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**International
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APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN* (“*ALI KUSHAYB*”)

Public

Prosecution response to the Defence appeal against the Decision on the admissibility of a video

Source: Office of the Prosecutor

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INTRODUCTION

1. The Prosecution respectfully requests the Appeals Chamber to dismiss the Defence's appeal of Trial Chamber I's decision admitting into evidence a video of the Accused in which he identifies himself as "Ali Kushayb" (DAR-OTP-0216-0119).¹ The Chamber correctly found that article 55(2) of the Statute did not apply to the circumstances surrounding the sending of the video by P-0869² and its receipt by the Prosecution. There was no 'questioning' of the Accused of any kind, let alone about alleged crimes under the Court's jurisdiction. Thus, given there had been no violation of the Statute or internationally recognised human rights, the Chamber declined to exclude the video under article 69(7). The Chamber's decision was reasonable, and correct.
2. The Defence's two grounds of appeal, arguing that the Chamber erred in fact and in law in concluding that article 55(2) did not apply to the circumstances in which the Prosecution received the video, amount to mere disagreements with the Chamber and do not identify any factual or legal error.
3. In challenging the Chamber's factual finding that the Prosecution did not request the video, the Defence largely repeats the same arguments that it made before the Trial Chamber on the admissibility of the video, and advances its preferred, alternative interpretation of the facts. The Defence further fails to demonstrate any error in the Chamber's finding that the Prosecution did not question the Accused within the meaning of article 55(2).
4. Similarly, in arguing that the Trial Chamber committed a legal error in finding that article 55(2) did not apply to the interaction between the Prosecution and P-0869, the Defence misconstrues the provisions of article 55(2) and disagrees with the Chamber without identifying any error in its reasoning. Moreover, the Defence's arguments rely upon its claim that P-0869 was the Prosecution's 'conduit' or '*de facto* agent' and therefore was indirectly 'questioning'

¹ ICC-02/05-01/20-905 ("[Appeal](#)"); ICC-02/05-01/20-876 ("[Decision](#)").

² P-0869 was not a contracted intermediary of the Office of the Prosecutor ("OTP" or "Office"). Contracted intermediaries are individuals who are selected by the Office and are screened, formally contracted, tasked, paid and monitored in their performance. By contrast, unknown individuals who contact the Office at their own initiative, merely offering to establish contact between the Office and a witness or source of information and without being, selected, tasked or contracted by the Office may be pro-bono intermediaries. In that context, and as the Chamber correctly found, P-0869 was not a Prosecution intermediary, and was not acting on behalf of the Prosecution, but was "an unknown individual who voluntarily contacted the Prosecution offering [] the opportunity to establish contact with the accused": [Decision](#), para. 50.

the Accused within the meaning of article 55(2). This claim has no support in the Chamber's factual findings.

5. Finally, the Defence fails to show any material impact of the alleged errors. Apart from summarily claiming that the video was obtained in violation of the Statute, and that this would compromise the proceedings and seriously undermine its integrity, the Defence does not demonstrate how the Decision would have differed had the Chamber found that article 55(2) was applicable. Given that article 69(7) involves a two-step inquiry to determine whether evidence is to be excluded, and that article 69(7)(b) sets a high bar in terms of the severity of the impact that the admission of the evidence would have on the integrity of the proceedings, it was incumbent on the Defence as the appellant to demonstrate the applicability of article 69(7) and thus, the material impact of the alleged errors. The Defence's failure to do so warrants the dismissal of the Appeal on this basis alone. In any event, the conditions under article 69(7)(a) or (b) are not met and the video would not have been deemed inadmissible.

6. Therefore, the Prosecution respectfully requests the Appeals Chamber to dismiss the Defence Appeal.

SUBMISSIONS

7. The Trial Chamber found that the Prosecution was not required to give the Accused notice under article 55(2) of his rights as a suspect as he was not questioned directly about the alleged crimes under the jurisdiction of the Court.³ Specifically, the Chamber found that the OTP investigator (P-1049) did not request P-0869 to produce or send the video.⁴ This was based on P-1049's evidence that:

- (a) P-1049 told P-0869 in their initial telephone call that the Prosecution required confirmation that P-0869 was in contact with the Accused;⁵
- (b) during this initial call, P-0869 informed P-1049 that "individuals who were in direct contact with the accused were preparing, and could share, some video material of the accused";⁶ and

³ [Decision](#), paras. 48-50.

⁴ [Decision](#), paras. 25, 46.

⁵ [Decision](#), para. 21.

⁶ [Decision](#), para. 22.

(c) P-1049 was favourable to the idea of receiving the video which was already being prepared, and may have expressed this to P-0869, and subsequently followed up with P-0869 about the video that he had proposed to send.⁷

8. The Chamber further found that:

(a) the Prosecution did not discuss anything related to the charged crimes with P-0869;

(b) P-0869 was not acting on behalf of the Prosecution but was an unknown individual who contacted the Prosecution voluntarily and without solicitation; and

(c) the Prosecution did not communicate with the Accused directly at any point until after its receipt of the video through P-0869.⁸

9. The Chamber's conclusion that article 55(2) did not apply in these circumstances was therefore the only reasonable conclusion on the evidence given that, during its interactions with P-0869, the Prosecution did not speak with, let alone 'question' the Accused, in relation to the alleged crimes.⁹ Accordingly, as there had been no violation of article 55(2) at the time the Prosecution received the video, the Chamber was not required to assess whether the video should be excluded under article 69(7) of the Statute¹⁰—the *lex specialis* concerning general admissibility considerations for evidence obtained in violation of the Statute or internationally recognised human rights.¹¹ The Chamber's decision was reasonable and correct.

10. The issue certified for appeal is whether the Trial Chamber erred in law and/or fact in concluding that article 55(2) did not apply to the circumstances in which the video was obtained by the Prosecution.¹² In its Appeal, the Defence advances two grounds of appeal arising from this issue: (i) that the Chamber erred in fact, as demonstrated by two factual errors; and (ii) that the Chamber erred in law, as demonstrated by five findings that were 'vitiating' by the legal error. For the reasons set out below, the Appeal should be dismissed and the Decision affirmed.

⁷ [Decision](#), para. 22.

⁸ [Decision](#), para. 50.

⁹ [Decision](#), para. 50.

¹⁰ [Decision](#), para. 52.

¹¹ ICC-01/05-01/13-2275-Anx (“[Bemba et al. AJ. Judge Henderson Sep. Op.](#)”), para. 32.

¹² ICC-02/05-01/20-894 (“[ALA Decision](#)”), paras. 5, 21.

A. Ground 1: The Chamber did not factually err in concluding that the Prosecution did not request P-0869 to send the video

11. The Defence argues that the Chamber made two factual errors in concluding at paragraphs 25 and 46 of the Decision that OTP investigator P-1049 “did not at any stage request the intermediary to introduce a video, nor did he ask the intermediary to send the video”.¹³

a. First alleged error: the Chamber took into account all relevant facts

12. The Defence argues that the Chamber did not take into account the relevant facts in paragraphs 22 and 23 in reaching its decision to admit the video, and that it adopted a different and irreconcilable version of these facts in reaching its conclusion that P-1049 did not request P-0869 to produce or send the video.¹⁴ In paragraph 22, the Chamber noted, *inter alia*, that P-1049 stated “he might have encouraged” P-0869’s proposition to send the video, that P-1049 “was inclined to be receptive for the video to be sent”, that he was “favourable to the idea of receiving a video”, that he might have expressed this to P-0869, and that he followed up with P-0869 about the video that P-0869 had proposed to send.¹⁵ In paragraph 23, the Chamber noted, *inter alia*, that the Prosecution considered the Accused’s diplomas—which P-0869 sent to P-1049 through WhatsApp—to be sufficient, but not conclusive, proof of contact with the Accused.¹⁶ The Defence fails to establish any error or inconsistency in the Chamber’s reliance upon these findings, and its assertion is not supported by the record of the Chamber’s extensive review in reaching its conclusion.

13. *First*, the Defence selectively reads the Chamber’s reasoning in arguing that the Chamber adopted “*une version différente des faits*”¹⁷ in concluding in paragraph 46 that it was satisfied that P-1049 did not ask P-0869 for the video.¹⁸ The Defence overlooks that the Chamber went on to state in that paragraph that it was “satisfied that the idea of sending the video *originated with the intermediary* and not the Investigators and that and when P-1049 was asking the intermediary for the video, it was *as a result of the intermediary having first intimated* that a video was being made and would be sent”.¹⁹ Thus, the Chamber found that P-1049 was indeed favourable to receiving the video, and communicated this to P-0869 (as it stated in paragraph

¹³ [Appeal](#), para. 4, citing [Decision](#), paras. 25, 46.

¹⁴ [Appeal](#), paras. 8-11

¹⁵ [Decision](#), para. 22.

¹⁶ [Decision](#), para. 23.

¹⁷ [Appeal](#), para. 10.

¹⁸ *Contra* [Appeal](#), paras. 4, 8. *See* [Decision](#), para. 46.

¹⁹ [Decision](#), para. 46. (Emphasis added.)

22 of the Decision), however he had not requested P-0869 to produce and send the video (as it concluded in paragraph 46). These findings are logically consistent. Indeed, it was logical and reasonable in the chronology of events for P-1049 to respond favourably to P-0869's indication that a video was being made of the Accused that he could send to the Prosecution, as such a video would conclusively prove that P-0869 and Accused were in contact. As the Chamber noted, the Prosecution was under an obligation, as the authority to whom an offer of surrender was made, to obtain irrefutable confirmation of the identity of a person who is to be surrendered.²⁰ In this context, it is unsurprising that P-1049 was favourable to receiving the video. The Defence does not show any factual error.

14. *Second*, the Chamber took into account all relevant factual findings in concluding that P-1049 did not request P-0869 to produce or send the video, clearly outlining the basis for its factual determination.²¹ The Chamber reasonably reached its conclusion from the evidence on the record, and it should be afforded the margin of deference commensurate with its primary responsibility to hear the evidence and evaluate the reliability and credibility of the evidence and comprehensively assess its weight.²²

15. Specifically, the following objectively discernible factors demonstrate how the Chamber reasonably reached its conclusion.²³ The Chamber set out the chronology of events relating to the OTP's receipt of the video, based on its analysis of the in-court testimony of OTP investigators P-1049 and P-1048, investigation reports, and screenshots of WhatsApp messages between P-1049 and P-0869.²⁴ The Chamber took into account the Defence and Prosecution's submissions concerning the events,²⁵ and explicitly noted its views on the shortcomings in respect of the OTP investigation.²⁶ Finally, the Chamber found the OTP investigators to be "candid, even when the answers were contrary to their interest", and thus found them "credible and reliable",²⁷ and noted that the Defence also accepted P-1049's testimony to be truthful, candid, frank and honest.²⁸ It is thus evident from the Decision that the Chamber reached the

²⁰ [Decision](#), para. 43.

²¹ [Decision](#), paras. 43-46.

²² ICC-02/04-01/15-2022-Red ("[Ongwen AJ](#)"), paras. 80, 82.

²³ [Ongwen AJ](#), para. 82.

²⁴ [Decision](#), paras. 20-27.

²⁵ [Decision](#), paras. 28-30, 32-38.

²⁶ [Decision](#), para. 62.

²⁷ [Decision](#), paras. 45, 46.

²⁸ [Decision](#), para. 45. See [ICC-02/05-01/20-T-109-ENG](#), 69:16-18.

conclusion that the Prosecution did not request the video from the Accused only upon assessing this entire record.

16. The evidence underlying the Chamber’s findings is not in dispute, and the Defence does not challenge it on appeal. Instead, the Defence merely repeats its same arguments before the Chamber, which it debated at length with the Prosecution over the course of two written submissions,²⁹ two and a half days of oral argument³⁰ and two days of witness testimony.³¹ The Defence thus had ample opportunity to advance its factual and legal assertions regarding P-1049’s communications with P-0869 and receipt of the video of the Accused—assertions which it merely reiterates now in disagreeing with the Chamber’s conclusion.

17. *Third*, regardless of the Prosecution’s interactions with P-0869 regarding the video, the crux of the issue is that the Prosecution did not instruct, request or solicit P-0869 to question the Accused, much less on any matters relating to the charged crimes, as the Chamber rightly found.³² The Defence does not allege that the Chamber made any factual error in reaching this finding which was fundamental in establishing that there had been no violation of article 55(2).

18. *Finally*, the Defence misconstrues the application of article 55(2) in arguing that the Chamber erroneously failed to find that the Prosecution should have given the article 55(2) notification to the Accused as of 27 December 2019 (*i.e.*, almost three months prior to receiving the video),³³ when it had received from P-0869 through WhatsApp the Accused’s diplomas, which the OTP investigators confirmed was sufficient (but not conclusive) proof that P-0869 was in contact with the Accused.³⁴ As the Chamber correctly held, article 55(2) is only triggered when a suspect is about to be *questioned directly about alleged crimes* under the jurisdiction of the Court.³⁵ The Defence offers no support for its assertion that the article 55(2) notice was required earlier in the circumstances of this case, where the OTP investigator continued to liaise solely with P-0869 for the purposes of verifying conclusively that he was in contact with the Accused, and did not convey any questions to him through P-0869. Nor does the Defence

²⁹ ICC-02/05-01/20-657 (“[Defence Evidence Objections](#)”); ICC-02/05-01/20-819 (“[Defence Outline of Submissions on Admissibility of Evidence](#)”).

³⁰ [ICC-02/05-01/20-T-104-Conf-Eng](#); [ICC-02/05-01/20-T-105-Conf-Eng](#); [ICC-02/05-01/20-T-109-Eng](#).

³¹ [ICC-02/05-01/20-T-106-Conf-Eng](#); [ICC-02/05-01/20-T-108-Conf-Eng](#).

³² [Decision](#), para. 50.

³³ ICC-02/05-01/20-822 (“[Prosecution Response to Defence Submissions on Admissibility of Evidence](#)”), para. 3 (the Prosecution received the video on 20 March 2020).

³⁴ [Appeal](#), para. 11, citing [Decision](#), para. 51.

³⁵ [Decision](#), para. 48.

explain how the Prosecution would be in a position to provide the article 55(2) notice in these circumstances. The Defence shows no error.

b. Second alleged error: the Chamber reasonably reached its conclusion on the evidence

19. The second alleged error—that the Chamber unreasonably concluded (in paragraph 46) that P-1049 did not request the video when this was contradicted by the evidence (including that outlined in paragraph 22)—is essentially a repetition of the first alleged error, differing only in the manner in which the Defence alleges the error occurred. While the Defence argues that the first factual error arose from the Chamber’s failure to take into account relevant facts, the second alleged factual error (relating to the same conclusions and same underlying findings and evidence) arose from the Chamber’s unreasonable assessment of the facts.³⁶ The Defence otherwise repeats its arguments that the Chamber’s conclusion in paragraph 46 was contradicted by the facts it outlined in paragraph 22.³⁷ The second error may therefore be dismissed for the same reasons as set out above in relation to the first error.

20. In particular, as set out above, there is no inconsistency between the Chamber’s finding that P-1049 expressed his favourability towards receiving a video after P-0869 proposed to send it, and the Chamber’s finding that P-1049 did not request the video. The Defence does not demonstrate any factual error.

21. Moreover, in arguing that it is irrelevant whether it was P-1049 or P-0869 who first proposed the idea of recording the video, the Defence asserts—without basis—that P-0869 acted as a mere conduit or *de facto* agent between the Prosecution and the Accused, passing instructions from P-1049 regarding the recording of the video.³⁸ This conclusion is not supported on the facts or evidence as examined by the Chamber. Rather, the Chamber correctly found that P-0869 was not a Prosecution intermediary (in that he was not acting on behalf of the Prosecution), but rather an unknown third party who contacted the Prosecution voluntarily.³⁹ The Defence again disagrees with the Chamber without identifying any factual error.

22. The first ground of the Defence Appeal should be dismissed for the reasons set out above.

³⁶ [Appeal](#), paras. 12-18.

³⁷ Compare [Appeal](#), paras. 12, 16-17 with paras. 8-11.

³⁸ [Appeal](#), para. 18.

³⁹ [Decision](#), para. 50.

B. Ground 2: The Chamber did not legally err in finding that article 55(2) did not apply to the interaction between the OTP investigator and P-0869

23. The Defence argues that the Chamber erred in law in concluding that article 55(2) did not apply to the interaction between the OTP investigator and P-0869.⁴⁰ Specifically, the Defence claims that the Chamber (i) erroneously narrowly interpreted article 55(2) as applying only to situations where the suspect is questioned directly about alleged crimes under the jurisdiction of the Court; and (ii) failed to take into account the circumstances of this case in which the evidence of the Accused’s nickname “Ali Kushayb” is inseparable from his involvement in the commission of the alleged crimes.⁴¹ The Defence argues that five specific findings or conclusions of the Trial Chamber are vitiated by its legal error regarding the non-applicability of article 55(2).⁴² For the reasons set out below, the Defence’s arguments should be rejected.

24. As a preliminary matter, however, the Appeals Chamber should dismiss *in limine* the Defence’s attempt to incorporate by reference its prior submissions before the Trial Chamber on the nature of the article 55(2) guarantees and the list of authorities it presented in its oral submissions to the Chamber on 5 December 2022, to the extent that the Defence does not explain in its Appeal brief how the authorities support its Appeal.⁴³ As the Appeals Chamber recently held, an appellant is required to set out arguments on appeal in its appeal brief and may not seek to incorporate by reference arguments developed in other filings.⁴⁴

25. Moreover, while the Defence requests the Appeals Chamber to render a preliminary decision recognising the guarantees of article 55(2) as general principles of criminal law,⁴⁵ the Appeals Chamber is not required to make any general pronouncements on the law or render decisions on issues in the abstract. The appellate procedure in this Court is corrective in

⁴⁰ [Appeal](#), paras. 19-37.

⁴¹ [Appeal](#), para. 19.

⁴² [Appeal](#), para. 22.

⁴³ [Appeal](#), para. 21; [Annex B to the Appeal](#).

⁴⁴ [Ongwen AJ](#), para. 92 (noting that “[a]ccording to the Appeals Chamber’s well-established jurisprudence, the appellant is required to set out arguments on appeal in the appeal brief. Mere references to arguments developed by the appellant in other filings is inappropriate and the Appeals Chamber has previously found the practice of making such references to be impermissible”).

⁴⁵ [Appeal](#), para. 21.

nature;⁴⁶ the Appeals Chamber does not have any advisory function calling upon it to issue guidance on general principles that do not arise from the errors alleged on appeal.⁴⁷

a. The Chamber correctly articulated the circumstances in which article 55(2) applies, and correctly found that it did not apply in this case (1st and 2nd conclusions)

26. The Defence argues that the Chamber erroneously found that article 55(2) does not apply to the circumstances surrounding the sending of the video by P-0869;⁴⁸ and that the Chamber erroneously narrowly construed article 55(2) as not applying to interactions between the Prosecution and intermediaries.⁴⁹ The Defence fails to establish any error.

27. *First*, the Defence again argues, without any basis in the record, that the video from the Accused was the result of an interrogation between the OTP and the Accused, through P-0869 as a conduit or *de facto* agent of the OTP.⁵⁰ The Chamber correctly found that P-0869 was an unknown third party who voluntarily contacted the Prosecution offering the opportunity to establish contact with the Accused.⁵¹ There was no evidence before the Chamber to indicate otherwise, and in particular no evidence to indicate that the Prosecution had any authority, control or influence over P-0869; indeed the Prosecution had none. Moreover there was no evidence that P-1049 asked P-0869 for anything more than to provide proof that he was in contact with the Accused. The Defence's claim that this interaction had all the essential characteristics of 'questioning' for the purposes of article 55(2) is simply unsupported by the evidence.

28. *Second*, the Defence misunderstands article 55(2) in arguing that the Chamber narrowly or restrictively interpreted the provision by finding that it only applies to direct interactions between the Prosecution and suspects, and not interactions taking place through intermediaries.⁵² To the contrary, the Chamber correctly found that article 55(2) "is designed to deal with situations where the suspect is questioned directly about alleged crimes under the

⁴⁶ ICC-01/04-01/06-3121-Red ("[Lubanga AJ](#)"), para. 56; ICC-02/05-03/09-295 ("[Banda & Jerbo Rule 111 and 112 AD](#)"), para. 20; ICC-01/09-02/11-202 ("[Muthaura et al. Investigation Report AD](#)"), para. 11.

⁴⁷ ICC-01/04-503 ("[DRC Situation Victim Participation AD](#)"), para. 30, citing ICC-01/04-01/07-3132 ("[Katanga & Ngudjolo Netherlands Directions Decision](#)"), para. 7; ICC-01/04-01/06-3026 ("[Lubanga Victim Participation Procedure Decision](#)"), para. 4.

⁴⁸ [Appeal](#), paras. 22 (i), 23-28, citing [Decision](#), paras. 48.

⁴⁹ [Appeal](#), para. 22(ii), citing [Decision](#), para. 48.

⁵⁰ [Appeal](#), para. 23.

⁵¹ [Decision](#), para. 50.

⁵² *Contra* [Appeal](#), paras. 24-27.

jurisdiction of the Court”.⁵³ This is consistent with the plain meaning of the provision, which provides that suspects may only be questioned by the Prosecution, or by national authorities pursuant to a Part 9 cooperation request. Furthermore, it is consistent with the Court’s long-standing jurisprudence, which recognises that the article 55(2) guarantees apply to persons who are about to be questioned by the Prosecution or by national authorities pursuant to cooperation requests made by the Court.⁵⁴ Moreover, as set out below in relation to the third allegedly erroneous conclusion, the Chamber’s accurate description of the cases cited by the parties demonstrates that it correctly understood the jurisprudence regarding article 55(2).⁵⁵

29. *Third*, the international human rights instruments and case law cited by the Defence are inapposite to the issue.⁵⁶ They merely affirm an accused’s internationally recognised right to legal assistance in conducting the defence (including at the pre-trial stage) and to be informed of this right⁵⁷—rights which are not in issue in this appeal. The Chamber did not interpret article 55(2) incompatibly with these internationally recognised human rights, and therefore did not violate article 21(3).⁵⁸ The case law that the Defence cites can be distinguished from Mr Abd-Al-Rahman’s situation on the facts, given that in the cited cases, the accused persons did not receive legal assistance for all, or a significant part, of the pre-trial and trial proceedings during which they were questioned several times regarding their involvement in the alleged crimes.⁵⁹ The Defence does not demonstrate how international human rights law applies in situations where a person suspected of crimes is to be identified by the investigating or prosecuting authority for the purposes of executing the arrest or facilitating the surrender of the person.

30. Indeed, the case law of the European Court of Human Rights cited by the Defence affirms that these rights apply from *the first interrogation of a suspect by the police*, unless in the circumstances there are compelling reasons to restrict this right.⁶⁰ The European Court of Human Rights has confirmed that the manner in which the right to counsel applies in the

⁵³ [Decision](#), para. 48.

⁵⁴ ICC-02/04-01/15-1762-Red (“[Ongwen TJ](#)”), para. 50; ICC-01/05-01/13-2275-Red (“[Bemba et al. AJ](#)”), para. 297 (fn. 673); ICC-01/05-01/13-1638 (“[Bemba et al. Witness Contact Decision](#)”), para. 81; ICC-01/04-02/12-301-tENG (“[Ngudjolo Compensation Decision](#)”), para. 26.

⁵⁵ See below paras. 32-36; *contra* [Appeal](#), paras. 22(iii), 29-33.

⁵⁶ *Contra* [Appeal](#), para. 27.

⁵⁷ IACtHR: *Maritza Urrutia v. Guatemala*, Series C No. 103, [Judgment](#), 27 November 2003, para. 120.

⁵⁸ *Contra* [Appeal](#), para. 28.

⁵⁹ ECtHR: *Salduz v. Turkey*, App. No. 36391/02, Judgment, 27 November 2008 (“[Salduz v. Turkey](#)”), paras. 56; ACHPR: *Vedastus v. Tanzania (merits and reparations)* (2019) 3 AfCLR 498, paras. 69-72 (concerning an accused who was not provided with free legal assistance for the entirety of the trial and appellate proceedings, the Court found this violated the Charter but made no comment on the question of whether the accused should also have been informed of their rights during the process of identifying them for surrender).

⁶⁰ [Salduz v. Turkey](#), para. 55.

preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.⁶¹ As demonstrated above, the Chamber in this case correctly found that the Prosecution did not even have direct contact with the Accused, much less ‘interrogate’ or ‘question’ him, nor did the Prosecution discuss with P-0869 anything related to the charged crimes,⁶² accordingly these were not interactions which triggered the Accused’s right to be informed of his rights under article 55(2) and/or international human rights law.

31. *Fourth*, the Chamber’s conclusion that article 55(2) did not apply until after the Prosecution had established the Accused’s identity in this case was also consonant with the Court’s prior jurisprudence.⁶³ Moreover, it was consistent with domestic practice. In domestic jurisdictions, persons need not be informed of their rights during interactions between the authorities and the person that are solely intended to establish their identity.⁶⁴

b. The Chamber correctly took into account the cases cited by the parties (3rd conclusion)

32. The third allegedly vitiated finding—*i.e.*, the Chamber’s finding that the cases relied on by the parties in relation to article 55(2) encompass situations where a person is questioned, directly and in-person about alleged crimes, and not through a third party⁶⁵—also does not evince error by the Trial Chamber.⁶⁶

33. *First*, the Defence again misinterprets the Chamber’s reasoning. The Chamber’s characterisation of the case law was correct;⁶⁷ the cases cited by the parties concerned situations where a suspect was questioned directly and in person in relation to the alleged crimes,

⁶¹ ECtHR: *Imbrioscia v. Switzerland*, App. No. 13972/88, [Judgment](#), 24 November 1993, para. 38; *Ibrahim & Others v. The United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08, [Judgment](#), 13 September 2016, para. 253; *Brennan v. The United Kingdom*, App. Nos. 39846/98, [Judgment](#), 16 October 2001, para. 45.

⁶² [Decision](#), para. 50.

⁶³ ICC-01/05-01/08-73 (“[Bemba Interim Release Decision](#)”), para. 45 (finding it was unclear whether, in respect of the arrest warrant, the investigating judge questioned Bemba within the meaning of article 55(2) or whether it was merely an interview to establish Bemba’s identity and to inform him of his rights. The Chamber found that it was the latter, “in which case the allegedly unlawful absence of the counsel would only entail a potential exclusion pursuant to article 69(7) of the Statute of evidence obtained in the interview”).

⁶⁴ [England & Wales: Police and Criminal Evidence Act 1984 \(PACE\), Code C](#), part 10.1(a) (a suspect must be cautioned before putting to them any questions about an offence, however a person need not be cautioned if the questions are for other necessary purposes, for example, solely to establish their identity); [United States: United States Supreme Court, Pennsylvania v. Muniz](#), 496 U.S. 582 (1990), pp. 601-602 (finding that police do not need to give suspects *Miranda* warnings (*i.e.*, to read the suspect their rights) prior to asking them identification questions at the time of arrest); [Canada: Ontario Court of Appeal, R. v. Kelly](#) [1985] 17 C.C.C. (3d) 419, p. 423 (confirming that the right to be informed of the right to counsel applies only on arrest or detention, and not prior).

⁶⁵ [Appeal](#), para. 22(iii), citing [Decision](#), para. 48.

⁶⁶ *Contra* [Appeal](#), paras. 22(iii), 29-33.

⁶⁷ [Decision](#), para. 48 (fn. 99).

including questioning by national authorities,⁶⁸ and for the purpose of ascertaining their identity to determine the applicability of an ICC arrest warrant.⁶⁹ The Chamber thus correctly understood the jurisprudence as finding that article 55(2) applied where persons were questioned by the OTP or by national authorities pursuant to OTP requests, but not by third parties. The Defence shows no error.

34. *Second*, the ICTR case of *Zigiranyirazo* on which the Defence relies is inapposite given it concerns a statement that Prosecution investigators requested the accused to provide, outlining what he knew and had done before, during and after the Rwandan genocide, at a time when the Prosecution had information to believe that he had committed crimes.⁷⁰ The circumstances are thus markedly different to the situation of Mr Abd-Al-Rahman recording a video to prove that P-0869 was in contact with him so as to facilitate his surrender. Unlike the *Zigiranyirazo* case, the Prosecution did not question Mr Abd-Al-Rahman or request him to provide any information, let alone information regarding the alleged crimes.

35. *Third*, the Defence misconstrues the *obiter* finding of the Pre-Trial Chamber in *Bemba*, on which it relies.⁷¹ Contrary to the Defence's submission, that case supports the view that interactions with a person who is the subject of an arrest warrant to confirm their identity following their arrest would not constitute "questioning" within the meaning of article 55(2).⁷² Moreover, the *obiter* finding indicates that evidence on the alleged crimes obtained in the absence of counsel, when the accused had requested counsel, could potentially be excluded under article 69(7)⁷³—an issue that did not apply in Mr Abd-Al-Rahman's case.

36. The Chamber therefore did not err in its consideration of the jurisprudence presented by the parties, nor did this give rise to any error upon which it based its conclusion that article 55(2) applies to the direct questioning of a suspect.⁷⁴

⁶⁸ ICC-02/04-01/15-1762-Red ("[Ongwen TJ](#)"), para. 50.

⁶⁹ [Bemba Interim Release Decision](#), para. 45.

⁷⁰ *Contra Appeal*, para. 32. See *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, [Decision on the Voire Dire Hearing of the Accused's Curriculum Vitae](#), 29 November 2006. para. 1, 3-4.

⁷¹ *Contra Appeal*, para. 30, citing [Bemba Interim Release Decision](#), para. 45.

⁷² [Bemba Interim Release Decision](#), para. 45.

⁷³ [Bemba Interim Release Decision](#), para. 45.

⁷⁴ *Contra Appeal*, para. 33.

c. The Chamber correctly found that the Prosecution and P-0869 did not discuss the charged crimes (4th conclusion)

37. In the fourth allegedly vitiated finding—that the Prosecution did not discuss with P-0869 anything related to the charged crimes and thus did not ‘question’ the Accused within the meaning of article 55(2)⁷⁵—the Defence states that the Prosecution knew or should have known that in this case, the identity of Mr Abd-Al-Rahman was an essential element of the charges, given he is accused of participating in the commission of crimes under the nickname “Ali Kushayb”.⁷⁶ The Defence’s argument is incorrect. The Prosecution did not at any time require P-0869 to produce proof of the Accused’s alias, but rather proof that he was in contact with the Accused.⁷⁷ Moreover, the argument is again premised on the claim that the Prosecution questioned the Accused, which is incorrect for the reasons set out above.⁷⁸ The Defence also does not demonstrate how the Trial Chamber erred in rejecting its argument that the Prosecution knew or should have known that the “Ali Kushayb” alias would be contested, when there was no information available to suggest that this would be contested.⁷⁹ The Defence merely repeats its submissions before the Chamber in this regard without identifying any error.⁸⁰

d. The Chamber did not err in finding that article 55(2) notification was only required once the Prosecution received the video proof of P-0869’s contact with the Accused (5th conclusion)

38. The fifth and final conclusion that the Defence alleges arises from the legal error was that the Chamber failed to draw the necessary conclusion that the Prosecution was obliged to give the article 55(2) notice to the Accused at the earliest opportunity on 27 December 2019 (*i.e.*, almost three months prior to receiving the video)⁸¹ when it was satisfied that P-0869 was indeed in contact with the Accused.⁸² The Defence argues that it was at this point in time, when OTP investigator P-1049 received documents from P-0869 through WhatsApp on 27 December 2019 including the Accused’s diploma, that provided the investigator with sufficient proof that

⁷⁵ [Appeal](#), para. 22(iv), citing [Decision](#), para. 50.

⁷⁶ [Appeal](#), para. 34.

⁷⁷ [Decision](#), paras. 49.

⁷⁸ *See above* paras. 8-9, 17.

⁷⁹ [Decision](#), para. 47.

⁸⁰ [Decision](#), para. 47.

⁸¹ [Prosecution Response to Defence Submissions on Admissibility of Evidence](#), para. 3 (the Prosecution received the video on 20 March 2020).

⁸² [Appeal](#), paras. 22(v), 36-37, citing [Decision](#), para. 51.

P-0869 was in contact with the Accused and should have prompted the investigator to notify the Accused pursuant to article 55(2).⁸³ This argument is misconstrued.

39. It is within the Prosecution's prerogative, in line with its duties and powers to conduct an independent investigation pursuant to article 54, to determine the extent of proof it required that P-0869 was in contact with the Accused. It is not a matter for the Defence to determine the point at which that evidence was sufficient. When asked by the Chamber, the Defence could not give a satisfactory answer as to how the Prosecution could have conceivably provided a 55(2) caution before it was in direct contact with the Accused.⁸⁴ In any case, this argument is again based on the Defence's erroneous contentions—as shown above—that the Prosecution's interactions with P-0869 to obtain proof of his contact with the Accused amounted to questioning under article 55(2). This is incorrect, as the Chamber correctly found.⁸⁵ The Defence's arguments on this issue are unmerited.

40. For the reasons above, the Defence fails to show error. The second ground of appeal should be dismissed.

C. The Defence fails to establish the material impact of the alleged errors

41. The Defence only cursorily addresses the alleged impact of the errors, arguing that the absence of notification under article 55(2) means that the admission of the video into evidence would compromise the proceedings and seriously undermine its integrity.⁸⁶ This is insufficient to meet the appellant's burden of substantiating the appeal.⁸⁷ The Defence fails to show that, had the Chamber erred and article 55(2) was applicable, the video would be excluded under article 69(7)(a) or (b). Article 69(7) sets a high bar for the exclusion of evidence. However, the Defence does not question the reliability of the video and it fails to establish that its admission would be antithetical and would seriously damage the integrity of the proceedings. In any event, several factors militate against such a finding, including that: the Prosecution did not request the video, which was proposed by P-0869; the Prosecution communicated with P-0869 for the limited purpose of obtaining proof of P-0869's contact with the Accused for the purposes of arranging his surrender;⁸⁸ the Prosecution did not discuss with P-0869 anything relating to the

⁸³ [Appeal](#), paras. 36-37.

⁸⁴ [Decision](#), para. 49.

⁸⁵ [Decision](#), para. 50.

⁸⁶ [Appeal](#), paras. 3, 20.

⁸⁷ ICC-02/05-01/20-459 (“[Detention Review AD](#)”), paras. 42, 43, 45.

⁸⁸ [Decision](#), paras. 46, 50.

charged crimes;⁸⁹ the Prosecution did not question the Accused through P-0869;⁹⁰ the Accused appears to have voluntarily and spontaneously stated his name and alias on the video; and, as the Chamber found when rejecting a Defence allegation on the matter, the Prosecution did not unduly delay his surrender.⁹¹

42. In this context, the Defence fails to establish—let alone argue—that the alleged errors had any material impact on the decision to admit the video. Significantly, the Defence does not demonstrate how the Chamber’s assessment of the criteria under article 69(7) would have differed had the Chamber not made the alleged errors. The Appeal may be dismissed on this basis alone.

CONCLUSION

43. For the foregoing reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal and to confirm the Decision. The Defence has shown neither error nor any material impact on the Decision.



Karim A. A. Khan KC, Prosecutor

Dated this 30th day of March 2023

At The Hague, The Netherlands.

⁸⁹ [Decision](#), para. 50.

⁹⁰ [Decision](#), para. 50.

⁹¹ [Decision](#), para. 61.