, no, but on the -- I mean, looking on the
- 19 photograph, it says photo -- on second page of this document --
- 20 MR EDWARDS: [11:55:45] Well, for a start, the translation has obscured the actual
- 21 photo.
- 22 PRESIDING JUDGE KORNER: [11:55:53] Sorry, I'm just trying to find it on the screen
- 23 before -- I've got the hard copy in front of me.
- 24 THE COURT OFFICER: [11:56:01] It seems that the document is not available in Nuix.
- 25 If you could please send us a courtesy copy.

- 1 PRESIDING JUDGE KORNER: [11:56:10] Because what I'm looking at in the hard copy
2 at the second page of this is -- it looks like nothing. In fact, it looks like a car door or
3 something.
- 4 MR EDWARDS: [11:56:28] I don't have the original in front of me. I think that that is
5 the handle of a -- of the front of a desk, and there's a document that's on the surface of
6 the desk.
- 7 PRESIDING JUDGE KORNER: [11:56:46] It's more like sort of a balloon or part of a
8 balloon. Does it go on to the next document?
- 9 MR EDWARDS: [11:56:52] I suspect what -- again, I don't want to give evidence, but I
10 think if -- if it's a photo that's been sent, if it's clicked on, you'll have a larger view of it
11 on the laptop screen.
- 12 PRESIDING JUDGE KORNER: [11:57:03] Yes, all right.
- 13 MR EDWARDS: [11:57:05] Ah, yes, okay. My learned friend is holding up the picture.
- 14 PRESIDING JUDGE KORNER: [11:57:09] Well, can I -- sorry, Mr Edwards, can I just
15 have a look.
- 16 MR EDWARDS: [11:57:13] Yes.
- 17 PRESIDING JUDGE KORNER: [11:57:14] Just hold it up. Ah, I see. Right.
- 18 MR EDWARDS: [11:57:19] I don't know why it's not on Nuix but it doesn't seem to be.
19 Anyway, well, let's -- if I may, I'll move on. Because the response, so it's DAR-OTP-
20 00000596. It's the next page showing the -- these WhatsApp messages.
- 21 Q. [11:57:40] We have your colleague saying to the intermediary, immediately
22 following these photographs: "Thank you," name of intermediary. "Let us follow-up
23 on the issue. I'd already informed those in charge of the latest developments. I'll keep
24 an eye on the issue at all times."
- 25 Now, that may not be on your screen, but you're familiar with what I'm reading to you;

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1 right?

2 A. [11:58:07] Yes.

3 Q. [11:58:07] Do you know why your colleague didn't say to the intermediary, "That's
4 fine. You've proved what we asked you to prove to our satisfaction. Let's now move
5 on and sort out the surrender"?

6 A. [11:58:29] Well, the ball is in the accused's court. We had just received
7 information. And at no stage during that time, other than 869 saying he could be in
8 contact, had the accused indicated directly that he could actually surrender.

9 Q. [11:58:48] Well, you say that the ball was then in the accused's court, but your
10 colleague is not telling him, "Okay, we've received the proof. That's fine. We are
11 satisfied of what we have asked you to do." Do you agree?

12 A. [11:59:07] Yes.

13 Q. [11:59:09] And then we move forward to 1 January at ERN DAR-OTP-00000597, 1
14 January. There's a new year's greeting followed by this message: "Are there any
15 developments on the issue?"

16 A. [11:59:36] Yes.

17 Q. [11:59:36] So, again, your colleague is indicating to the accused that the ball may
18 be in his court, but again your colleague isn't saying to him, "We're satisfied that you
19 are in contact with Kushayb or Abd-Al-Rahman"; right?

20 A. [12:00:00] No, there's no message saying that. There's also no message saying he's
21 not satisfied.

22 Q. [12:00:06] Well --

23 PRESIDING JUDGE KORNER: [12:00:07] Mr Edwards, are there any messages where
24 the name is directly mentioned? I mean, this is a WhatsApp message.

25 MR EDWARDS: [12:00:19] I'm not --

- 1 PRESIDING JUDGE KORNER: [12:00:19] So I wouldn't be surprised if it was couched
2 in somewhat ...
- 3 MR EDWARDS: [12:00:27] Yes, it's -- I don't see either name. At one point, I think --
4 we're getting on to it, actually. In February, the investigator, which is his colleague --
- 5 PRESIDING JUDGE KORNER: [12:00:40] There is a long --
- 6 MR EDWARDS: [12:00:41] -- makes reference to "one of the wanted individuals."
- 7 PRESIDING JUDGE KORNER: [12:00:46] Yes, well --
- 8 MR EDWARDS: [12:00:47] So it's couched. I accept that.
- 9 PRESIDING JUDGE KORNER: [12:00:49] Yes, exactly. I think it's fair to say that it
10 would be unlikely that something as bold as "is Mr Al-Rahman going to surrender or
11 not" --
- 12 MR EDWARDS: [12:01:02] No, that's fine. My point, though, is that at no -- I'll finish
13 my questions, if I may.
- 14 PRESIDING JUDGE KORNER: [12:01:08] All right. Thank you. Yes.
- 15 MR EDWARDS: [12:01:10]
- 16 Q. [12:01:11] And I was coming on to that last message from your colleague. Well,
17 there's the video of the -- the intermediary physically before the ICC and he does a little
18 speech, right. But this is what's important.
- 19 MR EDWARDS: [12:01:29] And if we can get it up, it would be great if we could. It's
20 DAR-OTP-00000601.
- 21 Q. [12:01:46] It's the text message from your colleague to the intermediary. The last
22 text message before the sending of the video. And it seems to be 15 February 2020 in
23 which he says this.
- 24 MR EDWARDS: [12:02:02] Oh, excellent. Thank you very much.
- 25 Q. [12:02:04] I'm going to read the whole thing out.

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1 "Thank you for sharing and for the update, Sir. Are you still in The Netherlands? And
2 is there a message for us from one of the wanted individuals requiring our follow up?"

3 Do you see that?

4 A. [12:02:23] Yes.

5 Q. [12:02:24] Now, here, your colleague is soliciting a message not just from the
6 intermediary but from Abd-Al-Rahman himself, isn't he?

7 A. [12:02:47] He's asking if there is a message, yes.

8 Q. [12:02:53] Yes, from one of the wanted individuals. There's no confusion. There's
9 no magic about this. We're talking about Abd-Al-Rahman here --

10 A. [12:03:01] Yes.

11 Q. [12:03:02] -- obviously. Yes. Now, in the -- there's no immediate substantive
12 response from the intermediary to that question, other than to say, well, "We need to
13 arrange some meetings with you"?

14 A. [12:03:35] Yes.

15 Q. [12:03:38] But this text message from your colleague is asking a question of Abd-
16 Al-Rahman, isn't it? "Is there a message for us" from him?

17 A. [12:04:18] Yes.

18 Q. [12:04:19] Thank you. Those are my questions.

19 MR EDWARDS: [12:04:22] Thank you very much. Can I make it absolutely clear, Your
20 Honours, there is nothing that we dispute in the witness's evidence. He's clearly been
21 entirely candid and honest, and he may not care, but I'm not taking a point at all about
22 the honesty of his answers.

23 PRESIDING JUDGE KORNER: [12:04:39] Right.

24 Sir, I've just got a couple further questions as a result of all of this.

25 MR NICHOLLS: [12:04:48] Very -- I apologise, your Honour. I was going to ask to ask

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1 a couple questions.

2 PRESIDING JUDGE KORNER: [12:04:53] You had your opportunity, Mr Nicholls.

3 MR NICHOLLS: [12:04:57] No, but they arise from -- they're merely to clarify arising
4 from --

5 PRESIDING JUDGE KORNER: [12:05:02] No, but he's not your witness --

6 MR NICHOLLS: [12:05:05] No.

7 PRESIDING JUDGE KORNER: [12:05:05] -- is he? I mean, you could have call -- I
8 mean, I said all along I was rather surprised the OTP didn't call him as a witness on
9 something like this.

10 MR NICHOLLS: [12:05:12] Well, that's because the Defence stipulated that the reports
11 would be the evidence and because the other intermediary is on their side as part of
12 their team.

13 PRESIDING JUDGE KORNER: [12:05:22] Well, all right. I mean, this is obviously an
14 important issue, so even if technically I'm not sure you're entitled to, you go ahead, Mr
15 Nicholls.

16 MR NICHOLLS: [12:05:30] Well, thank you. Thank you very much, your Honour. It's
17 just this.

18 QUESTIONED BY MR NICHOLLS:

19 Q. [12:05:41] I'll keep it very brief, Mr Witness. Sir, your e-mail attached to your
20 witness statement, I'm not going to go through the content, 28 December 2019 at 10.00
21 a.m.

22 A. [12:05:51] Yes.

23 Q. [12:05:51] And it says you've just quickly spoken with the other investigator on
24 the phone.

25 A. [12:06:04] Yes.

1 Q. [12:06:04] The transcript of the audio recording that P-0869 sent to the investigator

2 --

3 A. [12:06:14] Yes.

4 Q. [12:06:15] -- and I'm talking about the audio recording that Mr Edwards referred
5 you to where 869 is speaking to unknown people in Darfur or -- sorry, we don't know
6 exactly where, but somewhere, about creation of a video.

7 A. [12:06:30] Yes.

8 Q. [12:06:30] That was sent to the investigator, we can see, on 27 December.

9 A. [12:06:40] Yes, that is correct.

10 Q. [12:06:41] So before your e-mail.

11 A. [12:06:42] It's before my e-mail, yes.

12 MR NICHOLLS: [12:06:44] Thank you.

13 PRESIDING JUDGE KORNER: [12:06:52] So you were aware when you sent that e-
14 mail, is that what you're saying, of this rather odd transcript?

15 A. [12:06:57] No, I was not aware of the audio file.

16 PRESIDING JUDGE KORNER: [12:07:00] Well, what was your conversation with the
17 other investigator about then?

18 A. [12:07:04] He didn't inform me of the contents of the audio file. He just informed
19 me, very briefly, of his discussion with P-0869.

20 PRESIDING JUDGE KORNER: [12:07:28] I'm trying to get a feel for the hierarchy in
21 this place, I mean, in the Office of the Prosecutor. This is a P2 investigator who reports
22 to you as a P3 and you report to your team leader. Wasn't there any standard
23 operating procedure that when something like this happened, that something that was
24 material to an investigation had to be reported up the chain of command?

25 A. [12:08:00] Yes. My e-mail is the only notation of the conversation with Mr

- 1 (Redacted).
- 2 PRESIDING JUDGE KORNER: [12:08:05] No, I know that. No, no, but the audio file.
- 3 A. [12:08:07] I was unaware of the audio file at that time or the contents of it.
- 4 PRESIDING JUDGE KORNER: [12:08:13] All right. The other thing I just want to look
- 5 at for a moment. Sticking to that e-mail, if we can have it back up. Is it on the screen?
- 6 Because I've got it open on -- it's (Redacted). Right.
- 7 Is this team leader still working with you?
- 8 A. [12:08:53] Yes.
- 9 PRESIDING JUDGE KORNER: [12:08:54] And it is a she, I take it?
- 10 A. [12:08:56] Yes.
- 11 PRESIDING JUDGE KORNER: [12:08:58] Okay. So you report to her and you make
- 12 some suggestions to her as to next steps, effectively.
- 13 A. [12:09:11] Some recommendations.
- 14 PRESIDING JUDGE KORNER: [12:09:12] Recommendations. All right. Whose job --
- 15 one of the recommendations is that you -- sorry. "We should recommend to the lawyer
- 16 ..." Can we come down to the -- back to the last paragraph. Yes. Who would speak to
- 17 the lawyer, you or the team leader?
- 18 A. [12:09:34] No, it would be Investigator (Redacted).
- 19 PRESIDING JUDGE KORNER: [12:09:40] (Redacted) would be recommending to the
- 20 lawyer?
- 21 A. [12:09:43] The conversations with the lawyer --
- 22 PRESIDING JUDGE KORNER: [12:09:46] The other investigator.
- 23 MR NICHOLLS: [12:09:48] Just, again, sorry, the lawyer there I believe that is referred
- 24 to is P-00869.
- 25 THE WITNESS: [12:09:56] Yes.

- 1 PRESIDING JUDGE KORNER: [12:09:57] Oh, I'm sorry. Right. Yes, I see. Thank you
2 very much. Yes, sorry. It's the -- I keep forgetting that -- I see. Okay.
3 Then it goes on to say -- then you go on to say this:
4 "... we can look to obtain a version with 55(2) considerations ..."
5 Those are the rights of the accused warnings; right?
6 A. [12:10:26] Yes.
7 PRESIDING JUDGE KORNER: [12:10:27] "... as was originally planned. Explain to the
8 lawyer that for Kushayb to ensure his version can be admissible there are certain things
9 the OTP have to do (explaining right to silence etc)."
10 Now, can you just explain what you were talking about there, without me asking
11 pointed questions?
12 A. [12:10:52] If the accused did not want to surrender but was willing to provide a
13 version of events related to what happened, then those were the considerations.
14 PRESIDING JUDGE KORNER: [12:11:03] So what you're saying there is if he didn't
15 want to surrender, then what? If he didn't want to surrender --
16 A. [12:11:21] If the accused did not want to surrender but for some reason wanted to
17 provide a version as to what happened to us, then those are the considerations.
18 PRESIDING JUDGE KORNER: [12:11:44] Okay. "We cannot stop Kushayb
19 providing/recording a version if he wants."
20 So when you say "a version," you're talking about a version of what happened?
21 A. [12:11:56] Yes.
22 PRESIDING JUDGE KORNER: [12:11:57] "We should recommend to the lawyer," that's
23 the intermediary, "that he obtain a recording confirming that Kushayb is willing to
24 speak with the OTP."
25 A. [12:12:08] Yes.

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1 PRESIDING JUDGE KORNER: [12:12:09] "Then we can look to obtain a version with
2 55(2) considerations - as was originally planned."

3 What was originally planned?

4 A. [12:12:18] Your Honour, this part of the e-mail is in relation to investigative
5 avenues not related to P-0869.

6 PRESIDING JUDGE KORNER: [12:12:24] I see. So it was a completely different, I
7 suppose, method of seeing if he could be obtained. Is that --

8 MR NICHOLLS: [12:12:36] No, I just wanted to say for Mr (Redacted) to answer in
9 detail to your Honour's question, we may request private session briefly because --

10 PRESIDING JUDGE KORNER: [12:12:48] All right. Yes, well, I would like --

11 MR NICHOLLS: [12:12:51] -- it is referred to in the statement but it's a different issue.

12 PRESIDING JUDGE KORNER: [12:12:54] All right. Okay. Let's go into private
13 session, then, for a moment.

14 (Private session at 12.13 p.m.)

15 THE COURT OFFICER: [12:13:11] 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)

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1 (Redacted)

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5 (Open session at 12.22 p.m.)

6 THE COURT OFFICER: [12:22:19] We are back in open session, Madam President.

7 PRESIDING JUDGE KORNER: [12:22:20] Yes.

8 MR NICHOLLS: [12:22:21] I'm sorry to take this time, but just for scheduling, all going

9 well, then I think the 26th would be the date, because we don't have court on Friday the

10 27th. And the witness scheduled for the 25th is set in stone. He is unable to move.

11 PRESIDING JUDGE KORNER: [12:22:35] So failing this investigator, have we just got

12 the one witness for next week?

13 MR NICHOLLS: [12:22:42] Well, there I can turn it over to Mr --

14 PRESIDING JUDGE KORNER: [12:22:50] Jeremy.

15 MR NICHOLLS: [12:22:56] Yes.

16 PRESIDING JUDGE KORNER: [12:22:56] I'm starting the new year off better, Mr

17 Jeremy.

18 MR NICHOLLS: [12:23:00] To Mr Jeremy who has been working on this with other

19 colleagues. We would possibly be able to bring up another witness. So then next week

20 that would be P-0060 - correct me if I'm wrong, Mr Jeremy - in which case, next week

21 would be P-0060, P-1062, and then the other investigator.

22 PRESIDING JUDGE KORNER: [12:23:18] Well, no, the other -- I think the other

23 investigator -- why waste Monday and Tuesday? The sooner we can get him through,

24 the sooner I can listen to the submissions -- we can listen to the submissions. And the

25 sooner we -- we've obviously got to deliver a ruling fairly quickly. And I think given

1 that -- I don't think this is an issue that's come up before that I'm aware of, we're going
2 to give it in writing, which I hadn't originally intended to do. I thought it would --
3 orally, but I think it obviously has an impact or may have an impact on matters.
4 So I would prefer that at the latest, this investigator, if he is intending to return --
5 thought he's going to return to work next week can easily make a statement now.
6 We've got four days in which to do it.
7 In fact, I think we'll order him to produce it by 4.00 p.m. Wednesday.
8 And, of course, the other explanation, what he was doing, why these WhatsApp
9 messages weren't being ...
10 MR NICHOLLS: [12:24:28] Yes, I -- well, yes, your Honour, I'm sorry. If it's an order,
11 of course it's an order.
12 PRESIDING JUDGE KORNER: [12:24:36] No, I'll --
13 MR NICHOLLS: [12:24:38] I don't think that under our procedures, I cannot tell a staff
14 member to work when --
15 PRESIDING JUDGE KORNER: [12:24:47] No, but I can.
16 MR NICHOLLS: [12:24:48] Yes. Well, yes.
17 PRESIDING JUDGE KORNER: [12:24:51] I can tell a person who's a potential witness
18 that the statement is to be produced. I agree, you can't, but we can.
19 MR NICHOLLS: [12:25:00] I'm just saying he is still now out on this leave --
20 PRESIDING JUDGE KORNER: [12:25:03] I know. But it's not going to -- as I say, this is
21 why not having a report which explains what the problem is does benefit nobody, and,
22 in particular, may not benefit him. And I say again that confidentiality does not apply
23 save for that the report can be filed confidentially when a court orders it.
24 All right. Well, let's say -- as I say, it's going to be quite short. So let's say 4.00 p.m.
25 Thursday, so at least everybody's got a day to consider it.

1 MR EDWARDS: [12:25:50] If I may, just while we're still on this topic, there are two
2 things that give me concern. The first is of course it may be ultimately that he just is
3 too unwell to come and testify next week, in which case the existence of a report
4 potentially doesn't help anyone. He may be too unwell to give it. We don't know.
5 There has to be some finality, I'm sure your Honours will agree. So will your Honours
6 --

7 PRESIDING JUDGE KORNER: [12:26:18] No. If he's not --

8 MR EDWARDS: [12:26:20] (Overlapping speakers) guillotine about this whole issue of
9 whether the investigator comes and testifies or not.

10 PRESIDING JUDGE KORNER: [12:26:30] Yes, but, I mean, it's not going to end there.
11 If he's not testifying, then there has to be an explanation. This is an important matter
12 and it will not do to say he's not fit. And the doctor will be summonsed to court if we
13 don't get a proper explanation of this. Justice is not to be defeated by a wall of silence.

14 MR NICHOLLS: [12:26:51] And, your Honour, I'm really not trying to be difficult, but
15 for him to do his statement, he may not be able to do that --

16 PRESIDING JUDGE KORNER: [12:26:58] Without records, yes.

17 MR NICHOLLS: [12:27:01] -- at home. Yes. And he may very well need to come in to
18 access, start accessing -- I don't know what he will need to do --

19 PRESIDING JUDGE KORNER: [12:27:09] All right. Okay.

20 MR NICHOLLS: [12:27:10] But I'm not sure he can do it at home, and I -- you know --
21 you make orders, but he is not returning until --

22 PRESIDING JUDGE KORNER: [12:27:19] No, all right.

23 MR NICHOLLS: [12:27:20] -- Monday.

24 PRESIDING JUDGE KORNER: [12:27:22] All right. We'll dispense with the statement
25 rather than -- because, as I say, as Mr Edwards rightly points, it is an issue which needs

1 a resolution fairly quickly.

2 MR EDWARDS: [12:27:37] Can I say that provided I get the statement half an hour
3 before we come into court, I'll be able to deal with it. I don't think it's going to be a
4 complicated statement full of detail, I anticipate. So I'm not asking for a weekend's
5 notice or anything. If I can get it the morning he's going to testify, that will be fine.
6 First thing.

7 I indicated earlier that there were two matters that gave me concern and I addressed
8 you on the first. The second is that it seems to me that it's not simply a question of why
9 is there no written record. If there is no written record of the conversation, well, there
10 it is, there's no written record. The whys almost don't come into it, and I'm not going to
11 be making a great deal of noise about that.

12 PRESIDING JUDGE KORNER: [12:28:24] No, but it's what was said, and we need it
13 from the horse's mouth --

14 MR EDWARDS: [12:28:29] Of course.

15 PRESIDING JUDGE KORNER: [12:28:30] -- if we can get it.

16 MR EDWARDS: [12:28:32] Yes, absolutely. No, I take that point entirely.

17 PRESIDING JUDGE KORNER: [12:28:34] Yes.

18 MR EDWARDS: [12:28:35] But my concern is that there have been a number of
19 assertions made by today's witness about conversations that he had with his colleague.
20 And the concern I have is that evidence that we have heard today is going to be fed
21 back and a witness statement is going to be given by a witness in full knowledge of
22 what has been said in these proceedings.

23 PRESIDING JUDGE KORNER: [12:29:07] It's like police officers making up their notes
24 together, Mr Edwards, in the old days.

25 MR EDWARDS: [12:29:16] Yes, which is also -- yes, and we know what (Overlapping

1 speakers)

2 PRESIDING JUDGE KORNER: [12:29:17] Compiling.

3 MR EDWARDS: [12:29:19] Yes. So it is open, if your Honour considers it appropriate,
4 it is open for your Honours to direct that there be -- that the investigator who is unwell
5 not refer to what has happened in the course of today's evidence. That seems fair to
6 me, in my respectful submission.

7 PRESIDING JUDGE KORNER: [12:29:45] Well, I mean, except that it wasn't raised
8 before. And if he's been watching this ...

9 MR EDWARDS: [12:29:49] Well, if he's been watching it, then --

10 PRESIDING JUDGE KORNER: [12:29:52] Yes.

11 MR EDWARDS: [12:29:53] Well, a lot of the evidence -- well, some of the evidence has
12 been in closed session, and that's something we'll explore. But I'm very concerned that
13 a witness may deliberately or unconsciously mold a witness statement on the basis of
14 what he's heard today, on the basis of specific answers a colleague has given about
15 conversations that they've had together.

16 PRESIDING JUDGE KORNER: [12:30:18] All right. I will direct, then, that he be told
17 that he is -- if he didn't watch the proceedings today, that he's to be told that he must
18 not look at the transcript of what his fellow officer said.

19 MR NICHOLLS: [12:30:34] I won't object to that, your Honour. I don't like the
20 insinuation, but --

21 PRESIDING JUDGE KORNER: [12:30:42] Well, I mean, it's better for him, isn't it --

22 MR NICHOLLS: [12:30:45] Yes.

23 PRESIDING JUDGE KORNER: [12:30:45] -- as well.

24 MR NICHOLLS: [12:30:48] I was just going to say, then, we will try to have him put
25 together a statement, a brief one, as soon as he returns and disclose it as soon as

- 1 possible. It may not be possible to get it translated. But given that it's so brief, it can be
2 read to the client perhaps, if it's a very brief statement, just on the issues we have.
- 3 PRESIDING JUDGE KORNER: [12:31:10] All right. And as far as Mr Edwards' point is
4 concerned, if for some reason he can't give evidence next week and we're given a
5 proper explanation, then we will make our ruling without his evidence having been
6 given.
- 7 MR EDWARDS: [12:31:37] Your Honour will give us a few moments to make final
8 submissions?
- 9 PRESIDING JUDGE KORNER: [12:31:40] Oh, yes, sorry. When I say, we -- I mean,
10 obviously, we'll have final submissions.
- 11 MR EDWARDS: [12:31:46] Yes.
- 12 PRESIDING JUDGE KORNER: [12:31:47] Right. So when do you say P-whatsit is fixed
13 for immutably?
- 14 MR NICHOLLS: [12:31:56] P-1062, who is an expert, on the 25th. Next Wednesday.
- 15 PRESIDING JUDGE KORNER: [12:32:03] He's the Dutch guy?
- 16 MR NICHOLLS: [12:32:05] Yes.
- 17 PRESIDING JUDGE KORNER: [12:32:06] And he can't come on any other day for that
18 whole week?
- 19 MR NICHOLLS: [12:32:10] No. We've asked him. I mean he's -- we had to plan this
20 back in December because of his schedule. He's had -- I don't have his CV right in front
21 of me, but he's got a lot of responsibilities and he's a professor and --
- 22 PRESIDING JUDGE KORNER: [12:32:23] I was just wondering, I mean, Mr Edwards,
23 what is about his evidence -- or Mr Laucci, what about what in his evidence is in
24 dispute when I looked at his statement?
- 25 MR EDWARDS: [12:32:40] Can I put it this way: We're testing the safety of the

- 1 methodology and the conclusions he draws. I'm unlikely to be putting a positive case.
- 2 PRESIDING JUDGE KORNER: [12:32:48] Oh, all right.
- 3 MR EDWARDS: [12:32:49] But I'm testing his evidence.
- 4 PRESIDING JUDGE KORNER: [12:32:51] All right. Thank you. So he's not going to be
- 5 very long?
- 6 MR EDWARDS: [12:32:55] No.
- 7 PRESIDING JUDGE KORNER: [12:32:56] All right. Thank you.
- 8 MR NICHOLLS: [12:33:01] And, your Honour, I'm sorry to jump up again on the issue
- 9 of the other investigator. But I really think if he comes back Monday, he's part time, to
- 10 -- if he was able to testify the following week, I'm not sure there should be this hard
- 11 guillotine that it has to be next week. I understand it has to be -- you know, it can't
- 12 drag on forever. It's before the end of the case. As far as prejudice to the Defence,
- 13 again, the person on the other end of all these calls is on their team, so --
- 14 PRESIDING JUDGE KORNER: [12:33:28] I mean, I appreciate that, and that's
- 15 something that I've raised with the Defence, and they're aware that they've had the
- 16 option to call evidence about this and they've taken the view they're not going to.
- 17 What I'm anxious to avoid -- firstly, I'm anxious that we try and tidy up what is now
- 18 rapidly approaching as the end of the Prosecution case before we get on to anything
- 19 else. I am, therefore, going to say that if he's back on Monday, then he should testify on
- 20 Tuesday. All right? Or up until Thursday, but that is it.
- 21 MR NICHOLLS: [12:34:07] Yes, your Honour.
- 22 PRESIDING JUDGE KORNER: [12:34:09] All right. So we've got the expert on
- 23 Wednesday, and then who's the other witness?
- 24 MR JEREMY: [12:34:18] It's P-0060, Madam President. That's an AVL from a state
- 25 party. That witness is actually scheduled for the end of next week, and we proposed to

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1 bring that witness forward.

2 PRESIDING JUDGE KORNER: [12:34:33] Oh, right. All right. And so he's going to
3 testify on Thursday?

4 MR JEREMY: [12:34:36] Well, our suggestion was that he testifies perhaps on Monday
5 and Tuesday --

6 PRESIDING JUDGE KORNER: [12:34:43] Oh, right.

7 MR JEREMY: [12:34:45] -- and then we had 1062 on Wednesday and then 1049 --

8 PRESIDING JUDGE KORNER: [12:34:51] Yes, all right. Well, that's fine. No, that's
9 fine.

10 MR JEREMY: [12:34:54] -- on the Thursday.

11 PRESIDING JUDGE KORNER: [12:34:56] That's fine. All right. Yes.

12 Anything else? No. All right. Well, then, we -- yes, so tomorrow morning at 9.30.

13 THE COURT USHER: [12:35:19] All rise.

14 (The hearing adjourned in open session at 12.35 p.m.)