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No. ICC-02/05-01/20

Date: 17 February 2023

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

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

Public

**Decision on the admissibility of video (DAR-OTP-0216-0119) and records of
telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128)**

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

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Other

I. Procedural background

1. On 28 March 2022, pursuant to paragraph 17 of the Directions on the Conduct of Proceedings (the ‘Directions’),¹ the Office of the Prosecutor (the ‘Prosecution’) emailed Trial Chamber I (the ‘Chamber’) and the parties, a list of exhibits which it intended to use during its opening statement at the start of the trial of Mr Abd-Al-Rahman (the ‘accused’).² The list of exhibits included a video purportedly portraying the accused (the ‘video’).³

2. On 31 March 2022, the Defence filed a motion objecting to the Prosecution’s use of the video in the latter’s opening statement.⁴ The Defence submitted that the use of the video would violate the accused’s presumption of innocence, right to remain silent and right not to incriminate himself.⁵

3. On 1 April 2022, the Prosecution filed a response requesting that the Chamber reject the Defence’s motion.⁶ It submitted that the use of the video would not prejudice the Defence; it explained why in its view the factual basis of the Defence’s objections was inaccurate, and that there was no violation of any statutory provision in its acquisition of the video.⁷

4. On the same date, the Chamber decided that ‘the Prosecution cannot play the objected video during the opening statements’ on the basis ‘that the Prosecution will still be able to fully present and explain its case to the Chamber, and the public, without having to show the contested video’.⁸ The Chamber 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.⁹

¹ See Directions on the conduct of proceedings, ICC-02/05-01/20-478, para. 17.

² Email from the Prosecution, 28 March 2022, at 19:43.

³ Video recording of 20 March 2020, DAR-OTP-0216-0119. See Transcript of video, DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

⁴ 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, para. 2. (hereinafter: ‘Defence’s objection to the use of the video’)

⁵ Defence’s objection to the use of the video, ICC-02/05-01/20-657, paras 12-13.

⁶ Email from the Prosecution, 1 April 2022, at 11:52.

⁷ Email from the Prosecution, 1 April 2022, at 11:52.

⁸ Email from the Chamber, 1 April 2022, at 16:30.

⁹ Email from the Chamber, 1 April 2022, at 16:30.

5. On 16 November 2022, the Chamber scheduled a status conference to hear oral submissions on the admissibility of the video and related material during the week of 5 December 2022.¹⁰ The Chamber instructed the Defence and the Prosecution to submit skeleton arguments by 28 November and 2 December 2022 respectively.¹¹

6. On 28 November 2022, the Defence filed a summary of its arguments on the inadmissibility of the video and related material, including the exchanges of WhatsApp messages and recordings of telephone conversations (and their transcripts) that took place between 26 December 2019 and 7 June 2020, relating to the surrender of the accused.¹²

7. On 2 December 2022, the Prosecution filed its response to the Defence's summary arguments.¹³ The Prosecution specified that it sought the admission into evidence of the video,¹⁴ two subsequent telephone calls of 6 and 7 April 2020 (and their respective transcripts and translations), relating to the surrender of the accused (the 'telephone calls').¹⁵

8. On 5 and 6 December 2022, the Chamber heard oral submissions by the parties and the Common Legal Representative of Victims (the 'CLRV') on the admissibility of the video and the telephone calls.¹⁶ In her submissions, the CLRV supported the Prosecution's request to admit the video and the telephone calls into evidence.¹⁷

¹⁰ Transcript of hearing, ICC-02/05-01/20-T-099-ENG, p. 83. *See* Email from the Chamber, 29 November 2022, at 14:55.

¹¹ Transcript of hearing, ICC-02/05-01/20-T-099-ENG, p. 83.

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, para. 1. (hereinafter: 'Summary Arguments')

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: 'Response')

¹⁴ Video recording of 20 March 2020, DAR-OTP-0216-0119; Transcript of video, DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

¹⁵ Telephone Call of 6 April 2020, DAR-OTP-0216-0127; Transcript of 6 April 2020 call, DAR-OTP-0215-6865 (English translation: DAR-OTP-0215-8924); Telephone call of 7 April 2020, DAR-OTP-0216-0128; Transcript of 7 April 2020 call, DAR-OTP-0215-6873 (English translation: DAR-OTP-0220-3015).

¹⁶ Transcript of hearing, ICC-02/05-01/20-T-104-CONF-ENG; Transcript of hearing, ICC-02/05-01/20-T-105-CONF-ENG.

¹⁷ Transcript of hearing, ICC-02/05-01/20-T-105-CONF-ENG, pp. 42-43.

9. On 6 December 2022, since the Prosecution declined to call the investigators to testify in support of its case, the Chamber decided *proprio motu* to have the investigators testify on the discrete issues in relation to the admissibility of the impugned pieces of evidence. Accordingly, the Chamber instructed the Prosecution that on 16 January 2023, Prosecution investigators P-1048 and P-1049 must appear before the Chamber to answer questions in relation to the aforesaid material sought for admission.¹⁸ P-1048 and P-1049 are Prosecution investigators. At the time of the events in question, they were employed as Investigator (P3) and Associate Investigator (P2), respectively.

10. On 16 January 2023, P-1048 testified before the Chamber.¹⁹

11. On 24 January 2023, P-1049 testified before the Chamber.²⁰

12. On 25 January 2023, the Chamber heard final submissions from the parties in relation to the in-court testimonies of P-1048 and P-1049.²¹

13. On 3 February 2023, the 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.²²

II. Reasons for ruling on admissibility of the video and telephone calls at this stage of the proceedings

14. The Directions state that as a general rule, the Chamber recognises the submission of items of evidence without a prior ruling on the admissibility of that evidence but will assess the evidence when deciding on the guilt or innocence of the accused in its judgment pursuant to Article 74 of the Rome Statute (the ‘Statute’).²³

¹⁸ Transcript of hearing, ICC-02/05-01/20-T-105-CONF-ENG, pp. 43-44.

¹⁹ Transcript of hearing, ICC-02/05-01/20-T-106-CONF-ENG.

²⁰ Transcript of hearing, ICC-02/05-01/20-T-108-CONF-ENG. *See also* Transcript of hearing, 10 November 2022, ICC-02/05-01/20-T-088-CONF-ENG, pp. 4, 13-14; Transcript of hearing, 16 November 2022, ICC-02/05-01/20-T-099-CONF-ENG, p. 81; Email from the Chamber, 3 January 2023, at 11:11; Corrected version of ICC-02/05-01/20-845-Conf, dated 11 January 2023, 12 January 2023, ICC-02/05-01/20-845-Conf-Corr (with an annex); Registry update in relation to P-1049, ICC-02/05-01/20-854-Conf (with an annex); Email from the Chamber, 20 January 2023, at 13:50.

²¹ Transcript of hearing, ICC-02/05-01/20-T-109-ENG, pp. 65-119.

²² Email from the Chamber, 3 February 2023, at 11:50.

²³ Directions, ICC-02/05-01/20-478, para. 25.

15. However, the Directions also provide for the Chamber to make discrete determinations on the admissibility of specific items in accordance with the requirements of the Statute.²⁴ The Chamber notes that Rule 64(1) of the Rules of Procedure and Evidence provides that parties and participants must raise issues relating to the admissibility of evidence, at the time of its submission, or immediately after acquiring knowledge of such an issue.²⁵ Thereafter, the Chamber has the discretion to rule on any specific objection in advance of the judgment, particularly when it is necessary for a fair and expeditious trial as mandated by Article 64(2) of the Statute.²⁶

16. The rationale for the Prosecution's motion requesting admissibility of the video, WhatsApp messages and records of telephone calls is the Defence's disavowal of the name Ali Kushayb as a core aspect of their case. The Prosecution's case has almost concluded and the Defence has indicated its intention to present a case before the Chamber. The Chamber finds that a ruling at this juncture of the case on the admissibility of the video and records of telephone calls, in advance of the judgment, will provide clarity and certainty to the parties and participants particularly the Defence.²⁷ Accordingly, the Chamber finds it appropriate in these circumstances to rule on these discrete issues at this stage and not during its judgment pursuant to Article 74 of the Statute.

III. Applicable law

17. In determining whether the video and related material is admissible, the Chamber must have regard to Articles 52(2) and 69(7) of the Statute. Article 55(2) of the Statute provides that when there are grounds to believe that a person has committed a crime within the jurisdiction of the Court, that person, prior to being questioned by the Prosecution must be accorded and duly informed of certain enumerated rights (the 'Article 55(2) Notification'). The Appeals Chamber has determined that safeguards

²⁴ Directions, ICC-02/05-01/20-478, para. 26.

²⁵ Directions, ICC-02/05-01/20-478, para. 27. See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 48.

²⁶ Directions, ICC-02/05-01/20-478, para. 28.

²⁷ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements', 17 May 2021, ICC-01/12-01/18-1475-Red, para. 25.

under Article 55(2) of the Statute apply whenever there are grounds to believe that the person to be interviewed by the Prosecution has committed a crime within the jurisdiction of the Court.²⁸ These safeguards are set forth in the Statute to protect the person against self-incrimination.²⁹

18. The assessment of the admissibility of an item of evidence under Article 69(7) of the Statute occurs in two stages.³⁰ First, the Chamber must determine whether the item of evidence was obtained by means of a violation of the Statute or internationally recognised human rights. Second, if the Chamber makes an affirmative determination at the first stage, then it must consider whether: (i) the ‘violation casts substantial doubt on the reliability of the evidence’; or (ii) the ‘admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’. If at this second stage the Chamber makes an affirmative determination in either of the two considerations, the item of evidence is inadmissible.

IV. The Video and Related Material

19. The video is a recording sent to the Prosecution on 21 March 2020 by P-0869 (the ‘intermediary’) who at that time, had voluntarily contacted the Prosecution stating that he was in contact with the accused and that he could assist in the latter’s eventual surrender to the Court.³¹

A. The facts surrounding the sending of the Video and Related Material

20. In order to determine the admissibility of the video and related material, namely the WhatsApp messages and records of telephone conversations, the Chamber must assess the circumstances under which the intermediary sent the video and other material to the Prosecution. That assessment may only be made on the basis of evidence put

²⁸ Appeals Chamber, *The Prosecutor v. Bemba et al.*, Public redacted version of 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), para. 636 (hereinafter: ‘*Bemba et al* Appeals Judgment’).

²⁹ *Bemba et al* Appeals Judgment, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5), para. 636.

³⁰ *Bemba et al* Appeals Judgment, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5), para. 280.

³¹ Video recording of 20 March 2020, DAR-OTP-0216-0119. *See* Transcript of video, DAR-OTP-0220-3010 (English translation: DAR-OTP-0220-3015).

before it, namely: two investigation reports;³² screenshots of WhatsApp messages between P-1049 and the intermediary;³³ and in-court testimonies of P-1048 and P-1049.³⁴

21. The chronology of events in this regard is relevant to the Chamber's determination of the issues. 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.³⁵ On the same day, the intermediary also called P-1049 over the telephone.³⁶ P-1049 was unable to answer the intermediary's initial call as he was outside mobile network coverage at that time.³⁷ P-1049 talked with the intermediary for the first time on 27 December 2019, after reconnecting with mobile network.³⁸ P-1049 stated that during this initial call he told the intermediary that the Prosecution required confirmation that the intermediary was in contact with the accused.³⁹ In his testimony before the Chamber on 5 January 2023, P-1049 stated that he was not aware of the intermediary's email to the Court when the intermediary first spoke to him on 27 December 2019.⁴⁰ According to P-1049, this call lasted five to ten minutes.⁴¹ P-1049 did not make a record of this conversation in the investigation log maintained by the OTP, nor caused any other member of his team to do so.⁴²

³² December 2020 Investigation Report, DAR-OTP-0215-7063; February 2021 Investigation Report, DAR-OTP-0215-9698.

³³ See DAR-OTP-00000528; DAR-OTP-00000529; DAR-OTP-00000530; DAR-OTP-00000534; DAR-OTP-00000535; DAR-OTP-00000536; DAR-OTP-00000539; DAR-OTP-00000540; DAR-OTP-00000541; DAR-OTP-00000542; DAR-OTP-00000543; DAR-OTP-00000544; DAR-OTP-00000545; DAR-OTP-00000546; DAR-OTP-00000547; DAR-OTP-00000548. (Translations: DAR-OTP-00000592; DAR-OTP-00000593; DAR-OTP-00000594; DAR-OTP-00000598; DAR-OTP-00000599; DAR-OTP-00000600; DAR-OTP-00000607; DAR-OTP-00000608; DAR-OTP-00000609; DAR-OTP-00000610; DAR-OTP-00000611; DAR-OTP-00000612; DAR-OTP-00000613; DAR-OTP-00000614; DAR-OTP-00000615; DAR-OTP-00000617)

³⁴ See Transcript of hearing, 16 January 2023, ICC-02/05-01/20-T-106-CONF-ENG; Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG.

³⁵ P-0869 Email, DAR-OTP-0217-0030 (translation: DAR-OTP-0215-6799).

³⁶ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 10.

³⁷ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 10.

³⁸ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 10, 28.

³⁹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 10-11.

⁴⁰ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 10.

⁴¹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 29-30.

⁴² Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 22-23.

22. P-1049 confirmed that during this initial call, 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.⁴³ P-1049 stated that he might have encouraged this proposition by the intermediary.⁴⁴ 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’.⁴⁵ 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.⁴⁶ P-1049 acknowledged that he followed up with the intermediary about the video that the latter had proposed to send.⁴⁷ P-1049 stated that he mentioned the intermediary’s proposition to P-1048 the day after the telephone call.⁴⁸

23. Later, on 27 December 2019, the intermediary sent an audio file via WhatsApp to P-1049.⁴⁹ On the same date, P-1049 also received from the intermediary, via WhatsApp, photos of a ‘Technical Secondary Nursing Certificate’ and a ‘Diploma of General Medical Assistant’ bearing the photo and name of the accused.⁵⁰ In his testimony before the Chamber, P-1049 stated that this was sufficient proof that the intermediary was in contact with the accused, but it was not conclusive.⁵¹ P-1048 accepted that the Prosecution was content with the certificates as proof of contact between the intermediary and the accused.⁵²

24. On 15 February 2020, in response to a video message from the intermediary via WhatsApp, P-1049 enquired whether there was any message from the accused that

⁴³ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 51-53.

⁴⁴ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 53.

⁴⁵ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 59.

⁴⁶ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 59-60.

⁴⁷ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 63-64.

⁴⁸ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 53-54.

⁴⁹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 14.

⁵⁰ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 21. *See* Nursing Certificate, DAR-OTP-0215-5829; Diploma, DAR-D31-0001-0002. *See also* February 2021 Investigation Report, DAR-OTP-0215-9698, at 9698.

⁵¹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 18.

⁵² Transcript of hearing, 16 January 2023, ICC-02/05-01/20-T-106-CONF-ENG, pp. 52-53.

required following up.⁵³ The intermediary replied saying that he needed to arrange some meetings with P-1049.⁵⁴

25. On 20 March 2020, the intermediary sent the video to P-1049, via WhatsApp.⁵⁵ 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,⁵⁶ nor did he ask the intermediary to send the video.⁵⁷ 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.⁵⁸ P-1049 stated that, for him, the video was conclusive proof that the intermediary was in contact with the accused.⁵⁹

26. P-1049 also acknowledged that he might have had other conversations with the intermediary, which were not recorded in the investigations log.⁶⁰ He also stated that he did not recall the number of times he had conversations with the intermediary between 27 December 2019 and 20 March 2020, *i.e.*, the date of provision of the video.⁶¹

27. On 6 and 7 April 2020, the Prosecution spoke directly to the accused and not through the intermediary.⁶²

B. Defence's submissions

28. The Defence does not dispute that it is the accused who both appears in the video and speaks in the telephone conversations. It submits that the video and telephone calls are inadmissible first because of the provisions of Article 55(2) of the Statute and

⁵³ See DAR-OTP-00000598; DAR-OTP-00000599; DAR-OTP-00000600; DAR-OTP-00000601.

⁵⁴ See DAR-OTP-00000601.

⁵⁵ See DAR-OTP-00000601; DAR-OTP-00000607.

⁵⁶ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 17.

⁵⁷ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 18.

⁵⁸ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 19.

⁵⁹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 19-20.

⁶⁰ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 16. P-1049 qualifies this by stating that: 'These are mainly conversation that have, like, a preparatory nature. For the logistics of the call, for example, with the suspect, making arrangement for it to happen, consulting with him so we have a most focused conversation with the suspect.'

⁶¹ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 22.

⁶² Telephone Call of 6 April 2020, DAR-OTP-0216-0127; Transcript of 6 April 2020 call, DAR-OTP-0215-6865 (English translation: DAR-OTP-0215-8924); Telephone call of 7 April 2020, DAR-OTP-0216-0128; Transcript of 7 April 2020 call, DAR-OTP-0215-6873 (English translation: DAR-OTP-0220-3015).

second because of circumstances which amounted to coercion and constraint on the accused.

29. The Defence further submits that: (i) the testimony of P-1049 casts significant doubt on the Prosecution's assertion that the video was unsolicited;⁶³ and (ii) the testimonies of the P-1048 and P-1049 show that there were unrecorded conversations between P-1048 and the intermediary leading up to the sending of the video.⁶⁴

30. The Defence further submits that the Prosecution violated Article 55(2) of the Statute by not providing the accused with the Article 55(2) Notification during its communication with the intermediary between 27 December 2019 and 20 March 2020, *i.e.*, the date of receipt of the video. The Defence argues that the fact that the Prosecution's communication with the accused was not direct but went through an intermediary does not alter the fact that information was requested from the accused, and the lack of an Article 55(2) Notification renders all information obtained as part of this exchange inadmissible under Article 69(7) of the Statute.⁶⁵ Further, the Defence submits that when there is direct contact with the suspect, even if the Prosecution is not going to question the suspect about any alleged offences, an Article 55(2) Notification must be provided to the suspect.⁶⁶ Therefore the telephone calls are also inadmissible.

31. In respect of the telephone calls, the Defence argues that the Prosecution made an explicit commitment that they would not be used as evidence. The Defence refers to the investigation report of 26 February 2021 to posit that the Prosecution had decided that the accused would be informed at the commencement of the call that it did not intend to ask any questions in relation to the substance of the case and telephone discussions would be of a non-evidential nature.⁶⁷

⁶³ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 68-69, 82; Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, pp. 8, 17.

⁶⁴ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 66.

⁶⁵ Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, pp. 23, 26, 46-47; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 82. *See also* Summary Arguments, ICC-02/05-01/20-819, para. 10.

⁶⁶ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 85-86. *See also* Summary Arguments, ICC-02/05-01/20-819, para. 16.

⁶⁷ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 112-113; Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, pp. 13, 59-60. *See* Summary Arguments, ICC-02/05-01/20-819, para. 13. *See also* February 2021 Investigation Report, DAR-OTP-0215-9698, at 9700.

32. In support of its contentions, the Defence relied upon a substantial number of authorities.⁶⁸ The vast majority did no more than reiterate the general principles which underpin the terms of Article 55. However they relied, in particular on the *Protais Zigiranyirazo* and *Delalić et al.* cases.⁶⁹ The Defence argues that all relevant circumstances need to be considered and evidence should be excluded, on the basis that a statement taken in violation of the fundamental right to assistance of counsel would most likely be antithetical to, and would seriously damage, the integrity of the proceedings. The Defence submits that the Chamber should be very cautious when deciding not to exclude evidence under the provisions of Article 69(7) of the Statute, when the rights of the accused are violated.⁷⁰

33. Indeed, the Defence argues that questioning even for the purpose of establishing the identity of the suspect requires an Article 55(2) Notification. In support of its contention, it refers to the *Bemba* case, where the Pre-Trial Chamber indicated that an interview by an investigating judge to establish identity of a suspect may constitute ‘questioning’ within the meaning of Article 55(2)(d) of the Statute, in which case the violation of Article 55(2)(d) of the Statute would potentially entail exclusion of the evidence so obtained, under Article 69(7) of the Statute.⁷¹

34. The Defence further argues that, on and prior to 26 December 2019, the Prosecution knew, or ought to have known, that the alias ‘Ali Kushayb’ was potentially a live issue in this case and that the accused would contest it.⁷²

⁶⁸ Table of Authorities, Email from the Defence, 4 December 2022, at 17:21.

⁶⁹ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 86-87. See ICTR, *The Prosecutor v. Protais Zigiranyirazo*, Decision on the *voir dire* hearing of the accused's *curriculum vitae*, 29 November 2006, ICTR-2001-73-T, para. 13; ICTY, *The Prosecutor v. Delalić et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence (TC), Case No. IT-96-21-T, 2 September 1997, para. 43. See also ICTR, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Casimir Bizimungu, Justin Mugenzi and Jerome Bicomumpaka's written submissions concerning the issues raised at the hearing of 31 March 2006 in relation to the cross examination of witness Augustin Kayinamura (formerly INGA), 1 November 2006, Case ICTR-99-50-T.

⁷⁰ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 88-89.

⁷¹ Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, pp. 24-25; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG ET, pp. 85-86. See Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, para. 45.

⁷² Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 114-115; Transcript of hearing, 5 December 2022, ICC-02/05-01/20-T-104-CONF-ENG, pp. 14, 78-81. See also Summary Arguments, ICC-02/05-01/20-819, para. 15.

C. Prosecution's submissions

35. The Prosecution submits that it only sought proof that the intermediary was in contact with the accused, and there was no request for the video to be sent.⁷³ There is also no evidence that the Prosecution gave any instructions as to the content of the video.⁷⁴ Further, it is routine and necessary to require proof from an intermediary, to determine that he is actually in contact with a suspect, in order to check if it is a hoax.⁷⁵ The Prosecution also referred to national legislation highlighting that a caution about rights is not necessary when questions are asked to establish a person's identity.⁷⁶

36. The Prosecution submits that the intermediary was not Prosecution-appointed,⁷⁷ and had never been asked to say anything to the accused.⁷⁸ Moreover, the Prosecution argues that P-1049 asking the intermediary whether there were any updates is not a question to the accused.⁷⁹ The Prosecution also submit that until the receipt of the video, it did not have any direct contact with the accused, had no discussions with him, nor questioned him in any way.⁸⁰

37. The Prosecution argues that when the intermediary said that he could provide a video, P-1049's positive and encouraging response telling him to send the video is not questioning of the accused within the meaning of Article 55(2) of the Statute.⁸¹ The Prosecution further argues that the decision in the *Bemba* case, referred to by the Defence, does not apply to the video, since the facts in that case were different. In the *Bemba* case, the investigating judge directly questioned Mr Bemba in-person, which is not the case with the video.⁸² Lastly, on this issue, the Prosecution submits that at the

⁷³ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 15-16. *See also* Response, ICC-02/05-01/20-822, paras 10-11.

⁷⁴ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 97. *See also* Response, ICC-02/05-01/20-822, para. 12.

⁷⁵ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 4-5.

⁷⁶ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, p. 21. *See also* Response, ICC-02/05-01/20-822.

⁷⁷ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 97.

⁷⁸ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 97.

⁷⁹ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 97.

⁸⁰ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 6-8, 14; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 97.

⁸¹ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 98-99, 102. *See also* Response, ICC-02/05-01/20-822, paras 3, 6.

⁸² Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 100-101. *See* Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, para. 45.

time of these events, it did not know, nor could it have known, that the nickname ‘Ali Kushayb’ would be an issue in the case.⁸³

38. The Prosecution submits that there was no ‘questioning’ of the accused within the meaning of Article 55(2) of the Statute in the telephone calls.⁸⁴ The Prosecution submits that the sole purpose of these calls was to arrange the logistics of the transfer of the accused to The Hague and to deal with his security concerns, and not to elicit evidence from the accused.⁸⁵ Further the Prosecution argues that whilst the evidence shows that a decision was taken that the telephone calls would not be used for evidentiary purposes this decision was never communicated to the accused nor was such an assurance given to the accused.⁸⁶

39. The Prosecution also argues that it did not violate Article 55(2) of the Statute or any other internationally recognised human right in obtaining the evidence of the telephone calls.⁸⁷ It further submits that to treat every conversation, contact or interview with a suspect as questioning within the meaning of Article 55(2) of the Statute would lead to an unreasonable outcome whereby the Prosecution would be required to issue a caution at the beginning of every contact with a potential suspect.⁸⁸

40. Finally, the Prosecution submits that even if there was a violation of Article 55(2) of the Statute, this violation does not cast substantial doubt on the reliability of the evidence of the telephone calls, nor would their admission be antithetical to the proceedings.⁸⁹ In sum, the Prosecution submits that neither criterion pursuant to Article 69(7) of the Statute for exclusion of the video and related material or the telephone calls are met.⁹⁰

⁸³ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 96.

⁸⁴ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 24, 30. *See also* Response, ICC-02/05-01/20-822, para. 4.

⁸⁵ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, p. 24. *See also* Response, ICC-02/05-01/20-822, paras 13-17.

⁸⁶ DAR-OTP-0215-9700. *See* Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 27-28, 38-39.

⁸⁷ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 107-108.

⁸⁸ Transcript of hearing, 6 December 2023, ICC-02/05-01/20-T-105-CONF-ENG, pp. 25-26; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 104.

⁸⁹ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 107.

⁹⁰ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, p. 34; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 106.

V. Coercion or Constraint: Parties' submissions

41. The Defence argues that between 27 December 2019 and 20 March 2020, the Prosecution became aware that the accused was the subject of an arrest warrant in Sudan, and it delayed the surrender of the accused, thereby putting him in a situation of 'coercion or constraint'.⁹¹ The Defence refers to P-1049's testimony, who stated that, in December 2019, he knew at that time, through public sources and from contacts, that the Sudanese authorities had issued an arrest warrant for Mr Abd-Al-Rahman, but could not confirm the veracity of the information.⁹² P-1049 also stated that he had learned that the accused was in a difficult situation at that time.⁹³

42. The Prosecution submits that there is no evidence that it intentionally delayed the surrender of the accused or put any pressure on him, and his reasons for voluntary surrender are irrelevant to the issue of admissibility of the video and the telephone calls.⁹⁴ The Prosecution submits that it was reliant on the intermediary for securing the surrender of the accused, and during its initial telephone calls with the accused it began to make arrangements for the transfer of the accused to the Court.⁹⁵

VI. The Chamber's Findings

43. The Chamber observes that there is no dispute between the parties that the matters, which form the basis of this application by the Defence, arose in the context of the surrender of the accused, as a result of an arrest warrant having lawfully been issued by this court. That warrant or arrest was issued against 'Ali Muhammad Ali Abd-Al-Rahman' also known as 'Ali Kushayb' on 27 April 2007, and amended on 16 January 2018.⁹⁶ Surrender of an accused to an international criminal tribunal will inevitably

⁹¹ Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, pp. 36-40, 50-53; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 92-95. *See* Summary Arguments, ICC-02/05-01/20-819, para. 14. *See also* Media article, DAR-OTP-0215-2766; Annex to P-1048's statement, DAR-OTP-00000837.

⁹² Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 17, 33.

⁹³ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 33.

⁹⁴ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, pp. 9-10, 21-24; Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 98, 107. *See also* Response, ICC-02/05-01/20-822, paras 23-24.

⁹⁵ Transcript of hearing, 6 December 2022, ICC-02/05-01/20-T-105-CONF-ENG, p. 10. *See* 7 April 2020 call transcript, DAR-OTP-0216-0128 (translation: DAR-OTP-0215-8935); 6 April 2020 call transcript, DAR-OTP-0216-0127 (translation: DAR-OTP-0215-8924).

⁹⁶ *See* Pre-Trial Chamber II, *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Public redacted version of 'Second Warrant of Arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")', 16 January 2018, ICC-02/05-01/07-74-

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 person to be surrendered. Evidence of what took place during such negotiations, if relevant to an issue at trial, is admissible unless the circumstances amount to a breach of the rights of an accused.

44. The Chamber must first make a finding as to whether provision of the video, as proof of identity, originated with the Prosecution. The Chamber observes that, at an early stage there may have been telephone calls between P-1049 and the intermediary which were not recorded in the investigation log. The Chamber accepts that the Prosecution could not contact P-1049 to check whether all the telephone calls had been logged as P-1049 had been on sick leave.⁹⁷ The Chamber called P-1048 and P-1049 to resolve this dispute of fact. Having assessed their evidence, the Chamber is unable to dismiss the Defence suggestion that there were other telephone calls between P-1049 and the intermediary which were not logged. However P-1049 was adamant that the suggestion of a video emanated from the intermediary.

45. Whilst there was no onus on the Defence to place evidence before the Chamber in relation to these discrete issues, as a consequence of the Defence duly exercising its right not to present evidence on the issues, either from the accused or from the intermediary, the consequence thereof is that the only evidence before the Chamber emanates from the documents and the evidence of the Investigators, P-1048 and P-1049. Therefore, the creditworthiness of the Investigators is the crux of the Chamber's determination. The Defence accepts that P-1048 and P-1049 were truthful, candid, frank and honest during their testimony.⁹⁸ The Chamber has come to the same conclusion and finds that the Investigators were candid, even when the answers were contrary to their interest. Accordingly, the Chamber finds both Investigators credible and reliable.

Secret-Exp, 11 June 2020, ICC-02/05-01/07-74-Red. *See also* Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr.

⁹⁷ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 108-109.

⁹⁸ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 69.

46. 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 P1049 and the intermediary have no bearing upon its decision. 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.

47. The Chamber rejects the Defence's argument that the Prosecution, at the time of these events, should have been aware that the allegation that 'Ali Kushayb' is the same person as 'Ali Muhammad Ali Abd-Al-Rahman' would be disputed in this case. The Chamber finds that at no stage, during or before the events in question, had there been any indication in the evidence obtained or indeed in open source material relating to the charged incidents that the defence of the accused would amount to a complete denial that he was the person known as 'Ali Kushayb'.

A. Did Article 55(2) of the Statute apply at the time of the sending of the video?

48. The Chamber is satisfied that Article 55(2) of the Statute does not apply to the circumstances surrounding the sending of the video by the intermediary and its receipt by the Prosecution. 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. Interactions between the Prosecution and the intermediary do not fall under this category. Indeed, the cases relied on by the parties in relation to Article 55(2) of the Statute encompass situations where a suspect is questioned, directly and in-person about alleged crimes, and not through a third party.⁹⁹

⁹⁹ See *inter alia* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Trial Judgment, 4 February 2021, ICC-02/04-01/15-1762-Red, para. 50; 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 Request in Response to Two Austrian Decisions, 14 July 2016, ICC-01/05-01/13-1948; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, para. 45; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defences' Applications 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.

49. Until receipt of the video, the Prosecution communicated only with the intermediary and had no direct contact with the accused. Defence counsel, when asked when the appropriate time was for the Prosecution to have given the Article 55(2) notification to the accused or to the intermediary, was unable to provide a satisfactory answer.¹⁰⁰ The Defence does not dispute that, in order for Article 55(2) of the Statute to be applicable, the Prosecution has to be sure that the person is someone who is suspected of committing a crime.¹⁰¹

50. The Prosecution did not discuss with the intermediary anything related to the charged crimes. Consequently, the conversations between the intermediary and P-1049 do not trigger the notification requirement under Article 55(2) of the Statute in the specific circumstances of this case. Moreover, the Chamber notes that 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. Since all communications with the Prosecution until 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.

51. Therefore, 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. As a result, in the circumstances of this case, there is no violation of any rule of customary international law, human rights treaties or Article 21(1)(b) of the Statute *vis-à-vis* the accused's right to receive assistance of a counsel or his right to silence.

52. Since there is no violation of Article 55(2) of the Statute, or any rule of customary international law, human rights treaties or Article 21(1)(b) of the Statute, the Chamber declines to exclude the video under Article 69(7) of the Statute.

¹⁰⁰ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, pp. 115-117.

¹⁰¹ Transcript of hearing, 5 December 2022, ICC-02/05-01/12-T-104-CONF-ENG, p. 47.

B. Was Article 55(2) of the Statute applicable to the telephone calls?

53. The Chamber notes that in the telephone calls, the Prosecution spoke directly with the accused, but did not provide an Article 55(2) Notification to the accused in either of the calls.¹⁰² The Chamber finds that by the time of the telephone calls, the Prosecution knew it was communicating with the accused, having been provided with the two certificates and the video.¹⁰³

54. The Prosecution posits that there were many persons on the call and they could not be certain which one of the voices, if any, was that of the accused. However, it must have been the expectation of the Prosecution that the accused would be one of the voices on the telephone. An Article 55(2) Notification should then have been on the forefront of the Prosecution's mind. Even if the Prosecution was not sure to whom it was speaking to over the telephone, it undoubtedly had confirmation that it was talking to the accused when the accused introduced himself as 'Ali Muhammad Ali Abd-Al-Rahman' during the first telephone call on 6 April 2020.¹⁰⁴ From that point the Prosecution was indeed questioning the accused within the meaning of Article 55(2) of the Statute, and it became immediately incumbent upon the Prosecution to provide the accused with the Article 55(2) Notification.

55. Even if the Prosecution did not intend to discuss any evidentiary matter with the accused, it should have provided him with the Article 55(2) Notification in order to avoid the accused inadvertently making a statement, which amounted to self-incrimination, whilst being unaware of his rights. Indeed, the Defence argues that the Prosecution had made a decision not to use the calls for evidentiary purposes. The Prosecution argues that it had made no such promise to the accused but that decision demonstrates that the risk of self-incrimination by the accused was evident to the Prosecution.

56. The Chamber finds that while the Prosecution did not actually say to the accused that nothing he said on this call would be used evidentially, what the Prosecution said

¹⁰² See 7 April 2020 call transcript, DAR-OTP-0216-0128 (translation: DAR-OTP-0215-8935); 6 April 2020 call transcript, DAR-OTP-0216-0127 (translation: DAR-OTP-0215-8924).

¹⁰³ See Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 105.

¹⁰⁴ 6 April 2020 call transcript translation, DAR-OTP-0215-8924, at 8927, line 67. See also Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 106.

to the accused was sufficient to give rise to this expectation. Indeed, the Prosecution said to the accused that, ‘[...] we’re not going to talk to you about issues pertaining to the case, I mean, the substance of the case. We’re are going to talk about other things, I mean, security issues [...]’.¹⁰⁵ The Chamber finds that this was sufficient to have given the accused a legitimate expectation that the purpose of the call was not evidentiary but logistical.

57. Therefore, the Chamber finds that the telephone call of 6 April 2020, after the initial introduction by accused, *i.e.*, line 67 of the transcript, and the subsequent call on 7 April 2020, violate Article 55(2) of the Statute as the Prosecution questioned the accused without first providing him with the Article 55(2) Notification. Even if the purpose of the conversations was to arrange the transfer of the accused to The Hague, or to deal with his security concerns, rather than to elicit evidence from the accused, the fact is that the accused was being questioned by, *i.e.*, directly talking with, the Prosecution, and was therefore entitled to be accorded his rights under Article 55(2) of the Statute.

58. However, this violation of Article 55(2) of the Statute in relation to the relevant parts of the telephone calls, is not sufficient, in itself, to render the evidence inadmissible pursuant to Article 69(7) of the Statute.

59. The Chamber, as per paragraphs (a) and (b) of Article 69(7) of the Statute, must now consider whether: (i) the ‘violation casts substantial doubt on the reliability of the evidence’; or (ii) the ‘admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’.

C. Are the telephone calls inadmissible under Article 69(7) of the Statute?

60. In respect of Article 69(7)(i) of the Statute, there is no evidence that the violation of Article 55(2) of the Statute in relation to the relevant parts of the telephone calls casts substantial doubt on the reliability of this evidence. In particular, the Chamber notes that it is not contested that this conversation actually took place and that the accused participated in such a conversation. Neither is it contended that the content of the

¹⁰⁵ 6 April 2020 call transcript translation, DAR-OTP-0215-8924, at 8929, lines 147-149.

conversation is in any way unreliable. However, in respect of Article 69(7)(ii) of the Statute, the Prosecution communicated to the accused that the purpose of the calls were logistical and not evidential. In those circumstances, the Chamber is satisfied on the facts that it is antithetical to the integrity of the proceedings to permit the Prosecution to rely on any part of the telephone calls evidentially. Therefore, the Chamber finds that the telephone calls are inadmissible under Article 69(7) of the Statute.

D. Was there ‘coercion or constraint’ by the Prosecution?

61. The accused’s security concern or his reasons for surrendering to the Court are beyond the control or influence of the Prosecution. There is no evidence before the Chamber showing that the Prosecution took an unreasonable amount of time to confirm that the intermediary was in contact with the accused or unduly delayed the surrender of the accused in order to elicit evidence from the accused in respect of the nickname ‘Ali Kushayb’. Furthermore, the Defence acknowledges that it is not suggesting that ‘the Prosecution knowingly induced or coerced or used duress against the Accused’.¹⁰⁶ The Chamber finds that the Defence conflates the accused’s rationale for surrendering with the facility of the Court in apprehending him. Therefore, the Chamber rejects the Defence’s argument that the Prosecution put the accused in a situation of ‘coercion or constraint’ by delaying his surrender.

VII. Conclusion

62. Finally, the Chamber wishes to record its concerns with regard to shortcomings in respect of the procedures adopted by the Prosecution during the period preceding the sending of the video: (i) P-1049 lacked adequate investigative training, experience and supervision at the time of the events in question;¹⁰⁷ (ii) relevant personnel did not properly record conversations which took place with the intermediary;¹⁰⁸ (iii) relevant personnel did not properly report and communicate information and developments to their superiors and teams;¹⁰⁹ and (iv) the Prosecution also did not record information in

¹⁰⁶ Transcript of hearing, 25 January 2023, ICC-02/05-01/20-T-109-ENG, p. 91.

¹⁰⁷ See Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 6, 13, 23. See also Transcript of hearing, 16 January 2023, ICC-02/05-01/20-T-106-CONF-ENG, p. 23.

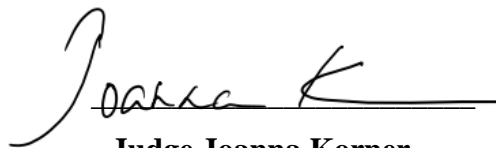
¹⁰⁸ Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, p. 16, line 24 - pp. 17, 22-23, 26, 62; Transcript of hearing, 16 January 2023, ICC-02/05-01/20-T-106-CONF-ENG, pp. 16-17, 24-25.

¹⁰⁹ See Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 14-16.

the investigation management system in a timely manner, if at all.¹¹⁰ The Chamber also observes that the Prosecution's standard operating procedure should contain guidance communication between the Prosecution and a suspect through an intermediary.¹¹¹

63. For these reasons, the Chamber:

- i. rejects the Defence's objections to the admissibility of the video, and recognises the admission of the video;
- ii. upholds the Defence's objections to the admissibility of the telephone calls; and
- iii. directs the Registry to proceed in accordance with paragraph 31(iv) of the Directions on the conduct of proceedings.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 17 February 2023

At The Hague, The Netherlands

¹¹⁰ See Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 7-8, 13-14, 26. See also Transcript of hearing, 16 January 2023, ICC-02/05-01/20-T-106-CONF-ENG, p. 15.

¹¹¹ See Transcript of hearing, 24 January 2023, ICC-02/05-01/20-T-108-CONF-ENG, pp. 6-8.