

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: **ICC-02/05-01/20 OA12**

Date: **20 March 2023**

**THE APPEALS CHAMBER**

**Before:**

**Judge Piotr Hofmański, Presiding Judge  
Judge Luz del Carmen Ibáñez Carranza  
Judge Marc Perrin de Brichambaut  
Judge Solomy Balungi Bossa  
Judge Godcha Lordkipanidze**

**SITUATION IN DAFUR, SUDAN**

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

**Public Document  
With Public Annex A**

**Appeal Brief OA12**

**Source: Mr Cyril Laucci, Lead Counsel**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Trial Chamber I

## INTRODUCTION

1. This submission constitutes the appeal brief (“Brief”) by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”, “Mr Abd-Al-Rahman”) in appeal proceedings OA12 instituted against Decision ICC-02/05-01/20-876 (“Decision #876”),<sup>1</sup> which was given by the Honourable Trial Chamber I (“the Chamber”) on 17 February 2023. The Brief is filed before the Honourable Appeals Chamber (“Appeals Chamber”) following the decision of the Chamber on 8 March 2023<sup>2</sup> granting leave to appeal Decision #876 pursuant to article 82(1)(d) of the Statute of the Court (“Statute”) and rule 155 of the Rules of Procedure and Evidence (“RPE”). It is filed within the time required under regulation 65(4) of the Regulations of the Court (“RoC”). The Brief is public.

## DECISION #876

2. In its Decision #876, the Chamber rejects the Defence submissions on the inadmissibility of a video recorded by Mr Abd-Al-Rahman on the occasion of his surrender and received by the Office of the Prosecutor (“OTP”) on 20 March 2020 (“Video”)<sup>3</sup> and admits it into evidence in the case record.<sup>4</sup> The Defence is appealing against this specific aspect of the Decision. It is not appealing against other aspects.

3. Whether or not the Video is admitted into evidence is pivotal to the trial. It is what prompted the Chamber to bring forward its review of the matter.<sup>5</sup> The Parties and the Chamber acknowledge that the Video was obtained by the OTP without first giving Mr Abd-Al-Rahman notice of his rights under article 55(2) of the Statute. The matter to be determined is what the consequences of this failure to give notice are for the admissibility of the Video. The Defence submits that the failure to give notice under article 55(2) of the Statute means that the Video cannot be admitted into evidence in

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<sup>1</sup> [ICC-02/05-01/20-876](#).

<sup>2</sup> [ICC-02/05-01/20-894](#).

<sup>3</sup> Video recording DAR-OTP-0216-0119, its Arabic transcript DAR-OTP-0220-3010 and its English transcript DAR-OTP-0220-3015.

<sup>4</sup> [ICC-02/05-01/20-876](#), para. 63(i).

<sup>5</sup> [ICC-02/05-01/20-876](#), para. 16.

that its admission would be antithetical to and would seriously damage the integrity of the proceedings.

#### **FIRST GROUND OF APPEAL: ERRORS OF FACT**

4. The Defence submits that the Chamber has erred in fact by conclusively finding in paragraphs 25 and 46 of its 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”.<sup>6</sup>

5. The Defence refers to the standard applicable to appellate interference to correct errors of fact.<sup>7</sup> The Defence respectfully submits that the finding “failed to take into account relevant facts” (“1<sup>st</sup> Error of Fact”) and “misappreciated the facts” (“2<sup>nd</sup> Error of Fact”) established by the evidence submitted for the consideration of the Chamber in relation to the admissibility of the Video. With respect to the 2<sup>nd</sup> Error of Fact, the Defence further submits that the available evidence ruled out that “the Chamber’s conclusion could have reasonably been reached from the evidence before it”. The Defence thus concludes that the applicable standard for appellate interference is met in this instance.

6. These two errors of fact had a direct impact on the outcome of Decision #876 in that, as a result of its erroneous finding, the Chamber concluded that the Video had not been solicited by the OTP, thus inferring that article 55(2) of the Statute did not apply<sup>8</sup> and that there were no grounds to exclude the Video under article 69(7) of the Statute.<sup>9</sup> Decision #876 is therefore “materially affected” by either or both errors of fact which meet the applicable standard for appellate interference in order to correct the error pursuant to article 83(2) of the Statute.

7. Evidence of the fact that investigator P-1049 had, at the very least, encouraged the Video to be produced and sent by intermediary P-0869 was tendered in abundance.

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<sup>6</sup> [ICC-02/05-01/20-876](#), para. 25. The same finding is reframed in para. 46.

<sup>7</sup> Specifically, [ICC-02/05-01/20-542-Conf OA10](#), and its public redacted version [ICC-02/05-01/20-542-Red OA10](#), para. 16.

<sup>8</sup> [ICC-02/05-01/20-876](#), paras. 48-51.

<sup>9</sup> [ICC-02/05-01/20-876](#), para. 52.

This evidence was clearly on record and left no room for any reasonable interpretation to the contrary.

8. **1<sup>st</sup> Error of Fact: The Chamber did not take the relevant facts determined in paragraphs 22 and 23 of Decision #876 into consideration in its analysis:** the Chamber determined in paragraph 22 of Decision #876 that investigator P-1049 had, at the very least, encouraged the production and sending of the Video by intermediary P-0869:

P-1049 stated that he might have encouraged this proposition by the intermediary.<sup>10</sup> P-1049 also stated that he did not recall whether he asked the intermediary to send him the video during their call, but he was 'inclined to be receptive for the video to be sent'.<sup>11</sup> P-1049 further added that he was 'favourable to the idea of receiving a video' and stated that he might have expressed this to the intermediary.<sup>12</sup> P-1049 acknowledged that he followed up with the intermediary about the video that the latter had proposed to send.<sup>13</sup> (emphasis added; footnotes in the original).<sup>14</sup>

Leaving aside the semantics and euphemisms evidently employed by Witness P-1049 when he appeared, the Chamber did note, in paragraph 22 of its Decision, that the witness was being honest and clear in admitting to saying he was favourable to receiving a video identifying Mr Abd-Al-Rahman as the suspect before the Court and to having chased intermediary P-0869 up about sending the Video.

9. The Chamber determines these facts in part IV ("The Video and Related Material"), section A ("The Facts surrounding the sending of the Video and Related Material") of its Decision #876. This part simply sets out the facts and does not include the analysis of the considerations and grounds relied on by the Chamber. That analysis starts further on, in paragraph 43 of the Decision,<sup>15</sup> after the presentation of the

<sup>10</sup> Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 53 (footnote in the original).

<sup>11</sup> Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 59 (footnote in the original).

<sup>12</sup> Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 59-60 (footnote in the original).

<sup>13</sup> Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 63-64 (footnote in the original).

<sup>14</sup> [ICC-02/05-01/20-876](#), para. 22.

<sup>15</sup> [ICC-02/05-01/20-876](#), paras. 43-61.

submissions from the Defence<sup>16</sup> and the Office of the Prosecutor (“OTP”),<sup>17</sup> and another summary of the Parties’ submissions on a different aspect of the Decision.<sup>18</sup>

10. However, when it returns to this aspect of the facts in the part where it is discussed, the Chamber adopts a different version of the facts. In sum, in paragraph 46 of Decision #876, the Chamber declares itself satisfied that “P-1049 did not ask the intermediary for the video”.<sup>19</sup> The Defence submits that this second version of the facts is not only affected by the 2<sup>nd</sup> Error of Fact, in that it clearly misappreciates the facts and the evidence, but is also affected by the 1<sup>st</sup> Error of Fact, in that it is irreconcilable with the Chamber’s previous presentation of the facts in paragraph 22 of the Decision. It fails to take into consideration the relevant facts recalled in paragraph 22 of the Decision, namely that the investigator had admitted to saying he was favourable to receiving a video which identified Mr Abd-Al-Rahman as the suspect before the Court and had admitted to having chased intermediary P-0869 up about the sending of this video. By not taking this admission into account, the Chamber therefore commits its 1<sup>st</sup> Error of Fact, that is, failure to take into consideration the admissions determined in paragraph 22 of Decision #876 to have been made by investigator P-1049. In the light of this admission, the Chamber could not reasonably have concluded that investigator P-1049 had not encouraged the recording of the Video and had not requested, reiterating this request several times, that it be sent.

11. The Chamber likewise fails to take into consideration, in paragraph 51 of Decision #876,<sup>20</sup> a relevant fact that it nevertheless determined in paragraph 23:

In his testimony before the Chamber, P-1049 stated that this was sufficient proof that the intermediary was in contact with the accused, but it was not conclusive. P-1048 accepted that the Prosecution was content with the certificates as proof of contact between the intermediary and the accused.

This fact had clearly been established before the Chamber. The OTP had acknowledged in its written submissions that, as of 27 December 2019, “[t]he

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<sup>16</sup> [ICC-02/05-01/20-876](#), paras. 28-34.

<sup>17</sup> [ICC-02/05-01/20-876](#), paras. 35-40.

<sup>18</sup> [ICC-02/05-01/20-876](#), paras. 41-42.

<sup>19</sup> [ICC-02/05-01/20-876](#), para. 46.

<sup>20</sup> [ICC-02/05-01/20-876](#), para. 51.

Prosecution was satisfied with this documentation demonstrating that P-0869 was in contact with the Accused. The Prosecution did not ask for additional material evidencing that P-0869 was in contact with the Accused”.<sup>21</sup> The two OTP investigators who appeared so confirmed. When asked by the Honourable Presiding Judge “was the Prosecution content with the certificates as proof that the intermediary was in contact?”, investigator P-1048 gave an unequivocal “[y]es”.<sup>22</sup> Investigator P-1049 confirmed likewise.<sup>23</sup> As of 27 December 2019, the evidence on record proves that the OTP believed it was in possession of “clear and irrefutable evidence that the intermediary was in contact with the accused”. The Chamber therefore made an error of fact in paragraph 51, by holding that the obligation “to give the article 55(2) Notification to the accused at the earliest opportunity”<sup>24</sup> did not apply as of 27 December 2019, in other words, before receipt of the Video. The obligation applied as of that date. Notice pursuant to article 55(2) of the Statute was not given. In accordance with the test applied by the Chamber, article 55(2) of the Statute was therefore violated and the Video is inadmissible.

12. **2<sup>nd</sup> Error of Fact: unreasonable finding in the fresh appreciation of the facts at issue undertaken in paragraph 46 of Decision #876:** Instead of referring to the facts determined in paragraph 22 of its Decision #876, the Chamber found – in the presentation of its analysis and grounds for its decision – that “P-1049 did not ask the intermediary for the video.”<sup>25</sup> This finding not only contradicts the Chamber’s presentation of the facts in paragraph 22 of the Decision, it also clearly contradicts the evidence submitted before the Chamber. The finding is therefore the result of an error of appreciation of the facts at issue, which could not reasonably support that finding.

<sup>21</sup> [ICC-02/05-01/20-822](#), para. 10.

<sup>22</sup> P-1048: ICC-02/05-01/20-T-106-CONF-ENG CT, p. 53, line 25 to p. 54, line 2.

<sup>23</sup> P-1049: ICC-02/05-01/20-T-108-CONF-ENG CT, p. 18, lines 15-16. The use of the words “but not conclusive” by investigator P-1049 does not relate to the value of the evidence of identity, but to the value of Mr Abd-Al-Rahman’s intention to cooperate with the Court. This point was clarified: “you want to hear from the suspect, directly from him, that he is willing to cooperate. Some other persons may think that the suspect has this and this intention. Unless you get confirmation from the suspect directly, you cannot act” (ICC-02/05-01/20-T-108-CONF-ENG CT, p. 18, line 20 to p. 19, line 2).

<sup>24</sup> [ICC-02/05-01/20-876](#), para. 51.

<sup>25</sup> [ICC-02/05-01/20-876](#), para. 46.

13. The issue of whether or not investigator P-1049 had solicited the Video in his interaction with intermediary P-0869 was explored when the investigator appeared in court on 24 January 2023. In response to hesitation and evasiveness on the part of the investigator, the Honourable Presiding Judge of the Chamber ultimately puts the question herself about the first conversation between investigator P-1049 and intermediary P-0869 on 27 December 2019. She has to repeat her question at least five times before getting a reply: (i) “Did you ask the intermediary at that stage when he mentioned a video to send it to you?”;<sup>26</sup> (ii) “Did you, in that conversation on 27 December, ask the intermediary to send you the video? It’s really not a difficult question”;<sup>27</sup> (iii) “Did you, in that conversation of 27 December, ask the intermediary to send you the video?”;<sup>28</sup> (iv) “What does ‘I am more inclined to be receptive for the video to be sent’ mean?”;<sup>29</sup> and (v) “And you did express your favourability to the intermediary?”.<sup>30</sup> At the end of this lengthy exchange, investigator P-1049 finally answers in the affirmative: “Yes, it might be that I have expressed my favourability to that.”<sup>31</sup> The Honourable Presiding Judge then brings this exchange to an end: “Okay, thank you.”<sup>32</sup> In summary, when asked “[d]id you ask the intermediary at that stage when he mentioned a video to send it to you?”,<sup>33</sup> the final response of investigator P-1049 was “[y]es, it might be that I have expressed my favourability to that”.<sup>34</sup> Investigator P-1049 therefore acknowledged that, irrespective of which of them – intermediary P-0869 or himself – had first mentioned the idea of recording the Video, he had asked for the Video to be sent.

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<sup>26</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 59, lines 8-9. The English version of the transcript is used here to ensure accuracy because the relevant conversation took place in English.

<sup>27</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 59, lines 12-13.

<sup>28</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 59, lines 19-20.

<sup>29</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 59, line 24.

<sup>30</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 60, lines 2-3.

<sup>31</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 60, lines 4-5.

<sup>32</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 60, line 6.

<sup>33</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 59, lines 8-9. The English version of the transcript is used here to ensure accuracy because the relevant conversation took place in English.

<sup>34</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 60, lines 4-5.



14. The admission that investigator P-1049 had solicited the Video is subsequently repeated in more detail. Investigator P-1049 is asked:

And the intermediary is saying to the other side of the conversation: "... if he could create recorded material, if you managed to film him for two or three minutes, if he appears in recorded material saying, 'I'm ...' I mean, 'Ali Kushayb,' and so on and so forth, 'I'm not accused by the Court. I didn't do these things and I'm ...'" and so on and so forth. That reflects the conversation that you had had with the intermediary the day before; right?

He replies "[y]eah, partly I would say, as I wouldn't mentioned to him that he should say "I am not accused." That's his own feeling of the script of the video."<sup>35</sup> Investigator P-1049 therefore clearly acknowledges that, at the very least, he encouraged the recording of a video in which Mr Abd-Al-Rahman would identify himself as "Ali Kushayb", with the only reservation being that the investigator did not suggest that he deny being the accused.

15. As recalled by the Chamber in paragraph 22 of its Decision #876,<sup>36</sup> investigator P-1049 then chased intermediary P-0869 up several times about the sending of the Video until it was received on 20 March 2020. With respect to a conversation that took place on 1 January 2020, when asked "'[a]re there any developments on the issue?' But by that you're talking about video, aren't you? You're saying: You going to send the video?", investigator P-1049 replies "[y]eah, I was waiting to get feedback from him."<sup>37</sup> Further on, regarding a conversation that took place on 15 February 2020, investigator P-1049 is asked "[t]hat second question is essentially you chasing the intermediary for this video that's been long-promised; right?", to which he replies "[y]es."<sup>38</sup> Evidence that investigator P-1049 had chased intermediary P-0869 up about the Video on at least 1 January and 15 February 2020 was therefore before the Chamber. Even assuming that the Video had not been specifically requested but merely accepted by investigator P-1049 during the first conversation on 27 December 2019 – which the Defence disputes and which is contradicted by the Chamber's determination in paragraph 22 of Decision #876 – the times when the matter was chased up on 1 January and 15

<sup>35</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 61, lines 2-10.

<sup>36</sup> [ICC-02/05-01/20-876](#), para. 22.

<sup>37</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 62, lines 4-7.

<sup>38</sup> ICC-02/05-01/20-T-108-CONF-ENG CT, p. 64, lines 11-13.

February 2020 do constitute occasions on which the Video was requested, and repeatedly so, by the OTP.

16. In the light of these conversations, the only reasonable finding was that investigator P-1049 had expressed his wish to obtain the Video and had chased intermediary P-0869 up several times to receive it, until it was received on 20 March 2020. It is this finding which the Chamber adopts in paragraph 22, before sidestepping it during its deliberations and adopting the exact opposite finding in paragraph 46 of its Decision #876, without any additional evidence.

17. The finding at paragraph 46 thus committed an error of fact on two counts: (i) it failed to take into consideration the relevant evidence referred to in paragraph 22 of Decision #876 and (ii) it relied on a clearly erroneous appreciation of the evidence. The Defence is aware of the bounds within which the Appeals Chamber authorizes itself to interfere with factual findings reached by first instance chambers. However, the Defence submits that the twofold error of fact described above is so evident and so borne out by the Chamber's own findings in paragraph 22 of its Decision #876 that, if the standard of appellate interference to correct an error of fact is not met in this instance, then it will never be met. Accordingly, the Defence prays the Appeals Chamber to determine that the Chamber has made an error of fact by finding, in paragraph 46 of its Decision, that the investigator had not solicited the Video from intermediary P-0869, even though the evidence establishes beyond reasonable doubt – as determined by the Chamber itself in paragraph 22 of Decision #876 – that investigator P-1049 had, at the very least, (i) encouraged its recording, (ii) requested that it be sent and (iii) chased intermediary P-0869 up several times until it was received on 20 March 2020.

18. The only area of doubt is whether intermediary P-0869 or investigator P-1049 was the first to mention the idea of recording the Video, but this issue had not the slightest relevance once it was established that the OTP had encouraged its recording and requested, repeatedly, that it be sent. The Defence submitted before the Chamber that intermediary P-0869 had acted in the capacity of a “conduit” or “postman”

between the OTP and Mr Abd-Al-Rahman,<sup>39</sup> and had passed on the instructions received from investigator P-1049 concerning the recording of the Video.<sup>40</sup> By performing this role, intermediary P-0869 was acting as a de facto agent of the OTP. His presence in the capacity of an intermediary therefore has no effect on the applicability of article 55(2) of the Statute and the Chamber made an error of law by concluding otherwise.

## SECOND GROUND OF APPEAL: ERROR OF LAW

19. The Defence submits that the Chamber made an error of law by concluding that article 55(2) of the Statute did not apply to the interaction between the OTP and intermediary P-0869 which resulted in the production of the Video.<sup>41</sup> In particular, the Defence submits that the Chamber made an error of law when it restrictively interpreted the guarantees set out in article 55(2) of the Statute as encompassing only “situations where the suspect is questioned directly about alleged crimes under the jurisdiction of the Court”.<sup>42</sup> The Chamber likewise made an error of law in its interpretation of article 55(2) of the Statute by not taking into consideration the particularities of the case, specifically the fact that Mr Abd-Al-Rahman is accused of having participated in the crimes described in the charges only under the alias “Ali Kushayb” and that the evidence of this alias cannot therefore be separated from the fact that he is being prosecuted for the commission of the “alleged crimes under the jurisdiction of the Court”. The standard applicable for appellate interference to correct an error of law<sup>43</sup> is therefore met in this particular case.

20. On the basis that article 55(2) of the Statute is not applicable, the Chamber infers that there are no grounds for excluding, pursuant to article 69(7) of the Statute, the

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<sup>39</sup> ICC-02/05-01/20-T-109-CONF-ENG ET, p. 82, lines 12-21.

<sup>40</sup> ICC-02/05-01/20-T-109-CONF-ENG ET, p. 76, line 18 to p. 77, line 8.

<sup>41</sup> [ICC-02/05-01/20-876](#), paras. 48-52.

<sup>42</sup> [ICC-02/05-01/20-876](#), para. 48.

<sup>43</sup> Specifically, ICC-02/05-01/20-542-Conf OA10, and its public redacted version [ICC-02/05-01/20-542-Red OA10](#), p. 6, para. 17. This judgment contains an error in the paragraph numbering. The Defence refers here to the first paragraph 17 (the one on page 6).

Video from evidence.<sup>44</sup> Decision #876 is therefore “materially affected” by this error of law and requires the interference of the Appeals Chamber pursuant to article 83(2) of the Statute.

21. The Defence refers to the comprehensive survey of the applicable law in its written and oral submissions concerning the importance of the guarantees under article 55(2) of the Statute as general principles of criminal law.<sup>45</sup> The table of authorities sent to the Chamber and Parties on 5 December 2022, on which the Defence relied in its submissions,<sup>46</sup> is annexed to this Brief.<sup>47</sup> Neither this survey, nor its corresponding conclusion reached, were challenged by the Parties. The issue is not the value of these principles, but the precise effect they have and the extent to which they apply to the circumstances of the case. The Defence therefore prays the Appeals Chamber, in the first place, to recognize the guarantees under article 55(2) of the Statute as general principles of criminal law which are applicable before the Court under article 21(1)(c) of the Statute.

22. The Defence identifies the following specific findings as being affected by errors of law:

- (i) “The Chamber is satisfied that article 55(2) of the Statute does not apply to the circumstances surrounding the sending of the video by the intermediary and its receipt by the Prosecution” (“Finding (i)”);<sup>48</sup>
- (ii) “Interactions between the Prosecution and intermediary do not fall under this category [to which article 55(2) applies]” (“Finding (ii)”);<sup>49</sup>
- (iii) “[T]he cases relied on by the Parties in relation to article 55(2) of the Statute encompass situations where a suspect is questioned, directly and in-person about alleged crimes, and not through a third party” (“Finding (iii)”);<sup>50</sup>

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<sup>44</sup> [ICC-02/05-01/20-876](#), para. 52.

<sup>45</sup> ICC-02/05-01/20-T-104-CONF-FRA CT, p. 21, line 8 to p. 82, line 11.

<sup>46</sup> ICC-02/05-01/20-T-104-CONF-FRA CT, p. 21, p. 4, lines 22-25.

<sup>47</sup> Public annex A: Table of authorities, 5 December 2022.

<sup>48</sup> [ICC-02/05-01/20-876](#), para. 48.

<sup>49</sup> [ICC-02/05-01/20-876](#), para. 48.

<sup>50</sup> [ICC-02/05-01/20-876](#), para. 48.

- (iv) “The Prosecution did not discuss with the intermediary anything related to the charged crimes” (“Finding (iv)”) <sup>51</sup> and
- (v) Lastly, the Chamber made an error of law by not drawing the necessary conclusion from the fact that the OTP “was obliged to give the article 55(2) Notification to the accused at the earliest opportunity” once it was satisfied, on 27 December 2019, that intermediary P-0869 had been in contact with Mr Abd-Al-Rahman <sup>52</sup> (“Finding (v)”).

23. **Findings (i) and (ii):** it is not disputed that the Video constitutes a message from Mr Abd-Al-Rahman, a suspect before the Court, to the OTP. It is not intermediary P-0869 talking on the Video, it is Mr Abd-Al-Rahman. His message is not directed at the intermediary. This message is a response to, at the very least, encouragement acknowledged by investigator P-1049, which he gave for the first time on 27 December 2019, as well as to requests repeated several times, including on 1 January and 15 February 2020, until the Video was obtained on 20 March 2020. <sup>53</sup> The Video was therefore received by the OTP in the course of its interaction with Mr Abd-Al-Rahman through investigator P-1049 and intermediary P-0869 (a mere “conduit” or de facto agent of the OTP). This interaction consisted of a request from the OTP, made for the first time on 26 December 2019 and reiterated on 1 January and 15 February 2020 at least, and his response, the Video. Irrespective of the specific circumstances in which it took place, this interaction has all the hallmarks of questioning: a query, repeated several times, and a response to it.

24. Article 55(2) of the Statute applies

[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9.

Nowhere does it require the questioning to take place directly, and nor does it place any limits on the method of questioning. According to the letter of article 55(2) of the

<sup>51</sup> [ICC-02/05-01/20-876](#), para. 50.

<sup>52</sup> [ICC-02/05-01/20-876](#), para. 51.

<sup>53</sup> [ICC-02/05-01/20-876](#), para. 22.

Statute, and without interpreting it in any way, it therefore applies to the interaction in the course of which the Video was obtained.

25. Findings (i) and (ii) that article 55(2) of the Statute does not apply to an indirect interaction through an intermediary therefore constitute a restrictive interpretation by the Chamber of the protection offered by article 55(2) of the Statute. They do not rest on any authority or any precedent mentioned in Decision #876. The Defence respectfully submits that they are not reasonable and that they run counter to the applicable international standards for protecting the rights of the accused and the fairness of the proceedings.

26. These findings are not reasonable in that the restrictive interpretation of article 55(2) of the Statute on which they are based is not necessary. In this particular case, the OTP had been given assurances of the fact that intermediary P-0869 was actually in contact with Mr Abd-Al-Rahman.<sup>54</sup> It was therefore completely possible for the OTP to have initiated the surrender procedure without requesting, let alone waiting for and chasing up, the sending of the Video. As the Chamber correctly concludes, the OTP was also obliged to make sure that Mr Abd-Al-Rahman was given notice of his rights under article 55(2) of the Statute “at the earliest opportunity”,<sup>55</sup> and this did not entail waiting for receipt of the Video. The restrictive interpretation of article 55(2) of the Statute does not, therefore, serve any procedural purpose other than to render admissible a video recorded without notice of the requisite rights. What is at issue in this interpretation – to render admissible an item of evidence which is essential for the alias “Ali Kushayb” – is sufficiently significant to have justified the Chamber bringing its consideration of the matter forward.<sup>56</sup> The issue at stake is commensurate with the prejudice done to the Defence as a result of the Chamber’s restrictive interpretation of article 55(2) of the Statute. Considering that this restrictive interpretation is not necessary, the resultant prejudice caused to the Defence inevitably makes that interpretation unreasonable.

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<sup>54</sup> [ICC-02/05-01/20-822](#), para. 10.

<sup>55</sup> [ICC-02/05-01/20-876](#), para. 51.

<sup>56</sup> [ICC-02/05-01/20-876](#), para. 16.

27. Introducing distinctions based on the circumstances and methods of questioning referred to in article 55(2) of the Statute, when the article provides for none, contributes to rendering nugatory this provision and the protection of the essential guarantees – the right not to incriminate oneself, the right to remain silent and the right to have the assistance of counsel – which it enshrines. It would be all too easy to circumvent the protection they offer by soliciting incriminating information “off the record”, before any “questioning” officially commences, with such information then being capable of being used as evidence. These rights are guaranteed in all the national legal systems referred to by the Defence in its table of authorities.<sup>57</sup> They are also protected by all the major international human rights instruments:<sup>58</sup>

- Articles 14(3)(b) and 14(3)(g) of the International Covenant on Civil and Political Rights of 1966, which entered into force for Sudan in 1986, set out the right of any person accused of a criminal offence to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” and “not to be compelled to testify against himself or to confess guilt.” Paragraph 14 of [General Comment No. 13 of the United Nations Human Rights Committee](#) relating to article 14 of the Covenant states: “The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable”;
- Article 7(1)(c) of the [African Charter on Human and Peoples’ Rights \(Banjul Charter\)](#) of 27 June 1981, which entered into force for [Sudan](#) in 1986, also protects the right of any accused person to be defended by counsel of his or her choice. The decisions of the African Court on Human Rights extend this right to any person accused of a criminal offence, without the person even having to request it;<sup>59</sup>

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<sup>57</sup> Annex A: Table of authorities, pp. 2-4.

<sup>58</sup> Annex A: Table of authorities, pp. 1-2.

<sup>59</sup> African Court on Human Rights, [case \*Vedastus v. Tanzania \(Merits and Reparations\)\*, 26 September 2019](#), *African Court Law Report*, Volume 3 (2019), pp. 498-517, para. 69.



- The jurisprudence of the European Court of Human Rights likewise excludes evidence collected during interrogation if the accused person has not first received assistance from a lawyer;<sup>60</sup>
- Articles 8(2)(d) and 8(2)(g) of the [American Convention on Human rights](#) (Pact of San José, Costa Rica) of 22 November 1969 also adopt the right to be assisted by legal counsel and the right not to be compelled to be a witness against oneself or to plead guilty. The Inter-American Court of Human Rights has held that the right to the assistance of a lawyer applies during judicial proceedings and in any procedure before or accompanying the judicial proceedings, in other words including interactions between the person being prosecuted and the police or the prosecution authorities.<sup>61</sup>

28. Pursuant to article 21(3) of the Statute, the interpretation of article 55(2) adopted by the Court must be consistent with the above internationally recognized human rights. The Defence submits that the needlessly restrictive interpretation of article 55(2) of the Statute adopted in Decision #876 is not consistent with these internationally recognized rights and is thus in violation of article 21(3) of the Statute. The Chamber has therefore made an error of law by adopting this interpretation, with the sole purpose of affording the OTP a procedural advantage – the admission of the Video into evidence – which is excessive compared to the prejudice caused to Mr Abd-Al-Rahman’s right to be informed of his rights, right to remain silent, right to receive assistance from counsel and right to be questioned in the presence of counsel. The Chamber has therefore made an error of law through its Findings (i) and (ii) which are based on this restrictive interpretation.

29. **Finding (iii):** in its Finding (iii), the Chamber relies on the assertion that the precedents on which the Parties have relied all concern direct interactions “where a suspect is questioned, directly and in-person about alleged crimes, and not through a third party”,<sup>62</sup> to bolster the erroneous criterion according to which article 55(2) of the

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<sup>60</sup> European Court of Human Rights (Grand Chamber), [case \*Salduz v. Turkey\* \(no. 36391/02\)](#), 27 November 2008, para. 55.

<sup>61</sup> Inter-American Court of Human Rights, [Maritza Urrutia v. Guatemala](#), 27 November 2003, para. 120.

<sup>62</sup> [ICC-02/05-01/20-876](#), para. 48.



Statute does not apply to an interaction conducted via an intermediary. This Finding (iii) is itself erroneous. The Defence<sup>63</sup> and the OTP<sup>64</sup> had relied on the relevant decisions delivered by the Court in the *Bemba* and *Ongwen* cases, to which the Chamber also refers,<sup>65</sup> among other legal precedents.

30. In the *Bemba* decision, the relevant interview was not between the suspect and the OTP, but with a national judge, and it was not about the charges, but about verifying the identity of the suspect:

[i]t is unclear whether [...] constituted a “questioning” within the meaning of article 55(2)(d) of the Statute or whether it was merely an interview to establish the identity of Jean-Pierre Bemba and to inform him of his rights. It would appear that, on the substance, it was rather 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.<sup>66</sup>

Hence, even during an interview restricted to verifying the identity of a suspect and not in the presence of the OTP, any evidence obtained during such an interaction must be excluded under article 69(7) of the Statute if notice of the rights has not been afforded pursuant to article 55(2) of the Statute and if the suspect has not received the assistance of counsel – in other words, in the very circumstances in which the Video was obtained. In the *Bemba* case, the Single Judge determined that the interview with the national judge had not revealed evidence against the suspect, but added that if that had been the case, such evidence would have been inadmissible pursuant to article 69(7) of the Statute for violating article 55(2) of the Statute. The Chamber therefore made an error of law in its Finding (iii) with respect to this *Bemba* decision: this decision holds that evidence generated during an interaction, which was not conducted in the presence of the OTP, with a suspect about verifying the suspect’s identity is inadmissible.

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<sup>63</sup> Annex A: Table of authorities, p. 4; ICC-02/05-01/20-T-104-CONF-FRA CT, p. 22, line 22 to p. 24, line 21 (*Bemba* decision [ICC-01/05-01/08-73](#)) ; p. 70, lines 2-17 (*Ongwen* decision [ICC-02/04-01/15-1762-Red](#)).

<sup>64</sup> [ICC-02/05-01/20-822](#), para. 6, footnote 10 (*Ongwen* decision [ICC-02/04-01/15-1762-Red](#)) and para. 7, footnote 12 (*Bemba* decision [ICC-01/05-01/08-73](#)).

<sup>65</sup> [ICC-02/05-01/20-876](#), para. 48, footnote 99.

<sup>66</sup> [ICC-01/05-01/08-73](#), para. 45.

31. The Decision delivered pursuant to article 74 of the Statute in the *Ongwen* case examines the admissibility of evidence revealed during the questioning of the suspect by the national authorities not in the presence of the OTP and without notice under article 55(2) of the Statute. The Decision expressly refers to article 69(7) of the Statute as being applicable in this respect,<sup>67</sup> but declines to consider the Defence's submissions concerning the inadmissibility of the evidence revealed during questioning on the ground that the Defence itself relied on this information in its evidence.<sup>68</sup> The reasons for regarding the evidence as admissible in the *Ongwen* case do not apply to the Video because the Defence has never relied on the Video in its evidence. The Chamber has therefore made an error of law in its Finding (iii) with respect to the *Ongwen* decision: this decision in fact considers the inadmissibility of evidence revealed during the questioning of a suspect by national authorities when not in the presence of the OTP and without notice under article 55(2) of the Statute.

32. The Chamber made a further error of law in its Finding (iii) by failing to take into consideration other relevant precedents from other international criminal courts and tribunals on which the Defence relied. In the *Zigiranyirazo* case, the International Criminal Tribunal for Rwanda ("ICTR") found a curriculum vitae, which the suspect had provided to the OTP for the purpose of a prospective professional collaboration, to be inadmissible, at a stage when he had yet to be formally indicted. The curriculum vitae was found inadmissible for violating rule 42(A) of the ICTR Rules of Procedure and Evidence, which sets out guarantees equivalent to those under article 55(2) of the Statute. The interaction in question was aimed at a prospective professional collaboration with the OTP; it did not relate to charges. It took place at a time when the person providing the curriculum vitae was not yet even a suspect. In the *Zigiranyirazo* case, there was therefore no suspect and no questioning relating to charges. Yet the equivalent of article 55(2) of the Statute was considered applicable and the item of evidence obtained in violation of this provision was found inadmissible under rule 95 of the ICTR Rules, which is the equivalent of article 69(7) of the Statute.

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<sup>67</sup> [ICC-02/04-01/15-1762-Red](#), para. 57.

<sup>68</sup> [ICC-02/04-01/15-1762-Red](#), para. 59.

Finding (iii) of the Chamber therefore made a further error of law by asserting that the precedents cited by the Parties “encompass situations where a suspect is questioned, directly and in-person about alleged crimes, and not through a third party”.

33. Had the Chamber taken into account the precedents in the *Bemba, Ongwen* and *Zigiranyirazo* cases, it would not have erred in law in its Finding (iii). In any event, even though not one of the precedents cited had specifically addressed the particular scenario “where a suspect is questioned, directly and in-person about alleged crimes, and not through a third party”, nor did any precedent exclude the application of article 55(2) of the Statute in the context of an interaction between a suspect and an accused through an intermediary. Finding (iii) was therefore not only erroneous, it was also an insufficient basis for Findings (i) and (ii) relating to the inapplicability of article 55(2) of the Statute to interactions conducted through an intermediary. The Chamber therefore also made an error of law by basing its Findings (i) and (ii) on its Finding (iii).

34. **Finding (iv):** the OTP knew, or should have known, that the suspect’s identity in this particular case constituted a crucial element of the charges because Mr Abd-Al-Rahman is accused of having participated in the commission of crimes under the jurisdiction of the Court but only under a different identity denoted by the alias “Ali Kushayb”.<sup>69</sup> The pharmacist, Abd-Al-Rahman, has nothing to do with the commission of the crimes: the militia leader, “Ali Kushayb”, is the person who stands accused. Whether Mr Abd-Al-Rahman and this alias are one and the same person is thus the crux for the Prosecution. If Mr Abd-Al-Rahman is not “Ali Kushayb”, as he has maintained ever since his initial appearance before the Court, he cannot have been involved in the acts described in the charges. By assuming that the alias “Ali Kushayb” would not be challenged, the OTP has therefore been negligent and has violated the presumption of innocence enjoyed by Mr Abd-Al-Rahman under article 66(2) of the Statute. Before his initial appearance, Mr Abd-Al-Rahman had also not yet adopted a position on the fact of his being prosecuted for the crimes referred to in the charges.

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<sup>69</sup> [ICC-02/05-01/20-550-Corr-Red2](#), paras. 89-177.

Yet the OTP<sup>70</sup> and the Chamber<sup>71</sup> acknowledge that questioning him about the investigation and/or about “alleged crimes under the jurisdiction of the Court”, specifically his participation in these crimes, would require first affording him notice of his rights under article 55(2) of the Statute. The distinction made so as to exclude the crux of the matter – whether Mr Abd-Al-Rahman is the same person as the alias “Ali Kushayb” – has no basis in authority nor any justification.

35. In its Finding (iv), the Chamber inferred that article 55(2) of the Statute was not applicable because the interaction between investigator P-1049 and intermediary P-0869 did not relate to the charges.<sup>72</sup> Finding (iv) is affected by an error of law: the discussions between investigator P-1049 and intermediary P-0869 were about the identification of Mr Abd-Al-Rahman, who, given that he stands accused only as the person designated by the alias “Ali Kushayb”, could not be dissociated from the charges. On the test laid down by the Chamber as to the applicability of article 55(2) of the Statute, it was therefore applicable.

36. **Finding (v):** Findings (i) and (ii) are highly inconsistent with the Chamber’s finding that once the OTP had ascertained to its satisfaction, on 27 December 2019, that intermediary P-0869 was in contact with Mr Abd-Al-Rahman, the OTP “was obliged to give the article 55(2) Notification to the accused at the earliest opportunity”.<sup>73</sup> As soon as it received the documents of 27 December 2019, the OTP should have pressed the intermediary for direct telephone contact with Mr Abd-Al-Rahman to be arranged with a view to giving him notice under article 55(2) of the Statute,<sup>74</sup> instead of insisting, as it did, on receiving the Video without giving him notice of his rights. Although that course of action was possible, the evidence before the Chamber shows that it was not even attempted. The Chamber made an error of law by not drawing conclusions from the OTP’s failure to attempt to establish direct contact with Mr Abd-Al-Rahman so as to give him notice of his rights under article 55(2) of the Statute before receipt of

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<sup>70</sup> [ICC-02/05-01/20-822](#), para. 6.

<sup>71</sup> [ICC-02/05-01/20-876](#), para. 48.

<sup>72</sup> [ICC-02/05-01/20-876](#), para. 50.

<sup>73</sup> [ICC-02/05-01/20-876](#), para. 51.

<sup>74</sup> ICC-02/05-01/20-T-104-CONF-FRA CT, p. 43, lines 10-27.

the Video, even though it was obliged to give him notice of them “at the earliest opportunity”.<sup>75</sup>

37. Instead, the Chamber delays the obligation to give notice under article 55(2) of the Statute for such time as the interaction continued to be conducted through intermediary P-0869, thus artificially rendering admissible the Video, which had been obtained in the meantime without Mr Abd-Al-Rahman being given notice of his rights. For the reasons set out above with respect to Findings (i) and (ii), this delaying of the time by which article 55(2) of the Statute became applicable is affected by an error of law.

**FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER TO:**

**1/ DETERMINE AND RULE** that the Chamber has erred in fact and law by finding that article 55(2) of the Statute was not applicable in the circumstances in which the Video was obtained;

**2/ DETERMINE** that the OTP violated article 55(2) of the Statute by requesting receipt of the Video, and reiterating this request, without giving prior notice under this article;

**3/ RULE** that this violation of article 55(2) of the Statute renders the Video inadmissible pursuant to article 69(7) of the Statute in that its admission would be antithetical to and would seriously damage the integrity of the proceedings.

[signed]

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Mr Cyril Laucci,  
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 20 March 2023,

At The Hague, Netherlands

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<sup>75</sup> [ICC-02/05-01/20-876](#), para. 51.