



DISSENTING OPINION OF
JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

I. INTRODUCTION

1. This appeal arises from the 17 February 2023 decision of Trial Chamber I (hereinafter: “Trial Chamber”) that rejected the Defence’s objections to the admissibility of a video in which the accused introduced himself as Ali Muhammad Ali Abd-Al-Rahman, nicknamed “Kushayb” (hereinafter: “Video”),¹ and recognised its admissibility into evidence.²

2. In today’s judgment, the Majority of the Appeals Chamber (hereinafter: “Majority”) confirms the Trial Chamber’s decision.³ In its view, the Trial Chamber did not err in fact (First Ground of Appeal) or law (Second Ground of Appeal).

3. I join the Majority in relation to its determination of the two preliminary issues that arise under the second ground of appeal, with those findings therefore being unanimous.⁴ I also agree with the general principles stated by the Majority in the first five paragraphs of its determination of the merits of the second ground of appeal.⁵

4. However, I respectfully disagree with the Majority in relation to the remainder of its findings and conclusions under both the first and second grounds of appeal. Contrary to the determinations of the Majority, I find that the Trial Chamber erred in both fact and law. I therefore also disagree with the conclusion of the Majority that the Impugned

¹ DAR-OTP-0216-0119. *See also* the transcript of the Video: DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

² [Decision on the admissibility of video \(DAR-OTP-0216-0119\) and records of telephone calls \(DAR-OTP-0216-0127, DAR-OTP-0216-0128\)](#), ICC-02/05-01/20-876 (hereinafter: “Impugned Decision”), para. 63(i).

³ [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled “Decision on the admissibility of video \(DAR-OTP-0216-0119\) and records of telephone calls \(DAR-OTP-0216-0127, DAR-OTP-0216-0128\)”](#), 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: “Majority Judgment”).

⁴ [Majority Judgment](#), paras 74-78.

⁵ [Majority Judgment](#), paras 79-83.

Decision should be confirmed. I set out my reasons below, having regard to the applicable standard of appellate review.⁶

5. For the avoidance of doubt, my references in this opinion to “the Prosecution” are references to the Office of the Prosecutor.

6. First, contrary to the view of the Majority, I consider that the Trial Chamber erred in fact as it failed to take into account relevant facts and incorrectly assessed evidence surrounding the production and sending of the Video. I am of the view that the Trial Chamber did not pay sufficient heed to the fact that, wherever the idea of the Video originated, its subsequent production and transmission to the Prosecution was encouraged and coordinated by P-1049 as a part of the Prosecution’s investigation – and that should have been the express factual basis for its legal analysis. In addition, the Trial Chamber placed too much reliance on the evidence of the Prosecution’s investigators while at the same time expressing concerns about various shortcomings in the steps that they took prior to receiving the Video and without having heard any evidence from the intermediary. I therefore do not regard the factual conclusions of the Trial Chamber to be reasonable in the circumstances of this case.

7. Second, I consider that the Trial Chamber erred in law. I am not persuaded by the Majority’s finding that article 55(2) of the Statute is not applicable to the circumstances of this case and I disagree with its restrictive interpretation of that provision.

8. As I noted in the *Mokom* OA3 Dissenting Opinion, I reaffirm that the statutory framework of the Court provides a staunch safeguard and mechanism that requires a balance between the fundamental rights of a suspect or an accused to a fair trial and due process with the interests of justice.⁷ In particular, pursuant to article 64(2) of the Statute, a chamber is obliged to ensure that the proceedings before it are conducted with full respect for the rights of the accused, including the rights of a suspect enshrined in article 55(2) of the Statute which reproduces internationally recognized human rights, and to guarantee the interests of justice and the fairness of the proceedings.

⁶ See [Majority Judgment](#), paras 19-24.

⁷ *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Dissenting Opinion of Judges Solomy Balungi Bossa and Judge Luz del Carmen Ibáñez Carranza](#), 19 December 2022, ICC-01/14-01/22-124-Anx-Red (OA3) (hereinafter: “*Mokom* OA3 Dissenting Opinion”), para. 9.

9. As such, I consider that the rights enumerated in article 55(2) of the Statute should be applicable at all stages of the Prosecutor's investigation, from the moment when there are grounds to believe that a person has committed a crime within the jurisdiction of the Court. I further consider that article 55(2) applies whenever a suspect is about to be questioned, regardless of the subject-matter of the questioning. That includes questions relating to the identification of the suspect, which necessarily forms a part of an investigation and is of particular relevance in this case where there is a dispute over identity. On the facts of this case, I am of the view that there has been a violation of article 55(2) of the Statute.

10. Third, I consider that these errors of fact and law materially affected the Impugned Decision. Had it not been for these errors, the Trial Chamber would have found a violation of article 55(2) of the Statute. In those circumstances, it would have been required to proceed to consider whether, as a result of that violation, the Video should be excluded from evidence pursuant to the terms of article 69(7) of the Statute – a provision that it did not consider in substance as a result of its errors. It would therefore have rendered a substantially different decision as it would have been taken on a different legal basis. As such, I would have reversed the Impugned Decision and remanded this matter to the Trial Chamber so that it could have been considered on the correct legal basis of whether the evidence should have been declared inadmissible under article 69(7)(a) or (b) of the Statute.

II. KEY FINDINGS

11. The rights provided for in article 55(2) of the Statute must be given to a suspect before any questioning of that suspect by the Prosecutor takes place.

12. Any inquiries relating to the identity of a suspect form a part of the Prosecutor's investigation. Inquiries in that context therefore constitute 'questioning' within the meaning of article 55(2) of the Statute when those inquiries are made of a person in relation to whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court. That is the case whether the inquiries are made by the Prosecutor, his investigators or other members of the Office of the Prosecutor directly, or by third parties acting on behalf of, and/or as a result of any request from, the Prosecutor, his investigators or other members of the Office of the Prosecutor.

13. The suspect is therefore required to be given notification of the rights under article 55(2) of the Statute prior to any such inquiries being made of him or her. A failure to do so constitutes a violation of article 55(2) of the Statute, when applied and interpreted consistently with internationally recognized human rights.

14. As such, any information obtained from the suspect in the above circumstances that the Prosecutor later wishes to rely upon as evidence against that suspect is potentially inadmissible under article 69(7) of the Statute, as it was obtained in violation of the Statute and/or internationally recognized human rights.

III. RELEVANT FINDINGS OF THE TRIAL CHAMBER

15. I refer generally to the relevant factual background from the Impugned Decision and relevant findings of the Trial Chamber set out by the Majority⁸ and wish to highlight the following points.

16. As part of its consideration of the facts surrounding the sending of the Video, the Trial Chamber found as follows at paragraphs 22 and 23 of the Impugned Decision:

[Prosecution investigator] P-1049 confirmed that during this initial call [on 27 December 2019], the intermediary informed him that individuals who were in direct contact with the accused were preparing, and could share, some video material of the accused. P-1049 stated that he might have encouraged this proposition by the intermediary. 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’. 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. P-1049 acknowledged that he followed up with the intermediary about the video that the latter had proposed to send. [...].

Later, on 27 December 2019, the intermediary sent an audio file via WhatsApp to P-1049. On the same date, P-1049 also received from the intermediary, via WhatsApp, photos of a ‘Technical Secondary Nursing Certificate’ and a ‘Diploma of General Medical Assistant’ bearing the photo and name of the accused. 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

⁸ [Majority Judgment](#), paras 26-36.

content with the certificates as proof of contact between the intermediary and the accused.⁹

17. In the section of the Impugned Decision headed “The Chamber’s Findings”, the Trial Chamber considered that it “must first make a finding as to whether provision of the video, as proof of identity, originated with the Prosecution”.¹⁰ The Trial Chamber stated that “P-1049 was adamant that the suggestion of a video emanated from the intermediary”.¹¹

18. The Trial Chamber found that, with the Defence having exercised its right not to present evidence on the issues from the accused or the intermediary, “the creditworthiness of the Investigators is the crux of the Chamber’s determination”, finding that they were candid, credible and reliable.¹² The Trial Chamber thereafter found as follows:

The Chamber, having found P-1049 credible and noting that the Defence acknowledges same, is satisfied that P-1049 did not ask the intermediary for the video. Accordingly, the Chamber is further satisfied that any unlogged conversations which took place between P-1049 and the intermediary have no bearing upon its decision. The Chamber is satisfied the idea of sending the video originated with the intermediary and not the Investigators and that 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.¹³

19. The Trial Chamber further found that, “[...] an Article 55(2) Notification was not required until after receipt of the video which provided clear and irrefutable evidence that the intermediary was in contact with the accused. The Prosecution was obliged to give the Article 55(2) Notification to the accused at the earliest opportunity”.¹⁴

20. The Trial Chamber also rejected the Defence’s argument that, at the relevant time, the Prosecution should have been aware that the allegation that “Ali Kushayb” was the same person as Mr Abd-Al-Rahman would be in dispute in this case.¹⁵

⁹ [Impugned Decision](#), paras 22-23 (footnotes omitted).

¹⁰ [Impugned Decision](#), para. 44.

¹¹ [Impugned Decision](#), para. 44.

¹² [Impugned Decision](#), para. 45.

¹³ [Impugned Decision](#), para. 46.

¹⁴ [Impugned Decision](#), para. 51.

¹⁵ [Impugned Decision](#), para. 47.

21. As regards the application of article 55(2) of the Statute, the Trial Chamber found that the provision “does not apply to the circumstances surrounding the sending of the video by the intermediary and its receipt by the Prosecutor”, because “[a]rticle 55(2) of the Statute is designed to deal with situations where the suspect is questioned *directly about alleged crimes* under the jurisdiction of the Court”, and the “[i]nteractions between the Prosecution and the intermediary do not fall under this category”.¹⁶

22. The Trial Chamber concluded that “[s]ince there is no violation of Article 55(2) of the Statute, or any [other relevant legal principle], the Chamber declines to exclude the video under article 69(7) of the Statute”.¹⁷ It therefore did not analyse the substantive provisions of article 69(7) of the Statute in light of its findings that there had not been any violation of article 55(2) of the Statute or internationally recognized human rights.¹⁸

IV. MERITS

A. Relevant legal framework

23. At the outset, I recall that article 64(2) of the Statute obliges a chamber to ensure that the proceedings before it are fair and “conducted with *full respect for the rights of the accused*”.¹⁹

24. Pursuant to article 21(3) of the Statute, a chamber is obliged to apply and interpret the regulatory framework of the Court in accordance with internationally recognized human rights.

25. Article 55 of the Statute concerns the rights of persons during an investigation, with article 55(1) providing, *inter alia*, that a person “[s]hall not be compelled to incriminate himself or herself or to confess guilt”.

26. Article 55(2) of the Statute provides:

Where 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

¹⁶ [Impugned Decision](#), para. 48 (emphasis added).

¹⁷ [Impugned Decision](#), para. 52.

¹⁸ See [Impugned Decision](#), para. 52.

¹⁹ Emphasis added.

under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

27. Rules 111 to 113 of the Rules of Procedure and Evidence provide further regulation of article 55(2) of the Statute.

28. Lastly, article 69(7) of the Statute states that

[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

B. First ground of appeal

29. I am of the view that, when considering whether article 55(2) of the Statute applied to the circumstances of this case, the Trial Chamber, in the part of its decision in which it set out its findings,²⁰ failed sufficiently to take into account that, wherever the idea of the Video originated, its subsequent production and transmission to the Prosecution was carried out on the specific encouragement of P-1049 and further to

²⁰ See [Impugned Decision](#), paras 43-52.

repeated requests by him for it to be sent.²¹ It was made in the context of the Prosecution’s investigation, specifically in relation to proving that the intermediary was in contact with the accused, which involved confirming the identity of the principal suspect in the case. P-1049’s communications with the intermediary were therefore part of a typical prosecutorial investigation, which mandated full respect for the rights of the suspect,²² including those rights specifically set out in article 55(2) of the Statute. The failure to make clear the extent to which P-1049 had encouraged and coordinated the production and transmission of the Video in its factual findings at paragraph 46 of the Impugned Decision – including by reference to the manner in which P-1049 had answered certain questions from the Presiding Judge about this topic²³ – therefore underplayed these key features of the case. They should have formed the express factual basis for the Trial Chamber’s legal findings.

30. Moreover, I consider that the Trial Chamber’s factual conclusions are unreasonable, given the extensive reliance that it placed on the evidence of the

²¹ See [Impugned Decision](#), paras 22, 24. See also the following passages of the evidence of P-1049: “Q. [...] Even if it was [the intermediary] who first raised the issue of video, you must have said to him something along the lines of, “Yes, that would be a great idea”? Do you accept that? A. [12:31:03] Yeah, I would [...] say that’s something that would prove his contact. That’s a good piece of evidence. Q. [12:31:11] Yes. You certainly wouldn’t have said, “Oh, no, don’t bother with a video. We won’t need that,” for example? A. [12:31:21] No, I wouldn’t [...] have said that”, [Transcript of the hearing of 24 January 2023](#), p. 53, lines 10-17; and, as referenced at [Appeal Brief](#), para. 15, with respect to a communication on 1 January 2020: “[Q.] ‘Are 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? A. [12:56:01] Yeah, I was waiting to get feedback from him”, [Transcript of the hearing of 24 January 2023](#), p. 62, lines 4-7; and, with respect to a communication on 15 February 2020: “Q. [13:01:40] That second question is essentially you chasing the intermediary for this video that’s been long-promised; right? A. [13:01:47] Yes”, [Transcript of the hearing of 24 January 2023](#), p. 64, lines 11-13.

²² See article 54(1)(c) of the Statute.

²³ See [Appeal Brief](#), para. 13, referring to the following passage of the evidence of P-1049: “PRESIDING JUDGE KORNER: [12:46:07] Don’t worry about that, sir. You’ve agreed with Mr Edwards there’s no reason why you wouldn’t have asked for the video to be sent. The question is did you? Did you ask the intermediary at that stage when he mentioned a video to send it to you? THE WITNESS: [12:46:32] If the video is done, then we are -- PRESIDING JUDGE KORNER: [12:46:42] No, no, no. Don’t -- no, no. Just concentrate on the question. Did you, in that conversation on 27 December, ask the intermediary to send you the video? It’s really not a difficult question. THE WITNESS: [12:47:10] I think the focus here is too much on the video. PRESIDING JUDGE KORNER: [12:47:12] No, no – I’m sorry. THE WITNESS: [12:47:18] Yes. PRESIDING JUDGE KORNER: [12:47:19] You really aren’t here to guess or second-guess what’s important to us and what isn’t. I simply want you to answer the question. Did you, in that conversation of 27 December, ask the intermediary to send you the video? THE WITNESS: [12:47:47] I do not recall, but I am more inclined to be receptive for the video to be sent. PRESIDING JUDGE KORNER: [12:47:58] I’m sorry, I don’t understand what that means. What does “I am more inclined to be receptive for the video to be sent” mean? THE WITNESS: [12:48:10] Yes, I am favourable to the idea of receiving a video if it is in existence. PRESIDING JUDGE KORNER: [12:48:18] Okay. And you did express your favourability to the intermediary? THE WITNESS: [12:48:32] Yes, it might be that I have expressed my favourability to that. PRESIDING JUDGE KORNER: [12:48:41] Okay, thank you”, [Transcript of the hearing of 24 January 2023](#), p. 59, line 6-p. 60, line 6.

Prosecution's investigators while at the same time setting out its concerns about matters that clearly demonstrate the shortcomings in respect of the procedures adopted by the Prosecution during the period preceding the sending of the Video.

31. In this regard, I note that no record of the initial telephone conversation between P-1049 and the intermediary was made in the Prosecution's investigation log;²⁴ P-1049 acknowledged the possibility of having had other conversations with the intermediary which were not recorded in the investigation log; and P-1049 did not recall the number of times that he spoke to the intermediary between the first call on 27 December 2019 and when the Video was sent on 20 March 2020.²⁵ The Trial Chamber stated that, having assessed the evidence of the Prosecution's investigators, it was unable to dismiss the suggestion of the Defence that there were further telephone calls between P-1049 and the intermediary which were not logged.²⁶

32. Furthermore, it is relevant to stress that the Trial Chamber expressed its concerns in the Impugned Decision about the following: "(i) P-1049 lacked adequate investigative training, experience and supervision at the time of the events in question; (ii) relevant personnel did not properly record conversations which took place with the intermediary; (iii) relevant personnel did not properly report and communicate information and developments to their superiors and teams; and (iv) the Prosecution also did not record information in the investigation management system in a timely manner, if at all".²⁷

33. Moreover, I note the Trial Chamber's observation that the Prosecution's standard operating procedure does not contain guidance on communication between the Prosecution and a suspect through an intermediary.²⁸

34. The above facts and observations of the Trial Chamber, taken as a whole, necessarily cast doubt upon the reliability of the events as put forward by the Prosecution's investigators.

²⁴ [Impugned Decision](#), para. 21.

²⁵ [Impugned Decision](#), para. 26.

²⁶ [Impugned Decision](#), para. 44.

²⁷ [Impugned Decision](#), para. 62.

²⁸ See [Impugned Decision](#), para. 62.

35. I further note that the Trial Chamber stated that the only evidence before it emanated from the documents and evidence of the two Prosecution investigators, who were called *proprio motu* by the Trial Chamber,²⁹ “as a consequence of the Defence duly exercising its right not to present evidence on the issues, either from the accused or from the intermediary”.³⁰

36. Recalling a chamber’s obligation to ensure that the proceedings before it are fair and conducted with full respect for the rights of the accused in accordance with article 64(2) of the Statute, I am of the view that the Trial Chamber could have exercised its ability to summon witnesses and called, or examined the option of calling, the intermediary *proprio motu*, pursuant to article 64(6)(b) of the Statute, to provide evidence relating to the declarations of the investigators, potentially contrasting them. The intermediary’s identity would have been known to the Trial Chamber. However, the Trial Chamber did not do so. Therefore, I consider that it is neither correct nor fair to punish the Defence for an omission of the Trial Chamber, especially in a process that is not adversarial in nature. Accordingly, in my view, the aforementioned shortcomings in respect of the procedures adopted by the Prosecution concerning the Video, compounded by the Trial Chamber’s omission that resulted in limited evidence in this regard, necessarily cast doubt about the reliability of the investigators and their account of the different stages of their contact with the intermediary.

37. In light of the above, I consider that the Trial Chamber failed to take into account relevant facts and incorrectly assessed evidence in relation to the production and sending of the Video, and that its conclusions in that regard at paragraph 46 of the Impugned Decision were unreasonable – in particular its failure to acknowledge the degree to which P-1049 encouraged the production and sending of the Video as a significant part of the Prosecution’s investigation in this case. Those failings of the Trial Chamber amount to errors of fact. I therefore respectfully disagree with the findings of the Majority that there were no errors of fact in the conclusions of the Trial Chamber.³¹ In particular, I disagree with the finding of the Majority that the Trial Chamber sufficiently took into account its findings at paragraph 22 of the Impugned Decision

²⁹ See [Impugned Decision](#), para. 9.

³⁰ [Impugned Decision](#), para. 45.

³¹ [Majority Judgment](#), paras 45, 55.

when it stated its conclusions at paragraph 46 of that decision;³² and with the Majority's acceptance of the Trial Chamber's findings which were based upon the reliability of the evidence of the investigators.³³

C. Second ground of appeal

I. Article 55(2) of the Statute, its applicability to this case and international human rights

38. Article 55(2) of the Statute provides that “[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”, “that person shall also have the [...] rights [enumerated in the provision] of which he or she shall be informed prior to being questioned”.

39. It is therefore clear from its wording that the rights under article 55(2) of the Statute apply prior to a person being questioned. In my view, recalling article 21(3) of the Statute, the rights enumerated in article 55(2) of the Statute, which reflect internationally recognized human rights to due process, should be upheld at all stages of the Prosecution's investigation from the moment when there are grounds to believe that a person has committed a crime within the jurisdiction of the Court. Non-compliance with the observation of these rights constitutes a fundamental violation of due process guarantees. In this regard, the drafting history of the Statute indicates that a broad timeframe for the application of the rights akin to those enumerated in article 55(2) of the Statute was envisioned. In particular, the proposals were made to provide a suspect with the rights “before being questioned, or when a measure infringing his liberty or property has been proposed and brought to his attention”.³⁴

40. Furthermore, the jurisprudence of the Appeals Chamber establishes that the safeguards under article 55(2) of the Statute apply whenever there are grounds to believe that the person being interviewed by the Prosecutor has committed a crime within the jurisdiction of the Court, and that these safeguards are set forth in the Statute

³² [Majority Judgment](#), paras 51-52.

³³ [Majority Judgment](#), paras 47-50.

³⁴ The Preparatory Committee on the Establishment of an International Criminal Court, [Report of the Informal Group on Procedural Questions, Fair Trial, and rights of the Accused](#), 27 August 1996, A/AC.249/CRP.14, p. 11.

to protect the person against self-incrimination.³⁵ Moreover, jurisprudence of this Court indicates that persons subject to a warrant of arrest or a summons to appear who have not yet surrendered to the Court shall enjoy rights guaranteed elsewhere in the Statute, such as the rights relating to investigations, pursuant to article 55(2) of the Statute,³⁶ including the right to legal assistance of a person that is the subject of an investigation, which is a statutory right, as well as an internationally recognized human right.³⁷

41. I further note that the case law of the European Court of Human Rights affirms that the equivalent of the rights provided for under article 55(2) of the Statute apply, “from the moment that a ‘criminal charge’ exists within the meaning of [the European] Court’s case-law [...] and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them”.³⁸ It had been recalled earlier in that judgment that, within the autonomous European Convention meaning given to it, “[a] ‘criminal charge’ exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him”.³⁹

42. There is therefore no doubt that the rights under article 55(2) of the Statute applied to the accused on the facts of the present case. I note that, almost thirteen years prior to the sending of the Video, on 27 April 2007 the first warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed during a non-international armed conflict in Sudan between August 2003 and March 2004 was

³⁵ See *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5) (hereinafter: “*Bemba et al. Appeals Judgment*”), para. 636.

³⁶ See Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings](#), 31 January 2011, ICC-01/04-01/10-51, fn. 15.

³⁷ See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Corrigendum of public redacted version of Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 55.

³⁸ ECtHR, Grand Chamber, *Ibrahim and Others v. the United Kingdom*, [Judgment](#), 13 September 2016, application nos. 50541/08, 50571/08, 50573/08 and 40351/09 (hereinafter: “*Ibrahim and Others v. the United Kingdom*”), para. 253.

³⁹ [Ibrahim and Others v. the United Kingdom](#), para. 249.

issued.⁴⁰ It is therefore clear that, from that time onwards, he was subject to a warrant of arrest; and that both his awareness of that warrant, alleging that he had committed criminal offences, and that his situation had been affected by the Prosecutor having sought and obtained its issuance, brought him within the above-cited case-law of the European Court of Human Rights. That Court has also found that the rationale for an accused to have the assistance of a lawyer at the initial stages of police interrogation is in order to protect against, *inter alia*, self-incrimination; and that access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless in the circumstances there are compelling reasons to restrict that right.⁴¹

2. *Mr Abd-Al-Rahman was “questioned” within the meaning of article 55(2) of the Statute*

a. **Questioning by the Prosecutor does not have to be direct**

43. For the reasons that follow, I respectfully disagree with the findings of the Majority that the accused was not “questioned” by the Prosecutor within the meaning of article 55(2) of the Statute and that the intermediary was not acting on behalf of the Prosecution on the facts of this case.⁴² I am of the view that the actions of P-1049 in this case amounted to ‘questioning’ Mr Abd-Al-Rahman within the meaning of article 55(2) of the Statute. He should therefore have been informed of his rights thereunder prior to the Video being recorded and sent. I also disagree with the Trial Chamber’s finding that article 55(2) of the Statute only applies to situations where a suspect is questioned *directly*.⁴³ I consider that the question put in this case came from the Prosecution to the accused, albeit via the intermediary, on the basis that wherever the idea of producing the Video originated, P-1049 discussed it with the intermediary and then followed up about it being sent.⁴⁴ Indeed, P-1049 accepted in evidence that, in his first conversation with the intermediary on 27 December 2019, he had discussed Mr Abd-Al-Rahman appearing in recorded material and introducing himself as “Ali

⁴⁰ [Decision on the Prosecution Application under Article 58\(7\) of the Statute](#), ICC-02/05-01/07-1-Corr; [Warrant of arrest for Ali Kushayb](#), ICC-02/05-01/07-3-Corr.

⁴¹ ECtHR, Grand Chamber, *Salduz v. Turkey*, [Judgment](#), 27 November 2008, application no. 36391/02, paras 54-55.

⁴² [Majority Judgment](#), paras 54, 85-88.

⁴³ [Impugned Decision](#), para. 48.

⁴⁴ [Impugned Decision](#), para. 22.

Kushayb”.⁴⁵ That was, in effect, a request for Mr Abd-Al-Rahman to identify himself. The Video was to contain the answer.

44. Thereafter, P-1049 chased the Video on two subsequent occasions.⁴⁶ On the second occasion, on 15 February 2020, P-1049 asked the intermediary whether there was a message from Mr Abd-Al-Rahman which required following up⁴⁷ – a message in which P-1049 knew that the accused would provide information to the Prosecutor, albeit via the intermediary. The answer from Mr Abd-Al-Rahman eventually followed when the Video was sent on 20 March 2020. In the Video, Mr Abd-Al-Rahman answered what was, in effect, a request for him to identify himself, stating that his name was Ali Muhammad Ali Abd-Al-Rahman and that his nickname was “Kushayb”.⁴⁸

45. As such, the Prosecution was aware that the suspect was making a statement in a video that was to be forwarded directly to it as a result of an initial question that it posed to the intermediary to provide confirmation that he was in contact with the suspect,⁴⁹ which involved proving the identity of the suspect.⁵⁰ I therefore agree with the Defence’s argument that the intermediary was, in essence, acting as a conduit between the Prosecution and the suspect. In any event, I note that there is nothing in the language of article 55(2) that requires the question to be put directly to the suspect. Otherwise, the Prosecution could avoid the requirements of article 55(2) of the Statute merely by

⁴⁵ See [Appeal Brief](#), para. 14, referring to [Transcript of the hearing of 24 January 2023](#), p. 61, lines 2-10. In his evidence, P-1049 accepted that the audio file that was sent to him on 27 December 2019, referenced at [Impugned Decision](#), para. 23, was a recording of the intermediary speaking to someone else, asking them to film the accused introducing himself as “Ali Kushayb” – and that that reflected what had been said during the initial conversation between him and the intermediary. The relevant part of the transcript reads as follows:

“Q. [12:51:15] 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?

A. [12:52:16] Yeah, 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”.

⁴⁶ [Appeal Brief](#), para. 15, referring to [Transcript of the hearing of 24 January 2023](#), p. 62, lines 4-7 and p. 64, lines 11-13.

⁴⁷ [Impugned Decision](#), para. 24; [Appeal Brief](#), para. 15, referring to [Transcript of the hearing of 24 January 2023](#), p. 64, lines 11-13.

⁴⁸ See the Video and its transcript (DAR-OTP-0220-3010; English translation: DAR-OTP-0220-3015).

⁴⁹ See [Impugned Decision](#), para. 21.

⁵⁰ See [Impugned Decision](#), para. 44.

posing questions through someone else, which would defeat the purpose of that provision.

b. Questioning does not have to relate solely to alleged crimes

46. I respectfully disagree with the findings of the Majority in relation to the Trial Chamber's finding that article 55(2) of the Statute only addresses situations in which the suspect is questioned *about alleged crimes* under the jurisdiction of the Court.⁵¹ The Majority considers that finding to be consistent with the manner in which the Court's statutory framework is drafted and that 'questioning' under article 55(2) of the Statute would ordinarily be expected to focus upon questions related to the crimes, which does not include establishing the identity of the suspect in the present case.⁵² I cannot agree, as I observe that there is no legal support for such a restrictive interpretation of the provision. Bearing in mind that a chamber is obliged to interpret and apply the regulatory framework of the Court in accordance with internationally recognized human rights, pursuant to article 21(3) of the Statute, I consider that the text of article 55(2) of the Statute does not limit the subject-matter of the questioning.

47. The provision certainly does not restrict its application to the charged crimes. In my view, information obtained as the result of questioning about any matter, including identity and matters such as the suspect's willingness to surrender to, or cooperate with, the Court fall under the ambit of article 55(2) of the Statute. In this regard, I note that the Oxford English Dictionary defines "questioning" as being: "[t]he action of asking someone questions, especially in an official context (using, as an example, 'the young lieutenant escorted us to the barracks for questioning')", and "to question" as "[a]sk (someone) questions, especially in an official context: (using as an example, 'four men were being questioned about the killings')". The subject-matter of the questioning is not limited; and the Statute does not use terms such as "interrogate" or "interview" which imply more systematic or intensive questioning. It simply refers to a person being "questioned".

48. The fact that the subject-matter of the questioning is unrestricted is also clear from knowing that a suspect may make incriminating statements in response to *any* question

⁵¹ [Impugned Decision](#), para. 48.

⁵² [Majority Judgment](#), paras 90-92, 96.

from the Prosecution. The facts of this case demonstrate that. Even where questions from the Prosecution are not intended to elicit incriminating answers they may, in fact, do so. That is the reason that article 55(2) of the Statute exists. It is designed to ensure that, prior to answering any questions from the Prosecution, whether put directly or via a third party, a suspect is appropriately notified of the rights under that provision, including the right to silence, which incorporates the privilege against self-incrimination. Restricting it to certain types of questioning allows the provision to be circumvented and its purpose frustrated.

49. In any event, I emphasise that all of the actions taken by the Prosecution were undertaken in the context of its investigation into the alleged crimes in this case. Establishing the identity of the suspect was a key part of the Prosecution's investigation. It is artificial to draw a distinction between "alleged crimes" and questions said to relate to other parts of the Prosecution's investigation. All such matters relate to the crimes being investigated and therefore fall within the meaning of being "questioned" under article 55(2) of the Statute. That provision is headed "Rights of persons during an investigation" and therefore relates to any questioning that takes place during the course of an investigation.

50. In my view, the above considerations, based upon the plain meaning of the provision and internationally recognized human rights, outweigh the reliance of the Majority upon factors such as the Court's practice at the initial appearance of an accused or the two European Union Directives and certain limited examples of national practice referred to by the Prosecutor, which the Majority states are illustrative in this context.⁵³

3. *The identity of the accused in this case forms a part of the charges*

51. For the reasons that follow, I also respectfully disagree with the Majority's finding that there was no error in the conclusion of the Trial Chamber that the Prosecution did not discuss with the intermediary anything related to the charged crimes.⁵⁴

⁵³ [Majority Judgment](#), paras 94-95.

⁵⁴ [Majority Judgment](#), paras 97-99.

52. The warrant of arrest was issued against ‘Ali Muhammad Ali Abd-Al-Rahman’ also known as ‘Ali Kushayb’.⁵⁵ The fact that both identities related to the same person necessarily formed a part of the charges, even if the Prosecution was not aware at that time that the alias ‘Ali Kushayb’ would later be contested.⁵⁶ To that extent, I consider that asking for a video to be sent in which the accused was to state his identity is connected to the crimes in question on the facts of this case. The nickname “Kushayb” and its connection to the name of Mr Abd-Al-Rahman is a key part of the charges and was therefore necessarily a fundamental part of the Prosecution’s investigation in this case. Indeed, evidence of the identity of the accused now forms a core aspect of the trial. As argued by the Defence, “[w]hether 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”;⁵⁷ and it is also a factor that persuaded the Trial Chamber to grant leave to appeal.⁵⁸

53. The fact that, as found by the Trial Chamber,⁵⁹ the Prosecution apparently did not know what the defence of the accused was going to be at the time that the question was posed – namely that he was to deny that he was “Ali Kushayb” – is not the issue. The Prosecution is not expected to know with certainty what the defence of a suspect might be at the early stage of an investigation. The obligation of the Prosecution is to provide a suspect with notification of his or her rights under article 55(2) of the Statute – including the right to a lawyer who can assist with the suspect’s defence – prior to answering any questions from the Prosecution. It is not linked to the Prosecution being aware of what the defence of the suspect might turn out to be. In any event, once a suspect is charged under two separate names those names form a part of the charges,⁶⁰ and the Prosecution is responsible for proving that those names relate to the same person, as is now being demonstrated by the arguments made in this case.

⁵⁵ See [Impugned Decision](#), para. 43.

⁵⁶ See [Impugned Decision](#), para. 47.

⁵⁷ [Appeal Brief](#), para. 3, referring to [Impugned Decision](#), para. 16.

⁵⁸ [Decision on Defence’s request for leave to appeal the decision on the admissibility of a video](#), 8 March 2023, ICC-02/05-01/20-894, paras 16-17, in which the Trial Chamber, *inter alia*, accepted that “the issue of admission of the video, as evidence of the link between the accused and the alias ‘Ali Kushayb’, affects the outcome of the trial”.

⁵⁹ [Impugned Decision](#), para. 47.

⁶⁰ See regulation 52 of the Regulations of the Court which provides, *inter alia*, that the document containing the charges shall include, “[t]he full name of the person and any other relevant identifying information” (regulation 52(a)).

4. *The Prosecution wishes to rely on the accused's statement as evidence*

54. Indeed, I observe that the Prosecution wishes to rely upon the fact that Mr Abd-Al-Rahman said in the Video that his nickname was “Kushayb” *as evidence* to rebut what is now known to be his defence that he is not “Kushayb”. I consider that when a piece of evidence is obtained in violation of a suspect’s statutory rights that mirror internationally recognized human rights, the admissibility of that evidence should be questioned from the very first moment that it is presented before a chamber. As noted above, I am of the view that questioning about any matter, including identity, falls squarely within the scope of article 55(2) of the Statute.

55. It follows that, should the Prosecution wish to rely upon something that was said in any such statement *as evidence* at the trial, as in the present case, the failure to inform the suspect of the rights under article 55(2) of the Statute renders that evidence potentially inadmissible under article 69(7) of the Statute, as it was obtained in violation of the Statute or internationally recognized human rights. This approach is in line with the *Bemba* case, in which the Single Judge held that, even if the interview were merely to establish identity and inform Mr Bemba of his rights, “*evidence* obtained in the interview” could potentially be excluded under article 69(7) of the Statute.⁶¹ The Prosecution now wishes to rely upon the Video *as evidence*, in violation of the provisions of article 55(2) of the Statute. I therefore respectfully disagree with the Majority’s interpretation of the *Bemba* case to which I have just referred,⁶² as well as with its more general finding that there was no violation of article 55(2) of the Statute or of internationally recognized human rights on the facts of the present case.⁶³

5. *The Prosecution had sufficient proof that the intermediary was in contact with the accused as of 27 December 2019*

56. Lastly, I observe that, throughout the time that the Prosecution was seeking further evidence of contact between the intermediary and the accused, which included obtaining evidence of Mr Abd-Al-Rahman’s identity, it already had sufficient proof of

⁶¹ See Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on application for interim release](#), 22 September 2009, ICC-01/05-01/08-73 (a confidential version was filed on 20 August 2008, ICC-01/05-01/08-73-Conf), para. 45.

⁶² [Majority Judgment](#), paras 93, 103.

⁶³ [Majority Judgment](#), paras 101-102, 105.

that contact and of his identity; proof that had already been provided by the intermediary on 27 December 2019 when the intermediary forwarded to the Prosecution the two certificates bearing the name and photo of the accused – the same day that P-1049 first spoke to the intermediary and as a direct result of him telling the intermediary that the Prosecution required confirmation that he was in contact with the accused.⁶⁴

57. The more senior of the two Prosecution investigators, P-1048, accepted in his evidence that the Prosecution was content with the above certificates as proof of contact between the intermediary and the accused.⁶⁵ Indeed, even the more junior investigator – P-1049 – accepted that the documentation constituted sufficient proof that the intermediary was in contact with the accused.⁶⁶ He proceeded to say that he did not regard it as conclusive proof, but he does not dispute that it was sufficient.

58. Therefore, at the time of the events in question, the Prosecution was already satisfied that there was, at least, sufficient proof that the intermediary was in contact with the accused. The documentation that it had received on 27 December 2019 contained both a photograph and the name of the accused. Knowing the above matters, it was an error for the Prosecution not to provide Mr Abd-Al-Rahman with his article 55(2) rights as of 27 December 2019 – the date on which it first encouraged, and then repeatedly thereafter requested, the Video to be sent. The Prosecution knew that Mr Abd-Al-Rahman would be making a statement in the Video, addressed to them, at a time when it already had sufficient proof that it was indeed the accused who was in contact with the intermediary. Given that there was therefore clearly a chance that the accused would make incriminating statements if he were not provided with the rights set out in article 55(2) of the Statute, it was incumbent upon the Prosecution to provide him with those rights as of 27 December 2019 and, in any event, before he made a statement to them.

59. This was not a simple preliminary request for an unknown individual to identify himself: it was the Prosecution requesting further information from the accused via an intermediary who it already had sufficient proof to know was in contact with the

⁶⁴ [Impugned Decision](#), paras 21, 23.

⁶⁵ [Impugned Decision](#), para. 23.

⁶⁶ [Impugned Decision](#), para. 23.

accused. Those circumstances make it clear that it was essential that the accused be given notice of his rights under article 55(2) of the Statute as of 27 December 2019. I therefore respectfully disagree with the conclusion of the Majority⁶⁷ in upholding the finding of the Trial Chamber that such notice was not required until “clear and irrefutable evidence” of contact had been obtained after receipt of the Video,⁶⁸ which was almost three months later.

6. *Conclusion on ground two: the Trial Chamber erred in law*

60. In light of the foregoing, I respectfully disagree with the conclusion of the Majority that the Trial Chamber did not err in law in the circumstances of the present case.⁶⁹ I consider that the Video was obtained in violation of Mr Abd-Al-Rahman’s statutory and internationally recognized human rights. Consequently, I consider that the Trial Chamber erred in law in finding the Video to be admissible on the basis that article 55(2) of the Statute does not apply to the facts of this case. The Prosecution now wishes to rely upon the Video as evidence against the accused, notwithstanding that it was obtained in violation of article 55(2) of the Statute.

61. Furthermore, as a result of the matters raised by this case, I find as follows by way of general conclusions in relation to the law.

62. The rights provided for in article 55(2) of the Statute must be given to a suspect before any questioning of that suspect by the Prosecutor takes place.

63. Any inquiries relating to the identity of a suspect form a part of the Prosecutor’s investigation. Inquiries in that context therefore constitute ‘questioning’ within the meaning of article 55(2) of the Statute when those inquiries are made of a person in relation to whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court. That is the case whether the inquiries are made by the Prosecutor, his investigators or other members of the Office of the Prosecutor directly, or by third parties acting on behalf of, and/or as a result of any request from, the Prosecutor, his investigators or other members of the Office of the Prosecutor.

⁶⁷ [Majority Judgment](#), paras 53, 104.

⁶⁸ [Impugned Decision](#), para. 51.

⁶⁹ [Majority Judgment](#), para. 105.

64. The suspect is therefore required to be given notification of the rights under article 55(2) of the Statute prior to any such inquiries being made of him or her. A failure to do so constitutes a violation of article 55(2) of the Statute, when applied and interpreted consistently with internationally recognized human rights.

65. As such, any information obtained from the suspect in the above circumstances that the Prosecutor later wishes to rely upon as evidence against that suspect is potentially inadmissible under article 69(7) of the Statute, as it was obtained in violation of the Statute and/or internationally recognized human rights.

D. Material effect of the errors

66. In my view, the aforementioned errors of fact and law materially affected the Impugned Decision. As a result of its erroneous finding that there had not been any violation of article 55(2) of the Statute, the Trial Chamber concluded its legal determination at that point.⁷⁰ It simply found that, because there was no violation of that provision, the Video would not be excluded under article 69(7) of the Statute.⁷¹

67. Had the Trial Chamber instead correctly found that there had been a violation of article 55(2) of the Statute, it would have been required to proceed to consider in substance the separate legal requirements of article 69(7) of the Statute in order to determine whether the Video should be excluded from evidence under that provision.

68. It is recalled that article 69(7) of the Statute provides for circumstances in which evidence shall be inadmissible.⁷² The Appeals Chamber, in the *Bemba et al.* Appeals Judgment, noted that a chamber's assessment of the admissibility of an item of evidence under article 69(7) of the Statute requires two consecutive inquiries: (i) whether the evidence at issue was "obtained by means of a violation of th[e] Statute or internationally recognized human rights"; and (ii) whether "[t]he violation casts substantial doubt on the reliability of the evidence" or "[t]he admission of the evidence

⁷⁰ [Impugned Decision](#), para. 52.

⁷¹ [Impugned Decision](#), para. 52.

⁷² As set out above, article 69(7) of the Statute provides:

"Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

would be antithetical to and would seriously damage the integrity of the proceedings”.⁷³ The Appeals Chamber noted that “[t]he evidence concerned is inadmissible in case of an affirmative answer to either of these two questions”.⁷⁴

69. In the present case, as a result of the erroneous finding of the Trial Chamber that the Video had not been obtained by means of a violation of article 55(2) of the Statute, the Trial Chamber concluded its inquiry at that point. It did not proceed to consider either of the two further legal questions under article 69(7) of the Statute, set out above, that it would have been required to analyse, but for its error. Its legal inquiry was therefore incomplete. Had it not erred, it would necessarily have rendered a substantially different decision, as that decision would have been based upon its legal findings under article 69(7) of the Statute – a separate and further legal determination from an examination of article 55(2) of the Statute alone but one which, on the facts of this case, the Trial Chamber left unaddressed in substance.⁷⁵

70. My own view is that the circumstances in which the Video was obtained make it an unreliable item of evidence which, if admitted, would seriously damage the integrity of the proceedings. This is particularly the case given that it is likely that, once admitted, the Video will form a significant part of the probative evidence upon which the Prosecutor will seek a conviction in this case – with the use of such evidence being one of the factors that the European Court of Human Rights takes into consideration in assessing whether the proceedings as a whole were fair.⁷⁶ I am therefore of the view that the Video should be declared inadmissible pursuant to article 69(7) of the Statute.

71. However, given that the legal question of whether the Video should be declared inadmissible under that provision as a result of the violation of article 55(2) of the Statute has not yet been considered by the first instance chamber, I believe it to be more appropriate for the Trial Chamber to determine this matter initially, rather than for the Appeals Chamber to do so. Proceeding in that manner also thereafter preserves the right

⁷³ [Bemba et al. Appeals Judgment](#), para. 280.

⁷⁴ [Bemba et al. Appeals Judgment](#), para. 280.

⁷⁵ See, in this context, Appeals Chamber, *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”*, 13 July 2006, ICC-01/04-169 (OA), paras 83-84, 91-92.

⁷⁶ ECtHR, Grand Chamber, *Beuze v. Belgium*, [Judgment](#), 9 November 2018, application no. 71409/10, para. 150(g).

of either party to seek leave to appeal, should it so wish. I would therefore have remanded this matter to the Trial Chamber so that it could have been considered on the correct legal basis of whether the evidence should have been declared inadmissible under article 69(7)(a) or (b) of the Statute.

V. CONCLUSION

72. For the foregoing reasons, I consider that the Trial Chamber erred in fact and in law. In my view, the appropriate relief in this appeal is to reverse the Impugned Decision and remand to the Trial Chamber the question of whether the Video should be excluded under article 69(7) of the Statute.

Done in both English and French, the English version being authoritative.



Judge Luz del Carmen Ibáñez Carranza

Dated this 28th day of June 2023

At The Hague, The Netherlands