

Original: **English**No.: **ICC-02/05-01/20**
Date: **2 December 2022****TRIAL CHAMBER I****Before:** Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor**SITUATION IN DARFUR, SUDAN****IN THE CASE OF
THE PROSECUTOR *v.*
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)****Public
With Confidential Annex A****Prosecution’s Response to “Résumé des soumissions de la Défense aux fins
d’exclusion du document DAR-OTP-0216-0119 et autres documents associés du
dossier de l’affaire”, 28 November 2022, ICC-02/05-01/20-819****Source: Office of the Prosecutor**

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

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I. INTRODUCTION

1. The Prosecution submits this response to the Defence's "*Résumé des soumissions de la Défense aux fins d'exclusion du document DAR-OTP-0216-0119 et autres documents associés du dossier de l'affaire*" ("Defence Submissions")¹ in accordance with the instructions of Trial Chamber I ("Chamber") given on 16 November 2022.²

2. The Prosecution respectfully requests that the Chamber admit into evidence a video provided by Mr Ali Muhammad Ali Abd-Al-Rahman, also known as Ali Kushayb,³ and two subsequent telephones calls related to his surrender.⁴ At no stage did the Prosecution violate article 55(2), any other provision of the Rome Statute or the Rules of Procedure and Evidence ("Rules"), or the rights of Mr Abd-Al-Rahman, who was a suspect during the relevant period (the "Accused").

II. SUBMISSIONS

3. The video provided by the Accused on 20 March 2020 prior to his surrender⁵ is admissible because it is relevant, highly probative and the Defence does not dispute its provenance or authenticity. In addition, the requirements under article 55(2) of the Statute do not apply to this video because it was sent to the Prosecution by the person known as P-0869⁶ without any questioning of the Accused by the Prosecution. After the Defence raised the issue of identity, the Prosecution made clear that it intends to rely on this video to connect the Accused to the nickname "Ali Kushayb".⁷

¹ *Résumé des soumissions de la Défense aux fins d'exclusion du document DAR-OTP-0216-0119 et autres documents associés du dossier de l'affaire*, [ICC-02/05-01/20-819](#) ("Defence Submissions").

² ICC-02/05-01/20-T-099-ENG RT, p. 103, l. 11-23.

³ DAR-OTP-0216-0119; DAR-OTP-0220-3010 (English translation at DAR-OTP-0220-3015).

⁴ DAR-OTP-0216-0127; DAR-OTP-0215-6865 (English translation at DAR-OTP-0215-8924); DAR-OTP-0216-0128; DAR-OTP-0215-6873 (English translation at DAR-OTP-0215-8935).

⁵ DAR-OTP-0216-0119; DAR-OTP-0220-3010 (English translation at DAR-OTP-0220-3015).

⁶ P-0869 was previously unknown to the OTP prior to 26 December 2019, and the Prosecution did not initiate contact with him regarding the surrender of the Accused. The Prosecution was later informed that P-0869 had been recruited as a "Resource Person" for the Defence as of August 2022. Email from the Defence to the Prosecution on 22 August 2022 at 16:10.

⁷ The Prosecution notes that, contrary to the Defence's assertion, it did not first utilise this video during the confirmation of charges hearing. [Defence Submissions](#), para. 17. The Prosecution first cited this video as evidence of the connection between the Accused and the nickname "Ali Kushayb" in a filing on 7 December 2020. *See*

4. The two calls between the Prosecution and the Accused in April 2020⁸ are admissible because they are probative, their authenticity and provenance are not contested and article 55(2) of the Statute did not apply. There was no violation of the Accused's rights. These calls were conducted for the sole purpose of arranging the logistics of the surrender and were not intended to serve as "questioning" such that article 55(2) would apply. Neither the substance of the case nor the conflict in Darfur were discussed during these calls. However, the Defence has since argued that Mr Abd-Al-Rahman is not the same person as Ali Kushayb. As a result, these calls are now evidence directly relevant to an identified Defence line and highly probative.

5. Moreover, the Accused's reasons for surrendering, including any alleged external pressures, which have not been established by the Defence, are irrelevant to the question of whether these materials are admissible. The extreme remedy proposed by the Defence to exclude this relevant and probative evidence is disproportionate to any alleged prejudice.

Article 55(2) is not applicable to the video provided by the Accused

6. In the Defence Submissions, the Defence claims that article 55(2) of the Statute applied to the video in which the Accused identified himself as well as subsequent calls with the Prosecution.⁹ Article 55(2) and the rights enumerated therein only apply to questioning in the context of an investigation.¹⁰ It is evident from the Prosecution's communication with the person who sent the video, P-0869, that the Accused was not at any point "questioned" by the Prosecution for the purposes of article 55(2).¹¹ The

Prosecution's submissions on the evidence demonstrating that Ali Abd-Al-Rahman is also known as Ali Kushayb pursuant to ICC-02/05-01/20-196, [ICC-02/05-01/20-224](#) ("Nickname Submissions"), paras. 14(c), 23(a).

⁸ DAR-OTP-0216-0127; DAR-OTP-0215-6865 (English translation at DAR-OTP-0215-8924); DAR-OTP-0216-0128; DAR-OTP-0215-6873 (English translation at DAR-OTP-0215-8935).

⁹ [Defence Submissions](#), para. 10.

¹⁰ *Prosecutor v. Ongwen*, Public Redacted Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 50.

¹¹ For the complete timeline of the Prosecution's contact with P-0869 and the Accused prior to the surrender, see Annex A. On 24 and 28 November 2022, following a request from the Defence, courtesy copies of screenshots of WhatsApp messages between P-0869 and the Prosecution investigator were disclosed. The Prosecution only retrieved these WhatsApp messages from the phone of the Prosecution investigator, who was on extended leave due to personal circumstances, on 27 October and 28 November 2022.

video that the Accused provided through P-0869 in which he identified himself as “Kushayb” was filmed and sent before any direct contact between the Prosecution and the Accused and without any initiation, encouragement or direction from the Prosecution that he identify himself as “Kushayb”.

7. The purpose of the Prosecution’s communication with P-0869 was to establish that he was in fact in contact with the Accused, that is, the person for whom the arrest warrants had been issued. During the subsequent two telephone calls, the Prosecution of course sought to establish that it was the Accused on the telephone call and not another person. This confirmation is permissible both within the jurisprudence of the Court¹² and in domestic jurisdictions.¹³ Under article 59(2) of the Statute, the enforcement of an arrest warrant is designed to ensure “that there is identity between the person against whom the warrant is directed and the arrested person”.¹⁴

8. Other organs of the Court, including the Registry and the Pre-Trial Chamber, adopt a similar approach following a suspect’s surrender. During the Accused’s arrest in the Central African Republic in June 2020, the Registry undertook the appropriate steps to verify his identity.¹⁵ Under article 60(1) of the Statute and rule 121(1) of the Rules, the purpose of the initial appearance is for the Pre-Trial Chamber to satisfy itself that the person “subject to a warrant of arrest” appearing before the Court has been informed of the crimes which he or she is alleged to have committed and his or her

¹² Chambers of the Court have distinguished “questioning within the meaning of article 55(2)(d) of the Statute” from “interview[s] to establish the identity” of the Accused. *Prosecutor v. Bemba*, Decision on application for interim release, [ICC-01/05-01/08-73](#), para. 45.

¹³ See e.g. Code C of the UK “Revised Code of Practice for the detention, treatment and questions of persons by Police Officers”, Section 10.1(a) (“[A] person need not be cautioned if questions are for necessary purposes, including [...] ‘solely to establish their identity’”).

¹⁴ *Prosecutor v. Lubanga*, Judgment on Jurisdiction Appeal, [ICC-01/04-01/06-772](#), para. 41. See also *Prosecutor v. Ruto & Sang*, Confidential Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, [ICC-01/09-01/11-1753](#), para. 27 (“This is because the law generally allows criminal investigators to investigate crimes and even to conduct arrests, without requiring presence of counsel during the investigation or the eventual arrest; provided that all that is done at the point of any eventual arrest is simply to arrest the suspect and nothing more.”).

¹⁵ Corrected version of “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (“Confirmation Decision”), [ICC-02/05-01/20-433-Corr](#), paras. 54-55. See also [ICC-02/05-01/20-90-Conf-Exp](#), para. 13.

rights under the Statute. Accordingly, as part of this process, the Single Judge did not caution the Accused prior to asking him to identify himself during the initial appearance hearing.¹⁶

9. On 26 December 2019, the Prosecution first received notice that the Accused was willing to cooperate with the Court through an unsolicited email from P-0869. P-0869 sent an email to the ICC Public Affairs Unit indicating that he was in touch with the Accused, whom he referred to “Ali Kushayb”.¹⁷ That same date, P-0869 also sent a WhatsApp message to a Prosecution investigator stating that he had an important issue to discuss.¹⁸ The Prosecution investigator called P-0869 and asked him to confirm that he was in contact with the suspect¹⁹ and informed him that the Prosecution required proof that his email was genuine and proof of the identity of the suspect referred to as “Kushayb” in his email.²⁰ This initial request was made simply to establish that P-0869 was genuinely in contact with the Accused, the person subject to the arrest warrants. Such confirmation is routine when the Prosecution receives unsolicited messages from unknown persons seeking to provide assistance.

10. On 27 December 2019, P-0869 forwarded to the Prosecution photographs of a nursing certificate dated 20 May 2007 and a medical assistant diploma dated 3 June 2007.²¹ The certificates included attached photos of the Accused with the name “Ali Mohamed Ali”²² and “Ali Mohamed Ali Abdel-Rahman”,²³ respectively. The 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, nor did it ever request that

¹⁶ [ICC-02/05-01/20-T-001-ENG ET](#), p. 3, l. 6, 24-25 and p. 4, l. 1-2.

¹⁷ DAR-OTP-0217-0030 (English translation at DAR-OTP-0215-6799).

¹⁸ DAR-OTP-00000537 (English translation at DAR-OTP-00000601).

¹⁹ DAR-OTP-0215-7063.

²⁰ DAR-OTP-0215-9698.

²¹ DAR-OTP-0215-9698; DAR-OTP-00000530; DAR-OTP-00000531.

²² DAR-OTP-0215-5829.

²³ DAR-D31-0001-0002.

assurances be made that this legal name referred to a person also known by the nickname “Ali Kushayb”.

11. Nevertheless, almost three months later, on 20 March 2020, P-0869 sent a video to the Prosecution²⁴ in which the Accused identified himself as “Ali Muhammad Ali Abd-Al-Rahman nicknamed Kushayb”.²⁵ This video was unsolicited, which is obvious from the Prosecution’s contemporaneous correspondence with P-0869.²⁶ The Prosecution did not speak with the Accused up to this point – let alone “question” him – such that article 55(2) would apply.

12. As the above makes clear, the Prosecution did not at any time request that the Accused identify himself by the name “Ali Kushayb” or otherwise encourage or direct him to send a video to that effect in order to produce “evidence of the alias” as the Defence inaccurately asserts.²⁷ The Prosecution would have been satisfied if P-0869 had merely provided, for example, a copy of the Accused’s passport, other identification or arranged a telephone call with the Accused to confirm identity, and indeed, it was content with the certificates provided on 27 December 2019.²⁸

Article 55(2) is not applicable to the telephone calls with the Accused

13. Further, the subsequent telephone calls that the Prosecution made with the Accused and P-0869 between 6 April and 4 June 2020 were for the sole purpose of facilitating surrender and an interview with the Accused. At that time, the Prosecution

²⁴ DAR-OTP-00000537 (English translation at DAR-OTP-00000601); DAR-OTP-00000539 (English translation at DAR-OTP-00000607); DAR-OTP-00000540 (English translation at DAR-OTP-00000608).

²⁵ DAR-OTP-0215-7063; DAR-OTP-0215-9698; DAR-OTP-0216-0119; DAR-OTP-0220-3010 (English translation at DAR-OTP-0220-3015 at 3017, l. 3-4).

²⁶ DAR-OTP-00000532 (English translation at DAR-OTP-00000596); DAR-OTP-00000533 (English translation at DAR-OTP-00000597); DAR-OTP-00000534 (English translation at DAR-OTP-00000598); DAR-OTP-00000535 (English translation at DAR-OTP-00000599); DAR-OTP-00000536 (English translation at DAR-OTP-00000600); DAR-OTP-00000537 (English translation at DAR-OTP-00000601). The Accused provided additional videos through P-0869 on 25 March, 10 April, 8 May, 27 May and 31 May 2020, again unsolicited. *See* Annex A.

²⁷ [Defence Submissions](#), para. 15.

²⁸ The Prosecution investigator merely enquired as to whether “there [was] a message for us from one of the wanted individuals requiring our follow-up”. DAR-OTP-00000537 (English translation at DAR-OTP-00000601 at 000002).

rightly did not deem it necessary to provide cautions under article 55(2) because the purpose of the calls was logistical, not substantive, investigative or evidentiary.²⁹

14. The first call on 6 April 2020³⁰ was organised only to establish that the Prosecution and the Accused would be able to communicate on the telephone given the technical difficulties of calling persons in remote areas of Africa.³¹ During this call with the Accused and P-0869, once connected, the Prosecution investigator introduced himself to the person on the other end of the line. The Prosecution investigator then asked that person to introduce himself.³² In response, and without intervention, the Accused identified himself as “Ali Muhammad Ali Abd-Al-Rahman – quote unquote, Kushayb”.³³

15. When the Accused introduced himself, the link between the legal name “Ali Muhammad Ali Abd-Al-Rahman” and the nickname “Ali Kushayb” was not yet in dispute and the Prosecution already possessed substantial evidence of that link.³⁴ There was no basis for the Prosecution to anticipate that the Accused would later deny his connection to his nickname. The Prosecution investigator explained that the purpose of the call was “a technical and logistical test run”³⁵ and accurately stated that “we’re not going to talk to you about issues pertaining to the case [...], the substance of the case”.³⁶

16. On 7 April 2020, there was a second call between the Senior Trial Lawyer, the Prosecution investigator, P-0869 and the Accused.³⁷ The Accused was again accurately

²⁹ DAR-OTP-0215-9698.

³⁰ DAR-OTP-0216-0127; DAR-OTP-0215-6857; DAR-OTP-0215-6859; DAR-OTP-0215-6861; DAR-OTP-0215-6863; DAR-OTP-0215-6865 (English translation at DAR-OTP-0215-8924).

³¹ At that point in time, the Prosecution was not aware of the location of the Accused.

³² DAR-OTP-0215-8924 at 8927, l. 45-49. Before the Accused identified himself, the Prosecution investigator only referred to him as “Uncle Ali” or simply “Ali”. *See e.g.* DAR-OTP-0215-8924 at 8927, l. 53 and 8929, l. 110-111.

³³ DAR-OTP-0215-8924 at 8927, l. 67 and 8927_01.

³⁴ *See* [Nickname Submissions](#).

³⁵ DAR-OTP-0215-8924 at 8929, l. 126-128.

³⁶ DAR-OTP-0215-8924 at 8929, l. 146-149.

³⁷ DAR-OTP-0216-0128; DAR-OTP-0215-6873 (English translation at DAR-OTP-0215-8935).

informed that they were not going to talk about “what happened in Darfur”, but only information that related to his current situation.³⁸ The Prosecution clarified that the purpose of the call was to arrange to meet with the Accused in a safe location where an interview could then take place.³⁹ When asked to introduce himself, the Accused stated “I’m Ali Muhammad Ali Abd-Al-Rahman, also known as Kushayb”.⁴⁰

17. In both instances in which the Accused referred to himself as “Kushayb”, it was in the standard context of any telephone call to establish who is speaking. Contrary to the Defence assertions that these calls amount to an “interrogation” as it is understood in national and international jurisprudence,⁴¹ or “questioning” under article 55(2) of the Statute, it is clear that the purpose of the calls between the Prosecution and the Accused through P-0869 was not to elicit evidence; rather, it was to facilitate his surrender.

The video and two calls are directly relevant to an identified Defence line

18. When the Prosecution was first informed by P-0869 that the Accused was willing to cooperate on 26 December 2019, the link between the Accused’s legal name “Ali Muhammad Ali Abd-Al-Rahman” and the nickname “Ali Kushayb” was not yet in dispute. The Prosecution already knew that the nickname of the Accused was “Ali Kushayb” and was not surprised when he introduced himself by this name in the two telephone calls. Indeed, the Accused had already used the nickname “Kushayb” in the unsolicited video sent to the Prosecution. The Prosecution was not aware, and could not reasonably have been expected to be aware, that the Accused would later argue that he did not have this nickname.⁴²

³⁸ DAR-OTP-0215-8935 at 8939, l. 79-80.

³⁹ DAR-OTP-0215-8935 at 8939, l. 89-92.

⁴⁰ DAR-OTP-0215-8935 at 8940, l. 111-112. Additional calls on logistical matters were made on 10 April, 22 April, 8 May and 4 June 2020. See Annex A.

⁴¹ [Defence Submissions](#), para. 7.

⁴² P-0869 consistently referred to the Accused as “Ali Kushayb” throughout his correspondence with the OTP. See e.g. DAR-OTP-0217-0030 (English translation at DAR-OTP-0215-6799); DAR-OTP-00000539 (English translation at DAR-OTP-00000607); DAR-OTP-00000547 (English translation at DAR-OTP-00000615). In

19. In the Decision on the Confirmation of the Charges, the Pre-Trial Chamber similarly observed that “[n]either in the context of [Mr Abd-Al-Rahman’s] arrest, nor during his appearance before the authorities in the Central African Republic did Mr Abd-Al-Rahman mention or otherwise raise the issue of mistaken identity: all these acts were undertaken on the basis of the First and Second Warrants of Arrest, both using the name ‘Ali Kushayb’ to identify the suspect.”⁴³ Additionally, with respect to the video that is presently in dispute, the Pre-Trial Chamber stated that the Accused “us[ed] the name ‘Ali Kushayb’ when introducing himself, with no hint or attempt at a denial, *distinguo* or additional qualification.”⁴⁴

20. The Defence acknowledges that it was only on the basis of the initial appearance on 15 June 2020 that the Prosecution became aware that the Accused intended to dispute his connection to the nickname “Ali Kushayb”.⁴⁵ Even if the Prosecution had known that the Defence would dispute the Accused’s connection to the nickname “Ali Kushayb”, the actions that it took to confirm that P-0869 was in fact in contact with the person subject to the arrest warrants would not have changed.⁴⁶ The Prosecution has never contested that “Ali Muhammad Ali Abd-Al-Rahman” is in fact the Accused’s legal name, and that “Ali Kushayb” is his widely known nickname,⁴⁷ and it was satisfied when it received certificates issued in his legal name alone.

addition, on 27 December 2019, the Prosecution received a recording of P-0869 speaking to other unidentified third parties in which they also refer, multiple times, to “Ali Kushayb”. The Prosecution was not involved in this recorded call and does not know the identity of the persons with whom P-0869 was speaking. DAR-OTP-00000453; DAR-OTP-00000477 (English translation at DAR-OTP-00000481).

⁴³ [Confirmation Decision](#), para. 54.

⁴⁴ [Confirmation Decision](#), para. 54. The Pre-Trial Chamber further observed that it was thus “highly unlikely that an individual opting to surrender only because honestly believing that it has been befallen by an instance of casual and unfortunate homonymy [...] would choose this approach.” [Confirmation Decision](#), para. 55.

⁴⁵ [Defence Submissions](#), para. 15.

⁴⁶ Even when contacting individuals for whom it intends to conduct an investigative interview under article 55(2), it is common practice for the Prosecution to ask the suspect his or her name in the process of making the necessary arrangements. This practice is not done in contemplation of that information being used to serve an investigative or evidentiary purpose. Instead, the identification process is a necessary and appropriate practicality.

⁴⁷ Prosecution’s Response to “Requête aux fins de modification du nom porté au dossier de l’affaire ICC-02/05-01/20”, [ICC-02/05-01/20-4](#), para. 8.

21. While the subsequent “phone discussions [...] of a non-evidential nature”⁴⁸ that were made with the Accused were not conducted for an investigative purpose, circumstances have now changed. Through the course of trial, the Defence has argued that the Accused is not the man that numerous witnesses have identified as “Ali Kushayb”, or perhaps that such a person never existed at all. Under article 66(2) of the Statute, the Prosecution is obliged to prove the guilt of the Accused, which necessarily involves rebutting any identified defences. Therefore, the Prosecution is entitled to present evidence disproving those defences.⁴⁹ Even assuming that there had been some error on the part of the Prosecution, which there was not, the Accused has opened the door to admission of these materials.

22. The Defence does not dispute that the man who appears in the video is the Accused, nor does it dispute that he affirmatively identified himself using the name “Kushayb” in both the video he provided and the two subsequent calls with the Prosecution.⁵⁰ As a result, these materials related to the Accused’s surrender, in particular the video that he provided, are relevant and highly probative to resolving the issue of whether the Accused has the nickname “Ali Kushayb”.

The Accused’s purported reasons for surrendering are irrelevant to admissibility

23. The Prosecution recognises that suspects surrender to the Court for a variety of reasons, which may remain unknown. The Prosecution could not reasonably have been aware of the Accused’s alleged mental state and reasons for choosing to surrender to the Court when it received the video from him through P-0869 and arranged subsequent telephone calls. Moreover, the reasons for the Accused’s voluntary surrender are ultimately irrelevant to the separate question of whether the

⁴⁸ DAR-OTP-0215-9698 at 9699-9700. The Prosecution notes that it made the assessment that the phone calls with the Accused would be of a “non-evidential nature” in the context of his surrender in April 2020, prior to the first indication that the Accused intended to dispute his connection to the nickname “Ali Kushayb”.

⁴⁹ *Prosecutor v. Ongwen*, Decision on Prosecution Requests Related to Mental Health Expert Evidence, [ICC-02/04-01/15-1073](#), para. 12.

⁵⁰ [Defence Submissions](#), para. 3.

video and the two calls with the Prosecution are relevant, probative and admissible in trial proceedings against him.

24. The Accused faced no coercion whatsoever on the part of the Prosecution at any time. The Accused was not coerced by the Prosecution when he chose to provide the video identifying himself, nor does the Defence provide proof of any coercion. External pressures or considerations which are outside of the Prosecution's control that may or may not have influenced the Accused, such as seeking the protection of the Court,⁵¹ have no impact on the respect for his rights arising under the Statute. The Prosecution acted properly when receiving materials from the Accused through P-0869 and in its telephone calls which it conducted to facilitate his surrender in accordance with its duties under article 54(1) to establish the truth and take appropriate measures to ensure the effective investigation and prosecution of crimes. Therefore, this evidence relevant to the Accused's use of the nickname "Ali Kushayb" is admissible.

The remedy of exclusion requested by the Defence is extreme and unwarranted

25. The Defence proposal to exclude this unquestionably relevant and probative evidence is extreme and unwarranted, in particular with respect to the video which was provided by the Accused under circumstances that the Prosecution could not control.⁵² Even if the Prosecution had committed a technical violation in its telephone calls with the Accused, which is plainly not the case, exclusion of this evidence is not appropriate. Evidence obtained through "interview[s] to establish [...] identity"

⁵¹ [Defence Submissions](#), para. 14.

⁵² "Such an analysis [under article 69(7)] may include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only insofar as those factors are relevant to the gathering of the specific evidence in this case by the ICC Prosecution." *Prosecutor v. Al Hassan*, Public redacted version of "Decision on requests related to the submission into evidence of Mr Al-Hassan's statements", [ICC-01/12-01/18-1475-Red](#), para. 42.

without article 55(2) provisions would only entail a potential exclusion pursuant to article 69(7).⁵³

26. The Defence acknowledges that the video in question is of the Accused and that he openly identifies himself as “Kushayb”.⁵⁴ The Defence has thus verified its source and not called into doubt its reliability as voluntary self-identification by the Accused. The Prosecution had no real ability to control the materials that the Accused chose to provide through P-0869 to indicate his willingness to cooperate. Likewise, the Defence does not dispute the authenticity of the telephone calls between the Prosecution and the Accused, in which he unambiguously claims the nickname “Kushayb”.

27. Furthermore, the admission of this evidence would not damage the integrity of the proceedings. The video provided by the Accused, in particular, was given without entreaty, inducement or misrepresentation which is evident throughout the Prosecution’s communications.⁵⁵ As a result, any irregularities in its provenance cannot be attributed to the Prosecution when it acted in good faith and could not reasonably have been expected to anticipate the defence that the Accused was not “Ali Kushayb”. The Prosecution also conducted itself appropriately and ethically during its telephone calls with the Accused that were intended merely to arrange the logistics of his surrender. This procedure is consistent with the jurisprudence of the Court and domestic jurisdictions.

28. The relevance and probative value of this evidence due to the Defence’s reliance on a mistaken identity defence greatly outweigh the potential prejudice of any alleged violation. A video, voluntarily provided by the Accused, in which he identifies himself using the nickname “Ali Kushayb”, a name he now disputes belongs to him, is necessary for the Chamber’s determination of the truth. Thus far, the Defence has failed to demonstrate any prejudice to the Accused emanating from this

⁵³ *Prosecutor v. Bemba*, Decision on application for interim release, [ICC-01/05-01/08-73](#), para. 45.

⁵⁴ [Defence Submissions](#), para. 3.

⁵⁵ See Annex A.

voluntary act. Any alleged harm can be mitigated by the Chamber admitting this relevant and probative evidence and affording it the appropriate weight in light of any extrinsic factors or circumstances. Not only should the video be admitted, but it should be given full weight in the overall determination of the case, including in consideration of sentencing in the event of a conviction.

III. CONCLUSION

29. There has been no violation of article 55(2) of the Statute nor any other provision of the Statute or the Rules by the Prosecution in relation to the receipt of the video or the conduct of the telephone calls with the Accused. For the foregoing reasons, the Prosecution respectfully requests that the Defence request for exclusion be denied in its entirety and the video and the two telephone calls be admitted into evidence.



Karim A. A. Khan KC
Prosecutor

Dated this 2nd day of December 2022

At The Hague, The Netherlands