

**Original: English****No. ICC-02/05-01/20 OA12****Date: 28 June 2023****THE APPEALS CHAMBER****Before:****Judge Piotr Hofmański, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze****SITUATION IN DARFUR, SUDAN****IN THE CASE OF THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-
RAHMAN (“ALI KUSHAYB”)****Public****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)”**

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

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Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of Victims

Ms Natalie von Wistinghausen
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REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Other

Trial Chamber I

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I entitled “Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128)” of 17 February 2023 (ICC-02/05-01/20-876),

After deliberation,

By majority, Judge Ibáñez Carranza dissenting,

Delivers the following

JUDGMENT

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)” is confirmed.

REASONS

I. INTRODUCTION

1. This is the appeal of Mr Abd-Al-Rahman (hereinafter: “the accused”) against the “Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128)” (hereinafter: “Impugned Decision”),¹ rendered on 17 February 2023. In the Impugned Decision, Trial Chamber I (hereinafter: “Trial Chamber”), *inter alia*, 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”),² and admitted the aforementioned item into evidence.³ The Prosecutor had sought the admission of the Video into evidence as a result of the Defence’s disavowal of the name

¹ [ICC-02/05-01/20-876](#).

² DAR-OTP-0216-0119. *See also* the transcript of the Video: DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

³ [Impugned Decision](#), para. 63(i).

“Ali Kushayb” as a core aspect of its case.⁴ The Trial Chamber found that the circumstances in which the Office of the Prosecutor (hereinafter: “Prosecution”) had obtained the Video did not violate article 55(2) or article 21(1)(b) of the Statute, nor any rule of customary international law or human rights treaties; and that it therefore should not be excluded from evidence under article 69(7) of the Statute.⁵ The Defence contests these findings on appeal.

II. KEY FINDINGS

2. Article 55 of the Statute sets out the rights of persons during an investigation. It provides essential guarantees at that initial stage to ensure that the entire course of the criminal proceedings are fair.

3. The requirement to inform the person of the rights under article 55(2) of the Statute “prior to being questioned” is both clear from the plain wording of the provision and is essential to make the rights set out practical and effective.

4. On the facts of the present case, where an unknown individual voluntarily contacted the Prosecution stating that he was in contact with a suspect and could assist in the latter’s eventual surrender to the Court, a request by the Prosecution for confirmation from the unknown individual that he was in contact with the suspect does not constitute ‘questioning’ of the suspect by the Prosecutor under article 55(2) of the Statute.

III. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

5. On 4 October 2021, the Trial Chamber issued directions on the conduct of the proceedings, instructing that

[t]he parties and participants are directed to indicate by email any material they intend to use in the course of their opening statements to the Chamber and other parties and participants eight days prior to the commencement of trial. Any objections to the use of such material shall be filed five days prior

⁴ [Impugned Decision](#), para. 16.

⁵ [Impugned Decision](#), para. 52.

to the commencement of trial. The parties and participants will be permitted to use audio/visual material during opening statements.⁶

6. On 28 March 2022, the Prosecution emailed the Trial Chamber and the parties a list of exhibits, including the Video, which it intended to use during its opening statement at the start of the trial.⁷

7. On 1 April 2022, following the Defence's motion of 31 March 2022 objecting to the Prosecution's use of the Video in its opening statement,⁸ and the Prosecution's response thereto of 1 April 2022,⁹ the Trial Chamber, via email, decided that "the Prosecution cannot play the objected video during the opening statements" and held that it was premature to rule on the admissibility of the video at that stage and that "it would consider the matter following the Prosecution's request for the formal submission of the video".¹⁰

8. On 16 November 2022, the Trial Chamber scheduled a status conference to hear oral submissions on the admissibility of the Video and related material during the week of 5 December 2022.¹¹

9. On 5 and 6 December 2022, after receiving the Defence's summary of its arguments on the inadmissibility of the Video and related material, filed on 28 November 2022,¹² and the Prosecutor's response thereto, filed on 2 December 2022,¹³ the Trial Chamber heard oral submissions by the parties and the Common Legal Representative of Victims on the admissibility of the Video and the telephone calls.¹⁴

⁶ [Directions on the conduct of proceedings](#), ICC-02/05-01/20-478, para. 17.

⁷ [Impugned Decision](#), para. 1, referring to Email from the Prosecution, 28 March 2022, at 19:43.

⁸ [Objection en vertu du paragraphe 17 des « Directions on the Conduct of the Proceedings » \(ICC-02/05-01/20-478\)](#), ICC-02/05-01/20-657.

⁹ [Impugned Decision](#), para. 3, referring to Email from the Prosecution, 1 April 2022, at 11:52.

¹⁰ [Impugned Decision](#), para. 4, referring to Email from the Trial Chamber, 1 April 2022, at 16:30.

¹¹ [Impugned Decision](#), para. 5.

¹² [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.

¹³ [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](#), ICC-02/05-01/20-822 (hereinafter: "Prosecutor's Response before the Trial Chamber").

¹⁴ [Impugned Decision](#), para. 8.

10. On 6 December 2022, the Trial Chamber decided, *proprio motu*, to have Prosecution investigators P-1048 and P-1049 appear before it to testify on matters relating to the admissibility of the pieces of evidence concerned.¹⁵

11. On 16 and 24 January 2023, Prosecution investigator P-1048 (hereinafter: “P-1048”) and Prosecution investigator P-1049 (hereinafter: “P-1049”), respectively, testified before the Trial Chamber.¹⁶ On 25 January 2023, the Trial Chamber heard final submissions from the parties in relation to the in-court testimonies of P-1048 and P-1049.¹⁷

12. On 3 February 2023, the Trial Chamber recognised as submitted on the record of the case, materials used during the testimonies of the two witnesses, and other materials necessary for the completeness of the record.¹⁸

13. On 17 February 2023, the Trial Chamber issued the Impugned Decision, *inter alia*, rejecting the Defence’s objections to the admissibility of the Video and recognising its admission into evidence.¹⁹

14. On 27 February 2023, the Defence requested leave to appeal the Impugned Decision in respect of two issues in relation to the admissibility of the Video.²⁰

15. On 3 March 2023, the Prosecutor filed his response to the request.²¹

16. On 8 March 2023, the Trial Chamber issued a decision granting the request to appeal the following issue:²²

¹⁵ [Impugned Decision](#), para. 9.

¹⁶ [Impugned Decision](#), paras 10-11.

¹⁷ [Impugned Decision](#), para. 12.

¹⁸ [Impugned Decision](#), para. 13.

¹⁹ [Impugned Decision](#), para. 63.

²⁰ [Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-876](#), ICC-02/05-01/20-883, para. 7; [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 (hereinafter: “Decision Granting Leave to Appeal”), fns 9, 10.

²¹ [Prosecution’s response to “Demande d’autorisation d’interjeter appel de la décision ICC-02/05-01/20-876”](#), 24 February 2023, ICC-02/05-01/20-883, ICC-02/05-01/20-890.

²² [Decision Granting Leave to Appeal](#), para. 21.

Did the Chamber make an error of fact and law when it concluded, in paragraphs 48 and 51-52 of its Decision, that Article 55(2) of the Statute does not apply to the circumstances in which the Video was obtained?²³

B. Proceedings before the Appeals Chamber

17. On 20 March 2023, the Defence filed its appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”).²⁴

18. On 30 March 2023, the Prosecutor filed his response to the Appeal Brief (hereinafter: “Prosecutor’s Response”).²⁵ No submissions were filed on behalf of victims.

IV. STANDARD OF REVIEW

19. In the present appeal, the Defence alleges errors of law and fact.

20. Regarding errors of law, the Appeals Chamber has previously held that it:

will not defer to the relevant Chamber’s interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁶

²³ [Decision Granting Leave to Appeal](#), paras 5, 21 (here adopting the unofficial translation of the issue used by the Trial Chamber at fn. 9, the original having been in French).

²⁴ [Appeal Brief OA12](#), ICC-02/05-01/20-905-tENG (hereinafter: “Appeal Brief”), with a public annex.

²⁵ [Prosecution response to the Defence appeal against the Decision on the admissibility of a video](#), 30 March 2023, ICC-02/05-01/20-912.

²⁶ *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022”](#), 19 December 2022, ICC-01/14-01/22-124-Red (OA3) (hereinafter: “Mokom OA3 Judgment”), para. 19, referring to *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: “Al Hassan OA Judgment”), para. 38.

21. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.²⁷ A decision is “materially affected by an error of law” if the chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.²⁸

22. As to errors of fact,

the Appeals Chamber will determine whether a chamber’s factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will not disturb a trial chamber’s factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber’s conclusion could have reasonably been reached from the evidence on the record.²⁹

²⁷ [Mokom OA3 Judgment](#), para. 20, referring to [Al Hassan OA Judgment](#), para. 38; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: “*Simone Gbagbo OA Judgment*”), para. 40. See also *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ \(ICC-02/05-01/20-302\)”](#), 1 November 2021, ICC-02/05-01/20-503 (OA8) (hereinafter: “*Abd-Al-Rahman OA8 Judgment*”), para. 12; *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’](#), 17 July 2019, ICC-02/04-01/15-1562 (OA4) (hereinafter: “*Ongwen OA4 Judgment*”), para. 45.

²⁸ *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”](#), 12 September 2022, ICC-01/04-02/06-2782 (A4-A5) (hereinafter: “*Ntaganda A4-A5 Judgment*”), para. 29; [Mokom OA3 Judgment](#), para. 20, referring to [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41. See also [Abd-Al-Rahman OA8 Judgment](#), para. 12; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 1 July 2021, ICC-01/12-01/18-1562-Red (OA3), para. 18; [Ongwen OA4 Judgment](#), para. 45. See also *Situation in the Islamic Republic of Afghanistan*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation”](#), 4 April 2023, ICC-02/17-218 (OA5), para. 23.

²⁹ [Mokom OA3 Judgment](#), para. 21. See also [Ntaganda A4-A5 Judgment](#), para. 30; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’](#), 30 March 2021, ICC-01/04-02/06-2667-Red (A3), paras 27-29; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10), para. 16.

23. The appellant is obliged to set out all the alleged errors in the appeal brief and “indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision”.³⁰

24. The above standard of review will guide the analysis of the Appeals Chamber.

V. MERITS

A. First ground of appeal: alleged errors of fact

25. Under its first ground of appeal, the Defence submits that the Trial Chamber erred in fact by conclusively holding, at paragraphs 25 and 46 of the Impugned Decision, that Prosecution 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”.³¹ The Defence argues that the erroneous factual conclusion of the Trial Chamber that the Video had not been solicited by the Prosecution led it to conclude that article 55(2) of the Statute did not apply and, for that reason, it concluded that there were no grounds to exclude the Video under article 69(7) of the Statute.³² The Defence requests the Appeals Chamber to overturn those findings.³³

1. *Relevant factual background from the Impugned Decision and the trial record*

26. The Appeals Chamber sets out below the relevant factual background as set out in the Impugned Decision and the trial record.

27. On 26 December 2019, an unknown intermediary (hereinafter: “intermediary”) voluntarily emailed the Public Information and Outreach Section of the Court, stating that he had received communication from people close to “Ali Kushayb”, and that the latter was willing to cooperate with the Court.³⁴ That day, the intermediary also telephoned Prosecution investigator P-1049, who was uncontactable at that time.³⁵

³⁰ [Abd-Al-Rahman OA8 Judgment](#), para. 14, referring to *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19\(1\) of the Statute” of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 48.

³¹ [Appeal Brief](#), para. 4.

³² [Appeal Brief](#), para. 6.

³³ [Appeal Brief](#), p. 21.

³⁴ [Impugned Decision](#), paras 19, 21, 50.

³⁵ [Impugned Decision](#), para. 21.

28. On 27 December 2019, P-1049 first spoke to the intermediary.³⁶ P-1049 stated in his evidence to the Trial Chamber that he was not at that stage aware of the email; and that he told the intermediary, during that initial call, that the Prosecution required confirmation that the intermediary was in contact with the accused.³⁷ P-1049 stated that the intermediary mentioned that individuals who were in direct contact with the accused were preparing, and could share, some video material of the accused.³⁸ The Trial Chamber proceeded as follows in the relevant parts of paragraphs 22 and 25 of the Impugned Decision:

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.³⁹

[...]

P-1049 stated that, although as noted above, he was favourable to the idea of the video offered by the intermediary, he did not at any stage request the intermediary to produce a video, nor did he ask the intermediary to send the video. P-1049 reiterated that although he asked for corroboration or proof that the intermediary was indeed in contact with the accused, he did not specifically ask for the video. P-1049 stated that, for him, the video was conclusive proof that the intermediary was in contact with the accused.⁴⁰

29. Later on 27 December 2019, the intermediary sent an audio file via WhatsApp to P-1049.⁴¹ The intermediary also sent P-1049 two certificates bearing the photo and name of the accused.⁴² In evidence before the Trial Chamber, the more senior Prosecution investigator, P-1048, stated that the Prosecution was content with those

³⁶ [Impugned Decision](#), para. 21.

³⁷ [Impugned Decision](#), para. 21.

³⁸ [Impugned Decision](#), para. 22.

³⁹ [Impugned Decision](#), para. 22 (footnotes omitted), *referring to* Transcript of the hearing of 24 January 2023, [ICC-02/05-01/20-T-108-Red-ENG](#) (hereinafter: “Transcript of the hearing of 24 January 2023”), pp. 51-53, 59-60, 63-64.

⁴⁰ [Impugned Decision](#), para. 25 (footnotes omitted), *referring to* [Transcript of the hearing of 24 January 2023](#), pp. 17-20.

⁴¹ [Impugned Decision](#), para. 23.

⁴² [Impugned Decision](#), para. 23.

certificates as proof of contact between the intermediary and the accused. P-1049 stated that this was “sufficient” proof of such contact, but was “not conclusive”.⁴³

30. Thereafter, there was further communication between P-1049 and the intermediary. P-1049 acknowledged in his evidence that he followed up with the intermediary about the Video that the latter had proposed to send.⁴⁴ This included a message from P-1049 to the intermediary on 15 February 2020, asking whether there was any message from the accused that required following up.⁴⁵ In response, the intermediary stated that he needed to arrange some meetings with P-1049.⁴⁶

31. On 20 March 2020, the intermediary sent the Video to P-1049,⁴⁷ in which the suspect identified himself as “Ali Muhammad Ali Abd-al-Rahman”, and said that his nickname was “Kushayb”.⁴⁸ On 6 and 7 April 2020, the Prosecution spoke directly to the accused.⁴⁹

32. The Impugned Decision points out that no record of the initial telephone conversation between P-1049 and the intermediary was made in the Prosecution’s investigation log;⁵⁰ and P-1049 also acknowledged that he may have had other conversations with the intermediary that were not recorded in the investigation log and that he 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 2020.⁵¹ The Trial Chamber expressed its concerns about, *inter alia*, these matters later in the Impugned Decision.⁵²

33. There was no dispute that the above matters occurred in the context of the surrender of the accused to the Court.⁵³ However, there was a factual dispute before the

⁴³ [Impugned Decision](#), para. 23.

⁴⁴ [Impugned Decision](#), para. 22, referring to [Transcript of the hearing of 24 January 2023](#), pp. 63-64.

⁴⁵ [Impugned Decision](#), para. 24, referring to, *inter alia*, DAR-OTP-00000601.

⁴⁶ [Impugned Decision](#), para. 24, referring to DAR-OTP-00000601.

⁴⁷ [Impugned Decision](#), para. 25, referring to DAR-OTP-00000601 and DAR-OTP-00000607.

⁴⁸ Video recording of 20 March 2020, DAR-OTP-0216-0119. See Transcript of video, DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

⁴⁹ [Impugned Decision](#), para. 27.

⁵⁰ [Impugned Decision](#), para. 21.

⁵¹ [Impugned Decision](#), para. 26, referring to [Transcript of the hearing of 24 January 2023](#), pp. 16, 22, with the Trial Chamber noting that, in respect of the unrecorded conversations, P-1049 had stated that these were mainly conversations that had a preparatory nature, such as the logistics of a call with the suspect (see [Impugned Decision](#), para. 26, fn. 60).

⁵² [Impugned Decision](#), para. 62.

⁵³ [Impugned Decision](#), para. 43.

Trial Chamber about the extent to which P-1049 requested, solicited and/or encouraged the production and sending of the Video.⁵⁴

2. *Relevant findings of the Trial Chamber*

34. 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”.⁵⁵ The Trial Chamber stated that “P-1049 was adamant that the suggestion of a video emanated from the intermediary”.⁵⁶ The Trial Chamber further 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.⁵⁷ 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.⁵⁸

35. 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.⁵⁹

36. As a part of its consideration as to whether article 55(2) of the Statute applied at the time of the sending of the Video, the Trial Chamber further found that: (i) “Until receipt of the video, the Prosecution communicated only with the intermediary and had no direct contact with the accused”;⁶⁰ (ii) “The Prosecution did not discuss with the

⁵⁴ See [Impugned Decision](#), paras 29-30, 35-36.

⁵⁵ [Impugned Decision](#), para. 44.

⁵⁶ [Impugned Decision](#), para. 44.

⁵⁷ [Impugned Decision](#), para. 45.

⁵⁸ [Impugned Decision](#), para. 46.

⁵⁹ [Impugned Decision](#), para. 47.

⁶⁰ [Impugned Decision](#), para. 49.

intermediary anything related to the charged crimes”;⁶¹ (iii) “[...] the intermediary was not a Prosecution intermediary, *i.e.*, he was not acting on behalf of the Prosecution. Instead, he was an unknown individual who voluntarily contacted the Prosecution offering them the opportunity to establish contact with the accused”;⁶² and (iv) “[...] 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”.⁶³

3. *The Defence’s submissions before the Appeals Chamber*

37. First, the Defence submits that the Trial Chamber failed to take into account relevant facts,⁶⁴ arguing that the Trial Chamber’s conclusion at paragraph 46 of the Impugned Decision that P-1049 “did not ask the intermediary for the video” was contrary to its earlier findings at paragraph 22 that P-1049 had, at the very least, encouraged the production and sending of the Video, stated that he was in favour of receiving it and had chased the intermediary about sending it.⁶⁵ The Defence submits that the Trial Chamber could not reasonably conclude that P-1049 did not encourage the recording of the Video and repeatedly request it to be sent.⁶⁶

38. The Defence further contends that the Trial Chamber erred in failing to take into account facts it had determined at paragraph 23 of the Impugned Decision when finding that the obligation to give the suspect notice of his rights under article 55(2) of the Statute “at the earliest opportunity” did not arise as of 27 December 2019, when the intermediary sent P-1049 two certificates bearing the photo and name of the accused.⁶⁷ By reference to the Prosecutor’s written submissions and the testimony of both investigators, the Defence submits that the Prosecution believed it was in possession of “clear and irrefutable evidence that the intermediary was in contact with the accused” as of 27 December 2019.⁶⁸ It further contends that the Trial Chamber’s reference to

⁶¹ [Impugned Decision](#), para. 50.

⁶² [Impugned Decision](#), para. 50.

⁶³ [Impugned Decision](#), para. 51.

⁶⁴ [Appeal Brief](#), paras 8-11.

⁶⁵ [Appeal Brief](#), paras 7-8, 10, 17.

⁶⁶ [Appeal Brief](#), paras 10, 17.

⁶⁷ [Appeal Brief](#), para. 11, referring to [Impugned Decision](#), para. 51.

⁶⁸ [Appeal Brief](#), para. 11, referring to [Prosecutor’s Response before the Trial Chamber](#), para. 10.

P-1049 stating that he regarded the two certificates as sufficient but not conclusive proof did “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”.⁶⁹

39. Second, the Defence submits that the Trial Chamber misappreciated the facts,⁷⁰ arguing that the finding of the Trial Chamber at paragraph 46 of the Impugned Decision that “P-1049 did not ask the intermediary for the video” was contrary to the evidence that was before the Trial Chamber.⁷¹ The Defence contends that P-1049 “solicited the Video”, referring to answers that he gave during his evidence, which the Defence characterises as reflecting “hesitation and evasion”.⁷² It avers that P-1049 acknowledged that, regardless of who first mentioned recording a video, P-1049 asked for it to be sent.⁷³ The Defence further submits that P-1049 acknowledged in evidence that he, at the very least, encouraged the recording of a video in which the suspect would identify himself as “Ali Kushayb”; and, by reference to communications on 1 January and 15 February 2020 between P-1049 and the intermediary, that P-1049 repeatedly requested the Video.⁷⁴

40. The Defence further argues that it does not matter who first mentioned the idea of recording the Video, given that the Prosecution encouraged its recording and repeatedly requested that it be sent.⁷⁵ As such, the Defence submits that the intermediary acted as a “conduit” or “postman” and a “*de facto* agent” of the Prosecution; and that the Trial Chamber erred in law in finding that article 55(2) of the Statute did not apply in such circumstances.⁷⁶

4. *The Prosecutor’s submissions before the Appeals Chamber*

41. First, in respect of the Defence’s submissions that the Trial Chamber failed to take into account relevant facts, the Prosecutor argues that the Defence selectively reads

⁶⁹ [Appeal Brief](#), para. 11, fn. 23, referring to [Transcript of the hearing of 24 January 2023](#), p. 18, line 20-p. 19, line 2.

⁷⁰ [Appeal Brief](#), paras 12-18.

⁷¹ [Appeal Brief](#), paras 12, 17.

⁷² [Appeal Brief](#), para. 13, referring to [Transcript of the hearing of 24 January 2023](#), p. 59, line 8-p. 60, line 6.

⁷³ [Appeal Brief](#), para. 13.

⁷⁴ [Appeal Brief](#), paras 14-15, referring to [Transcript of the hearing of 24 January 2023](#), p. 61, lines 2-10, p. 62, lines 4-7, p. 64, lines 11-13.

⁷⁵ [Appeal Brief](#), para. 18.

⁷⁶ [Appeal Brief](#), para. 18.

the Impugned Decision and overlooks the Trial Chamber's statements that it was "satisfied that the idea of sending the video originated with the intermediary" and that P-1049's asking for the Video "was as a result of the intermediary having first intimated that a video was being made and would be sent".⁷⁷ He argues that the Trial Chamber's findings in paragraph 22 that P-1049 was favourable to receiving the Video and communicated that to the intermediary and in paragraph 46 that P-1049, however, had not requested the intermediary to produce and send the video are logically consistent, and that the Defence does not demonstrate any factual error.⁷⁸

42. The Prosecutor further submits that the Trial Chamber took into account all relevant factual findings and, upon assessing the entire record, clearly outlined the basis for its determination that P-1049 did not request the intermediary to produce or send the Video, having also found the Prosecution's investigators to have been candid, credible and reliable.⁷⁹ He further avers that the Defence had ample opportunity to advance its factual and legal arguments before the Trial Chamber, merely reiterating them now in disagreeing with the Trial Chamber's conclusion;⁸⁰ and that the Defence does not allege that the Trial Chamber made any factual error in finding that the Prosecutor did not instruct, request or solicit the intermediary to question the accused, including on any matters relating to the charged crimes.⁸¹

43. The Prosecutor further avers that the Defence misconstrues the application of article 55(2) of the Statute in arguing that the Trial Chamber erroneously failed to find that the Prosecution should have given the article 55(2) notification to the accused as of 27 December 2019.⁸² The Prosecutor submits that the Trial Chamber correctly held that article 55(2) of the Statute is only triggered when a suspect is about to be questioned directly about alleged crimes under the jurisdiction of the Court and that the Defence fails to demonstrate an error.⁸³

44. Second, in respect of the Defence's submissions that the Trial Chamber misappreciated the facts, the Prosecutor argues that they differ from those made in

⁷⁷ [Prosecutor's Response](#), para. 13.

⁷⁸ [Prosecutor's Response](#), para. 13.

⁷⁹ [Prosecutor's Response](#), paras 14-15.

⁸⁰ [Prosecutor's Response](#), para. 16. *See also* para. 3.

⁸¹ [Prosecutor's Response](#), para. 17.

⁸² [Prosecutor's Response](#), para. 18.

⁸³ [Prosecutor's Response](#), para. 18.

respect of the first factual error only in the manner in which the Defence alleges that the error occurred and that they can therefore be dismissed for the same reasons.⁸⁴ In particular, the Prosecutor argues that there is no inconsistency between the Trial Chamber's findings in paragraphs 22 and 46 of the Impugned Decision, and that the Defence fails to identify any factual error.⁸⁵ He further avers that the Defence's assertion that the intermediary acted as a conduit or *de facto* agent between the Prosecution and the accused is without support on the facts or evidence and that the Defence does not identify any factual error.⁸⁶

5. *Determination by the Appeals Chamber*

45. The Appeals Chamber observes that the Defence is challenging certain conclusions of the Trial Chamber by arguing: first, that they were inconsistent with factual findings that it had made in paragraphs 22 and 23 of the Impugned Decision,⁸⁷ and, second, that the Trial Chamber made unreasonable findings on the evidence in concluding, at paragraph 46 of the Impugned Decision, that "P-1049 did not ask the intermediary for the video".⁸⁸ As the arguments made by the Defence essentially relate to the same factual matters and evidence, the Appeals Chamber will consider them together. For the reasons that follow, the Appeals Chamber, by majority, Judge Ibáñez Carranza dissenting, does not find that the Defence has demonstrated any error of fact in the conclusions of the Trial Chamber.

46. First, the Appeals Chamber notes the careful manner in which the Trial Chamber considered this matter and arrived at its factual findings. The Trial Chamber initially received both written and oral submissions from the parties,⁸⁹ as well as oral submissions from the Common Legal Representative of Victims.⁹⁰ It also had regard to two investigation reports,⁹¹ screenshots of WhatsApp messages between P-1049 and the intermediary,⁹² and the Trial Chamber itself decided to call the two Prosecution investigators to testify about issues relating to the admissibility into evidence of, *inter*

⁸⁴ [Prosecutor's Response](#), para. 19.

⁸⁵ [Prosecutor's Response](#), para. 20.

⁸⁶ [Prosecutor's Response](#), para. 21.

⁸⁷ [Appeal Brief](#), paras 4, 8-11.

⁸⁸ [Appeal Brief](#), paras 4, 12-18.

⁸⁹ See [Impugned Decision](#), paras 5-8.

⁹⁰ See [Impugned Decision](#), para. 8.

⁹¹ See [Impugned Decision](#), para. 20.

⁹² See [Impugned Decision](#), para. 20.

alia, the Video.⁹³ It heard the evidence of the investigators on two separate dates,⁹⁴ further to which it heard final submissions from the parties in relation to the investigators' in-court testimony.⁹⁵ It is clear from the Impugned Decision, including from the references in its footnotes, that the Trial Chamber arrived at its conclusions based upon its assessment of the entire record before it.⁹⁶

47. Furthermore, the Trial Chamber proceeded to assess the credibility of the two Prosecution investigators and the reliability of their evidence, noting that it was their testimony and documents alone that were before it as a consequence of the Defence having duly exercised its right not to present evidence on these issues, whether from the accused or the intermediary.⁹⁷ The Trial Chamber considered the investigators to have been candid, "even when the answers were contrary to their interest".⁹⁸ It found them to be "credible and reliable", having also noted that the Defence had accepted them to have been truthful, candid, frank and honest during their testimony.⁹⁹ The Appeals Chamber also notes that the Trial Chamber recorded its concerns about certain shortcomings in relation to procedures adopted by the Prosecution prior to the receipt of the Video,¹⁰⁰ which supports the conclusion that the assessment of the evidence was carried out in a thorough and balanced manner.

48. Moreover, in relation to the specific factual findings challenged by the Defence, the Appeals Chamber observes that, prior to determining that "P-1049 did not ask the intermediary for the video",¹⁰¹ the Trial Chamber explained that it was making a finding in relation to whether the provision of the Video *originated with the Prosecution*.¹⁰² It recalled that P-1049 "was adamant that the suggestion of a video emanated from the intermediary".¹⁰³ Indeed, earlier in the Impugned Decision, in finding that P-1049 asked for proof that the intermediary was in contact with the accused but did not specifically

⁹³ See [Impugned Decision](#), para. 9.

⁹⁴ See [Impugned Decision](#), paras 10-11.

⁹⁵ See [Impugned Decision](#), para. 12.

⁹⁶ See [Impugned Decision](#), paras 19-30, 32-38, 43-47.

⁹⁷ [Impugned Decision](#), para. 45.

⁹⁸ [Impugned Decision](#), para. 45.

⁹⁹ [Impugned Decision](#), para. 45.

¹⁰⁰ See [Impugned Decision](#), para. 62.

¹⁰¹ [Impugned Decision](#), para. 46.

¹⁰² [Impugned Decision](#), para. 44.

¹⁰³ [Impugned Decision](#), para. 44.

ask the intermediary to produce or send the Video,¹⁰⁴ the Trial Chamber cited to the pages of the transcript of the hearing of 24 January 2023 containing, *inter alia*, passages of the evidence of P-1049 that support those findings.¹⁰⁵

49. Specifically in relation to paragraph 22 of the Impugned Decision, the Trial Chamber further referred to the evidence of P-1049, including certain of the passages that the Defence highlights in its submissions,¹⁰⁶ in finding that, at the time of his initial telephone conversation with the intermediary on 27 December 2019: P-1049 might have encouraged the intermediary to share video material of the accused;¹⁰⁷ that he was in favour of receiving the Video and might have expressed that to the intermediary;¹⁰⁸

¹⁰⁴ [Impugned Decision](#), para. 25.

¹⁰⁵ [Impugned Decision](#), para. 25, referring to the pages of the transcript which contained, *inter alia*, the following passages:

“PRESIDING JUDGE KORNER: [...] At any stage in any conversation did you request that such a video be produced?

A. [10:21:20] No, I did not request or give instruction that such a video should be made. I was discussing with the intermediaries, exploring ways how to possibly confirm the [...] identity of the suspect, whether he’s in existence and he’s there and he’s willing to cooperate with the Court. And there are different ways of doing that. I had no script to tell the intermediary what he should do or not” ([Transcript of the hearing of 24 January 2023](#), p. 17, lines 18-24);

“PRESIDING JUDGE KORNER: [...] you explained that to us, that you asked for proof of his contact, but did you ever, well, either in that call, because it’s not recorded, or in any subsequent calls before the video was sent, ask for a video?

A. [10:22:41] No, I just followed up the matter. He said there might be a video. They’re working on something. I just wanted to know an update where he is with his contact with the suspect mainly to get confirmation that the suspect is willing to cooperate and possibly surrender himself [...]” ([Transcript of the hearing of 24 January 2023](#), p. 18, lines 4-11); and

“PRESIDING JUDGE KORNER: [10:26:41] But you stand by your answer, do you, you never asked for that video?

A. [10:26:50] No, I did not ask specifically for that video. I asked for corroborations, or, yeah, proof that he is in contact with the suspect” ([Transcript of the hearing of 24 January 2023](#), p. 19, lines 10-13).

¹⁰⁶ [Appeal Brief](#), paras 8, 13, 15.

¹⁰⁷ [Impugned Decision](#), para. 22, referring to a page of the transcript of the evidence of P-1049 containing, *inter alia*, the following passage:

“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.

¹⁰⁸ [Impugned Decision](#), para. 22, referring to pages of the transcript of the evidence of P-1049 containing, *inter alia*, the following passage:

“PRESIDING JUDGE KORNER: [...] 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 19-p. 60, line 6.

and that he followed up with the intermediary about the Video.¹⁰⁹ The Trial Chamber nevertheless concluded that the suggestion of providing the Video originated with the intermediary.¹¹⁰

50. More generally, in reaching its factual conclusions, the Trial Chamber specifically referenced the transcript of what it considered to be the relevant parts of the evidence of P-1049,¹¹¹ including in relation to the findings that it made that it was the intermediary who initially telephoned him,¹¹² that it was during this call that P-1049 stated that the Prosecution required confirmation that the intermediary was in contact with the accused¹¹³ and that the intermediary informed P-1049 that individuals who were in direct contact with the accused were preparing, and could share, some video material of the accused.¹¹⁴

51. Further to the above, and contrary to the submissions of the Defence, the Appeals Chamber cannot find that the Trial Chamber failed to take its earlier findings in paragraph 22 of the Impugned Decision into account in its conclusions at paragraph 46. Of significance is that, in that latter paragraph, the Trial Chamber did not merely find that P-1049 had not asked for the Video. It found, in relevant part, as follows:

¹⁰⁹ [Impugned Decision](#), para. 22, referring to [Transcript of the hearing of 24 January 2023](#), pp. 63-64, which contains, *inter alia*, the following passage:

“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”.

¹¹⁰ [Impugned Decision](#), paras 44-46.

¹¹¹ See [Impugned Decision](#), paras 21-23, 25.

¹¹² [Impugned Decision](#), para. 21, referring to [Transcript of the hearing of 24 January 2023](#), p. 10.

¹¹³ [Impugned Decision](#), para. 21, referring to [Transcript of the hearing of 24 January 2023](#), pp. 10-11.

¹¹⁴ [Impugned Decision](#), para. 22, referring to pages of the transcript of the evidence of P-1049 containing, *inter alia*, the following passages:

“Q. [12:25:10] And from your statement, paragraph 7, you state that in that first conversation of 27 December 2019, [the intermediary] informed you that his acquaintances who were in direct contact with the accused were preparing some video material. Right? A. [12:26:07] Yes. Q. [12:26:14] But if we look at paragraph 9, you’re a bit more specific. [...] So during this conversation: “... I do recall that I have stressed to him that we need to authenticate the identity of the suspect to be able to make further planning. I do recall that ... [the intermediary] had said that there is a video material of the suspect which could be shared.” That’s something that he said to you during that telephone call? A. [12:26:56] Yes. Q. [12:27:00] You remember that? A. [12:27:01] Yeah. Not [...] the exact words, but there was something along this line. Q. [12:27:10] So I just want to be very clear. Your very first contact with [the intermediary], the issue of a video being shared was discussed. A. [12:27:36] Yes. Q. [12:27:39] Now, you – A. [12:27:41] But not – not in details, but – Q. [12:27:44] No, not in details. A. [12:27:46] He volunteered – Q. [12:27:48] He volunteered it? A. [12:27:49] -- that information to me. Yeah. [...] I mentioned to him that [...] it is important for us to confirm that he is in direct contact with the witness and we need proof for that [...]”, [Transcript of the hearing of 24 January 2023](#), p. 51, line 10-p. 52, line 8, p. 52, lines 16-18.

The Chamber, having found P-1049 credible [...], is satisfied that P-1049 did not ask the intermediary for the video. [...] The Chamber is satisfied that 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.¹¹⁵

52. In its express references to paragraph 46 of the Impugned Decision, the Defence focuses its submissions on the above conclusion that “P-1049 did not ask the intermediary for the video”.¹¹⁶ However, that finding must be read in conjunction with the remainder of the paragraph. The Trial Chamber explains that P-1049 did not ask the intermediary for the Video and that the idea “originated with the intermediary and not the Investigators”. However, it expressly continues by finding that “P-1049 was asking the intermediary for the video [...] as a result of the intermediary having first intimated that a video was being made and would be sent”. The Appeals Chamber finds that the determinations of the Trial Chamber are consistent. They must be read in context as reflecting the overall findings of the Trial Chamber that, while P-1049 did not initially suggest that the Video should be made and sent, once the intermediary stated that a video could be shared P-1049 was in favour of receiving it and followed up in relation to this. The Defence has therefore neither demonstrated that those findings were unreasonable in light of the evidence that was before it nor shown any inconsistency in the Trial Chamber’s findings.

53. The Appeals Chamber also does not find unreasonable the factual finding of the Trial Chamber that it was the receipt of the Video in March 2020 which provided the Prosecution with “clear and irrefutable evidence that the intermediary was in contact with the accused”.¹¹⁷ The Appeals Chamber notes the reference of the Defence in this context to the submissions filed by the Prosecutor on 2 December 2022 which stated that the Prosecution was satisfied with the documentation received on 27 December 2019 as demonstrating that the intermediary was in contact with the accused and did not ask for additional material evidencing that matter.¹¹⁸ However, the Appeals

¹¹⁵ [Impugned Decision](#), para. 46.

¹¹⁶ [Appeal Brief](#), paras 10, 12.

¹¹⁷ [Impugned Decision](#), para. 51.

¹¹⁸ [Appeal Brief](#), para. 11, referring to [Prosecutor’s Response before the Trial Chamber](#), para. 10.

Chamber observes that those submissions were filed, without input from P-1049,¹¹⁹ in advance of the hearings that the Trial Chamber held in this matter and, in particular, before it had heard the evidence of investigators P-1048 and P-1049 and the submissions from the parties in relation to that evidence thereafter.¹²⁰ In the Impugned Decision, the Trial Chamber referred to the evidence of both investigators on this point and recalled that, at least for P-1049, while the documentation received on 27 December 2019 was “sufficient” proof of contact between the intermediary and the accused, it was “not conclusive”.¹²¹ The Defence argues that P-1049 was not referring to the accused’s identity, but rather to his willingness to cooperate, when he referred to the evidence not being conclusive.¹²² The Appeals Chamber does not find that argument persuasive in light of P-1049’s evidence on this point.¹²³ P-1049 responded to a question from the Presiding Judge asking whether he and his superiors were satisfied that the certificates received on 27 December 2019 were sufficient proof that the intermediary was in contact with the accused by stating that they were “sufficient proof that he is in contact with Mr Abd-Al-Rahman but not conclusive”.¹²⁴ While P-1049 did refer to the accused’s willingness to cooperate during the course of a subsequent answer, when the Presiding Judge proceeded to ask him what would have constituted conclusive evidence, he responded, “*When the video came showing the suspect identifying himself,*

¹¹⁹ See [Impugned Decision](#), para. 44, stating that P-1049 had been on sick leave, *referring to* the transcript of the hearing of 25 January 2023, [ICC-02/05-01/20-T-109-ENG](#), pp 108-109, which includes a passage stating that P-1049 had not been asked for input prior to the Prosecution’s response to the original written motion as he had been on sick leave.

¹²⁰ See [Impugned Decision](#), paras 7, 9-12.

¹²¹ [Impugned Decision](#), para. 23.

¹²² See [Appeal Brief](#), para. 11, fn. 23, *referring to* [Transcript of the hearing of 24 January 2023](#), p. 18, lines 15-16 and p. 18, line 20-p. 19, line 2.

¹²³ The following exchange took place: “PRESIDING JUDGE KORNER: [10:23:13] Once the certificates were received, were you and your superiors satisfied that there was sufficient proof that he was in contact with Al-Rahman? A. [10:23:30] For me, yes, I believe that that was a sufficient proof that he is in contact with Mr Abd-Al-Rahman but not conclusive. I have seen these certificates from different source” (see [Transcript of the hearing of 24 January 2023](#), p. 18, lines 12-17). In the next passage, in the context of addressing what evidence would be conclusive, P-1049 does indeed state: “you want to hear from the suspect, directly from him, that he is willing to cooperate. Some other person may tell me that the suspect has this and this intention. Unless you get confirmation from the suspect directly, you cannot act [...]”. However, this is followed by the following question and answer: “PRESIDING JUDGE KORNER: [10:25:47] Well, I understand what you say, sir, but then can I ask you what in your view would have been conclusive evidence? A. [10:25:59] *When the video came showing the suspect identifying himself, that was for me conclusive.* That was for me the point, and I think also for the team, to take this intermediary seriously and seriously start making plans to facilitate the surrender of the suspect” (see [Transcript of the hearing of 24 January 2023](#), p. 18, line 18-p. 19, line 9 (emphasis added)).

¹²⁴ [Transcript of the hearing of 24 January 2023](#), p 18, lines 15-16.

that was for me conclusive”.¹²⁵ The Defence has therefore not demonstrated any factual error in this regard.

54. Finally, the Appeals Chamber finds that the Defence, in arguing that the intermediary acted as “a *de facto* agent of the OTP”,¹²⁶ has not established that it was unreasonable for the Trial Chamber to conclude that he “was not a Prosecution intermediary, i.e. he was not acting on behalf of the Prosecution”.¹²⁷ The Trial Chamber explained that finding by stating that the intermediary was, instead, “an unknown individual who voluntarily contacted the Prosecution offering them the opportunity to establish contact with the accused”.¹²⁸ The Defence has not put forward any arguments that demonstrate that these conclusions were unreasonable and could therefore amount to an error of fact. Whether the interactions between the intermediary and the Prosecutor required the accused to be given notice of his rights under article 55(2) of the Statute is a separate question of law, to be considered under the second ground of appeal.

55. For the above reasons, the Appeals Chamber concludes, by majority, Judge Ibáñez Carranza dissenting, that the Defence has not established any error of fact and therefore rejects the first ground of appeal.

56. For the reasons expressed in her dissenting opinion, Judge Ibáñez Carranza, contrary to the view of the Majority, considers 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. She is 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, Judge Ibáñez Carranza considers that 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

¹²⁵ [Transcript of the hearing of 24 January 2023](#), p 19, lines 6-7.

¹²⁶ [Appeal Brief](#), para. 18.

¹²⁷ [Impugned Decision](#), para. 50.

¹²⁸ [Impugned Decision](#), para. 50. *See also* [Impugned Decision](#), para. 19.

Video and without having heard any evidence from the intermediary. She therefore does not regard the factual conclusions of the Trial Chamber to be reasonable in the circumstances of this case.

B. Second ground of appeal: alleged errors of law

57. Under its second ground of appeal, the Defence submits that the Trial Chamber erred in law in concluding, at paragraphs 48-52 of the Impugned Decision, that article 55(2) of the Statute was not applicable to the interaction between P-1049 and the intermediary, which resulted in the production of the Video.¹²⁹ The Defence further submits that the Trial Chamber's finding that article 55(2) of the Statute was not applicable led it to conclude that there was no reason to declare the Video inadmissible under article 69(7) of the Statute – and that this constituted an error of law which materially affected the Impugned Decision.¹³⁰

1. Relevant part of the Impugned Decision

58. The Trial Chamber found that article 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 did not apply to the circumstances surrounding the sending of the Video and the interactions between the Prosecution and the intermediary.¹³¹ The Trial Chamber further found that the cases relied upon by the parties in respect of article 55(2) of the Statute concerned circumstances in which a suspect is questioned directly and in-person about alleged crimes and not through a third party.¹³²

59. The Trial Chamber held that, until the Video was received, the Prosecution did not have any direct contact with the accused but communicated only with the intermediary, with the Defence neither being able to provide a satisfactory answer as to when the Prosecution should have given the required notification under article 55(2) of the Statute nor disputing that the Prosecution has to be sure that the person is someone suspected of committing a crime before article 55(2) of the Statute is applicable.¹³³

¹²⁹ [Appeal Brief](#), para. 19.

¹³⁰ [Appeal Brief](#), para. 20.

¹³¹ [Impugned Decision](#), para. 48.

¹³² [Impugned Decision](#), para. 48.

¹³³ [Impugned Decision](#), para. 49.

60. The Trial Chamber determined that, because the Prosecution did not discuss anything related to the charged crimes with the intermediary, article 55(2) of the Statute did not apply to the present circumstances; and that the intermediary was not acting on behalf of the Prosecution.¹³⁴ It proceeded to find that, as all communications prior to the receipt of the Video took place through the intermediary, “none of the conversations between the Prosecution and the intermediary can be considered to be questioning within the meaning of Article 55(2) of the Statute”.¹³⁵

61. The Trial Chamber found that the Prosecution was obliged to give notice of the rights under article 55(2) of the Statute “at the earliest opportunity”, but that that was not required in this case until after receipt of the Video which provided “clear and irrefutable evidence” that the intermediary was in contact with the accused.¹³⁶ As such, the Trial Chamber held that there had not been any violation of any rule of customary international law, human rights treaties or article 21(1)(b) of the Statute.¹³⁷ In light of those findings, the Trial Chamber declined to exclude the Video under article 69(7) of the Statute.¹³⁸

2. The Defence’s submissions before the Appeals Chamber

62. The Defence submits that the Trial Chamber erred in law in interpreting the rights set out in article 55(2) of the Statute to apply only to “situations where the suspect is questioned directly about alleged crimes under the jurisdiction of the Court”.¹³⁹ The Defence further argues that the Trial Chamber erred in law in its interpretation of article 55(2) of the Statute, by failing to take into account 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 is therefore inseparable from his involvement in the commission of the alleged crimes.¹⁴⁰ The Defence proceeds to aver that the Trial Chamber erred in law in relation to the following conclusions.

¹³⁴ [Impugned Decision](#), para. 50.

¹³⁵ [Impugned Decision](#), para. 50.

¹³⁶ [Impugned Decision](#), para. 51.

¹³⁷ [Impugned Decision](#), para. 51.

¹³⁸ [Impugned Decision](#), para. 52.

¹³⁹ [Appeal Brief](#), para. 19, referring to [Impugned Decision](#), para. 48.

¹⁴⁰ [Appeal Brief](#), para. 19.

63. First, in respect of the Trial Chamber's conclusions that article 55(2) of the Statute does not apply to the interactions between the investigator and the intermediary, and the circumstances surrounding the sending of the Video, the Defence submits that the Video constitutes a message from Mr Abd-Al-Rahman, as a suspect before the Court, to the Prosecution; and that it is a response to, at least, encouragement from P-1049 and repeated requests for it to be sent thereafter, albeit via an intermediary, who was "a mere 'conduit' or *de facto* agent" of the Prosecution.¹⁴¹ The Defence argues that the interaction "has all the hallmarks of questioning", involving a request from the Prosecution and a response from Mr Abd-Al-Rahman;¹⁴² and that article 55(2) of the Statute is therefore applicable to it, as that provision is not limited to circumstances in which a suspect is questioned directly, or by the manner in which the questioning is carried out.¹⁴³ The Defence submits that the more restrictive interpretation of article 55(2) of the Statute given by the Trial Chamber is unsupported by authority and contrary to international human rights standards, arguing that it thereby violates article 21(3) of the Statute.¹⁴⁴ It further submits that the procedural advantage granted to the Prosecutor by admitting the Video was excessive when compared to the prejudice caused to Mr Abd-Al-Rahman and violated his article 55(2) rights.¹⁴⁵

64. Second, the Defence submits that, in concluding at paragraph 48 of the Impugned Decision that the cases relied upon by the parties in relation to article 55(2) of the Statute encompassed situations in which a suspect is questioned directly and in-person about alleged crimes, the Trial Chamber wrongly interpreted the *Ongwen* and *Bemba* precedents that it cited and failed to take into account other relevant precedents relied upon by the Defence, namely the *Zigiranyirazo* case.¹⁴⁶

65. Third, the Defence contests the conclusion of the Trial Chamber, at paragraph 50 of the Impugned Decision, that article 55(2) of the Statute did not apply as a result of the Prosecution not discussing anything related to the charged crimes with the intermediary.¹⁴⁷ The Defence argues that the Prosecution knew, or should have known,

¹⁴¹ [Appeal Brief](#), para. 23.

¹⁴² [Appeal Brief](#), para. 23.

¹⁴³ [Appeal Brief](#), para. 24.

¹⁴⁴ [Appeal Brief](#), paras 25-28.

¹⁴⁵ [Appeal Brief](#), para. 28.

¹⁴⁶ [Appeal Brief](#), paras 29-33.

¹⁴⁷ [Appeal Brief](#), para. 35.

that the identity of the suspect in this case was an essential element of the charges, as Mr Abd-Al-Rahman disputes that he is “Ali Kushayb” – and it is that latter person who is accused of the crimes.¹⁴⁸ The Defence further submits that, by assuming the alias “Ali Kushayb” would not be challenged, the Prosecution has been negligent and violated Mr Abd-Al-Rahman’s presumption of innocence under article 66(2) of the Statute.¹⁴⁹ The Defence avers that any discussion of the identity of the suspect could not be separated from the charges and rendered article 55(2) of the Statute applicable.¹⁵⁰

66. Fourth, the Defence submits that the Trial Chamber erred in law in failing to conclude that, on the facts, the Prosecution should have informed the suspect of his article 55(2) rights upon receipt of other documents confirming his identity on 27 December 2019, rather than concluding that this was not required until the Video was received on 20 March 2020.¹⁵¹

67. The Defence submits that, as a result of its erroneous factual and legal findings in this case, the Trial Chamber inferred that there were no grounds to exclude the Video under article 69(7) of the Statute – and that the Impugned Decision is therefore materially affected by those errors.¹⁵² It requests the Appeals Chamber to rule, *inter alia*, that there has been a violation of article 55(2) of the Statute, which renders the Video inadmissible under article 69(7) of the Statute, as its admission would be antithetical to and would seriously damage the integrity of the proceedings.¹⁵³

3. *The Prosecutor’s submissions before the Appeals Chamber*

68. The Prosecutor requests the Appeals Chamber to reject the second ground of appeal.¹⁵⁴ He submits that the Defence fails to show any error in the Trial Chamber’s reasonable and correct conclusion that article 55(2) of the Statute did not apply in the circumstances of this case and that, accordingly, the Trial Chamber was not required to assess whether the Video should be excluded under article 69(7) of the Statute.¹⁵⁵ The

¹⁴⁸ [Appeal Brief](#), para. 34.

¹⁴⁹ [Appeal Brief](#), para. 34.

¹⁵⁰ [Appeal Brief](#), para. 35. *See also* para. 19.

¹⁵¹ [Appeal Brief](#), paras 26, 36-37.

¹⁵² [Appeal Brief](#), paras 6, 20.

¹⁵³ [Appeal Brief](#), para. 3, p. 21, para. 3.

¹⁵⁴ [Prosecutor’s Response](#), paras 23, 40.

¹⁵⁵ [Prosecutor’s Response](#), para. 9.

Prosecutor proceeds to respond to the Defence's submissions in relation to each of the conclusions of the Trial Chamber that it challenges.¹⁵⁶

69. First, the Prosecutor submits that the Trial Chamber was correct to find that article 55(2) of the Statute did not apply to the interactions between the Prosecution and the intermediary.¹⁵⁷ He avers that the Defence's claim that the intermediary was the Prosecution's "*de facto* agent" and that the Video was the result of 'questioning' of Mr Abd-Al-Rahman by the Prosecutor within the meaning of article 55(2) of the Statute is without any basis in the record;¹⁵⁸ that the Trial Chamber correctly found that the provision applies to direct interactions between the Prosecution and suspects, and not to interactions taking place through intermediaries;¹⁵⁹ that the Trial Chamber did not interpret article 55(2) of the Statute incompatibly with internationally recognized human rights and therefore did not violate article 21(3) of the Statute;¹⁶⁰ and that the Trial Chamber's conclusion that article 55(2) of the Statute did not apply until after the Prosecution had established Mr Abd-Al-Rahman's identity was consistent with the Court's prior jurisprudence and domestic practice.¹⁶¹

70. Second, the Prosecutor submits that the Trial Chamber did not err in its consideration of the jurisprudence presented by the parties, nor did this give rise to any error upon which it based its conclusion that article 55(2) of the Statute applies to the direct questioning of a suspect,¹⁶² arguing that the Trial Chamber correctly characterised the case law;¹⁶³ that the case of *Zigiranyirazo* on which the Defence relies is inapposite as it concerns markedly different circumstances to the situation at hand;¹⁶⁴ and that, contrary to the Defence's submissions, the *obiter* finding of the Pre-Trial Chamber in *Bemba* supports the view that interactions with a person who is the subject of an arrest warrant to confirm their identity following their arrest would not constitute 'questioning' within the meaning of article 55(2) of the Statute.¹⁶⁵

¹⁵⁶ [Prosecutor's Response](#), paras 26-40.

¹⁵⁷ [Prosecutor's Response](#), para. 26.

¹⁵⁸ [Prosecutor's Response](#), para. 27.

¹⁵⁹ [Prosecutor's Response](#), para. 28.

¹⁶⁰ [Prosecutor's Response](#), paras 29-30.

¹⁶¹ [Prosecutor's Response](#), para. 31.

¹⁶² [Prosecutor's Response](#), paras 32, 36.

¹⁶³ [Prosecutor's Response](#), para. 33.

¹⁶⁴ [Prosecutor's Response](#), para. 34.

¹⁶⁵ [Prosecutor's Response](#), para. 35.

71. Third, the Prosecutor submits that the Defence fails to identify any errors in the Trial Chamber's finding that the Prosecution did not discuss anything related to the charged crimes with the intermediary and thus did not question the accused within the meaning of article 55(2) of the Statute, rejecting the Defence's argument that the Prosecution knew or should have known that, in this case, the identity of Mr Abd-Al-Rahman was an essential element of the charges.¹⁶⁶ He contends that the Defence's argument is incorrect as: (i) the Prosecution did not at any time require the intermediary to produce proof of Mr Abd-Al-Rahman's alias; and (ii) it is premised on the Defence's incorrect claim that Mr Abd-Al-Rahman was questioned by the Prosecution.¹⁶⁷

72. Fourth, the Prosecutor submits that the Defence's claim that the Prosecution was obliged to give the article 55(2) notification to Mr Abd-Al-Rahman at the earliest opportunity on 27 December 2019 when it was satisfied that the intermediary was in contact with Mr Abd-Al-Rahman is misconstrued and unmerited.¹⁶⁸ In support, he avers that it is within the prerogative of the Prosecutor, in line with his duties and powers pursuant to article 54 of the Statute, to determine the extent of the proof that he requires to prove contact, and that this argument, in any event, is based on the Defence's erroneous contentions that the interactions between the Prosecution and the intermediary amounted to 'questioning' under article 55(2) of the Statute.¹⁶⁹

73. The Prosecutor also submits that the Defence fails to establish that the alleged errors had any material impact on the Trial Chamber's decision to admit the Video, with the Defence failing to demonstrate how the Trial Chamber's assessment of the criteria under article 69(7) of the Statute would have differed had the Trial Chamber not erred and had article 55(2) of the Statute therefore been applicable.¹⁷⁰ He avers that, in any event, several factors militate against a finding that the Video would have been excluded under article 69(7) of the Statute.¹⁷¹

¹⁶⁶ [Prosecutor's Response](#), para. 37.

¹⁶⁷ [Prosecutor's Response](#), para. 37, referring to [Prosecutor's Response](#), paras 8-9, 17.

¹⁶⁸ [Prosecutor's Response](#), paras 38-39.

¹⁶⁹ [Prosecutor's Response](#), para. 39.

¹⁷⁰ [Prosecutor's Response](#), paras 5, 41-42.

¹⁷¹ [Prosecutor's Response](#), para. 41.

4. Determination by the Appeals Chamber

a. Preliminary issues

74. Two preliminary issues arise out of the Defence's submissions on the second ground of appeal. The below determination of these two preliminary issues by the Appeals Chamber is unanimous.

75. First, the Prosecutor requests that the Appeals Chamber dismiss *in limine* the Defence's attempt to incorporate by reference its prior submissions in relation to the guarantees of article 55(2) of the Statute and the list of authorities it presented before the Trial Chamber,¹⁷² to the extent that the Defence fails to explain in its Appeal Brief how the authorities support its appeal.¹⁷³

76. In the Appeal Brief, the Defence states that it refers to its written and oral submissions before the Trial Chamber on the applicable law concerning the rights under article 55(2) of the Statute and annexes the table of authorities it relied upon in those submissions as the Annex to the Appeal Brief.¹⁷⁴ The Defence submits that "[t]he 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".¹⁷⁵

77. The Appeals Chamber recalls that an appellant is required to set out arguments on appeal in its appeal brief and may not seek to incorporate by reference arguments developed in other filings.¹⁷⁶ As such, the Defence cannot simply incorporate by reference previous submissions that it made before the Trial Chamber in this case and the Appeals Chamber will therefore only consider the arguments raised in the Appeal Brief. In addition, and for the same reasons, the Appeals Chamber will only consider authorities contained within the Annex to the Appeal Brief to the extent that the Defence explains how any of them support the arguments that it is making on appeal and how they apply to the circumstances of the present case.

¹⁷² [Prosecutor's Response](#), para. 24, referring to [Appeal Brief](#), para. 21; [Annex to Appeal Brief](#).

¹⁷³ [Prosecutor's Response](#), para. 24.

¹⁷⁴ [Appeal Brief](#), para. 21; [Annex to Appeal Brief](#).

¹⁷⁵ [Appeal Brief](#), para. 21.

¹⁷⁶ *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"](#), 15 December 2022, ICC-02/04-01/15-2022-Red, paras 92-94.

78. Second, the Defence requests that the Appeals Chamber, “in the first place”, recognise the rights set out in 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”,¹⁷⁷ which is opposed by the Prosecutor.¹⁷⁸ The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law in the abstract as it is not an advisory body.¹⁷⁹ As recently noted in the *Said* OA5 Decision, this is not a role vested in the Appeals Chamber by the applicable law before the Court.¹⁸⁰ Notwithstanding the above, the Appeals Chamber observes that the rights contained within article 55(2) of the Statute are directly applicable law under article 21(1)(a) of the Statute. For that reason, the Appeals Chamber does not see any need to separately recognise those rights as general principles of law under article 21(1)(c) of the Statute, which is designed to give the Court authority to apply general principles of law that are not otherwise provided for within, *inter alia*, the Statute. The Appeals Chamber further recalls that, pursuant to article 21(3) of the Statute, the application and interpretation of the Statute must be consistent with internationally recognized human rights. The Appeals Chamber therefore dismisses the request of the Defence for it to recognise the guarantees of article 55(2) of the Statute as general principles of criminal law under article 21(1)(c) of the Statute.

b. Merits

79. At the outset, it is recalled that the Appeals Chamber considers that a trial chamber, as the trier of fact, has the “primary responsibility” for evaluating the relevance, probative value and potential prejudice of the evidence (to be) submitted, as

¹⁷⁷ [Appeal Brief](#), para. 21.

¹⁷⁸ [Prosecutor’s Response](#), para. 25.

¹⁷⁹ See *The Prosecutor v. Mahamat Said Abdel Kani*, [Decision on the admissibility of the appeal](#), 25 October 2022, ICC-01/14-01/21-514, para. 23; *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute”](#), 16 December 2013, ICC-02/11-01/11-572 (OA5), paras 54, 65; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497 (OA8), para. 38. See also *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”](#), 30 May 2012, ICC-01/04-01/10-514 (OA4), para. 68.

¹⁸⁰ [Said OA5 Decision](#), para. 23.

well as any issues raised by the parties in that regard.¹⁸¹ As such, when a party requests the submission of an item of evidence, a trial chamber has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as “submitted” within the meaning of article 74(2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted, or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.¹⁸² It is further recalled that “the paramount principle of free assessment of evidence as enshrined in article 69(4) of the Statute and rule 63(2) of the Rules [...] is ‘a core component of judicial activity both at the pre-trial stage of the case and at trial’”.¹⁸³

(i) Article 55 of the Statute

80. Article 55 of the Statute sets out the rights of persons during an investigation. It provides essential guarantees at that initial stage to ensure that the entire course of the criminal proceedings are fair. As stated in the commentary of the International Law Commission on the text of what formed the basis for article 55 of the Statute, “[...] the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example, the right not to be compelled to confess to a crime”.¹⁸⁴

¹⁸¹ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [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*”), paras 509, 597-598; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5), para. 57.

¹⁸² See *Bemba et al. Appeals Judgment*, para. 598. The Appeals Chamber notes that, in the [Impugned Decision](#) in the present case, the Trial Chamber found that ruling on the admissibility of the Video when it did (towards the conclusion of the case of the Prosecution and prior to the presentation of the case of the Defence) would provide clarity and certainty to the parties and participants, particularly to the Defence, in light of its disavowal of the name Ali Kushayb as a core part of its case; and that it was therefore appropriate to rule on its admissibility at this stage of the proceedings rather than during its decision pursuant to article 74 of the Statute: see [Impugned Decision](#), para. 16.

¹⁸³ Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para. 59. See also *Bemba et al. Appeals Judgment*, paras 583-592.

¹⁸⁴ International Law Commission, [Draft Statute for an International Criminal Court with commentaries](#), 1994, Article 26, p. 47.

81. Article 55(1) of the Statute provides a person with fundamental rights in respect of an investigation under the Statute generally, including the right not to be compelled to self-incriminate or to confess guilt.¹⁸⁵ Article 55(2) of the Statute specifically addresses the additional rights that apply to a person who is about to be questioned. It provides as follows:

2. 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 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.

82. The Appeals Chamber, in its *Bemba et al.* Appeals Judgment, noted 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 “[t]hese safeguards are set forth in the Statute to protect the person against self-incrimination”.¹⁸⁶ It further noted that, pursuant to article 55(2) of the Statute, “when there are grounds to believe that a person

¹⁸⁵ Article 55(1) of the Statute provides:

“1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

¹⁸⁶ [Bemba et al. Appeals Judgment](#), para. 636.

has committed a crime within the jurisdiction of the Court, that person, when questioned, *inter alia*, by national authorities acting at the behest of the Court, must be accorded (and duly informed of) certain enumerated rights”.¹⁸⁷

83. Indeed, the requirement to inform the person of the rights under article 55(2) of the Statute “prior to being questioned” is both clear from the plain wording of the provision and is essential to make the rights set out practical and effective.¹⁸⁸ It is necessary for the person to be able to exercise those rights both *before* the questioning begins and during the questioning itself.¹⁸⁹

(ii) *Whether the accused was “questioned” within the meaning of article 55(2) of the Statute*

84. The question to be addressed in this appeal is whether, in the specific circumstances of this case, the accused was “questioned” within the meaning of article 55(2) of the Statute. It is recalled that the Video was provided by the intermediary as proof that the person with whom he was in contact was the accused, which involved establishing the latter’s identity;¹⁹⁰ and that this was in the context of

¹⁸⁷ [Bemba et al. Appeals Judgment](#), fn. 673.

¹⁸⁸ See, in this context, 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. 272: “In order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them”.

¹⁸⁹ The Appeals Chamber notes that Trial Chamber VII, in *Bemba et al.*, in addressing the submissions relating to a violation of article 69(7) of the Statute, noted that “where there are grounds to believe that a person has committed a crime within the Court’s jurisdiction, Article 55(2) of the Statute guarantees certain rights to that person *during* questioning”: see Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, [Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible](#), 30 October 2015, ICC-01/05-01/13-1432, para. 23 (emphasis added). The Appeals Chamber further notes that, in the case of *Katanga and Ngudjolo*, Pre-Trial Chamber I considered that “the rights provided for in article 55(2) of the Statute must be made effective *immediately prior to, and during*, the interview of the relevant witness”: see Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the Defences’ Application for Leave to Appeal the “Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12”](#), 22 May 2008, ICC-01/04-01/07-496, p. 9 (emphasis added). See also ECtHR, Grand Chamber, *Beuze v. Belgium*, [Judgment](#), 9 November 2018, application no. 71409/10, paras 133-134, in which it was held that, from the time when suspects are taken into custody, it must “be possible for a suspect to consult with his or her lawyer prior to an interview”; and that “suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings [...] in particular to ensure that the defence rights of the interviewed suspect are not prejudiced [...]”.

¹⁹⁰ See [Impugned Decision](#), paras 21, 23, 25 (stating that the Prosecution required confirmation that the intermediary was in contact with the accused) and paras 43-44 (referring to the need to obtain irrefutable proof of the identity of the accused).

the surrender of the accused to the Court.¹⁹¹ The findings of the Appeals Chamber below, which are made by majority, Judge Ibáñez Carranza dissenting, must be seen in that context.

85. At the outset, the Appeals Chamber observes that, contrary to the submissions of the Defence, the intermediary in the present case was not acting on behalf of the Prosecution.¹⁹² He was, in fact, an unknown individual who voluntarily contacted the Prosecution offering it the opportunity to establish contact with the accused.¹⁹³ The Prosecution did not have any authority or control over him.¹⁹⁴

86. Furthermore, the Prosecution did not itself have any direct contact with, or put any questions to, the accused prior to the Video being sent to it: the only communications that it had were with the intermediary.¹⁹⁵ During the initial telephone call with the intermediary, P-1049 told him that the Prosecution required confirmation that he was in contact with the accused.¹⁹⁶ Given that the intermediary was unknown, the Prosecution was thereby, in effect, asking the intermediary to prove that he was genuine, in the sense of in fact being in contact with the accused and was able to assist with his surrender to the Court.¹⁹⁷ It was the intermediary who then had the idea of providing such confirmation by means of sending the Prosecution a video.¹⁹⁸ Indeed, it was during the initial call with P-1049 that 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”.¹⁹⁹ It was only after the intermediary made that suggestion that the Prosecution followed up with him about receiving it.²⁰⁰

87. Moreover, the Appeals Chamber observes that the Prosecution did not influence the contents of the Video by questioning the suspect while it was being made, whether

¹⁹¹ [Impugned Decision](#), para. 43.

¹⁹² [Impugned Decision](#), para. 50.

¹⁹³ See [Impugned Decision](#), paras 19, 21, 50.

¹⁹⁴ [Impugned Decision](#), para. 50. See also [Prosecutor's Response](#), para. 1, fn. 2, para. 27.

¹⁹⁵ See [Impugned Decision](#), paras 49-50.

¹⁹⁶ [Impugned Decision](#), para. 21.

¹⁹⁷ [Impugned Decision](#), paras 19, 21, 43.

¹⁹⁸ See [Impugned Decision](#), paras 22, 25, 44, 46.

¹⁹⁹ [Impugned Decision](#), para. 22. See also para. 46.

²⁰⁰ [Impugned Decision](#), paras 22, 46.

by means of asking follow-up questions to anything that was being said or otherwise. The Prosecution was not present when the Video was recorded.

88. For the above reasons, the Appeals Chamber observes that the Prosecution in this case did not put any questions to the accused. However, even assuming that it were possible to attribute any of the actions of the intermediary to the Prosecution, there was, in any event, no ‘questioning’ of the accused within the meaning of article 55(2) of the Statute on the facts of this case for the reasons that follow.

89. In addition to the factors set out above, the Trial Chamber found that the Prosecution did not discuss with the intermediary anything related to the charged crimes.²⁰¹ The focus of the Prosecution was solely upon receiving confirmation from an unknown individual that he was genuinely in contact with the accused.²⁰² That took place before any direct contact had been had between the accused and the Prosecution. Indeed, the reason that the intermediary was in contact with the Prosecution was to “[offer] them the opportunity to establish contact with the accused”.²⁰³ In so far as that required establishing the identity of the accused for that purpose, the issue is whether, in the specific circumstances of this case, that forms the subject-matter of the ‘questioning’ envisaged by article 55(2) of the Statute.

90. The Trial Chamber found that article 55(2) of the Statute is designed to address situations in which the person concerned is “questioned”²⁰⁴ about alleged crimes within the jurisdiction of the Court.²⁰⁵ The Appeals Chamber finds that this is 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. The rights provided under article 55(2) of the Statute are to be afforded to a person who is suspected of committing a crime. Crucially, they are designed to protect that person when answering questions about their possible involvement in that crime, which could result in criminal charges, an eventual trial on those charges and a potentially lengthy sentence if the person is convicted. They are

²⁰¹ [Impugned Decision](#), para. 50.

²⁰² [Impugned Decision](#), paras 19, 21, 50.

²⁰³ [Impugned Decision](#), para. 50.

²⁰⁴ It is noted that the Statute refers three times to “questioning” persons and five times to being “questioned”, but does not define that term.

²⁰⁵ [Impugned Decision](#), para. 48. *See also* para. 50.

essential rights to be guaranteed during the criminal process – a process that is underpinned by charges outlining the crimes allegedly committed.²⁰⁶

91. Turning to the present case, the Appeals Chamber finds that the preliminary matters arising in this appeal do not fall within the meaning of ‘questioning’ pursuant to article 55(2) of the Statute. They instead concern essential prerequisites to any such questioning taking place, namely whether a person claiming to be in contact with the accused is genuine or being sure about the identity of the person to be surrendered before any questioning can take place. This is therefore distinguishable from a situation in which the Prosecution, with knowledge of its investigation in relation to the crimes committed, directly asks questions of a person who it has established is indeed the suspect.²⁰⁷

92. It follows that merely establishing the identity of that person does not constitute being “questioned” within the meaning of article 55(2) of the Statute, as that would ordinarily need to take place before the rights under that provision are administered. As the Trial Chamber highlighted at the beginning of its findings, the context in which this issue arises is of note: it involves the “[s]urrender of an accused to an international criminal tribunal [which] will inevitably involve negotiations, often complex and resource intensive, which would not normally arise in a domestic context. It is therefore incumbent upon the authority to whom an offer of surrender is made to obtain irrefutable confirmation of the identity of a person to be surrendered”.²⁰⁸

93. Consistent with the above, and contrary to the arguments of the Defence,²⁰⁹ the Appeals Chamber further notes the decision of Pre-Trial Chamber III in the *Bemba* case, in which the Single Judge made an express distinction between ‘questioning’ under article 55(2)(d) of the Statute and “*merely an interview to establish the identity of Mr Jean-Pierre Bemba and to inform him of his rights*”.²¹⁰ The Single Judge

²⁰⁶ See regulation 52 of the Regulations of the Court.

²⁰⁷ See also, in this context, the detailed procedure provided for in rules 111 and 112 of the Rules of Procedure and Evidence which relate to questioning under article 55(2) of the Statute.

²⁰⁸ [Impugned Decision](#), para. 43.

²⁰⁹ [Appeal Brief](#), para. 30.

²¹⁰ 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) (hereinafter: “*Bemba Decision on application for interim release*”), para. 45 (emphasis added).

proceeded to state that, as it appeared to have been the latter, only “evidence” obtained in the interview could potentially be excluded under article 69(7) of the Statute, *i.e.* evidence related to matters other than identity, having just held that an interview establishing the identity of the suspect did not fall within article 55(2)(d) of the Statute.²¹¹

94. Furthermore, the above is consistent with what happens when a person first appears before the Court under article 60(1) of the Statute. By way of example, in his initial appearance, the accused in this case was first asked to introduce himself.²¹² It was only thereafter that the accused was made aware of the scope of the hearing, which would include the Single Judge being satisfied that he was informed of the crimes that he was alleged to have committed and, importantly, of his rights under the Statute.²¹³

95. More generally, the Appeals Chamber also notes as illustrative, in this context, two European Union Directives,²¹⁴ as well as certain limited examples of national

²¹¹ The relevant paragraph of the decision reads in full as follows: “45. In respect of the warrant of arrest of 23 May 2008, it is unclear whether the interview by the investigating judge on 25 May 2008 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 Mr 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”.

²¹² See the transcript of the hearing of the accused’s initial appearance on 15 June 2020, [ICC-02/05-01/20-T-001-ENG](#), p. 3, line 6, p. 3, line 19-p. 4, line 2.

²¹³ See the transcript of the hearing of the accused’s initial appearance on 15 June 2020, [ICC-02/05-01/20-T-001-ENG](#), p. 4, lines 18-23.

²¹⁴ See [DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty](#), Official Journal of the European Union, 6 November 2013, L 294/1, which provides for suspects or accused persons to have access to a lawyer, *inter alia*, before and during questioning, noting, in particular, its Recital 20 which provides, in relevant part: “For the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned [...]”; and [DIRECTIVE \(EU\) 2016/343 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#), Official Journal of the European Union, 11 March 2016, L 65/1, which provides for Member States to ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected of having committed (Article 7(1)) and that they have the right not to incriminate themselves (Article 7(2)), noting, in particular, its Recital 26 which provides: “The right to remain silent and the right not to incriminate oneself should apply to questions relating to the criminal offence that a person is suspected or accused of having committed and not, for example, to questions relating to the identification of a suspect or accused person”.

practice referred to by the Prosecutor,²¹⁵ which do not require rights to be given prior to interactions which are solely for the purpose of establishing identity.

96. The Appeals Chamber concludes that ‘questioning’ under article 55(2) of the Statute does not relate to the Prosecution in the present case informing an unknown intermediary that it required confirmation that he was in contact with the accused. To the extent that the confirmation of the identity of the accused was a necessary part of that exercise, that falls outside the scope of article 55(2) of the Statute.

(iii) Discussion of the charged crimes with the intermediary

97. The Appeals Chamber further dismisses the contention of the Defence that, in the present case, the Trial Chamber erred in law in finding that the Prosecution did not discuss with the intermediary anything related to the charged crimes in that the Prosecution “knew, or should have known, that the suspect’s identity [...] constituted a core aspect of the charges” because Mr Abd-Al-Rahman is accused “only under a different identity defined by the alias ‘*Ali Kushayb*’”; and that, by assuming the alias would not be challenged, the Prosecution has been negligent and violated his presumption of innocence under article 66(2) of the Statute.²¹⁶

98. The Appeals Chamber notes that the warrant of arrest in this case was issued against ‘Ali Muhammad Ali Abd-Al-Rahman’, also known as ‘Ali Kushayb’.²¹⁷ The Appeals Chamber observes that the Trial Chamber rejected the argument of the Defence that the Prosecution, at the time of the events in question, should have been aware that

²¹⁵ See [Prosecutor’s Response](#), para. 31, referring to United Kingdom, [Police and Criminal Evidence Act 1984 \(PACE\): CODE C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers](#), United Kingdom Home Office, 1 August 2019. Part 10.1 of that Code relates to when a suspect must be cautioned and provides:

“10 Cautions

(A) When a caution must be given

10.1 A person whom there are grounds to suspect of an offence [...] must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect’s answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g.:

(a) *solely to establish their identity or ownership of any vehicle;*
[...]” (emphasis added).

In the same paragraph of his Response, the Prosecutor further refers to the United States Supreme Court case of [Pennsylvania v. Muniz](#), 18 June 1990, 496 U.S. 582, pp. 601-602, which found that police did not need to read suspects their rights before asking them their name as part of routine booking procedures.

²¹⁶ [Appeal Brief](#), paras 19, 22(iv), 34-35.

²¹⁷ See [Impugned Decision](#), para. 43 and its footnote 96.

the allegation that ‘Ali Kushayb’ is the same person as ‘Ali Muhammad Ali Abd-Al-Rahman’ would be disputed, whether from the evidence obtained or open source material.²¹⁸ The Appeals Chamber further notes that the Trial Chamber rejected the Defence’s request for leave to appeal the issue of whether the Trial Chamber, in the same paragraph of the Impugned Decision, erred in law in its definition of the Prosecution’s burden of proof pursuant to article 66(2) of the Statute.²¹⁹ Although the Defence now phrases this on appeal in terms of it being the accused’s presumption of innocence that was violated pursuant to article 66(2) of the Statute,²²⁰ this appears to be related to the issue for which leave to appeal was refused and, in any event, the Defence does not explain how the presumption of innocence was violated in these circumstances.

99. Furthermore, the Appeals Chamber finds, as argued by the Prosecutor,²²¹ that the Prosecution did not at any point require the intermediary to provide proof of the alias ‘Ali Kushayb’, but rather sought confirmation that he was in contact with the accused. Insofar as that involved establishing the identity of the accused, that solely involved confirming that the intermediary was in touch with the person wanted by the Court in the context of his surrender. Moreover, the Appeals Chamber observes that it was the intermediary, in his first voluntary contact with the Court, who referred to the accused as ‘Ali Kushayb’.²²² For the reasons stated above, the Appeals Chamber finds no error in the conclusion of the Trial Chamber that the Prosecution did not discuss with the intermediary anything related to the charged crimes.²²³

(iv) Internationally recognized human rights

100. The Appeals Chamber observes that the application and interpretation of article 55(2) of the Statute, as with any other provision, must be consistent with internationally recognized human rights.²²⁴ The Defence argument that the rights

²¹⁸ [Impugned Decision](#), para. 47.

²¹⁹ [Decision Granting Leave to Appeal](#), 8 March 2023, ICC-02/05-01/20-894, paras 5, 7, 18-20.

²²⁰ [Appeal Brief](#), para. 34.

²²¹ [Prosecutor’s Response](#), para. 37.

²²² [Impugned Decision](#), para. 21, setting out that, “On 26 December 2019, the intermediary sent an email to the Public Information and Outreach Section of the Court stating that he had received communication from people close to ‘Ali Kushayb’, and that the latter was willing to cooperate with the Court”, *referring to the email from the intermediary, DAR-OTP-0217-0030 (translation: DAR-OTP-0215-6799)*.

²²³ [Impugned Decision](#), para. 50.

²²⁴ Article 21(3) of the Statute.

enumerated in article 55(2) of the Statute are protected by all the major international human rights instruments to which it refers²²⁵ is not the issue in the present case: it is the interpretation and application of article 55(2) of the Statute to the facts of this case that is of relevance.

101. Indeed, the European Court of Human Rights (hereinafter: “ECtHR”) has made clear that the manner in which the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms which are akin to those under consideration in the present appeal “are to be applied during the investigation stage depends on the special features of the proceedings and on the circumstances of the case”.²²⁶ In that context, the Defence has not referenced any authority in support of its contention that it is a violation of international human rights law for the Prosecution to ask an unknown intermediary to provide confirmation that he is in contact with a suspect further to his statement that he could assist with that suspect’s surrender to an international criminal tribunal.²²⁷ The ECtHR case to which the Defence refers in this context itself states that, “as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police”.²²⁸ However, for the reasons explained

²²⁵ [Appeal Brief](#), para. 27.

²²⁶ [Ibrahim and Others v. the United Kingdom](#), para. 253, referring to ECtHR, [Imbrioscia v. Switzerland, Judgment](#), 24 November 1993, application no. 13972/88, para. 38.

²²⁷ The facts of the ECtHR case relied upon by the Defence at paragraph 27 of the [Appeal Brief](#) are significantly different in that the applicant was denied access to a lawyer while he was in police custody, during which he was interrogated by the police, to whom he made, *inter alia*, various admissions in relation to the offences and thereafter made statements in relation to the offences both to the public prosecutor and the investigating judge without legal representation: see [Salduz v. Turkey](#), paras 14, 17, 61-62. Similarly, the case on which the Defence relies at paragraph 27 of the [Appeal Brief](#) from the African Court on Human and Peoples’ Rights involved the applicant not being afforded free legal assistance throughout the proceedings in the national courts in relation to a serious offence with a severe penalty: see African Court on Human and Peoples’ Rights, [In the matter of Majid Goa alias Vedastus v. United Republic of Tanzania, Judgment \(merits and reparations\)](#), 26 September 2019, application no. 025/2015, paras 69-73. Finally, the passage of the case on which the Defence relies at paragraph 27 of the [Appeal Brief](#) from the Inter-American Court of Human Rights (hereinafter: “IACtHR”) merely reaffirms that the rights under consideration in this appeal must be respected at the pre-trial stage, which is not in dispute: see IACtHR, [Maritza Urrutia v. Guatemala, Judgment](#), 27 November 2003, Series C, no. 103, para. 120. That case is in any event of a wholly different nature relating, *inter alia*, to an abduction that lasted for eight days, during which Ms Urrutia was in clandestine detention and subjected to long and continuous interrogations without a lawyer by members of the Guatemalan Army’s intelligence unit, accompanied by torture and threats to kill her or members of her family if she did not collaborate; was forced to make filmed statements stating that she had abandoned an organisation and urging her companions to abandon their armed fight; and was thereafter forced, under threat of death, to go to the Attorney General who took her to request an amnesty from a judge, before leaving the country fearing attempts on her life. It was in those circumstances that the IACtHR found that she had been obliged to incriminate herself without being provided with the rights akin to those under consideration in the present appeal: See pp. 12-13, paras 58.1-58.11, 107-130.

²²⁸ ECtHR, Grand Chamber, [Salduz v. Turkey, Judgment](#), 27 November 2008, application no. 36391/02 (hereinafter: “[Salduz v. Turkey](#)”), para. 55.

above, the Appeals Chamber finds that, on the facts of this case, there had not yet been any “first interrogation”²²⁹ of the accused at the time of the matters under consideration.

102. The Appeals Chamber therefore determines that, contrary to the contention of the Defence,²³⁰ the Trial Chamber’s interpretation and application of article 55(2) of the Statute to the facts of this case was not inconsistent with internationally recognized human rights.

(v) *Other precedents relied upon by the Defence*

103. The Appeals Chamber also does not find that the three precedents to which the Defence refers in challenging one of the conclusions of the Trial Chamber in any way affect the above findings.²³¹ The Appeals Chamber has already referred to the decision in the *Bemba* case, to which the Defence refers, as in fact reflecting a conclusion that an interview to establish identity does not fall within article 55(2) of the Statute.²³² Furthermore, the paragraph of the *Ongwen* case cited by the Trial Chamber indeed states that the rights enumerated in article 55(2) of the Statute only apply when the person is questioned in the context of an investigation by the Court, either by the Prosecutor or by national authorities pursuant to a cooperation request made by the Court under Part 9 of the Statute.²³³ Finally, the Defence reliance on the *Zigiranyirazo* case also does not assist it.²³⁴ In that case, prosecution investigators asked the accused to prepare a document of what he knew and what he had done before, during and after the Rwandan genocide; there was evidence that the prosecution possessed information that the accused had committed crimes over which the tribunal had jurisdiction; and the accused should have been treated as a suspect during the meetings with prosecution

²²⁹ The Oxford English Dictionary defines “interrogate” as: “Ask questions of (someone) closely, aggressively, or formally (using as an example, ‘*police interrogated more than 15 people; he was interrogated at a detention centre*’). Black’s Law Dictionary (11th ed. 2019), gives the following principal definition of “interrogation”: “The formal or systematic questioning of a person; esp., intensive questioning by the police, usu. of a person arrested for or suspected of committing a crime”.

²³⁰ [Appeal Brief](#), paras 25, 27-28.

²³¹ [Appeal Brief](#), paras 22(iii), 29-33.

²³² See [Bemba Decision on application for interim release](#), para. 45; paragraph 93 above.

²³³ See [Impugned Decision](#), para. 48, referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen, Trial Judgment*, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 50.

²³⁴ [Appeal Brief](#), para. 32, referring to ICTR, Trial Chamber III, *Prosecutor v. Zigiranyirazo, Decision on the Defence Motion for Disclosure of Voir Dire Evidence*, 27 April 2006, ICTR-2001-73-T (hereinafter: “ICTR *Zigiranyirazo* Decision”).

investigators.²³⁵ The information requested of the accused in that case therefore related to crimes, which is different from the circumstances of the present case.

(vi) Clear and irrefutable evidence of contact

104. Finally, contrary to the submissions of the Defence,²³⁶ on the facts of this case, the Appeals Chamber does not find any error in the conclusion of the Trial Chamber that the Prosecution was not required to give notice under article 55(2) of the Statute until after “clear and irrefutable evidence” of contact between the intermediary and the accused had been obtained.²³⁷ The interactions took place in the context of the surrender of a suspect to an international court.²³⁸ It was therefore reasonable for the Prosecution to wish to have irrefutable confirmation that the person to be surrendered was the accused and that the intermediary was genuinely in contact with him. As found above,²³⁹ on the facts of this case it was the Video which provided that evidence.

(vii) Conclusion

105. For all of the above reasons, the Appeals Chamber concludes, by majority, Judge Ibáñez Carranza dissenting, that the Trial Chamber did not err in law in the circumstances of the present case. There was neither any questioning of the accused within the meaning of article 55(2) of the Statute nor any application or interpretation of that provision that was inconsistent with internationally recognized human rights. In sum, on the facts of the present case, where an unknown individual voluntarily contacted the Prosecution stating that he was in contact with a suspect and could assist in the latter’s eventual surrender to the Court, a request by the Prosecution for confirmation from the unknown individual that he was in contact with the suspect does not constitute ‘questioning’ of the suspect by the Prosecutor under article 55(2) of the Statute. The Appeals Chamber therefore, by majority, Judge Ibáñez Carranza dissenting, rejects the second ground of appeal.

106. For the reasons expressed in her dissenting opinion, Judge Ibáñez Carranza, contrary to the view of the Majority, considers that the Trial Chamber erred in law. She

²³⁵ [ICTR Zigranyirazo Decision](#), paras 1, 3-4, 9.

²³⁶ [Appeal Brief](#), paras 22(iv), 26, 36-37.

²³⁷ [Impugned Decision](#), para. 51.

²³⁸ [Impugned Decision](#), para. 43.

²³⁹ *See supra*, para. 53.

is not persuaded by the Majority's finding that article 55(2) of the Statute is not applicable to the circumstances of this case and disagrees with what she regards as its restrictive interpretation of that provision. Judge Ibáñez Carranza considers 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. She further considers that article 55(2) of the Statute applies whenever a suspect is about to be questioned, regardless of the subject-matter of the questioning. In her view, 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, Judge Ibáñez Carranza is of the view that there has been a violation of article 55(2) of the Statute. She considers that the errors of fact and law that she has found materially affected the Impugned Decision. She would have reversed the Impugned Decision and remanded this matter to the Trial Chamber.

VI. APPROPRIATE RELIEF

107. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.²⁴⁰ In the present case, it is appropriate to confirm the Impugned Decision.

Judge Ibáñez Carranza appends a dissenting opinion to this Judgment.

²⁴⁰ Rule 158(1) of the Rules of Procedure and Evidence.

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



Judge Piotr Hofmański
Presiding



Judge Luz del Carmen Ibáñez Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa



Judge Gocha Lordkipanidze

Dated this 28th day of June 2023

At The Hague, The Netherlands