

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad
5 Ali Abd-Al-Rahman (Ali Kushayb) - ICC-02/05-01/20
6 Presiding Judge Piotr Hofmański
7 Appeals Judgment - Courtroom 3
8 Wednesday, 28 June 2023
9 (The hearing starts in open session at 10.01 a.m.)
10 THE COURT USHER: [10:01:44] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE HOFMAŃSKI: [10:01:58] Good morning.
14 Would the court officer please call the case.
15 THE COURT OFFICER: [10:02:20] Good morning, Mr President.
16 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
17 Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05-01/20.
18 And, for the record, we are in open session.
19 PRESIDING JUDGE HOFMAŃSKI: [10:02:40] Thank you very much.
20 I am Judge Piotr Hofmański, presiding in the appeal arising from the case of The
21 Prosecutor v Ali Muhammad Ali Abd-Al-Rahman. My fellow Judges in the appeal
22 are Judge Luz del Carmen Ibáñez Carranza, Judge Marc Perrin de Brichambaut, Judge
23 Solomy Balungi Bossa and Judge Gocha Lordkipanidze.
24 May I ask the parties to introduce themselves for the record, please, starting with the
25 Defence. I authorised the remote attendance of the co-counsel and I invite Mr Laucci

1 to introduce those members of the Defence team appearing today, both remotely and
2 in the courtroom. Please, you have the floor.

3 MR LAUCCI: [10:03:28] Good morning, Mr President, and thank you for your
4 authorisation to attend remotely. I am Cyril Laucci, the lead counsel for the Defence
5 of Ali Muhammad Ali Abd-Al-Rahman. Mr Abd-Al-Rahman is also attending
6 remotely from the detention facility. Co-counsel Iain Edwards is also in attendance
7 remotely, and the members of the Defence present in the courtroom are
8 Mr Mohammad El Rahi, Madam Marcela Velarde, both assistants in charge of
9 analysis, analysing the evidence, and our intern, Madam Nour Ouwardani.

10 PRESIDING JUDGE HOFMAŃSKI: [10:04:13] Thank you, Mr Laucci. Office of the
11 Prosecutor, please.

12 MS BRADY: [10:04:19] Good morning, your Honour, and good morning to everyone
13 in the courtroom and attending remotely. My name is Helen Brady, and I'm the
14 senior appeals counsel, and I'm here today with Ms Nivedha Thiru, associate appeals
15 counsel. Thank you very much.

16 PRESIDING JUDGE HOFMAŃSKI: [10:04:35] Thank you, Ms Brady.
17 Legal Representative for Victims, please.

18 MR SHAH: [10:04:42] Good morning, Mr President. The participating victims are
19 represented in the courtroom today by myself, Anand Shah, associate counsel, with
20 our case manager Saif Kassis. And the legal representative Ms von Wistinghausen is
21 following the live feed as well. Thank you.

22 PRESIDING JUDGE HOFMAŃSKI: [10:05:01] Thank you. Thank you very much.
23 Today, the Appeals Chamber will deliver the judgment in the appeal of
24 Mr Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023
25 entitled "Decision on the admissibility of the video and records of telephone calls".

1 This is a non-authoritative summary of the Appeals Chamber's written judgment in
2 the appeal. The written judgment will be notified after this hearing.

3 I will now briefly explain the context of this appeal.

4 On 26 December 2019, an unknown intermediary voluntarily emailed the Public
5 Information Outreach Section of the Court, stating that he had received
6 communication from people close to "Ali Kushayb", and that the latter was willing to
7 cooperate with the Court. He also telephoned Prosecution investigator P-1049, to
8 whom he spoke the next day.

9 In that initial telephone call, P-1049 stated in his evidence before the Trial Chamber
10 that he told the intermediary that the Prosecution required confirmation that the
11 intermediary was in contact with the accused. P-1049 stated that the intermediary
12 mentioned that individuals who were in direct contact with the accused were
13 preparing, and could share, some video material of the accused.

14 Later, on 27 December 2019, the intermediary sent P-1049 two certificates bearing the
15 name and photograph of the accused. Thereafter, P-1049 followed up with the
16 intermediary about the video.

17 On 20 March 2020, P-1049 received a video from the intermediary, in which the
18 suspect identified himself as "Ali Muhammad Ali Abd-Al-Rahman", and said that his
19 nickname was "Kushayb".

20 The case concerns the admissibility of that video. Before the Trial Chamber, the
21 Prosecution sought to rely upon the video, as a result of the Defence's disavowal of
22 the name "Ali Kushayb" as a core aspect of the case, whereas the Defence objected to
23 its admissibility as evidence.

24 In the Impugned Decision, the Trial Chamber, *inter alia*, rejected the Defence's
25 objections and recognised the admission of the video into evidence.

1 The Trial Chamber found that the circumstances in which the Office of the Prosecutor
2 had obtained the video did not violate Article 55(2) of the Statute or Article 21(1)(b) of
3 the Statute, nor any rule of customary international law or human rights treaties, and
4 that it therefore should not be excluded from the evidence under Article 69(7) of the
5 Statute.

6 The Defence appealed the Impugned Decision, raising two grounds of appeal.

7 First, the Defence alleges that the Trial Chamber committed errors of fact by
8 conclusively holding that P-1049 "did not at any stage request the intermediary to
9 introduce the video, nor did he ask the intermediary to send the video".

10 The Defence argues that the erroneous factual conclusion of the Trial Chamber that
11 the video had not been solicited by the Prosecution led it to conclude that Article 55(2)
12 of the Statute did not apply and, for that reason, it concluded that there were no
13 grounds to exclude the video under Article 69(7) of the Statute.

14 Second, the Defence alleges that the Trial Chamber erred in law in concluding, at
15 paragraphs 48-52 of the Impugned Decision, that Article 55(2) of the Statute was not
16 applicable to the interaction between P-1049 and the intermediary, which resulted in
17 the production of the video. The Defence further submits that the Trial Chamber's
18 finding that Article 55(2) of the Statute was not applicable led it to conclude that there
19 was no reason to declare the video inadmissible under Article 69(7) of the
20 Statute -- and that this constituted an error of law which materially affected the
21 Impugned Decision.

22 The Defence seeks the reversal of the Impugned Decision.

23 I will now address the merits of the appeal.

24 Under the first ground of appeal, the Defence challenges certain conclusions of the
25 Trial Chamber by arguing: first, that they were inconsistent with factual findings that

1 it had made earlier in the Impugned Decision; and, second, that the Trial Chamber
2 made unreasonable findings on the evidence in concluding that "P-1049 did not ask
3 the intermediary for the video".

4 For the reasons that follow, the Appeals Chamber, by majority, Judge Ibáñez
5 Carranza dissenting, does not find that the Defence has demonstrated any error of
6 fact in the conclusions of the Trial Chamber.

7 The Appeals Chamber first notes the careful manner in which the Trial Chamber
8 considered this matter and arrived at its factual findings. It is clear from the
9 Impugned Decision, including from the references in its footnotes, that the Trial
10 Chamber arrived at its conclusions based upon its assessment on the entire record
11 before it.

12 In relation to the specific factual findings challenged by the Defence, the Appeals
13 Chamber considers that the finding at paragraph 46 of the Impugned Decision that
14 "P-1049 did not ask the intermediary for the video" must be read in conjunction with
15 the remainder of that paragraph. The Trial Chamber explains that P-1049 did not ask
16 the intermediary for the video and that the idea "originated with the intermediary
17 and not the investigators". However, it expressly continues by finding that "P-1049
18 was asking the intermediary for the video [...] as a result of the intermediary having
19 first intimated that a video was being made and would be sent".

20 The Appeals Chamber finds that the determinations of the Trial Chamber are
21 consistent. They must be read in context as reflecting the overall findings of the Trial
22 Chamber that, while P-1049 did not initially suggest that the video should be made
23 and sent, once the intermediary stated that a video could be shared P-1049 was in
24 favour of receiving it and followed up in relation to this. The Defence has therefore
25 neither demonstrated that those findings were unreasonable in light of the evidence

1 that was before the Trial Chamber nor shown any inconsistency in the Trial
2 Chamber's findings.

3 With respect to the factual finding of the Trial Chamber that it was the receipt of the
4 video in March 2020 which provided the Prosecution with "clear and irrefutable
5 evidence that the intermediary was in contact with the accused", the Appeals
6 Chamber considers that, in light of the evidence that P-1049 gave to the Trial
7 Chamber, the factual finding of the Trial Chamber was not unreasonable, and the
8 Defence has not demonstrated any factual error in this regard.

9 As regards the Defence's argument that the intermediary acted as "a *de facto* agent of
10 the OTP", the Appeals Chamber notes that the Defence has not put forward any
11 arguments demonstrating that the Trial Chamber's conclusion that he "was not a
12 Prosecution intermediary, [...] he was not acting on behalf of the Prosecution" was
13 unreasonable and could therefore amount to an error of fact.

14 For these reasons, the Appeals Chamber, by majority, with Judge Ibáñez Carranza
15 dissenting, does not find any error of fact and the first ground of appeal is rejected.

16 For the reasons expressed in her dissenting opinion, Judge Ibáñez Carranza considers
17 that the Trial Chamber did err in fact as it failed to take into account relevant facts
18 and incorrectly assessed evidence surrounding the production and sending of the
19 video. She is of the view that the Trial Chamber did not pay sufficient heed to the
20 fact that, wherever the idea of the video originated, its subsequent production and
21 transmission to the Prosecutor was encouraged and coordinated by P-1049 as a part of
22 the Prosecution's investigation, and that should have been the express factual basis
23 for its legal analysis. In addition, Judge Ibáñez Carranza considers that the Trial
24 Chamber placed too much reliance on the evidence of the Prosecution's investigators
25 while at the same time expressing concerns about various shortcomings in the steps

1 that they took prior to receiving the video and without having heard any evidence
2 from the intermediary. She therefore does not regard the factual conclusions of the
3 Trial Chamber to be reasonable in the circumstances of this case.

4 Under the second ground of appeal, the Defence submits that the Trial Chamber erred
5 in law in interpreting the rights set out in Article 55(2) of the Statute to apply only "to
6 situations where the suspect is questioned directly about alleged crimes under the
7 jurisdiction of the Court".

8 The Defence further argues that the Trial Chamber erred in law in its interpretation of
9 Article 55(2) of the Statute, by failing to take into account that Mr Abd-Al-Rahman is
10 accused of having participated in the crimes described in the charges only under the
11 alias "Ali Kushayb", and that the evidence on this alias is therefore inseparable from
12 his involvement in the commission of the alleged crimes.

13 The Defence proceeds to aver that the Trial Chamber erred in law in relation to
14 several of its conclusions, in essence arguing that it should have found that Article
15 55(2) of the Statute was applicable to the facts of this case.

16 As a part of its determination of the merits of the second ground of appeal, the
17 Appeals Chamber refers to Article 55 of the Statute setting out the rights of the
18 persons during the investigation. That provision provides essential guarantees at
19 that initial stage to ensure that the entire course of the criminal proceedings are fair.
20 The requirement to inform the person of the rights under Article 55(2) of the Statute
21 "prior to being questioned" is both clear from the plain wording of the provision and
22 is essential to make the rights set out practical and effective.

23 The question to be addressed in this appeal is whether, in the specific circumstances
24 of this case, the accused was "questioned" within the meaning of Article 55(2) of the
25 Statute.

1 It is recalled that the video was provided by the intermediary as proof that the person
2 with whom he was in contact was the accused, which involved establishing the
3 latter's identity, and that this was in the context of the surrender of the accused to the
4 Court. The findings of the Appeals Chamber below, which are made by majority,
5 with Judge Ibáñez Carranza dissenting, must be seen in that context.

6 At the outset, the Appeals Chamber observes that, contrary to the submissions of the
7 Defence, the intermediary in the present case was not acting on behalf of the
8 Prosecution. He was, in fact, an unknown individual who voluntarily contacted the
9 Prosecution, offering it the opportunity to establish contact with the accused.

10 The Appeals Chamber further observes that the Prosecution did not have any
11 authority or control over him. The Prosecution did not itself have any direct contact
12 with, or put any questions to, the accused prior to the video being sent to it. The
13 only communications that it had were with the intermediary.

14 Moreover, the Appeals Chamber observes that the Prosecution did not influence the
15 contents of the video by questioning the suspect while it was being made, and that the
16 Prosecution was not present when the video was recorded.

17 For those reasons, the Appeals Chamber observes that the Prosecution in this case did
18 not put any questions to the accused. However, even assuming that it were possible
19 to attribute any of the actions of the intermediary to the Prosecutor, there was, in any
20 event, no "questioning" of the accused within the meaning of Article 55(2) of the
21 Statute on the facts of this case for the reasons that follow.

22 In addition to the factors already mentioned, the Trial Chamber found that the
23 Prosecution did not discuss with the intermediary anything related to the charged
24 crimes. The Trial Chamber found that Article 55(2) of the Statute is designed to
25 address situations in which the person concerned is "questioned" about alleged crimes

1 within the jurisdiction of the Court.

2 The Appeals Chamber finds that this is consistent with the manner in which the
3 Court's statutory framework is drafted, and that "questioning" under Article 55(2) of
4 the Statute would ordinarily be expected to focus upon questions related to the
5 crimes.

6 In the present case, the preliminary matters arising in the appeal do not fall within the
7 meaning of the "questioning", but instead concern essential prerequisites to any such
8 questioning taking place, namely, whether a person claiming to be in contact with the
9 accused is genuine or being sure about the identity of the person to be surrendered
10 before any questioning can take place.

11 This is, therefore, distinguishable from a situation in which the Prosecution, with
12 knowledge of its investigation in relation to the crimes committed, directly asks
13 questions of a person who it has established is indeed the suspect.

14 It follows that merely establishing the identity of that person does not constitute being
15 "questioned" within the meaning of Article 55(2) of the Statute, as it would ordinarily
16 need to take place before the rights under that provision are administered. This is
17 consistent with the previous case law and practices of this Court, as well as certain
18 examples of the European Union and domestic practice, which the Appeals Chamber
19 notes as illustrative.

20 The Appeals Chamber concludes that "questioning" under Article 55(2) of the Statute
21 does not relate to the Prosecution in the present case informing an unknown
22 intermediary that it required confirmation that he was in contact with the accused.
23 To the extent that the confirmation of the identity of the accused was a necessary part
24 of that expert, that falls outside the scope of Article 55(2) of the Statute.

25 The Appeals Chamber further dismisses the contention of the Defence that, in the

1 present case, the Trial Chamber erred in law in finding that the Prosecution did not
2 discuss with the intermediary anything related to the charged crimes in that the
3 Prosecution "knew, or should have known, that the suspect's identity [...] constituted
4 a core aspect of the charges".

5 The Appeals Chamber observes that the Trial Chamber rejected the argument of the
6 Defence that the Prosecution, at the time of the events in question, should have been
7 aware that the allegation that "Ali Kushayb" is the same person as "Ali Muhammad
8 Ali Abd-Al-Rahman" would be disputed.

9 Furthermore, the Appeals Chamber finds that the Prosecution did not at any point
10 require the intermediary to provide proof of the alias "Ali Kushayb" but, rather,
11 sought confirmation that the intermediary was in contact with the accused. Insofar
12 as that involved establishing the identity of the accused, that solely involved
13 confirming that the intermediary was in touch with the person wanted by the Court
14 in the context of his surrender.

15 The Appeals Chamber, therefore, finds no error in the conclusion of the Trial
16 Chamber that the Prosecution did not discuss with the intermediary anything related
17 to the charged crimes.

18 The Appeals Chamber also determines that, contrary to the contentions of the
19 Defence, the Trial Chamber's interpretation and application of Article 55(2) of the
20 Statute to the facts of this case was not inconsistent with the internationally
21 recognised human rights.

22 The Defence has not referenced any authority in support of its contention that it is a
23 violation of international human rights law for the Prosecution to ask an unknown
24 intermediary to provide confirmation that he is in contact with the suspect, further to
25 his statement that he could assist with the suspect's surrender to an international

1 criminal tribunal.

2 Both the human rights law and three other international precedents upon which the
3 Defence elaborates in the appeal brief are distinguishable from the present situation
4 and do not assist it.

5 Finally, contrary to the submissions of the Defence, on the facts of this case, the
6 Appeals Chamber does not find any error in the conclusion of the Trial Chamber that
7 the Prosecution was not required to give notice under Article 55(2) of the Statute until
8 after "clear and irrefutable evidence" of contact between the intermediary and the
9 accused has been obtained.

10 The interactions took place in the context of the surrender of a suspect to an
11 international court. It was, therefore, reasonable for the Prosecution to wish to have
12 irrefutable confirmation that the person to be surrendered was the accused and that
13 the intermediary was genuinely in contact with him.

14 On the facts of this case, it was the video which provides that evidence.

15 For all the above reasons, the Appeals Chamber concludes, by majority, Judge Ibáñez
16 Carranza dissenting, that the Trial Chamber did not err in law in the circumstances of
17 the present case. There was neither any questioning of the accused within the
18 meaning of Article 55(2) of the Statute, nor any application or interpretation of that
19 provision that was inconsistent with internationally recognised human rights.

20 In sum, on the facts of the present case, where an unknown individual voluntarily
21 contacted the Prosecution stating that he was in contact with the suspect and could
22 assist in the latter's eventual surrender to the Court, a request by the Prosecution for
23 confirmation from the unknown individual that he was in contact with the suspect
24 does not constitute "questioning" of the suspect by the Prosecutor under Article 55(2)
25 of the Statute.

1 The Appeals Chamber therefore, by majority -- Judge Ibáñez Carranza
2 dissenting -- rejects the second ground of appeal.

3 For the reasons expressed in her dissenting opinion, Judge Ibáñez Carranza, contrary
4 to the view of the majority, considers that the Trial Chamber erred in law. She is not
5 persuaded by the majority's finding that Article 55(2) of the Statute is not applicable
6 in the circumstances of this case, and disagrees with what she regards as its restrictive
7 interpretation of that provision. Judge Ibáñez Carranza considers that the rights
8 enumerated in Article 55(2) of the Statute should be applicable at all stages of
9 the Prosecutor's investigation, from the moment when there are grounds to believe
10 that a person has committed a crime within the jurisdiction of the Court.

11 She further considers that Article 55(2) of the Statute applies whenever a suspect is
12 about to be questioned, regardless of the subject matter of the questioning. In her
13 view, that includes questions relating to the identification of the suspect, which
14 necessarily forms a part of an investigation, and is of particular relevance in this case
15 where there is a dispute over identity.

16 On the facts of this case, Judge Ibáñez Carranza is of the view that there has been a
17 violation of Article 55(2) of the Statute. She considers that the errors of fact and law
18 that she has found materially affected the Impugned Decision. She would have
19 reversed the Impugned Decision and remanded this matter to the Trial Chamber.

20 In conclusion, for these reasons -- and for the reasons stated more fully in the written
21 judgment -- the Appeals Chamber by majority, with Judge Ibáñez Carranza
22 dissenting, rejects the appeal and confirms the Impugned Decision.

23 This brings us to the end of the summary of the Appeals Chamber's judgment.

24 I would like to thank the court reporters, interpreters and other Registry staff for their
25 valuable assistance today in holding this hearing.

Appeals Judgment

(Open Session)

ICC-02/05-01/20

- 1 The hearing is adjourned.
- 2 THE COURT USHER: [10:31:59] All rise.
- 3 (The hearing ends in open session at 10.31 a.m.)