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No.: **ICC-02/05-01/20**
Date: **06 November 2025**

TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

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

PUBLIC
with public redacted Annex 1

Public Redacted Version of the Corrigendum to the Defence Sentencing Submissions (ICC-02/05-01/20-1259-Conf-Corr)

Source: **Defence for Mr Ali Muhammad Ali Abd-Al-Rahman**

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I. INTRODUCTION

1. On 6 October 2025, Trial Chamber I convicted Mr Ali Muhammad Ali Abd-Al-Rahman of 27 charges of war crimes and crimes against humanity.[1] On the same day, the Trial Chamber issued its Decision on the sentencing procedure by which the parties and participants were informed they:

> may file written submissions relevant to the sentence by **3 November 2025**. The submissions shall include any argument they wish to raise on the factors to be considered by the Chamber pursuant to Article 78 of the Statute and Rule 145 of the Rules, including on any mitigating or aggravating circumstances.[2]

2. Pursuant to the Trial Chamber's invitation, the Defence for Mr Abd-Al-Rahman ("Defence") files these submissions on sentencing. The arguments set out below will, with the Chamber's leave, be further developed during the sentencing hearing, scheduled for the week of 17-21 November 2025.[3]

3. These submissions are intended to bring to the Trial Chamber's attention relevant mitigating and personal circumstances relating to Mr Abd-Al-Rahman in order that the Chamber may arrive at a sentence that is in accordance with international human rights standards, and is proportionate to his culpability based on the legal and factual findings made in the Trial Judgment. Nothing set out herein should be taken to be a concession about the correctness of these findings, or of Mr Abd-Al-Rahman's guilt.

II. CLASSIFICATION

4. These submissions are classified as confidential pursuant to Regulation 23*bis* of the Regulations of the Court ("RoC") because they contain information that is confidential. A public redacted version of this request will be filed contemporaneously.

III. APPLICABLE LEGAL FRAMEWORK

5. Articles 76-78 of the Rome Statute ("Statute") and Rules 145-147 of the Rules of Procedure and Evidence ("Rules"), when read together with the Preamble to the Statute, establish a comprehensive scheme for the determination of a sentence.[4]

[1] Trial Judgment, ICC-02/05-01/20-1240.
[2] Decision on the sentencing procedure, ICC-02/05-01/20-1241 para. 7. The deadline for filing submissions on sentencing was later extended to 5 November 2025: email from Trial Chamber I, 30 October 2025 at 17:05.
[3] Decision on the sentencing procedure, para. 8.
[4] *Al Hassan* Sentencing Judgment, para. 15. *See also Lubanga* Sentencing Appeal Judgment, paras 32-35; *Bemba* Sentencing Judgment, para. 12; *Al Mahdi* Judgment and Sentence, para. 68.

(a) Purposes of sentencing

6. It has been consistently stated that retribution and deterrence are the primary objectives of punishment at the Court.[5]

7. Retribution should be understood as an expression of the international community's condemnation of the statutory crimes. By imposing a proportionate sentence, the harm caused to the victims is also acknowledged.[6]

8. With regard to deterrence, a sentence should be adequate to discourage a convicted person from recidivism, as well as to ensure that those who may consider committing similar crimes are dissuaded from doing so.[7] In the case of Mr Abd-Al-Rahman, his age and state of health make any considerations about the need to reduce the risk of recidivism irrelevant. Only the deterrence aspect with respect to the dissuasive effect on others could conceivable be taken into account.

9. Rehabilitation is also a relevant purpose of sentencing, but it should not be given undue weight in the context of the crimes adjudicated by the Court.[8]

(b) Sentencing principles and factors

10. The Court's legal framework does not contain mandatory minimum or maximum sentences, or sentence ranges, for specific crimes, and the Chamber enjoys broad discretion in determining the sentence,[9] within the limits defined under the Statute and Rules. In particular, under Article 78(1) of the Statute, and given the importance of retribution as one of the primary objectives of sentencing, the totality of the sentence must be proportionate and reflect the culpability of the convicted person.[10] The penalties must therefore be tailored to the gravity of the crimes.[11] Gravity is generally measured in the abstract by assessing the constitutive elements of the crime and the mode of liability in general terms, and measured concretely by assessing particular circumstances of the case looking at the degree of harm caused by the crime and the

[5] *Al Hassan* Sentencing Judgment, para. 16. *See also Katanga* Sentencing Judgment, para. 38; *Bemba* Sentencing Judgment, para. 10; *Al Mahdi* Judgment, para. 66; *Ntaganda* Sentencing Judgment, para. 9.
[6] *Al Hassan* Sentencing Judgment, para. 16. *See also Katanga* Sentencing Judgment, para. 38; *Bemba* Sentencing Judgment, para. 11; *Al Mahdi* Judgment, para. 67; *Ntaganda* Sentencing Judgment, para. 10.
[7] *Al Hassan* Sentencing Judgment, para. 16. *See also Bemba* Sentencing Judgment, para. 11; *Al Mahdi* Judgment, para. 67; *Ntaganda* Sentencing Judgment, para. 10.
[8] *Al Hassan* Sentencing Judgment, para. 17. *See also Lubanga* Sentencing Appeal Judgment, para. 40; *Bemba* Sentencing Judgment, para. 12; *Al Mahdi* Judgment, para. 68; *Ntaganda* Sentencing Judgment, para. 11.
[9] *Al Hassan* Sentencing Judgment, para. 17. *See also Lubanga* Sentencing Appeal Judgment, para. 40; *Bemba* Sentencing Judgment, para. 12; *Al Mahdi* Judgment, para. 68; *Ntaganda* Sentencing Judgment, para. 11.
[10] Rule 145(1)(a) of the Rules. *See also Al Hassan* Sentencing Judgment, para. 17; *Lubanga* Sentencing Appeal Judgment, para. 40; *Bemba* Sentencing Judgment, para. 12; *Al Mahdi* Judgment, para. 68; *Ntaganda* Sentencing Judgment, para. 11.
[11] Article 78(1) of the Statute. *See also Al Hassan* Sentencing Judgment, para. 17; *Katanga* Sentencing Judgment, para. 39; *Ntaganda* Sentencing Judgment, para. 11.

culpability of the perpetrator.[12] The Chamber will base itself primarily in this regard on the findings in the Trial Judgment.[13]

11. After having determined the gravity of the relevant crimes in theory, the Chamber is obliged to individualise the penalty to the concrete gravity of the crimes.[14] The appropriate sentence should also reflect the individual circumstances of the convicted person, including any aggravating and mitigating factors. The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is a matter for a Chamber's discretion.[15]

12. Certain factors may reasonably be considered under more than one category.[16] The category in which a certain factor is placed is therefore of limited relevance. It is more for the Chamber to identify all relevant factors, and to attach appropriate weight to them in its determination of the sentence.[17] The Chamber must be careful not to rely on the same factor more than once.[18] Any factors assessed in relation to the gravity of the crime must not be considered as aggravating circumstances, and *vice versa*.[19]

(c) Gravity

13. Pursuant to Article 78(1) of the Statute, the Chamber must take into account, *inter alia*, the gravity of the crime. Gravity is a principal consideration in the imposition of a sentence.[20] Despite being the most serious crimes of concern to the international community, not all crimes under the Statute are necessarily of equivalent gravity and the Chamber must weigh each of them.[21] Crimes against property, for example, are generally of lesser gravity than crimes against the person.[22]

14. The Statute does not pre-establish any hierarchy among individual modes of liability for the purposes of sentencing. The ultimate assessment of the level of culpability of the convicted

[12] *Al Hassan* Sentencing Judgment, para. 17. *See also Lubanga* Sentencing Appeal Judgment, paras 40, 62; *Ntaganda* Sentencing Judgment, para. 11.
[13] *Al Hassan* Sentencing Judgment, para. 17. *See also Ntaganda* Sentencing Judgment, para. 11.
[14] *Al Hassan* Sentencing Judgment, para. 18. *See also Lubanga* Sentencing Appeal Judgment, paras 76-77; *Bemba* Sentencing Judgment, para. 92; *Ntaganda* Sentencing Judgment, para. 12.
[15] *Al Hassan* Sentencing Judgment, para. 18. *See also Lubanga* Sentencing Appeal Judgment, para. 3; *Ntaganda* Sentencing Judgment, para. 12.
[16] *Al Hassan* Sentencing Judgment, para. 19. *See also Lubanga* Sentencing Appeal Judgment, para. 85; *Ntaganda* Sentencing Judgment, para. 13.
[17] *Al Hassan* Sentencing Judgment, para. 19. *See also Lubanga* Sentencing Appeal Judgment, paras 61-66; *Ntaganda* Sentencing Judgment, para. 13.
[18] *Al Hassan* Sentencing Judgment, para. 19. *See also Ntaganda* Sentencing Judgment, para. 13.
[19] *Al Hassan* Sentencing Judgment, para. 19. *See also Katanga* Sentencing Judgment, para. 35; *Bemba* Sentencing Judgment, para. 14; *Al Mahdi* Judgment, para. 70; *Ntaganda* Sentencing Judgment, para. 13.
[20] *Al Hassan* Sentencing Judgment, para. 20. *See also Bemba* Sentencing Judgment, para. 15; *Ntaganda* Sentencing Judgment, para. 14.
[21] *Al Hassan* Sentencing Judgment, para. 20. *See also Katanga* Sentencing Judgment, para. 43; *Ntaganda* Sentencing Judgment, para. 14.
[22] *Ntaganda* Sentencing Judgment, para. 14.

person and its impact on the sentence always depends on a concrete assessment of the degree of participation and the degree of intent in the particular circumstances of the case.[23]

15. Beyond these general considerations of gravity, the Chamber's determination of the gravity of the acts must be made in light of the particular circumstances of the case.[24] This assessment is to be done from both a quantitative and a qualitative standpoint.[25] This assessment must take into account: (i) the gravity of the crimes, namely the particular circumstances of the acts constituting the elements of the offence; as well as (ii) the gravity of the culpable conduct, namely the particular circumstances of the conduct constituting elements of the mode of liability. As long as they relate to the elements of the offence and mode(s) of liability, the factors stipulated in Rule 145(1)(c) of the Rules will be considered in the evaluation of gravity, including the extent of the damage caused, the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, and/or the circumstances of manner, time and location, as well as the nature and degree of participation of the convicted person in the commission of the crime and his or her degree of intent.[26] Beyond such elements, the Chamber has a degree of discretion to consider other relevant factors for the purpose of the determination of the gravity of the crime or as aggravating circumstances.[27]

(d) Aggravating circumstances

16. For factors not considered as part of the gravity assessment, but taken into account separately as aggravating circumstances, the Chamber must be convinced of their existence beyond reasonable doubt. Rule 145(2)(b) of the Rules provides a list of aggravating circumstances which includes, but is not limited to: (i) any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) abuse of power or official capacity; (iii) commission of the crime where the victim is particularly defenceless; (iv) commission of the crime with particular cruelty or where there were multiple victims; (v) commission of the crime for any motive involving discrimination on any of the grounds referred to in Article 21(3) of the Statute.

[23] *Al Hassan* Sentencing Judgment, para. 21. *See also Katanga* Sentencing Judgment, para. 61; *Ntaganda* Sentencing Judgment, para. 15.
[24] *Al Hassan* Sentencing Judgment, para. 22. *See also Katanga* Sentencing Judgment, para. 61; *Ntaganda* Sentencing Judgment, para. 16.
[25] *Al Hassan* Sentencing Judgment, para. 22. *See also Katanga* Sentencing Judgment, para. 43; *Ntaganda* Sentencing Judgment, para. 16.
[26] *Al Hassan* Sentencing Judgment, para. 22. *See also Lubanga* Sentencing Appeal Judgment, paras 61-66; *Ntaganda* Sentencing Judgment, para. 16.
[27] *Al Hassan* Sentencing Judgment, para. 22. *See also Ntaganda* Sentencing Judgment, para. 16.

17. Aggravating circumstances must relate to the crimes of which a person was convicted or to the convicted person themself.[28] For a factor to be considered as aggravating, there must be a sufficiently proximate link between the factor and the crime or crimes that form the basis for the conviction.[29] In relation to uncharged offences or allegations, the Appeals Chamber has stressed that "[t]*he convicted person is sentenced for the crime or offence for which he or she was convicted, not for other crimes or offences that that person may also have committed, but in relation to which no conviction was entered*".[30] It emphasised that "[t]*his applies even when, based on the factual findings entered by the Trial Chamber, it may be concluded that these other crimes or offences were actually established at trial*".[31] Consequences of a crime or offence in relation to which a person has been convicted may be taken into account to aggravate the sentence as long as they were, at least, objectively foreseeable by the convicted person; this applies both for the assessment of gravity of the crime or offence and for potential aggravating circumstances.[32]

18. A legal element of the crime or mode of liability cannot be considered as an aggravating circumstance.[33] For example, the discriminatory intent underlying the conviction for the crime of persecution (Counts 11 and 21, Article 7(1)(h) of the Statute) cannot be considered an aggravating circumstance for that crime.[34]

19. The absence of a mitigating circumstance does not constitute an aggravating circumstance.[35]

(e) Mitigating circumstances

20. Rule 145(2)(a) of the Rules provides for some circumstances which may be considered in mitigation when determining a sentence, namely circumstances falling short of constituting grounds for exclusion of criminal responsibility, and the convicted person's conduct after the act.

21. Bearing in mind the different circumstances of each case, the Chamber has a considerable degree of discretion in determining what constitutes a mitigating circumstance in addition to those explicitly set out in Rule 145(2)(a) of the Rules, and the weight, if any, to be afforded to

[28] *Al Hassan* Sentencing Judgment, para. 24. *See also Ntaganda* Sentencing Judgment, para. 18.
[29] *Al Hassan* Sentencing Judgment, para. 24. *See also Ntaganda* Sentencing Judgment, para. 18.
[30] *Al Hassan* Sentencing Judgment, para. 24, citing *Bemba et al* Sentencing Appeal Judgment, para. 113. *See also Ntaganda* Sentencing Judgment, para. 18.
[31] *Al Hassan* Sentencing Judgment, para. 24, citing *Bemba et al* Sentencing Appeal Judgment, para. 113. *See also Ntaganda* Sentencing Judgment, para. 18.
[32] *Al Hassan* Sentencing Judgment, para. 24, citing *Bemba et al* Sentencing Appeal Judgment, paras 5, 263, 334.
[33] *Al Hassan* Sentencing Judgment, para. 25. *See also Bemba* Sentencing Judgment, para. 14; *Al Mahdi* Judgment, para. 70; *Ntaganda* Sentencing Judgment, para. 20.
[34] *Al Hassan* Sentencing Judgment, para. 25.
[35] *Ntaganda* Sentencing Judgment, para. 21. *See also Bemba* Sentencing Judgment, para. 18; *Al Mahdi* Judgment, para. 73.

such circumstances.[36] Examples include the convicted person's behaviour in detention, and voluntary surrender.[37]

22. Whether mitigating circumstances exist is considered on a balance of probabilities.[38] Although mitigating circumstances must relate directly to the convicted person,[39] they need not directly relate to the crimes the person is convicted of. Moreover, they are not limited by the scope of the confirmed charges, or the Chamber's findings in the Trial Judgment.[40]

23. The existence of mitigating circumstances that relate to the convicted person does not lessen the gravity of the offence.[41] In light of the purposes of sentencing, such circumstances are relevant considerations in determining whether the length of the sentence that would be appropriate on the basis of the gravity of the crime ought to be reduced.[42]

(f) Determination of the appropriate sentence

24. Pursuant to Article 78(3) of the Statute, when a person has been convicted of more than one crime, the Chamber "*shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment*". Each individual sentence must therefore be calculated separately, with reference to all relevant facts and circumstances applicable to the crime concerned.[43] The highest individual sentence constitutes the minimum possible joint sentence,[44] but the Court's legal framework does not prescribe by how much, and in what circumstances, the joint sentence may exceed the highest individual sentence.[45] Article 78(3) of the Statute does, however, provide that any joint sentence of imprisonment may not exceed 30 years, unless the extreme gravity of the crime and the individual circumstances of the convicted person warrant a term of life imprisonment. The Defence submits that neither the exceptional sentence of life imprisonment, nor any sentence of imprisonment for a period which, taking into consideration his age, would result *de facto* in a life sentence, are warranted in Mr Abd-Al-Rahman's case.

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[36] *Al Hassan* Sentencing Judgment, para. 27. *See also Bemba* Sentencing Judgment, para. 19; *Al Mahdi* Judgment, para. 74, *Ntaganda* Sentencing Judgment, para. 22.
[37] *Ntaganda* Sentencing Judgment, para. 22; *Plavšić* Sentencing Judgment, para. 84; *Jokić* Sentencing Judgment, paras 70-73.
[38] *Al Hassan* Sentencing Judgment, para. 28. *See also Bemba* Sentencing Judgment, para. 19; *Al Mahdi* Judgment, para. 74, *Ntaganda* Sentencing Judgment, para. 24.
[39] *Al Hassan* Sentencing Judgment, para. 28. *See also Bemba* Sentencing Judgment, para. 19; *Al Mahdi* Judgment, para. 74, *Ntaganda* Sentencing Judgment, para. 24.
[40] *Al Hassan* Sentencing Judgment, para. 28. *See also Bemba* Sentencing Judgment, para. 19; *Al Mahdi* Judgment, para. 74, *Ntaganda* Sentencing Judgment, para. 24.
[41] *Al Hassan* Sentencing Judgment, para. 29. *See also Ntaganda* Sentencing Judgment, para. 23.
[42] *Al Hassan* Sentencing Judgment, para. 29. *See also Ntaganda* Sentencing Judgment, para. 23.
[43] *Al Hassan* Sentencing Judgment, para. 30.
[44] *Al Hassan* Sentencing Judgment, para. 30. *See also Ntaganda* Sentencing Judgment, para. 25.
[45] *Al Hassan* Sentencing Judgment, para. 30. *See also Ntaganda* Sentencing Judgment, para. 25.

25. Once a joint sentence is established, the time spent by the convicted person in detention in accordance with an order of the Court must be deducted therefrom under Article 78(2) of the Statute. Any time otherwise spent in detention in connection with conduct underlying the crime may also be deducted.

IV. MITIGATING CIRCUMSTANCES

26. These submissions are designed to assist the Chamber in assessing the applicable sentence for Mr Abd-Al-Rahman, drawing on its findings in the Trial Judgment. Nothing in these submissions should be construed as any admission that the findings made in the Trial Judgment with respect to Mr Abd-Al-Rahman and/or his guilt are correct, nor limit the right of Mr Abd-Al-Rahman to challenge these by way of appeal pursuant to Article 81 of the Statute, nor be used as proof of his guilt in subsequent appeal proceedings.

(a) M. Abd-Al-Rahman's Subordinate Rank and Low Hierarchical Position

27. In its Trial Judgment, the Chamber finds M. Abd-Al-Rahman guilty of the crimes committed in Kodoom, Bindisi, Mukjar and Deleig by the *Janjaweed*,[46] as well as for certain individual crimes that he directly committed himself. Although the Chamber generally finds that M. Abd-Al-Rahman held "*a high-ranking position as a senior* Janjaweed *leader with a substantial set of responsibilities and powers*",[47] a close reading of the Trial Judgment reveals that, over the period of relevance to the charges, from August 2003 in Kodoom and Bindisi until March 2004 in Deleig, and at all times in between, the Chamber finds that he was, at best, one among several local leaders of the so-called *Janjaweed* militia,[48] implementing orders received[49] and/or acting under the authority[50] of higher ranking officials from the Sudanese Armed Forces (such as Hamdi and Al-Tayyib);[51] from the Central Reserve Forces (such as Himeidan);[52] from the Popular Defence Forces (such as Hassaballah and Solonga);[53] from local officials (such as Commissioners Abd-Al-Hakam and Torshein);[54] and/or from the Government of Sudan (such as Minister Ahmad Harun).[55] M. Abd-Al-Rahman is rarely found to have acted on his own and,

[46] Trial Judgment, paras 843-941.
[47] Trial Judgment, para. 59.
[48] Trial Judgment, *inter alia*, paras 53, 341, 396, 664-675, 983.
[49] Trial Judgment, *inter alia*, paras 41, 391, 539, 586, 649, 662-663, 933, 966-967, 1004-1005.
[50] Trial Judgment, *inter alia* paras 340, 350-351, 367, 381, 383-388, 391, 463, 516-519, 660-663, 846, 851, 903, 905, 933, 962, 967-969, 974, 983, 985, 988.
[51] Trial Judgment, *inter alia* paras 53, 294, 306, 316, 458, 462, 516, 519, 522, 533, 538, 548, 556, 580, 588, 594, 607, 664-665, 670, 962, 967-969, 974, 977-978, 983, 988.
[52] Trial Judgment, *inter alia*, paras 316, 381, 391, 393, 416, 508, 664.
[53] Trial Judgment, *inter alia* paras 306, 345, 382, 395-397, 401, 405, 421, 441, 460, 462, 470, 487, 555-556, 588, 606-607, 611, 623, 668, 962, 969, 974, 977, 979, 1003.
[54] Trial Judgment, *inter alia*, paras 53, 353, 381, 389, 444, 464, 516, 519, 522, 538, 556, 660, 664.
[55] Trial Judgment, *inter alia* paras 41, 53, 340, 350-355, 358-359, 367, 381, 383-388, 391, 463-464, 516-519, 539, 660-663, 669-670, 846, 851, 903, 905, 933, 962, 966-967, 983, 985, 1004-1005.

when he is found to have done so, it is with little or no authority over others, and in the course of implementing orders he had received.[56]

28. The Chamber further found that M. Abd-Al-Rahman was incorporated within the CRF shortly after the events in Deleig.[57] Although the Chamber made no finding as to his original rank within the CRF, the evidence on record shows that he was initially incorporated as a simple recruit (the lowest possible rank in the CRF hierarchy)[58] before being promoted to the rank of *musa'id*.[59] The Chamber did not find Defence witnesses providing this evidence reliable, but in the absence of proof that M. Abd-Al-Rahman ever held another or higher rank within the CRF, a reasonable conclusion is that these 11 witnesses who perfectly corroborate each other on the point, probably told the truth. The Chamber found that M. Abd-Al-Rahman held the same rank within the SAF before his retirement.[60] *Musa'id* are warrant officers. It is a not a high rank within the Sudanese military hierarchy.

29. Before, during and after the period of the charges, M. Abd-Al-Rahman continuously held a subordinate, relatively low rank within the hierarchy of the SAF and/or the CRF. During the period of the charges, M. Abd-Al-Rahman never held any position within the PDF. The *Janjaweed* group or militia over which the Chamber found that he had authority had no clear structure. At least, there is no evidence of a chain of command of the *Janjaweed* that could support a conclusion that M. Abd-Al-Rahman held a senior *Janjaweed* command position. At its highest M. Abd-Al-Rahman's *de facto* authority was no more than one of many *Janjaweed* leaders within the Wadi Saleh area receiving orders and acting under the authority of formal military authorities, such as Lieutenant Hamdi, local officials, such as Commissioner Abd-Al-Hakam, and GoS officials, such as Minister Harun.

30. The relatively low position of M. Abd-Al-Rahman within the hierarchy is a relevant factor in the assessment of his liability for the crimes he has been convicted for and which the Chamber should weigh in the balance in its determination of an appropriate sentence.

(b) Evidence that obeying orders was mandatory

31. At paragraph 59 of the Trial Judgment, the Chamber finds "*that a reasonable person in the position of the Accused would not have been 'deceived' into believing that his acts and*

[56] Trial Judgment, *inter alia* paras 541-542, 544, 549, 662.
[57] Trial Judgment, paras 676-680.
[58] DAR-D31-0002-0003, at 0005.
[59] **D-0001**, T-154, p. 57, lines 22-25 ; **D-0002**, T-156, p. 59, lines 20-22 ; **D-0003** : T-155, p. 46, lines 18-20 ; **D-0007** : T-149, p. 28, lines 5-13 (Conf) ; **D-0008 :** T-139, p. 28, lines 2-8 (Conf); **D-0011** : T-138, p. 52, lines 5-9 (Conf) ; **D-0028** : DAR-D31-00000150, para. 23 ; **D-0029 :** T-157, p. 25, lines 9-11 ; **D-0032 :** T-140, p. 88, lines 17-19 (Conf); T-141, p. 22, lines 4-13 ; **D-0035**: DAR-D31-00000274, par. 23 ; **D-0039 :** T-159, p. 34, lines 13-17 and p. 79, lines 20-23
[60] Trial Judgment, paras 9, 52, 262(e), 264, 983.

conduct during the charged events were legal or justified." This finding constitutes the essential position of the Chamber in respect of the Defence's third line of defence.[61]

32. Under Rule 145(2)(a)(i) of the RPE, "*circumstances failing short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress*" constitute mitigating circumstances. Defence Line 3 essentially relied on Article 32(2) of the Statute. Under that provision, a mistake of law may "*be a ground for excluding criminal responsibility if it negates the mental element required by such crime, or as provided for in Article 33.*" Mistake of law relied upon under the Defence Line 3 could thus have potentially excluded criminal responsibility. Although Defence Line 3 fell short of establishing a complete defence, it may nevertheless be relied upon as a mitigating circumstance under Rule 145(2)(a)(i) of the RPE under the applicable balance of probabilities standard.[62]

33. In sum, the mistake of law that M. Abd-Al-Rahman committed according to the Defence was his belief that acts and conduct instructed by the authorities, such as representatives of the government or military officers, had to be performed irrespective of their apparent criminal nature. The Trial Judgment contains several findings of the Chamber which show that such belief was widespread in the Darfuri community in 2003-2004. At paragraphs 354 and 386, the Chamber finds that Minister Harun delivered a speech in Mukjar on 9 August 2003 during which he referred to the Fur population as *ghanima* and said that they would be looted, killed and raped. The Chamber finds that **P-0903** felt afraid by that speech and left the place. Had **P-0903** believed that Harun had no authority to deliver that speech, declare the Fur *ghanima* and order their looting, killing and raping, he may have felt outraged, but would have had no reason to feel "afraid". His fear tends to show that he believed that these words proffered by a Minister of the Government had weight and may well mean that his audience would feel authorized to perform the prescribed acts of looting, killing and raping against the Fur. The Chamber considered **P-0903**'s account of this scene and his reaction credible.[63] **P-0916**, [REDACTED],[64] attended the same meeting and the Chamber found his corroboration of **P-0903**'s evidence credible.[65] **P-0922**, [REDACTED],[66] also corroborated **P-0903**'s evidence about Harun's speech and was found credible by the Chamber.[67] **P-0984**, [REDACTED], also corroborated **P-0903**'s evidence on

[61] Defence Final Brief, paras 795-826.
[62] *Al Hassan* Sentencing Judgment, para. 28. *See also Bemba* Sentencing Judgment, para. 19; *Al Mahdi* Judgment, para. 74, *Ntaganda* Sentencing Judgment, para. 24.
[63] Trial Judgment para. 386, Trial Judgment Confidential Annex B, paras 311-324.
[64] Trial Judgment Confidential Annex B, para. 370.
[65] Trial Judgment, para. 386, footnote 965 and Confidential Annex B, para. 373.
[66] Trial Judgment Confidential Annex B, para. 415.
[67] Trial Judgment, para. 386, footnote 965 and Confidential Annex B, para. 421.

Harun's speech and was found credible by the Chamber.[68] Although he is not mentioned in the Trial Judgment, **P-0757** also attended Harun's meeting and corroborated **P-0903**'s evidence and was found credible.[69] According to the findings of the Chamber, at least five witnesses (**P-0757**, **P-0903**, **P-0916**, **P-0922** and **P-0984)** attended Harun's speech, heard him declare the Fur *ghanima* and order that they be looted, raped and killed, and none of them questioned his authority to order so.

34. At paragraph 41 of the Trial Judgment, in relation to Harun's speech of 9 August 2003 in Mukjar, the Chamber finds that "*the evidence in the present case does not demonstrate, nor does any applicable provision of Sudanese law, that Minister Harun had the legal authority to make such a general declaration* [as declaring the Fur *ghanima*]."[70] This argument is used in order to rebut the Defence's argument that M. Abd-Al-Rahman, had he attended Harun's speech, may have felt under an obligation to perform acts, such as those mentioned in the speech. Applying the standard of proof beyond reasonable doubt applicable at trial, the Defence's argument thus failed.

35. But applying the relaxed balance of probabilities standard applicable to mitigating circumstances to the other findings of the Chamber based on the evidence of witnesses **P-0757**, **P-0903**, **P-0916**, **P-0922** and **P-0984**, it is reasonable to conclude that, on the balance of probabilities, it is probable that if M. Abd-Al-Rahman was present during Harun's speech, he would have believed, as the other five witnesses, that Harun had authority to declare the Fur *ghanima*, to order their looting, killing and raping, and that, irrespective of the apparent illegality of these acts, he and the other attendees were under an obligation to commit those crimes.

36. This conclusion, based on the balance of probabilities, is fully compatible with the Chamber's finding at paragraph 41, which was based on a more stringent standard of proof. This conclusion is made even more reasonable by the fact that **P-0916** and **P-0922** [REDACTED], and by the fact that **P-0984** [REDACTED]. This conclusion is eventually supported by the evidence relied upon by the Defence in support of its Defence Line 3, in particular M. Abd-Al-Rahman relatively low military rank - *Musa'id* - within the SAF,[71] his absence of IHL training,[72]

[68] Trial Judgment, para. 386, footnote 965 and Confidential Annex B, paras 471-483.
[69] Trial Judgment Confidential Annex B, paras 804-808.
[70] Trial Judgment, para. 41.
[71] Defence Final Brief, para. 806.
[72] Defence Final Brief, para. 807.

and his likely awareness about Article 48(c) of the 1986 People's Armed Forces Act sanctioning by the death penalty the refusal to obey orders.[73]

37. On the basis of the assessment of the evidence of witnesses **P-0757**, **P-0903**, **P-0916**, **P-0922** and **P-0984** and on the basis of M. Abd-Al-Rahman's education and profile, the Defence submits that the Chamber has before it sufficient evidence to conclude on the balance of probabilities that Mr Abd-Al-Rahman would have believed that Harun had authority to declare the Fur *ghanima* and to order their looting, killing and raping, as well as all other acts performed in furtherance of Harun and other authorities' instructions and orders. Pursuant to Rule 145(2)(a)(i) of the RPE, his sentence should be mitigated accordingly.

(c) Mr Abd-Al-Rahman's background

38. Rule 145(1)(c) of the Rules provides that the Court *shall* give consideration, *inter alia*, to the convicted person's age, education, social and economic condition. Mr Abd-Al-Rahman was born in Rahad Al-Berdi, South Darfur, in 1949.[74] He is now 76 years old. He is by a significant margin the oldest person to have been convicted by the ICC.

39. At 76 years old, it will be uncontroversial to note that any substantial sentence of imprisonment, even a sentence that is not imposed pursuant to Article 77(1)(b), will amount to a *de facto* sentence of life imprisonment. It is submitted that the Trial Chamber should take this into account and fix a term that does not rob Mr Abd-Al-Rahman of any hope of release. His prospects of rehabilitation are good, and the risk he poses of recidivism is nugatory. He should be provided with the opportunity to start his sentence in the knowledge that there remains hope for him of being reunited with his family and of spending his final years at home, back at the heart of his community.

40. Mr Abd-Al-Rahman [REDACTED][75] He had seven years of primary education only, and did not attend secondary school.[76] He later obtained a diploma in nursing whilst in the SAF after two years of study.[77]

41. Mr Abd-Al-Rahman [REDACTED] joined the Army in 1964 when he was 15 years old.[78] It was an agreed fact between the parties that he retired from the Army in the early- to mid-1990s. He [REDACTED] spent 19 years in the military before retiring, but that would seem to be an

[73] DAR-OTP-00006136, at 0020, article 48(c); **P-0883**; T-073, pp. 15-16, 19 (found credible by the Chamber in Confidential Annex B, paras 278-301); **P-0954**: DAR-OTP-0221-0571-R01, paras 24-27, 43; **D-0016**: T-131, p. 5 (Conf).
[74] Trial Judgment, para. 7.
[75] DAR-D31-00000378.
[76] [REDACTED].
[77] [REDACTED].
[78] [REDACTED].

underestimate likely due to his cognitive deficiencies. In any event, despite his very many years in the military, Mr Abd-Al-Rahman was never promoted beyond the rank of non-commissioned officer, *musa'id.*[79] He [REDACTED] was not a high-ranking officer.[80] The Trial Chamber can reasonably infer that his economic situation was likely modest at best while in the SAF.

42. Whilst the Trial Chamber found that Mr Abd-Al-Rahman may have been well-known and even respected by virtue of his activities as a pharmacist in Garsila,[81] it made no finding that Mr Abd-Al-Rahman was particularly well-off, much less wealthy. The available evidence tends to show the opposite: in early 2020, as a *musa'id* within the CRF, he earned only 660 Sudanese Pounds per month in that capacity.[82] 660 Sudanese Pounds equated more or less 12 euros in 2020 and is equating about 1,30 euro nowadays.[83]

43. Mr Abd-Al-Rahman's economic situation is today much diminished, beyond the inevitable limitations to his earning power caused by his detention. His inability to provide for his family is a matter of significant concern. [REDACTED]:

[REDACTED]

44. More complete submissions about Mr Abd-Al-Rahman's financial support for and continuing contact with his family are set out in the following paragraphs.

(d) Mr Abd-Al-Rahman's family situation

45. The family life of a convicted person has been taken into account in several cases before the ICC, starting with *Katanga*, where the Trial Chamber took note of his family circumstances when discussing mitigation.[84] By contrast, family circumstances were not considered as mitigating in *Ongwen*, as the Chamber was unconvinced that Mr Ongwen was "*genuinely motivated by the responsibility to take care of his children, when he so obviously and so cruelly failed to take care of them when he had the chance.*"[85]

46. Mr Abd-Al-Rahman's situation is wholly distinguishable from that of Mr Ongwen. He is keenly interested in his family life, despite the huge physical distance between him and his family.

47. Mr Abd-Al-Rahman [REDACTED] has three wives.[86] Of course, in the context of Sudanese culture, there is nothing unusual about this. He has fathered twelve sons and seven

[79] Trial Judgment, paras 9, 52.
[80] [REDACTED].
[81] Trial Judgment, para. 680.
[82] DAR-D31-0002-0002 (Translation at DAR-D31-0002-0006).
[83] Confirmation of charges hearing, T-008, p. 76; T-009, p. 70. These figures were not challenged by the Prosecution.
[84] *Katanga* Sentencing Judgment, para. 88.
[85] *Ongwen* Sentencing Judgment, para. 123-124.
[86] [REDACTED].

daughters. He has suffered the untimely death of five of his children over the years, including two of his sons during the period of his detention in The Hague such that he was only able to mourn them alone, in his cell in the Detention Unit, thousands of miles from his grieving family and from their graves.

48. [REDACTED][87] In detention, he is unable to adequately fulfil the predominant role in which he sees himself: as a provider for and protector of his family.

49. [REDACTED][88] [REDACTED] [89] [REDACTED]The Chamber is invited to conclude that he is genuinely doing all in his power [REDACTED].

50. The Registry's conduct report confirms that, since his incarceration in the ICC Detention Centre, Mr Abd-Al-Rahman [REDACTED].[90] [REDACTED]. Since then, war broke out in Sudan, making travel extremely difficult. [REDACTED]

51. [REDACTED] [91]

52. In determining the sentence to be imposed, the Trial Chamber should take into account the fact that a lengthy period of imprisonment will have a serious and deleterious impact not only on Mr Abd-Al-Rahman's ability to enjoy contact with his minor children, but also on his minor children's right to enjoy contact with their father. A substantial sentence of imprisonment, seen from the perspective of Mr Abd-Al-Rahman's children, punishes not only the father, but the innocent children also. The preamble of the 1989 United Nations Convention on the Rights of the Child ("CRC") reads in part as follows:

> ... Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...[92]

53. It is important for Mr Abd-Al-Rahman's minor children to be able to maintain relations with him as much as possible. Imprisonment will inevitably impact on the children's rights to maintain that contact, especially given the current conditions in which travel outside of Darfur is so perilous. The longer the sentence of imprisonment, the graver will be the impact on the rights of the children to have contact with their father, and the greater the risk of harming their balanced and safe development, which Article 6 of the CRC ultimately seeks to protect.[93]

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[87] [REDACTED].
[88] ICC-02/05-01/20-1247-Conf-Anx, p. 2.
[89] DAR-D31-00000368.
[90] ICC-02/05-01/20-1247-Conf-Anx, p. 2.
[91] DAR-D31-00000369.
[92] 1989 United Nations Convention on the Rights of the Child ("CRC") - Preamble.
[93] 1989 United Nations Convention on the Rights of the Child ("CRC") - Article 6.

54. The rights of Mr Abd-Al-Rahman's children are thus a relevant factor to be taken into consideration by the Trial Chamber in the determination of the sentence.

55. This material demonstrates on the balance of probabilities Mr Abd-Al-Rahman's strong dedication to his family life, and their reliance on him as a provider. He is genuinely committed to take care of his family. It is submitted that the longer his sentence of imprisonment, the more acute will be his feelings of inadequacy and failure as a husband and father. This would significantly worsen, should his imprisonment status change and [REDACTED]. Although the Chamber has no jurisdiction on the conditions of enforcement of sentence under PART X of the Statute, this is a relevant aspect that the Chamber needs to weigh in its determination on the applicable sentence, as it is directly related to Mr Abd-Al-Rahman personal circumstances, in particular with respect to his family. This aspect is further addressed below.

56. Mr Abd-Al-Rahman's commitment and efforts to carry on playing his role as provider and protector for his family despite the difficult conditions he has been facing since his transfer to the Court are established beyond the applicable standard of balance of probability. The Chamber is invited to consider it as mitigating factor in the determination of his sentence.

(e) Actions to protect and preserve life

57. Before the other tribunals, acts and conducts of the Accused prior or after the charged events showing their good character and concrete contribution to peace and harmony were taken into consideration as mitigating factors.[94] Before the Court, in the *Ntaganda* case, the Appeals Chamber considered that "*actions taken by a convicted person to protect life may generally be characterised as altruistic and potentially be considered as a mitigating circumstance*", except if such actions were in fact taken with the aim of benefiting the common plan.[95] Also in the *Bemba* case, the Trial Chamber found that "*promotion of peace and reconciliation may only constitute a mitigating circumstance if it is genuine and concrete*".[96] In the present case, genuine and concrete actions of Mr Abd-Al-Rahman has been demonstrated beyond the applicable standard of balance of probability and acknowledged by the Chamber in its Trial Judgment, without the exceptions contemplated in the *Ntaganda* and *Bemba* precedents.

(e-i) M. Abd-Al-Rahman's positive good character generally

58. The Defence presented ten witnesses with sustained, long-term knowledge of Mr Abd-Al-Rahman, often spanning decades, and including knowledge in both professional and personal

[94] *Niyitigeka* Judgment and Sentence, para. 496; *Semanza*, Appeals Judgment, para. 397; *Ntakirutimana*, Judgment and Sentence, para. 895.
[95] *Ntaganda* Sentencing Appeal Judgment, para. 150.
[96] *Bemba* Sentencing Judgment, para. 72.

contexts.[97] It is submitted that such proximity to Mr Abd-Al-Rahman permits the Chamber to attach greater weight to their accounts regarding the topic of his positive good character and accept their evidence to the balance of probabilities standard. The Defence is aware of the Chamber's findings as to the reliability of these witnesses. But if they did not pass the "beyond reasonable doubt" test on key issues - such as the alias Ali Kushayb -, there is no reason why they should not pass the "balance of probabilities" test on issues which have nothing to do with the charges.

59. Multiple Defence witnesses, from different backgrounds and with knowledge of Mr Abd-Al-Rahman over varying periods, consistently attested to his humane and generous disposition. Their testimonies are remarkably consistent. He was known not only as a man of respect and generosity, but also as someone who actively sought to help the vulnerable and provide support to those in need.

60. D-0001 described Mr Abd-Al-Rahman as a man who "helped the weak and stood by the poor" adding that he was very socially engaged with all the tribes, respectful, generous and hospitable.[98] Such words, [REDACTED], underscore that Mr Abd-Al-Rahman was a pillar of social support and cohesion rather than a source of division. D-0002, confirmed this reputation testifying that the accused was "humanitarian", that he helped the vulnerable, protected the oppressed and promoted unity, and that he actively participated in reconciliation between people.[99] The ability to bring parties together in reconciliation shows that Mr Abd-Al-Rahman actively worked to resolve tensions and maintain peace within the cosmopolitan community of Rahad Al Berdi. D-0005, who knew him in that town, echoed those accounts describing him as "a humanitarian person" who helped orphans, provided clothing[100] and sometimes offered free medication when people could not afford it.[101] This testimony highlights a pattern of concrete humanitarian acts demonstrating that his generosity was expressed through assistance to the most vulnerable. D-0007 described him as "a nice and humane person".[102] D-0008, reinforced the same theme, testifying that Mr Abd-Al-Rahman gave medicine free of charge if people could not

[97] **D-0001**: T-154, p. 52, lines 8-24 (Conf); **D-0002**: T-156, p. 42, lines 6-14 (Conf) ; **D-0003**: T-155, p. 37, lines 15-23 (Conf) and p. 80, lines 7-24 ; **D-0005**: T-158, p. 6, lines 2-14 (Conf); **D-0007**: T-149, p. 6 line 5-p. 7 line 17 (Conf) and, p. 13 line 20-p. 17 line 20 (Conf); **D-0008**: T-139, p. 26 lines 1-4 (Conf), p. 27 lines 23-p. 28 line 1 (Conf); **D-0011**: T-138, p. 53 lines 13-25 (Conf) ; **D-0029**: T-157, p. 24, lines 7-12 ; **D-0032**: DAR-D31-00000160 at 0006, para. 26 ; **D-0039**: T-159, p. 27, lines 14-24 and p. 36, lines 23-25.
[98] **D-0001**: T-154, p. 53, lines 18-25.
[99] **D-0002**: T-156, p. 48, line 25-p. 49, line 8.
[100] **D-0005** : T-158, p. 19, lines 1-16.
[101] **D-0005** : T-158, p. 27, lines 1-10 (Conf).
[102] **D-0007** : T-149, p. 9 line 7 (Conf).

pay and that he had a "nice reputation" in the community.[103] D-0040 has provided a statement in which he describes Mr Abd-Al-Rahman as playing a central role in preserving stability and reconciliation in Rahad al-Berdi.[104] In 2009 he initiated and chaired an Agricultural Protection Committee composed of representatives of all local tribes, including Ta'aisha, Fur, Tama, and Masalit, which worked to prevent and resolve conflicts between herders and farmers. Under his leadership, the committee promoted peaceful coexistence, equality, and respect among communities.[105] In recognition of his contribution, all the tribes of Rahad al-Berdi jointly awarded him a medal of honour in 2014 for his service to the community.[106]

61. Similarly, D-0029, [REDACTED], confirmed that Mr Abd-Al-Rahman had a good reputation in Rahad al-Berdi.[107] D-0041, [REDACTED] further confirmed that Mr. Abd-Al-Rahman regularly delivered speeches calling for fraternity, equality and non-violence among the thirty-six tribes of Rahad al-Berdi and that he participated in a Reconciliation Committee mediating inter-communal disputes.[108] This witness also described his direct interventions to prevent violence and to protect the Salamat and Fur communities, demonstrating consistent efforts toward peace and protection of civilians.[109] The Fur community itself regarded him as a protector who defended their families and children from harm, and they continue to wish for his return to the community.[110]

62. The fact that witnesses from outside Mr Abd-Al-Rahman's own ethnic group corroborate his positive reputation is highly significant. On the balance of probabilities, these testimonies establish not simple good character evidence but also positive acts of humanitarian assistance, meriting mitigation.

(e-ii) M. Abd-Al-Rahman's role as a mediator

63. At paragraph 680 of its Trial Judgment, the Chamber finds that one of the reasons that meant that Mr Abd-Al-Rahman was a well-known, well-respected character in the Wadi Salih locality before the conflict was "*because he was called to mediate in tribal negotiations*". The Chamber's acknowledgement of Mr Abd-Al-Rahman's role as a man of peace and a mediator relies, *inter alia*, on the evidence of P-0932 and P-0585.[111] It is further supported by the consistent

[103] **D-0008**: T-139, p. 28 lines 23-p. 29 line 7.
[104] **D-0040**: DAR-D31-00000357 (Translation at DAR-D31-00000358), para. 13.
[105] **D-0040**: DAR-D31-00000357 (Translation at DAR-D31-00000358), para. 13.
[106] **D-0040**: DAR-D31-00000357 (Translation at DAR-D31-00000358), para. 14.
[107] **D-0029**: T-157, p. 24, lines 17-19.
[108] **D-0041**: DAR-D31-00000360 (Translation at DAR-D31-00000361), para. 15.
[109] **D-0041**: DAR-D31-00000360 (Translation at DAR-D31-00000361), para. 15.
[110] **D-0041**: DAR-D31-00000360 (Translation at DAR-D31-00000361), para. 16.
[111] Trial Judgment, footnote 2276.

statements of Defence witnesses D-0001,[112] D-0002,[113] D-0005[114] and D-0008.[115] The Chamber's findings that the evidence of Defence Witnesses D-0001, D-0002, D-0005 and D-0008 had little weight essentially relate to their denial that Mr Abd-Al-Rahman ever had the nickname Ali Kushayb. It thus has no bearing on their corroboration of the Chamber's findings and P-0932 and P-0585's evidence of Mr Abd-Al-Rahman's role as a mediator and man of peace, before and/or after the conflict.

64. Additional Defence Witnesses further corroborate the Chamber's findings in relation to Mr. Abd-Al-Rahman's role as a man of peace and a mediator before and/or after the armed conflict. In his statement, Defence Witnesses D-0040 corroborates the role of Mr Abd-Al-Rahman in the resolution of conflicts and illustrates this by latter's initiative of the creation of a committee for the protection of farmers, in charge of preventing and resolving tensions with herders, which he shared until his surrender to the Court.[116] Defence Witness D-0041 provides four concrete examples of interventions of Mr Abd-Al-Rahman to mediate conflicts and restore peace over a period of time running from 2009 until 2014 and acknowledges his role in protecting the Fur in Rahad Al-Berdi.[117] This is corroborative evidence supporting the Chamber's finding that Mr Abd-Al-Rahman was known for his role in tribal mediation before and/or after the period of the charges.

(e-iii) M. Abd-Al-Rahman's role as medical assistant and pharmacist

65. It is an agreed fact between the parties that upon retirement from the SAF in around the early to middle 1990s, Mr Abd-Al-Rahman opened a shop in Garsila from which he sold medication.[118] This shop was referred to throughout the trial as the pharmacy in Garsila market. Several Defence witnesses also confirmed that, after 2003-2004, he owned and operated a pharmacy in Rahad-al-Berdi.[119] It was an agreed fact that as of 10 April 2012, Mr Abd-Al-Rahman was in possession of a licence from the Federal Council for Pharmaceuticals and Toxicology to sell medicine.[120]

[112] Trial Judgment, Annex B, paras 572, 577.
[113] Trial Judgment, Annex B, paras 583, 587.
[114] Trial Judgment, Annex B, paras 602, 605.
[115] Trial Judgment, Annex B, paras 616, 619.
[116] DAR-D31-00000358, paras 13-16.
[117] DAR-D31-00000361, paras 15-16.
[118] ICC-02/05-01/20-504-AnxA, para. 11.
[119] *See eg* **D-0002** : T-156, p. 48, lines 10-21; **D-0029** : T-157, p. 28, line 21-p.29, line 23.
[120] ICC-02/05-01/20-504-AnxA, para. 12; DAR-D31-0001-0003 (Translation at DAR-D31-0001-0006).

66. D-0035 explained that when Mr Abd-Al-Rahman was recruited into the CRF in 2004, his medical skills were so valued that an age exception was made in order to admit him.[121] This demonstrates the recognition that his competence as a medical practitioner was a unique asset.

67. The importance of the work of a pharmacist in locations in rural Darfur cannot be overstated. In a region marked by chronic underdevelopment and a lack of healthcare infrastructure, pharmacies are often the primary point of access to medicine and medical advice for local people. A pharmacist is not merely a seller of medication. He or she is a community healthcare provider, and often the only healthcare provider, whose services are vital for families, farmers, herders, and displaced populations alike. A South Sudan Medical Journal article states the following about pharmacists in such rural regions: "*A community pharmacy is the most readily available health facility… A pharmacy is the first, and often the last, point of contact for patients… Pharmacy personnel can play a vital role in identifying suspected infectious diseases and directing patients to the next step.*"[122]

68. Additionally, an article in the Journal of Pharmaceutical Policy and Practice explains that "*Private medicine retailers, or drug shops, are an important source of essential medicines and basic healthcare, particularly in rural areas of low and middle-income countries where licensed providers are often scarce*".[123] A Global Health Journal article on access to healthcare in Sudan notes that patients in public healthcare facilities lack access to essential medication due to high costs and pervasive poverty.[124] Where hospitals are few and far between, understaffed and resource-scarce, a pharmacist willing to provide free medicine to those in need can serve as a lifeline for the poor. The Trial Chamber heard evidence that Mr Abd-Al-Rahman would provide medication to his clientele for free.[125]

69. It is submitted that the work of both a military medic and of a pharmacist is inherently humanitarian. The very essence of a pharmacist's job, as that of a doctor, is to cure illness, treat injuries and restore health. In Mr Abd-Al-Rahman's case, this was not abstract, witness after witness confirmed that he used his skills and resources to ensure that even those without means had access to medical treatment.

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[121] **D-0035**: DAR-D31-00000274, para. 22.
[122] Oliver Batista Ugoro, Role of the community pharmacy in the control of pandemics in South Sudan, South Sudan Medical Journal 2022;15(3):116-117, DAR-D31-00000370.
[123] Zubin Cyrus Shroff et al., Strengthening health systems: the role of drug shops, Journal of Pharmaceutical Policy and Practice, Vol.14, Supplement 1, Article number 86 (2021), DAR-D31-00000371.
[124] Lina Hemmeda et al., Accessibility crisis of essential medicines at Sudanese primary healthcare facilities, Global Health Journal, (2023) 22:216, DAR-D31-00000372.
[125] *See eg* **D-0005** : T-158, p. 26, line 12-p. 27, line10 (Conf); **D-0008** : T-139, p. 28, line 3-p. 30, line 4.

(e-iv) M. Abd-Al-Rahman's direct interventions to preserve life

70. The Trial Chamber heard evidence from two witnesses that Mr Abd-Al-Rahman did indeed take direct action in his life to protect and preserve life in circumstances having nothing to do with an intent to benefit any common plan underpinning criminality in 2003-2004.

71. Firstly, D-0007 gave evidence of Mr Abd-Al-Rahman saving the life of a very ill soldier or policeman named Musa in 1986 in Soungo.[126] Mr Abd-Al-Rahman saved this man's life in extremely difficult circumstances. He is alive today thanks to Mr Abd-Al-Rahman's selflessness and bravery. Notwithstanding the Trial Chamber's general finding that D-0007's evidence was of limited reliability and credibility,[127] it must be noted that his evidence about this incident specifically was not challenged by the Prosecution. The Presiding Judge asked D-0007 why Mr Abd-Al-Rahman's actions could be described as "*very humane*" given he was acting under his orders as a superior,[128] but in no way indicated that the witness's account of the incident itself was in doubt.

72. Secondly, P-0905 gave evidence that *Ali Kushayb* ordered Janjaweed fighters to spare women in Arawala from death.[129] He also testified that *Ali Kushayb* ordered Muqaddam Idriss to protect women and girls at risk of rape form Arab fighters on operations. The Defence recalls that the Trial Judgment found P-0905's evidence about Mr Abd-Al-Rahman making efforts to prevent rapes credible.[130]

73. The Defence acknowledges that P-0905 testified that *Ali Kushayb* gave his orders in Arawala at the same time as he ordered the killing of men and that its submission that Mr Abd-Al-Rahman deserves some credit in mitigation may appear unattractive. Nevertheless, the Chamber's positive credibility findings about P-0905 regarding these incidents make the following conclusion inescapable: there are women from Arawala who are alive today, and others who were saved from sexual violence, because, according to P-0905, Mr Abd-Al-Rahman - who could easily have done nothing - took positive decisions to order that they be spared. It is submitted that it cannot be said that these positive decisions in any way benefitted a common plan. This is proof, found credible by the Trial Chamber, that Mr Abd-Al-Rahman intervened on at least these occasions to protect and preserve life.

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[126] **D-0007**: T-149, p. 9, lines 6-23 (Conf).
[127] Trial Judgment, Annex B, para. 613.
[128] **D-0007**: T-149, p. 53, lines 6- 16 (Conf).
[129] **P-0905**: T-085, p. 54, lines 12- 13 (Conf).
[130] Trial Judgment, Annex B, paras 335-336.

(e-v) Mr Abd-Al-Rahman's attempts to create solidarity across ethnic lines

74. Multiple witnesses stated that Mr Abd-Al-Rahman did not engage in discriminatory speech or conduct, and that he acted in ways that fostered peaceful coexistence among the different tribes and ethnicities in his community. This is not a simply the impression of a single witness, but a pattern supported by evidence, which should be taken into account when assessing mitigation to the balance of probabilities standard.

75. **D-0041** [REDACTED] stated that Mr Abd-Al-Rahman intervened impartially to protect members of other tribes.[131] He explained that the Fur community regarded him positively in Rahad Al-Berdi and that he ensured their safety and equal participation in community life.[132] The Defence submits that the testimony [REDACTED] should carry significant weight regarding the issue of solidarity and absence of discriminatory motive. **D-0041**s's evidence on this aspect is corroborated by **D-0003**,[133] **D-0008**,[134] **D-0039**[135] and **D-0040**.[136] Some OTP witnesses, including **P-0717** and **P-0882**, testified that Mr Abd-Al-Rahman ran a pharmacy where Fur staff were employed and Fur customers were served.[137] Together, these witnesses provide proof that, on the balance of probabilities, M. Abd-Al-Rahman displayed cross-ethnic solidarity through daily acts of hosting, feeding, and assisting families, including those of the Fur tribe.

(e-vi) Mr Abd-Al-Rahman's words in the Um Sory and Teachers video

76. There is no dispute that Mr Abd-Al-Rahman is the speaker in both videos. Both recordings occur outside the charged period of 2003 and 2004.

77. The Prosecution suggests that the *Um Sory* speech took place around 2013-2015, and the Teachers speech after 2019 (after the fall of President Al-Bashir).[138] The Prosecution alleges that the *Um Sory* video contains violent threats against minorities tribes:[139] the Prosecution relies in particular on the following quote: "*Masalit, Tama or Bargo, everyone … if they so much as spray water on a member of any of these marginal tribes, then we'll spray them with blood.*"[140] But when understood accurately, the "*marginal tribes*", the Masalit, Tama, Bargo, are the groups under threat from outside that Mr Abd-Al-Rahman wants to demonstrate he will protect, even if that requires sacrifice. The statement is a pledge to defend them against attack, not to threaten

[131] **D-0041**: DAR-D31-00000360 (Translation at DAR-D31-00000361), para. 15.
[132] **D-0041**: DAR-D31-00000360 (Translation at DAR-D31-00000361), para. 16.
[133] **D-0003**: T-156, p. 50, lines 7-10.
[134] **D-0008**: T-139, p. 18 line 4, p. 19 line 21, p. 28 lines 23-25 (Conf), p. 29, lines 1-7 (Conf).
[135] **D-0039**: T-159, p. 43, lines 4-15.
[136] **D-0040**: DAR-D31-00000357 (Translation at DAR-D31-00000358), para. 13.
[137] DAR-OTP-0218-0165, para. 77; DAR-OTP-0210-0187-R01, para. 40.
[138] ICC-02/05-01/20-1206, paras 10-11.
[139] OTP Final Trial Brief, para. 200.
[140] DAR-OTP-00012474 ; DAR-OTP-0223-0519-R01 (Translation DAR-OTP-00012491-R01, p. 5, lines 82-93).

them. Defence witnesses **D-0039** and **D-0003** confirmed this interpretation in Court, reading the speech as protective of minorities.[141] The *Um Sory* speech contains explicitly inclusive passages: "*There should be no tribalism, regionalism or racism. All of us are so tightly bonded … you'd need a sword to divide us*";[142] "*There are no Zayds or Abids, only sons of Jinayd*";[143] "*…everyone should be equal.*"[144] There should be unity across "*brown, black … all people*".[145] These are anti-discrimination statements that fatally undermines the Prosecution's inaccurate portrayal of Mr Abd-Al-Rahman's speeches. Witnesses who heard the *Um Sory* speech confirmed that it was received as a message of defence and unity.[146] On the balance of probabilities, the plain wording of the *Um Sory* speech strongly negates any finding of ethnic hatred at a personal level.

78. It is just as important to understand the cultural linguistic framing of language used in the Teachers Video: Mr Abd-Al-Rahman says the following: "*I'd have stabbed and killed any individual who mocked Rehed al-Birdi or denigrated the teacher… I"ll grab him like that, tie him up…*".[147] These words are spoken, it is submitted in a highly emphatic way while laudably insisting on the importance of respect for the women teachers in the crowd, and of the value of education. As **D-0003** explained, these statements are understood locally as "*mere words*" or "*silent boasting*", not as genuine admissions of conduct. On the balance of probabilities, the Chamber should accept this evidence and recognise the cultural convention of hyperbolic speech in Darfur, which relies on admittedly violent metaphor and bravado to project authority, but no more.

79. Both videos, properly contextualised, demonstrate that Mr Abd-Al-Rahman is a man who forcefully and publicly rejects racism and tribalism, calls for equality, and espouses the need for full respect to (women) teachers and education.

(e-vii) Conclusion on M. Abd-Al-Rahman's actions to protect and preserve life

80. Mr Abd-Al-Rahman's continuing role as a mediator and a man of peace before and after the events of 2003-2004, his speeches and the fact that he intervened on at least two occasions to save lives during those events are established beyond the applicable standard of balance of probabilities. The Chamber already made findings about it. This role as a man of peace and a

[141] **D-0003**: T-156, p.11, lines 10-20, p.13, lines 11-16; **D-0039**: T-159, p. 92, lines 14-16.
[142] DAR-OTP-00012474 ; DAR-OTP-0223-0519-R01 (Translation DAR-OTP-00012491-R01, lines 40-41).
[143] DAR-OTP-00012474 ; DAR-OTP-0223-0519-R01 (Translation DAR-OTP-00012491-R01, lines 34-38).
[144] DAR-OTP-00012474 ; DAR-OTP-0223-0519-R01 (Translation DAR-OTP-00012491-R01 line 83.
[145] DAR-OTP-0220-4835 (subtitled), DAR-OTP-00012474 (corrected, subtitled), DAR-OTP-00006452, Translation, DAR-OTP-00012491-R01, page 5, lines 171-174.
[146] **D-0003**: T-156, p. 11, lines 10-20; **D-0039**: T-159, p. 92, lines 14-16.
[147] DAR-OTP-0215-2697 (Translation DAR-OTP-0220-3199, p. 2 lines 43 to 47).

mediator in conflicts shall be given full weight as a major mitigating circumstance in the Chamber's determination on the appropriate sentence.

(f) Voluntary surrender

81. Cooperation with the Court is expressly considered a mitigating factor under Rule 145(2)(a)(ii) of the RPE. Voluntary surrender is the most decisive way an indicted person can cooperate with the Court.

82. Voluntary surrender has been considered a mitigating factor before the *ad hoc* international tribunals for many years.[148] A mere willingness to surrender was considered a sufficient mitigating factor, even when the Accused had had no opportunity to do so.[149] In *Ntaganda*, the Trial Chamber recalled the considerable benefits that voluntary surrender presents for international courts and tribunals and that this could constitute a significant mitigating circumstance,[150] but partially varied this established case law by considering that the delay of five years between the issuance of the first warrant of arrest and Mr Ntaganda's voluntary surrender was too great. Thus, no weight was attached to this factor in mitigation.

83. This Trial Chamber is not bound by the Chamber's finding in *Ntaganda.* This first instance ruling was not challenged on appeal. It is open to the Trial Chamber to disregard the *Ntaganda* Chamber's finding and arrive at its own conclusion.

84. The circumstances of Mr Abd-Al-Rahman's surrender significantly differ from those in the *Ntaganda* Case. Mr Abd-Al-Rahman not only took the initiative of surrendering himself to the Court at the end of 2019, but had to wait until June 2020 before he was able to finally meet with representatives of the Prosecution in Birao, Central African Republic. Throughout this time, through his intermediary, he remained in contact with the OTP and sent them information about his identity. The Chamber received evidence that, by 27 December 2019, the OTP had enough information to be satisfied that the intermediary was indeed in contact with Mr Abd-Al-Rahman,[151] but the surrender did not take place for another six months. During this period of six months, from December 2019 until May 2020, Mr Abd-Al-Rahman had to hide in difficult and perilous conditions in the border region between Sudan and the Central African Republic, with limited support, before the Office of the Prosecutor finally met him to take his surrender. [REDACTED] "*I spent three* [sic] *months without a fixed place to stay. I contacted the ICC, identified myself as Abd-Al-Rahman, and requested a meeting.*"[152] It is consistent with evidence

[148] *Jokić* Sentencing Judgment, paras 76, 89.
[149] *Deronjić* Sentencing Judgment, paras 266-267.
[150] *Ntaganda* Sentencing Judgment, para. 228.
[151] ICC-02/05-01/20-876, para. 23.
[152] DAR-D31-00000378, para. 35.

on record of his dreadful condition by the time.[153] The Chamber made findings on this episode at paragraphs 21 to 27 of its decision on the admission of the surrender video.[154] His perseverance in staying in contact with the Prosecution, waiting for a meeting so that he could formally surrender and be taken into custody, even at the cost of sending the surrendering video that the Chamber now uses as evidence of identity as *Ali Kushayb* in the Trial Judgment,[155] is established beyond the balance of probabilities standard. The Chamber already made findings about it. Such perseverance provides the Chamber with a solid foundation for distinguishing the circumstances of his surrender from that of M. Ntaganda.

85. It is submitted that, notwithstanding the delay between the arrest warrant for Mr Abd-Al-Rahman and his first contact with the ICC, he should nevertheless be given credit for his decision to hand himself in. The truth of the matter is that, had he not done so, the chances he would have ever ended up in the custody of the Court are close to zero. As the Trial Chamber acknowledged in the Judgment, the Prosecution was unable to access any location in Darfur.[156] There was never any realistic chance that the GoS would have ever arrested and transferred Mr Abd-Al-Rahman to The Hague. The only reason Prosecution witnesses and victims have been able to give their accounts to this Trial Chamber is because Mr Abd-Al-Rahman decided to surrender himself to its jurisdiction.

86. The Defence submits that the Trial Chamber has a rare opportunity to place on the record that voluntary surrender may inspire other ICC suspects to do the same. Wanted persons who decide to answer warrants for their arrest will be rewarded with a reduction in any sentence in the event of a conviction, whatever the time elapsed since the issuance of the warrant of arrest. This would be a powerful message that the Court would send to, *inter alia*, M. Banda, M. Harun, M. Al-Bashir and M. Hussein, as well as other long-time awaited fugitives in other Situations before the Court. Conversely, a ruling that there can be no mitigation when there is a substantial delay would amount to a missed opportunity to encourage suspects to submit to the Court and would play as a strong deterrent against surrender. It is in the public interest to encourage suspects' cooperation with the Court, even in those circumstances where cooperation was not immediately forthcoming. The specific circumstances of Mr Abd-Al-Rahman's surrender provide a solid ground to enter such ruling.

[153] DAR-OTP-00000837-R01, at 000003.
[154] ICC-02/05-01/20-876, paras 21-27.
[155] Trial Judgment, paras 242-249.
[156] Trial Judgment, footnote 244.

(g) Exemplary behaviour in the Detention Centre

87. Evidence of exemplary behaviour in detention has been found a relevant factor for mitigation.[157] Even Chambers with no appetite to take good behaviour in detention as a mitigating factor had to admit that an exceptionally good behaviour should play in favour of the convicted person.[158] It is submitted that good behaviour should still be rewarded by being taken into account in the sentencing exercise. It is indeed a valid exercise of the Trial Chamber's discretion to recognise that a detainee's good behaviour plays an important role in fostering the orderly administration of an international detention centre. Respectful relations between detainees and Detention Centre staff, and between detainees themselves, create a harmonious living and working environment for all. A detainee's willingness to contribute to a harmonious living and working environment provides a strong sign of his genuine will and capacity to rehabilitate and resume, when given the chance, the life of an ordinary citizen respectful of the law. By contrast, detainees who are violent, who are disruptive and disrespectful of the rules and regulations of a Detention Centre, create discord and create unnecessary stress. Such conditions often result in the Detention Centre population as a whole having to spend longer periods of the day confined to their cells. Good behaviour benefits all, is a strong sign of possible rehabilitation and should be rewarded.

88. [REDACTED][159] [REDACTED][160] [REDACTED][161] [REDACTED][162] [REDACTED][163] [REDACTED] describe, beyond the applicable standard of balance of probabilities, the behaviour of Mr Abd-Al-Rahman in detention as *exceptionally good*, thus meeting even the most restrictive standard set in the *Ntaganda* Sentencing Judgment. If good conduct in detention is ever to be found as a mitigating factor, and there are powerful reasons of principal why it should be, this mitigating factor shall play in favour of Mr Abd-Al-Rahman. His behaviour is a strong indicium of Mr Abd-Al-Rahman's capacity and willingness to achieve full and complete rehabilitation and a peaceful return into his community after detention, under the sole condition that his age, at the time of his release, will still allow so. This should be acknowledged and encouraged.

[157] *Al Mahdi* Judgment and Sentence, para. 97.
[158] *Ntaganda* Sentencing Judgment, para. 229.
[159] [REDACTED]
[160] [REDACTED]
[161] [REDACTED]
[162] [REDACTED]
[163] [REDACTED]

(h) Absence of previous convictions

89. Mr Abd-Al-Rahman has no previous convictions in Sudan, or indeed in any other country. The Prosecution did not adduce evidence of any previous convictions. The Defence made significant efforts to obtain from Sudan details of any previous convictions, but in vain. Mr Abd-Al-Rahman, at the age of 76 years, stands to be sentenced for the first time in his life for criminal activity.

(i) Absence of risk that he may reoffend once released

90. The above factor is of relevance to the question of the risk of reoffending. If, as Mr Abd-Al-Rahman sincerely hopes, and as we urge the Chamber to do, a sentence is passed that permits him one day to be released from prison, the Chamber can be sure that he would present no risk of reoffending. The evidence before the Chamber relating to Mr Abd-Al-Rahman's character and efforts to foster inter-community harmony further underscores the Defence's submissions that there is no chance of him engaging in criminality in the future.

(j) Expression of empathy for victims and efforts to compensate them

91. Efforts to compensate the victims is expressly considered a mitigating circumstance under Rule 145(2)(a)(ii) of the RPE. "*Peace, justice and reconciliation advocacy*",[164] "*generosity towards compatriots and persons in need*",[165] and expressions of "*sentiments of empathy towards the victims*"[166] have been considered relevant mitigating factors in the Court's sentencing practice.

92. Since his arrival at the Court, M. Abd-Al-Rahman took the floor three times to express himself.

93. The first occasion was during his initial appearance. His interventions were limited to answering questions from the single Judge. He could not express himself further.[167]

94. The second opportunity was during the hearing on the confirmation of charges. His intervention is very limited, but starts with the following: "*first, I would like to express, to pray for mercy for all the victims who dies in Darfur and we hope that Darfur lives in peace away from all tribal conflicts.*"[168] This is the first instance where M. Abd-Al-Rahman expressed empathy towards victims and advocated in favour of peace.

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[164] *Bemba et al.* Sentencing Judgment, paras 92, 96 (upheld in appeal, *Bemba et al.* Sentencing Appeal Judgment, paras 341-342).
[165] *Bemba et al.* Sentencing Judgment, paras 92, 96 (upheld in appeal, *Bemba et al.* Sentencing Appeal Judgment, paras 341-342).
[166] *Al-Mahdi* Judgment and Sentence, para. 104.
[167] Initial Appearance, T-001, p. 3, lines 19-21, p. 6, lines 9-11, p. 20, line 4 - p. 21, line 21, p. 24, lines 12-16.
[168] Review on Detention Hearing, T-010, p. 3, lines 21-22.

95. His third intervention was in December 2024, at the very end of the trial. His words included the following: "*Because of the war, all of this is ruined and destroyed and the Sudanese people are suffering. They suffered in 2003-2004, they suffered before, they have suffered since then and they are still suffering now.* […] *The victims of 2003, 2004 and of today are my brothers and sisters. I pray for their salvation and I suffer with their families, for whom their absence has caused an eternal suffering.* […] *There should be no place for racism, tribalism or hatred. We are all Sudanese citizens. We are all Sudanese citizens and we must work to restore peace and prosperity to our beautiful country for our common salvation and for the future of our children.* […] *I pray God for the fighting to stop and for the reconciliation of my brothers in order to rebuild in the peace of God. Politics had led them to hell and may God guide them to good. Religion is Islam and not weapons*."[169] The Trial Chamber will appreciate the authenticity of M. Abd-Al-Rahman's words. These are the true chosen words of a Sudanese. He chose to express his empathy for the victims of 2003-2004 ("*The victims of 2003, 2004 and of today are my brothers and sisters. I pray for their salvation and I suffer with their families, for whom their absence has caused an eternal suffering*") and to advocate for peace and reconciliation in Sudan ("*no place for racism, tribalism or hatred. We are all Sudanese citizens*", '*I pray God for the fighting to stop and for the reconciliation of my brothers*", "*Religion is Islam and not weapons*").

96. The Chamber may regret that the above expressions of empathy and advocacy for peace do not contain remorse. Remorse would have implied that M. Abd-Al-Rahman confesses guilt and expresses his regrets for what he had allegedly caused, but this was incompatible with his line of defence, consisting in denying any role in the commission of the crimes. Pursuant to Article 67(1)(g) of the Statute, M. Abd-Al-Rahman enjoys the right not to be compelled to confess guilt, without his silent being a consideration in the determination on guilt or innocence. Had remorse been compatible with his position and had he chosen to express these, this could have been seen as a mitigating factor, but the absence of that particular mitigating factor cannot be construed as an aggravating one. The absence of remorse should have no impact on the consideration of his repeated expressions of empathy for the victims and advocacy for peace, reconciliation and harmony in Sudan as mitigating circumstances pursuant to the above case law.

97. Beyond his words before the Court, the Chamber's finding that M. Abd-Al-Rahman was known for mediating tribal conflicts[170] demonstrates his active role in favour of peace, justice and reconciliation. The evidence of M. Abd-Al-Rahman's generosity as a medical assistant and

[169] Closing Statements, T-162, pp. 62-64.
[170] Trial Judgment, para. 680.

pharmacist[171] should also be factored in by the Chamber as a mitigating circumstance weighted by the Court in other cases.

98. From the earliest days at the Court, M. Abd-Al-Rahman has demonstrated his genuine and persistent concern for the suffering of victims and their right to obtain reparations. M. Abd-Al-Rahman's abovementioned extremely modest condition - once again 660 Sudanese Pounds monthly salary in 2020,[172] i.e. more or less 12 euros in 2020, about 1,30 euro today[173] - allows him no financial capacity to offer compensation for victims. He was concerned about that. To alleviate his concerns, the Defence explained him the reparation scheme available before the Court. His reaction was that this scheme should be activated without delay for victims to receive reparations. M. Abd-Al-Rahman's concerns about the victims' right to reparations led the Defence to imagine, draft and submit its propositions on reparations for victims on 17 July 2020[174] and to pursue these as far as procedural rights allowed.[175] The rejection of these proposals was bitterly received by M. Abd-Al-Rahman, who had difficulties to understand its rationales. One may say that instructing his Defence to make submissions on reparations does not amount to a genuine effort to compensate victims because the proposal was to have reparations paid by the Trust Fund for Victims, not to pay for it. But this criticism would imply that only wealthy convicts can benefit from the mitigating circumstance expressly provided under Rule 145(2)(a)(ii) of the RPE. Making the benefit of mitigating circumstances in such a way contingent on the convict's wealth would be irreconcilable with the prohibition of "*any adverse distinction founded on grounds such as* […] *wealth, birth or other status*" in the application and interpretation of the law applicable by the Court pursuant to Article 21(3) of the Statute. This criticism would also be ill-founded as the proposals included the possibility of reparations proceedings against the convicted person pursuant to Article 75(2) of the Statute: "*Dans l'hypothèse où un jugement de condamnation final est délivré à l'encontre de l'une de ces personnes, la Chambre de première instance peut rendre à son encontre une Ordonnance en vertu de l'Article 75-2 du Statut.*"[176] By instructing his Defence to submit these propositions and by accepting in advance that he would become liable for reparations in case of a conviction, M. Abd-Al-Rahman thus demonstrated his unprecedented, genuine, concrete and exceptional efforts

[171] *See eg* **D-0005** : T-158, p. 27, lines 1-10 (Conf); **D-0008** : T-139, p. 28, line 23 – p. 29, line 7.
[172] DAR-D31-0002-0002 (Translation at DAR-D31-0002-0006).
[173] Confirmation of Charges Hearing, T-008, p. 76, lines 12-13 ; T-009, p. 70, line 23 - p. 71, line 1. These figures were not challenged by the Prosecution.
[174] ICC-02/05-01/20-98.
[175] ICC-02/05-01/20-147 OA4.
[176] ICC-02/05-01/20-98, para. 100 : « *Principe additionnel de la Réparation no. 9 - Incidence des réparations sur les procédures dans le dossier de l'affaire* », p. 55.

to compensate victims. This should play as a powerful factor mitigating his sentence pursuant to Rule 145(2)(a)(ii) of the RPE.

99. Finally, on 4 November 2025, at the request of the Defence, a meeting was held with representatives of the Trust Fund for Victims. This meeting was the occasion of a fruitful exchange on various issues, such as the reparations proceedings, the absence of assistance or reparations programmes for victims in the Sudan Situation so far, fundraising aspects and the possibility, or not, to make earmarked voluntary donations in favour of victims in Sudan. The Defence will now report to M. Abd-Al-Rahman on the outcome of this discussion and available options. This topic may be further addressed in the Defence's oral arguments at the hearing on sentencing.

100. Pursuant to Rule 145(2)(a)(ii) of the RPE, the Defence hereby prays the Chamber to take into consideration M. Abd-Al-Rahman's repeated expressions of empathy towards the victims, his concrete action in favour of peace, justice and reconciliation in Darfur, his generosity towards the poor, and his genuine concern and effort in favour of reparations for victims, in the mitigation of his sentence.

(k) [REDACTED]

101. [REDACTED][177] [REDACTED][178]

102. [REDACTED][179]

103. [REDACTED][180] [REDACTED][181]

104. [REDACTED][182]

105. [REDACTED][183] [REDACTED]

106. [REDACTED]

107. [REDACTED]

108. [REDACTED]

[REDACTED][184]

[REDACTED][185]

109. [REDACTED]

[177] [REDACTED].
[178] [REDACTED].
[179] [REDACTED].
[180] [REDACTED].
[181] [REDACTED].
[182] [REDACTED].
[183] [REDACTED].
[184] [REDACTED].
[185] [REDACTED].

110. [REDACTED]

(l) Conditions in which M. Abd-Al-Rahman would have to serve any sentence of imprisonment

111. It is submitted that the Trial Chamber should also take into account the future conditions of imprisonment that await Mr Abd-Al-Rahman. It will be impossible for Mr Abd-Al-Rahman to be transferred to serve his sentence in Sudan. It is improbable he will even be able to serve his sentence on the continent of Africa. Similarly, there is currently no option to transfer him to serve his sentence in an Arabic-speaking country.

112. What is most likely is that he will be sent to serve his sentence in a country far removed from his country, his family, his community and his culture. The conditions of his future imprisonment will undeniably be far more onerous for him than other prisoners serving similar sentences. [REDACTED]

> *Older individuals in prison typically have higher health and social-care needs, and prison settings are often not well adapted for ageing (mobility, continence, night-time support). Extended detention tends to accelerate deconditioning and dependency; a lengthy custodial sentence is likely to intensify these pressures.*[186]

113. Regarding Mr Abd-Al-Rahman's inevitable foreign-national status in his future place of imprisonment, the difficulty of cultural distance, and the language barrier, [REDACTED]:

> *As an Arabic-speaking foreign national far from Sudan, Mr Abd-Al-Rahman faces cultural displacement and unfamiliar systems that increase his vulnerability with age. This likely impacts him because he links his self-identity to community status and culturally specific roles that are largely absent in custody, with the lack of familiar social support structures.*[187]
>
> *The language barrier limits Mr Abd-Al-Rahman's understanding of rules, healthcare, and procedures. He has managed this challenge for five years, demonstrating some adaptation, but the situation remains fragile. In the long term, continued reliance on ad hoc interpreters increases the risk of misunderstandings and of overlooking symptoms.* [REDACTED]*his ability to compensate is likely to decline further.*[188]

114. Mr Abd-Al-Rahman faces a future of increasing isolation and reduced social contact as he ages, [REDACTED].[189] [REDACTED].

115. Prolonged absence from his family means the protective effect of sustained family ties are absent. The assistance the ICC has been able to offer to arrange [REDACTED] will likely disappear once Mr Abd-Al-Rahman is transferred to a new enforcement state. Unless a future enforcement state has facilities to enable video link visits with his family in Darfur, he faces a

[186] [REDACTED].
[187] [REDACTED].
[188] [REDACTED].
[189] [REDACTED].

near future of no family contact. Prolonged separation from family typically weakens a known factor against deterioration.[190]

116. The Defence submits that this alarming prospect for Mr Abd-Al-Rahman's future, and that of his family, should be fully taken into account by the Trial Chamber so that the lowest possible sentence is passed.

V. DETERMINATION ON APPLICABLE PENALTIES

(a) Applicable Law

117. Article 77 of the Statute defines the "*Applicable Penalties*" under the Statute. Pursuant to Article 77(1) of the Statute, these include imprisonment for a specified number of years, not exceeding 30 years, or, when justified by the extreme gravity of the crimes and the individual circumstances of the convicted person, life imprisonment. A fine and forfeiture of proceeds, property and assets derived directly or indirectly from the crime is also possible under Article 77(2)(a) and (b). These are the penalties provided under the Statute.

118. Article 21(1) of the Statute identifies the applicable law before the Court: (a) in the first place, the Statute, Elements of Crimes and Rules of Procedure and Evidence; (b) where appropriate, applicable treaties and principles and rules of international law; and, (c) failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the State that would normally exercise jurisdiction over the crime. Sudanese law, especially its provisions governing penalties, does not form part of the Law applicable before the Court. There may be circumstances making the particular provisions of Sudanese Law a relevant factor in the determination of the Chamber - these are explored below -, but in no case can the Chamber inflict a penalty by way of direct application of the provisions of Sudanese law. The penalties applicable before the Court and which the Chamber is empowered to apply are those provided under Article 77 of the Statute.

119. Article 21(3) of the Statute further clarifies that "*the application and interpretation of law* […] *must be consistent with internationally recognized human rights*". Among these "*internationally recognized human rights*" of relevance for sentencing are those enshrined in the Statute, as interpreted and implemented by other relevant international bodies protecting human rights, such as the European Court of Human Rights, the African Court of Human Rights or the Interamerican Court of Human Rights[191] or, where relevant and appropriate, domestic case

[190] [REDACTED].

[191] *Lubanga*, ICC-01/04-01/06-772 OA4, para. 38; *Lubanga*, ICC-01/04-01/06-773 OA5, para. 20; *Lubanga,* ICC-01/04-01/06-2205 OA15 OA16, paras 83-84 ; *Katanga*, ICC-01/04-01/07-475 OA, paras 57-58; *Bemba*, ICC-01/05-01/08-323 OA, paras 28-32; *Abd-Al-Rahman*, ICC-02/05-01/20-503 OA8, para. 85.

law.[192] The Defence refers to their interpretation and application of the relevant principles governing penalties whenever necessary.

120. Among "*internationally recognized human rights*", Articles 22 to 24 of the Statute articulate the general principle of international law *nullum crimen nulla poena sine lege* and the general principle of non-retroactivity *ratione personae*. Together, these three provisions constitute the various facets of the principle of legality.

121. Article 22 of the Statute deals with the *nullum crimen sine lege* aspect of the principle of legality. This aspect is addressed by the Chamber at paragraphs 28 to 60 of its Trial Judgment. Without prejudice to the exercise of Mr. Abd-Al-Rahman's right to appeal and challenge the findings of the Chamber on this specific issue, the Chamber's findings under Article 22 constitute the premise for the Defence's submissions below. Relevantly, Article 22(2) provides that the definition of crimes "*shall be strictly construed and shall not be extended by analogy*". The prohibition of analogy has been extended by the Court to the application of the *nulla poena sine lege* principle under Article 23: "*there is no infringement of the principle of legality if the Chamber exercises its power to decide whether M. Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (*lex scripta) *pre-existing criminal norms approved by the States Parties to the Rome Statute* (lex praevia)*, defining prohibited conduct and* ***setting out the related sentence*** **(lex certa)** ***which cannot be interpreted by analogy*** **in malam partem (lex stricta)**" (emphasis added).[193]

122. Article 23 of the Statute, *Nulla poena sine lege*, excludes the application of any penalties, other than those provided under Article 77: "*a person convicted by the Court may be punished only in accordance with this Statute*". This would exclude, for example, other penalties provided under various States' domestic law, such as the death penalty or corporal punishments. These are forbidden before the Court, even if Sudanese Law gives room to such penalties for certain crimes.

123. Article 24 of the Statute – Non-retroactivity *ratione personae* is the last aspect of the principle of legality. Its paragraph 2 relevantly provides that "*in the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply*". The mention "*convicted*" implies that the principle spelled out in Article 24(2) also applies to the law governing penalties, i.e. in case of a change in the law governing penalties incurred for a crime, the most lenient provision shall prevail. There are numerous applications of the non-retroactivity principle to the changes in law

[192] *Lubanga*, ICC-01/04-01/06-772 OA4, para. 39.
[193] *Lubanga* Confirmation of charges Decision, para. 303.

setting up penalties. For instance, in *Del Rio Prada v. Spain*, the ECHR Grand Chamber found that "*the Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted, there was in force a legal provision which made the act punishable, and that* ***the punishment imposed did not exceed the limits fixed by that provision***".[194] Also with respect to war crimes, in *Maktouf and Damjanović v. Bosnia and Herzegovina*, the ECHR Grand Chamber found: "*the court is unable to agree with the Government's argument that if an act was criminal under the "general principles of law recognised by civilised nations" within the meaning of Article 7§2 of the Convention at the time when it was committed then the rule of non-retroactivity of crimes and punishments did not apply. […] It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity.*"[195] At domestic level in the African setting, the Supreme Court of the Republic of Benin, in *Houngli Hounguevenou et Ousmane Dienne c. Ministère Public*, reversed a judgment which had violated Article 4 of the Penal Code according to which "*nulle contravention, nul délit, nul crime ne peuvent être punis de peines qui n'étaient pas prononcées pas la loi avant qu'ils fussent commis*."[196]

124. Some commentators questioned the reference to a change in the "*law"* in Article 24(2).[197] Because domestic law is not applicable before the Court pursuant to Article 21(1), such change in the law cannot be related to domestic variations. On the other hand, there is no rationales or justification for restricting the reference to a change in the "*law*" to the sole unlikely scenario of an amendment to the Statute. The importance attached to the principle by the abovementioned case law of the European Court, Interamerican Court and African Court of Human Rights concurs with the *ratione personae* dimension of Article 24 in leading to the conclusion that it applies to every case where, for whatever reasons, there is a change in the law applicable to a given individual with respect to the penalties incurred for the crimes for which he has been convicted. Such changes may result, for instance, from variations in other sources of applicable law before the Court, such as decisions by the International Court of Justice or a regional court of human rights;[198] they may also result from the entry into force of the Statute *vis-à-vis* an individual, such

[194] ECHR, *Del Rio Prada v. Spain* [GC], para. 80; *Achour v. France* [GC], para. 43. *See also* Inter-American Court of Human Rights, *Vélez Loor v. Panama*, Judgment, para. 183; *See also* African Court of Human and Peoples' Rights, *Kabalabala Kadumbagula & al. v. United Republic of Tanzania*, pp. 22-26 (on the failure to apply a lighter sentence as provided in an amended law).
[195] ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 72.
[196] Bénin, Cour Suprême du Bénin, Chambre judiciaire, Arrêt no. 12, 27 June 1974.
[197] R. C. Pangalangan, "Article 24 - Non-retroactivity *ratione personae*", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd Ed. (2008), pp. 740-741; W.A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), p. 420.
[198] W.A. Schabas, *Ibid.*, p. 420.

as when a crime is committed on the territory of a Non-State Party, over which the Court later on receives jurisdiction as a result of a resolution of the United Nations Security Council.

125. The referral of a Situation in a Non-State Party by the Security Council pursuant to Article 13(b) of the Statute has an individual impact on the law applicable to individuals on the territory of that State: whereas the Statute was not applicable to them before that referral, they suddenly fall under the jurisdiction and the law of the Court as a result of it. This amounts to "*a change in the law applicable*" to an individual pursuant to Article 24(2) of the Rome Statute. In the case of M. Abd-Al-Rahman, until the passing of Resolution 1593 by the United Nations Security Council on 31 March 2005, the offences and penalties applicable to him were those defined under Sudanese law, in the first place the 1991 Criminal Act and 1986 People's Armed Forces Act. From the 31 March 2005 onwards, his acts and conduct fell under the jurisdiction and law of the Rome Statute. There could have been no basis for a challenge to the jurisdiction of the Court for crimes committed after the 31 March 2005: the Statute had become clearly applicable. The Defence challenged the jurisdiction of the Court for crimes allegedly committed before that date, in 2003-2004. This challenge triggered the Appeals Chamber's OA8 Judgment and is resolved, with respect to jurisdiction and the *nullum crimen* side of the principle of legality at paragraphs 20 to 60 of the Trial Judgment. After the conviction of M. Abd-Al-Rahman, the time has now come to address the *nulla poena* side of the principle of legality.

126. In the Statute, this two-pronged principle is fully articulated under Article 22 - *Nullum crimen sine lege*, Article 23 - *Nulla poena sine lege*, completed by Article 24 - Non-retroactivity *ratione personae*. This makes the Statute of the International Criminal Court much more specific, much more detailed and much more protective of the Defendant's rights than the statutory provisions governing other international criminal tribunals. "*All previous international criminal courts have been created with the mandate to operate, at last partially, with respect to acts perpetrated prior to their establishment. The retroactivity of prosecution has always been viewed as a shortcoming, albeit one for which a satisfactory explanation was available. Nevertheless, to the extent it operates for crimes committed after its establishment, the International Criminal Court represents very significant progress.*"[199] This major difference of the Court with other sister international criminal tribunals makes their case law of limited to no assistance in the

[199] W.A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), p. 417. *See also* R. C. Pangalangan, "Article 24 - Non-retroactivity *ratione personae*", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd Ed. (2008), pp. 735-741; D. Scalia, « Article 23. *Nulla poena sine lege* » et « Article 24. Non-rétroactivité *ratione personae* », *in* J. Fernandez, X. Pacreau et M. Ubéda-Saillard, *Statut de Rome de la Cour pénale internationale - Commentaire article par article*, 2ème éd. (2019), pp. 997-998, 1005-1009; S.H. Steiner, R.C. Paret, « Légalité (Principe de) », *in* O. Beauvallet *et al.* (eds.), *Dictionnaire Encyclopédique de la Justice Pénale Internationale* (2017), p. 619.

application of the principle of legality. At paragraph 83 of its Judgment OA8 in the present Case, the Appeals Chamber has emphasised the fundamental nature of this principle in international law. Although the issue before the Appeals Chamber was more focused on the first prong - *nullum crimen* - of the principle of legality, the Appeals Chamber refers to various authorities in International Law addressing it inseparably from its second prong - *nulla poena* -.[200] The Appeals Chamber endorses the views of scholars who "*describe the prohibition of retroactive penal laws as a fundamental and non-derogable rule of international law, and some suggest it has attained the level of a* jus cogens *norm*".[201] The *prohibition of retroactive penal laws*" referred to by the Appeals Chamber encompasses both the *nullum crimen* and *nulla poena* aspects and, actually, the entire provisions of Articles 22 to 24 of the Statute. The intertwined, interdependent nature of the guarantees under Articles 22 to 24 of the Statute implies that the same solutions followed to assess compliance with one aspect, like *nullum crimen*, shall prevail *vis-à-vis* the other aspects, like *nulla poena* and non-retroactivity *ratione personae*.

127. In its Judgment OA8, the Appeals Chamber interprets and draws the consequences of this principle of legality on the exercise of its jurisdiction by the Court. Focusing on the *nullum crimen* aspect before it, the Appeals Chamber rules that "*the principle of* nullum crimen sine lege *generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law*".[202] The Appeals Chamber then develops the applicable tests of "foreseeability" and "accessibility" to assess compliance with that principle. For conduct that takes place on the territory of a State that is not a Party to the Statute, like Sudan, the Appeals Chamber adds: "*it is not enough that the crimes charged can be found in the text of the Statute. In interpreting Article 22(1) of the Statute in a manner consistent with human rights law, a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that*

[200] ICC-02/05-01/20-503 OA8, paras 83-84, quoting Article 11(2) of the Universal Declaration of Human Rights ("UDHR"), Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR"), Article 7(2) of the African Charter on Human and Peoples' Rights ("African Charter"), Article 15 of the Arab Charter on Human Rights ("Arab Charter") (para. 84).
[201] ICC-02/05-01/20-503 OA8, para. 84, quoting, *inter alia*, W.A. Schabas, *The International Criminal Court: A Commentary of the Rome Statute* (2016), p. 540; J. Nicholson, "Strengthening the Effectiveness of International Criminal Law through the Principle of Legality" *in 17 International Criminal Law Review 656* (2017), p. 660; B. Broomhall, "Article 22" *in O. Triffterer, K. Ambos* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2015, 3rd ed.), p. 950; K.S. Gallant, *The Principle of legality in International and Comparative Criminal Law* (2009), pp. 206-207; S. Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law" *in* A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), p. 735.
[202] ICC-02/05-01/20-503 OA8, para. 85.

a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged".[203]

128. This is the test applied by the Chamber at paragraphs 20 to 60 of its Trial Judgment. Regarding the applicable laws applicable to the Accused at the time of his conduct, the Chamber has "*assessed the relevant Sudanese laws submitted in the case record which were in force at the time of the charged events*".[204] These include the 1998 Sudanese Constitution, the 1991 Criminal Act, from which the Chamber refers to a series of provisions defining offences that it finds "*analogous*" to the crimes charged,[205] and the 1986 Peoples' Armed Forces Act, as relevantly clarified by Witness **D-0016**.[206] It is on the basis of the foregoing findings that the Chamber assesses the Defence's challenge to jurisdiction and foreseeability tests set by the Appeals Chamber,[207] to conclude that it is satisfied that the criminal laws considered, i.e. Sudanese criminal laws, applicable to the Accused at the time of commission of the charged acts "*clearly described the prohibited conduct and defined crimes comparable to the crimes charged*".[208] The Chamber therefore affirms the jurisdiction of the Court on the case and convicts M. Abd-al-Rahman.

129. The same test now needs to be applied to the determination of the applicable penalties.

(b) Application to the determination of applicable penalties in the present case

130. Now that the case has reached the sentencing phase, the Chamber shall consider the appropriate sentence, pursuant to Article 76(1) of the Statute. In doing so, the Chamber must follow the same logic and principles in its application of the second prong of the principle of legality in relation to the determination on applicable penalties, *nulla poena sine lege*, under Article 23 of the Statute and the complementary non-retroactivity *ratione personae* under Article 24, in particular the obligation to apply the law more favourable to the person convicted, under Article 24(2) of the Statute. As prescribed by the Appeals Chamber, because Sudan was not a party to the Rome Statute in 2003-2004, with the consequence that it did not apply to M. Abd-al-Rahman, the Chamber "*must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place*".[209] To be consistent, the Chamber should proceed as it did at paragraphs 20 to 60 of its Trial Judgment, that is looking at the relevant

[203] ICC-02/05-01/20-503 OA8, para. 86.
[204] Trial Judgment, para. 32.
[205] Trial Judgment, para. 34, footnote 46.
[206] Trial Judgment, para. 35.
[207] Trial Judgment, paras 37-50.
[208] Trial Judgment, para. 51.
[209] ICC-02/05-01/20-503 OA8, para. 86.

provisions of Sudanese law applicable to M. Abd-Al-Rahman in 2003-2004 to see what were, by the time, the penalties applicable to offences that it finds "*analogous*" to the crimes charged.[210]

131. Upon reading the findings on jurisdiction made by the Chamber at paragraphs 20 to 60 of the Trial Judgment, the Defence anticipated that the Chamber may wish to conduct again that exercise with respect to sentencing. This is why it decided to re-interview Witness **D-0016** on the specific issues of applicable sentences under Sudanese law. His second written statement[211] has been admitted into evidence pursuant to Rule 68(3) of the RPE.[212] **D-0016** is scheduled to appear at the hearing on sentencing and will have an opportunity to respond any questions from the Judges, the Prosecution and/or the Legal Representatives of Victims and provide the required clarifications on these issues.

132. Witness **D-0016** first highlighted that the absence of specific incriminations of the violations of International Humanitarian Law in Sudan in 2003-2004 did not mean that their perpetrators would go unpunished. Sudanese courts would prosecute these violations "*on the basis of their analogy with equivalent offences in the 1991 Criminal Act and/or 1986 Armed Forces Act. The corresponding sentences provided for these equivalent offences would be the ones applied to what would amount to War Crimes and Crimes against Humanity*".[213] Witness **D-0016** then considered one by one each of the Counts on which the Chamber issued a finding of guilt and indicated how he [REDACTED] would draw an analogy with a corresponding offence under the 1991 Criminal Act or the 1986 Peoples' Armed Forces Act, and the applicable penalties. His answers include death penalty[214] and corporal punishments, in particular crucifixion,[215] amputation[216] and whipping[217]. With respect to imprisonment sentences, his answers run from a minimum of 1 month[218] to a maximum of 30 years imprisonment.[219] Fines also apply to most offences. Witness **D-0016** eventually clarified that people over 70 years of age could no longer be sentenced to death[220] and would have any imprisonment sentence converted into alternative measures, such as expatriation or placement under family or

[210] Trial Judgment, para. 34, footnote 46.
[211] DAR-D31-00000363.
[212] Email from the Trial Chamber, "Decision on the presentation of additional sentencing evidence", 30 October 2025, 11h16.
[213] DAR-D31-00000363, para. 16.
[214] DAR-D31-00000363, paras 20, 24, 33, 48-50.
[215] DAR-D31-00000363, para. 33. Crucifixion follows death penalty.
[216] DAR-D31-00000363, paras 33, 34.
[217] DAR-D31-00000363, paras 44, 48, 51, 52.
[218] DAR-D31-00000363, para. 44 under Article 160 of the 1991 Criminal Act, "Insult and Abuse" that **D-0016** equates to Counts 7, 16 and 26.
[219] DAR-D31-00000363, para. 20 under Article 52(b) of the 1986 People's Armed Forces Act, "Prohibited Acts whilst on field service" that **D-0016** equates to Count 1.
[220] DAR-D31-00000363, para. 77 under Article 27(2) of the 1991 Criminal Act.

institutional care.[221] After interviewing **D-0016**, the Defence was able to find a Sudanese ruling confirming so.[222] The only exception to the exclusion of imprisonment for elders is with respect to penalties for *Hiraba*, which become limited to 7 years imprisonment when the convicted persons turn 70 years.[223] The Chamber already made a similar finding with respect to the exclusion of death penalty for people above the age of 70 under the Sudanese Constitution.[224] Witness **D-0016** is of the view that *Hiraba* under Articles 167-168 of the 1991 Criminal Act is one of the possible offences that may correspond, depending on the circumstances, to Count 4.[225] These are the penalties that were in force in 2003-2004 and that the Sudanese courts would apply.

133. The death penalty and other corporal punishments provided under Sudanese Law are not applicable before the Court. These are not provided under Article 77 of the Statute and Article 23 *Nulla poena sine lege* excludes the possibility of penalties other than those provided under the Statute.

134. The only remaining penalties provided under Sudanese law in 2003-2004 are imprisonment for a maximal period of 7 years, should the Chamber find that pillaging under Count 4 qualifies as *Hiraba*, and a fine.

(i) Imprisonment

135. The applicable Sudanese law in 2003-2004 excluded the enforcement of imprisonment penalties for persons above 70 years of age. The only exception in their case was imprisonment for a maximum of 7 years for *Hiraba*. M. Abd-Al-Rahman is born in 1949 and is thus 76 years old. Under the applicable Sudanese law prevailing in 2003-2004, there is thus no imprisonment sentence applicable to him, except 7 years for *Hiraba*, should the Chamber find that Count 4 - Pillaging is analogous to *Hiraba* in the circumstances of the Case.

136. The Defence observes that the clarifications provided by Witness **D-0016** on the definition and elements constituting *Hiraba*[226] should normally lead the Chamber to conclude that the acts and conduct described under Count 4 do not qualify as *Hiraba*: the findings of the Chamber at paragraphs 369 to 377, 404 to 416, 420 to 441 and 848 to 852 show that both

[221] DAR-D31-00000363, para. 79 under Article 48 of the 1991 Criminal Act.
[222] DAR-D31-00000361: Judgment of 17 June 2014, T.J. 97/2014, at 003-004.
[223] DAR-D31-00000363, para. 78 under Article 33(4) of the 1991 Criminal Act.
[224] Trial Judgment, para. 44 and footnote 74.
[225] DAR-D31-00000363, paras 31-33.
[226] DAR-D31-00000363, para. 32.

Kodoom[227] and Bindisi[228] qualified as significant urban areas, at least for Sudan; it also shows that the attacks on these two localities were performed in the presence of members of the Central Reserve Forces ("CRF") and members of the Popular Defence Forces, including their local Garsila Coordinator Hassaballah and Mukjar Coordinator Solonga,[229] i.e. government forces mandated with the protection of the population and/or the arrest of offenders. The two alternative elements of the crime of *Hiraba* under Article 167 of the 1991 Criminal Code, i.e. "*away from urbanization*" or "*without any rescue*" are thus not met in the present case, thus making pillaging fall under the alternative offences of Capital Theft or Robbery under Articles 170 or 175 of the 1991 Criminal Act.[230] Although this is an issue that the Chamber may wish to explore further during the appearance of Witness **D-0016**, it seems that the exception of 7 years imprisonment for *Hiraba* cannot apply in the present case. But this 7 years sentence is the highest possible imprisonment penalty incurred by M. Abd-Al-Rahman for criminal acts committed in 2003-2004, i.e. before the Statute of the Court became applicable to him as a result of Resolution 1593. Depending on its finding as to whether Count 4 falls under the definition of *Hiraba* under Article 167 of the 1991 Criminal Act, the Chamber thus can impose a penalty of 7 years imprisonment or no imprisonment at all.

137. The Chamber may consider things differently and decide that the test it followed to assess the jurisdiction of the Court under the principle *nullum crimen* and Article 22 of the Statute at paragraphs 20 to 60 of the Trial Judgment does not necessarily apply to *nulla poena* and non-retroactivity *ratione personae* under Articles 23 and 24 of the Statute. Similarly, the Chamber may decide that it is not bound to apply the same test set up by the Appeals Chamber in its Judgment OA8 for the principle *nullum crimen* to its assessment of the *nulla poena* component of the principle of legality under Article 23 of the Statute. Reading the plain wording of Article 23 of the Statute, the Chamber may decide that M. Abd-Al-Rahman shall be punished only in accordance with the Statute, by application of the penalties provided under its Article 77, without taking into account the provisions of Sudanese law. As a result, M. Abd-Al-Rahman may be sentenced to imprisonment for a specified number of years not exceeding 30 years, or to life sentence, should the Chamber find that the gravity of his crimes and his individual circumstances

[227] Trial Judgment, paras 370-372: The Chamber finds that Kodoom had several neighbourhoods, a school, an hospital, a police station, a mosque and a cemetery and regrouped approximately 1,600 families.
[228] Trial Judgment, paras 373-377: The Chamber finds that Bindisi was the headquarters of the local administration, with several neighbourhoods, a court, a town hall, more than one police stations, a veterinary office, a *zakat* office, a government pharmacy, an agricultural office, a health centre, two schools, a big market and regrouped approximately 1,800 families.
[229] Trial Judgment, *inter alia* paras 404-405, 416 -421.
[230] DAR-D31-00000363, paras 34-35.

justify so. But by doing so, the Chamber would apply to M. Abd-Al-Rahman the provisions of the Statute, which were not applicable to him at the time when the crimes were committed, and became applicable to him on 31 March 2005 only. This change in the law applicable to M. Abd-Al-Rahman as a result of the referral of the Situation in Darfur by Resolution 1593 would trigger the application of Article 24(2) of the Statute, according to which "*the law more favourable*" to him should prevail.

138. For the very same crimes he has been convicted for, M. Abd-Al-Rahman would incur imprisonment up to 30 years or life imprisonment under the Statute, or, under Sudanese law, no imprisonment at all or imprisonment for a maximum of 7 years in case Count 4 is considered *Hiraba.* The more favourable, more lenient penalties provided under Sudanese law shall be preferred pursuant to Article 24(2) of the Rome Statute. In this case, the more lenient penalties are those provided under Sudanese law.

139. Whatever the reasoning and test that the Chamber will chose to apply to the *nulla poena* and non-retroactivity *ratione personae* components of the principle of legality, the result is the same: M. Abd-Al-Rahman cannot be sentenced to imprisonment, or to a maximum of 7 years imprisonment should the Chamber find that Count 4 is analogous to *Hiraba* under Sudanese Law.

(ii) Fine

140. Imposing a fine was contemplated under the Sudanese Law applicable in 2003-2004. In the determination of a fine, the Court shall, under Rule 146(1) of the RPE, "*give due consideration to the financial capacity of the convicted person*" and take into account "*whether and to what degree the crime was motivated by personal financial gain*". Rule 146(2) further provides that "*a fine imposed under Article 77, paragraph 2(a), shall be set at an appropriate level*" and that "*under no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants*". Finally, Rule 146(3) of the RPE provides that "*in imposing a fine, the Court shall allow the convicted person a reasonable period in which to pay the fine*", either by way of a lump sum or by way of instalments during that period.

141. Should the Chamber consider the imposing of a fine on M. Abd-Al-Rahman, it will have to consider the information provided by the evidence on record: M. Abd-Al-Rahman worked his entire life to earn his money to sustain his family; he earned a salary of about 12 € per month as *Musa'id* within the CRF before his surrender;[231] there is no evidence of any property or asset of

[231] DAR-D31-0002-0002.

his that could be used to pay a fine; [REDACTED];[232] and [REDACTED]. This information should be duly weighed in the Chamber's assessment of M. Abd-Al-Rahman's financial capacity to pay a fine. Pursuant to Article 109 of the Statute, imposing a fine is also likely to raise complex legal issues in light of the situation regarding Sudan's cooperation with the Court.

(iii) Conclusion

142. In light of the above, the Defence submits that there is no penalty applicable to M. Abd-Al-Rahman under the Statute, particularly its Articles 23, 24(2) and 77, for the crimes he has been convicted of, other than a fine and/or 7 years if the Chamber finds that Count 4 amounts to *Hiraba* under Article 167 of the 1991 Criminal Act. As explained above, the Defence is of the view that Count 4 cannot be equated to *Hiraba* for sentencing purpose. The Defence thus invites the Chamber to find accordingly and order the immediate release of M. Abd-Al-Rahman in the absence of applicable imprisonment sentence, with, should the Chamber find it appropriate, the imposition of a fine. This decision shall have no impact on the Chamber's finding of guilt for the purpose of applying Articles 20(2) and 75(2) of the Statute.

FOR THE FOREGOING REASONS, THE DEFENCE PRAYS THE CHAMBER:

(i) TO FIND that:

(a) M. Abd-Al-Rahman's subordinate rank and low hierarchical position,

(b) his honest but erroneous belief that obeying orders was mandatory,

(c) his background,

(d) his family situation,

(e) his actions to protect and preserve life,

(f) his voluntary surrender,

(g) his exemplary behaviour in detention,

(h) his absence of previous convictions,

(i) the absence of risk that he may reoffend once released,

(j) his expressions of empathy for victims and his efforts to compensate them,

(k) [REDACTED] and

(l) the conditions in which he would have to serve any imprisonment sentence

constitute as many factors mitigating the sentence he should serve as a result of his conviction**;**

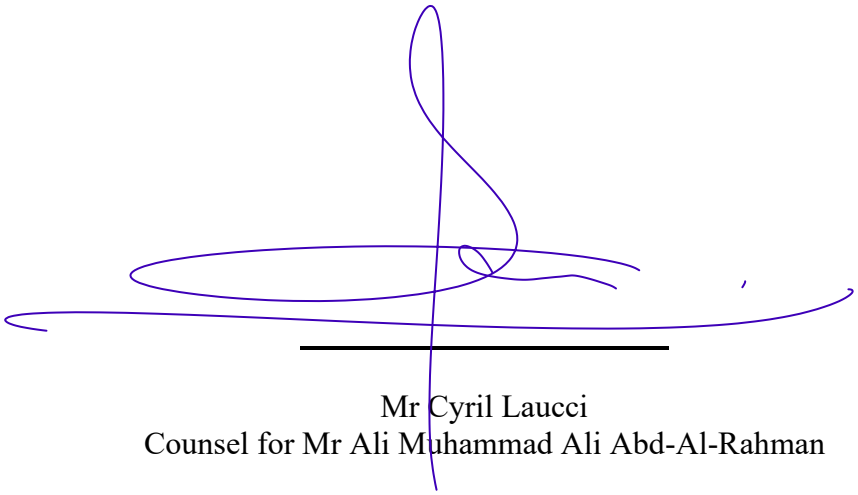
[232] DAR-D31-00000368.

(ii) TO FIND that there is no penalty applicable to M. Abd-Al-Rahman under the Statute, particularly its Articles 23, 24(2) and 77, for the crimes he has been convicted of, other than a fine, under Article 77(2)(a) of the Statute **AND TO ORDER THE IMMEDIATE RELEASE OF M. ABD-AL-RAHMAN**, with a possible fine, as deemed appropriate under Rule 146 of the RPE;

OR IN THE ALTERNATIVE,

TO FIND that the maximum period of imprisonment he may be sentenced for under Article 77(1)(a) of the Statute is 7 years under Count 4 **AND TO SENTENCE M. ABD-AL-RAHMAN** to imprisonment for a period not exceeding 7 years with credit for time already served in detention since his transfer to the Court in June 2020, , with a possible fine, as deemed appropriate under Rule 146 of the RPE.

Respectfully submitted,



Mr Cyril Laucci
Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 06 November 2025
At The Hague, The Netherlands.