Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-02/05-01/20 OA8**
Date: **10 March 2023**

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN DARFUR, SUDAN

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

Public Document

Public redacted version of the Request for Reconsideration of the Judgment Delivered in the OA8 Appeals Proceedings

Source: **Mr Cyril Laucci, Lead Counsel**

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

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INTRODUCTION

1. The present request ("Request") filed by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman", "Defence") moves the Honourable Appeals Chamber ("Chamber") to reconsider the judgment it delivered on 1 November 2021 in the OA8 appeals proceedings ("OA8 Judgment"),[1] in particular at paragraphs 1 and 85 to 91, on the basis of new facts which emerged during the trial. As a consequence of its reconsideration of the OA8 Judgment, the Defence prays the Chamber to hold that the Court has no jurisdiction to prosecute Mr Abd-Al-Rahman, to bring the proceedings against him to a definitive end and to acquit him.

CLASSIFICATION

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), the Request is registered as confidential for its reference to certain items of evidence thus classified. A public redacted version of the reference to that confidential evidence is being registered simultaneously.

APPLICABLE LAW

3. The Court has long since held that the Honourable Chambers of the Court have the power to reconsider their own decisions on the basis of a new fact. The Chamber has had occasion to contemplate that possibility, although has not seen fit to exercise such power.[2] The Chamber has moreover affirmed that it is open to the Pre-Trial and/or Trial Chambers to reconsider their decisions.[3] The power to reconsider their own decisions has also been acknowledged in relation to the Presidency of the Court[4] and the plenary of judges.[5]

4. Reconsideration of a previous decision by the Chamber which issued it is an exceptional measure and one which cannot be granted under normal circumstances.[6]

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[1] ICC-02/05-01/20-503 OA8.
[2] ICC-02/11-01/11-266 OA2, paras. 12, 15; ICC-01/09-02/11-1015 OA5, para. 7.
[3] ICC-01/04-01/07-475 OA, para. 73(c); ICC-01/04-01/07-476 OA2, para. 64.
[4] ICC-01/04-01/07-3833, para. 25.
[5] ICC-01/09-01/11-911, para. 14.
[6] ICC-01/05-01/08-596-Red, para. 15; ICC-02/05-01/20-163-tENG, para. 11.

Here, the Defence points to the body of previous decisions of the Honourable Pre-Trial Chamber II on the issue in the case *sub judice*.[7]

5. The Defence respectfully submits that, since the Chamber delivered its OA8 Judgment, a set of new facts has come to light during the presentation of the evidence of the Office of the Prosecutor ("OTP") at trial. A change of circumstances has ensued, mandating, in accordance with the body of decisions aforementioned, that the Chamber reconsider paragraphs 1 and 85 to 91 of its OA8 Judgment and determine that the Court lacks jurisdiction.

6. The motion for reconsideration is also made pursuant to OA8 Judgment itself, which, at paragraph 91, lays down that "only once a link is drawn with the charges in this case can the question of the legality of the charges be **definitively** answered" (emphasis added).[8] The OTP rested its case on 28 February.[9] The time is now ripe to ascertain definitively and in the light of the OTP evidence in its entirety that the criteria the Chamber set in its OA8 Judgment are met.

7. The Request is submitted as part of the OA8 appeals proceedings which were instituted on the basis of article 82(1)(a) of the Statute of the Court ("the Statute") and rule 154(1) of the Rules of Procedure and Evidence ("RPE").[10] The Request is, therefore, not subject to the prior leave of the Honourable Trial Chamber I.

8. Lastly, the Defence submits that, contrary to what the OTP suggests,[11] reconsideration of the OA8 Judgment cannot be achieved through a fresh jurisdictional challenge entered under article 19(4) of the Statute with the approval of Trial Chamber I because such a fresh jurisdictional challenge is confined to article 17(1)(c) of the Statute, which does not apply here.

[7] ICC-02/05-01/20-163-tENG, para. 12.
[8] ICC-02/05-01/20-503 OA8, para. 91.
[9] ICC-02/05-01/20-887.
[10] ICC-02/05-01/20-418-tENG OA8, para. 1.
[11] ICC-02/05-01/20-896, para. 8.

TIMING OF THE FILING OF THE REQUEST

9. The new facts referred to below and on whose basis the Defence moves the Chamber to reconsider its OA8 Judgment are directly linked to the presentation of the OTP's evidence at trial. They consist not only of the evidence the OTP tendered before the Chamber – be it statements given by OTP witnesses at the hearing or documentary evidence tendered in connection with the witnesses' appearance or tendered separately[12] – but also the evidence on which the Chamber relied in its OA8 Judgment and which the OTP did not tender into evidence and is therefore not on record, specifically the document referred to at footnote 160 of the OA8 Judgment. To be in a position to say that the document was not on record, the Defence had necessarily to wait until the OTP had definitively rested its case, on 28 February 2023,[13] and hence could not submit its Request earlier.

10. The Court has further required that motions for reconsideration based on the emergence of new facts be entered without delay, as soon as the facts come to light. To satisfy that condition, the Defence has therefore submitted its Request within the ten days after the OTP definitively rested its case[14] and has not waited for other phases [of] ongoing proceedings to be completed. The Defence has in any event declared its intention to set out like arguments in support of its motion for acquittal, should the Honourable Trial Chamber I grant it leave.[15] However the Defence cannot risk waiting for the outcome of this series of proceedings in order to move the Chamber to reconsider the OA8 Judgment because its motion to that effect would come too late. This is why it is filing its Request without further delay. It will be for the Chamber to take account of the outcome of this other series of proceedings in its decision on the Request, should it see fit.

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[12] ICC-02/05-01/20-885.
[13] ICC-02/05-01/20-887.
[14] ICC-02/05-01/20-887.
[15] ICC-02/05-01/20-891, paras. 3-5.

FINDINGS OF THE OA8 JUDGMENT WHOSE RECONSIDERATION IS SOUGHT

11. By the OA8 Judgment, the Chamber affirmed the jurisdiction of the Court to prosecute Mr Abd-Al-Rahman. To make that finding, the Chamber defined the relevant conditions under which the Court was entitled to exercise its jurisdiction, regard being had, in particular, to the fact that Sudan is not a State Party and to the principle of *nullum crimen sine lege*. The main finding set forth at paragraph 1 of the OA8 Judgment reads:

> In order to extend to an accused the guarantee of legality consistent with human rights norms, 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** (emphasis added).[16]

The Defence concurs fully with the test thus defined by the Chamber ("Test"). Its motion for reconsideration rests precisely on the fact that, in the light of the evidence tendered at trial, the conditions for the Court to exercise jurisdiction which the Test defined are no longer met.

12. At paragraph 85 of its OA8 Judgment, the Chamber breaks the Test down into two separate criteria: "foreseeability" and "accessibility", which it defines as follows:

> As to foreseeability, the European Court of Human Rights uses the standard of "reasonableness" in assessing the foreseeability of prosecution,[17] taking into account factors such as the "flagrantly unlawful nature" of the crimes charged and the circumstances of the accused.[18] As to accessibility, the relevant laws must have been ascertainable, in the sense that the laws were sufficiently clear and accessible to the accused" (footnotes in the original version).[19]

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[16] ICC-02/05-01/20-503 OA8, para. 1.

[17] See ECtHR, Grand Chamber, *Korbely v. Hungary*, Application No. 9174/02, Judgment of 19 September 2008, paras. 76-77, 94; *Ould Dah v. France*, Application No. 13113/03, Decision of 17 March 2009, p. 19; *Jorgić v. Germany*, Application No. 74613/01, Judgment of 12 July 2007, paras. 109, 113 (footnote included in the original version).

[18] See ECtHR, *Šimšić v. Bosnia and Herzegovina*, Application No. 51552/10, Decision of 10 April 2012, para. 24; Grand Chamber, *Kononov v. Latvia*, Application No. 36376/04, Judgment of 17 May 2010, paras. 235-238; *Jorgić v. Germany*, para. 113. See also *Milutinović et al.* Decision on jurisdiction, para. 42: "Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts" (footnote included in the original version).

[19] ICC-02/05-01/20-503 OA8, para. 85.

There too, the Defence concurs fully with how the Chamber has defined that twofold, cumulative foreseeability-accessibility criterion. Its motion for reconsideration rests on the fact that the presentation of the OTP's evidence has since revealed that neither of the two criteria were in fact met in the case.

13. At paragraph 86 of its OA8 Judgment, the Chamber observed that where the alleged crimes were committed on the territory of a non-Party State, such as Sudan, it does not suffice for the crimes stated in the charges to be defined by the Statute. The Chamber has laid down that regard must be had to

> the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged.[20]

The Defence also concurs fully with how that criterion is framed. The Chamber rightly notes at paragraph 87 that the crimes the Statute defines were not applicable to Mr Abd-Al-Rahman at the material time.[21]

14. At paragraphs 88 and 89 of its OA8 Judgment, the Chamber looks at the factors which it considers relevant to ascertaining whether the criteria of foreseeability and accessibility are examined. To that end, it draws on the presentation of the facts in the decision on the confirmation of charges[22] and points out that its inquiry is, as a result, not definitive and must be revisited in the light of the OTP's evidence.[23] For the purposes of its inquiry, the Chamber relies on:

- the time Mr Abd-Al-Rahman spent as a "Non-commissioned Officer" in the Sudanese Armed Forces[24] ("1st Factor");
- the fact that Mr Abd-Al-Rahman stands accused of having command over the Janjaweed militias in the Wadi Saleh and Mukjar localities and of having exercised authority over the members of those militias and some Sudanese Armed Forces personnel[25] ("2nd Factor");

[20] ICC-02/05-01/20-503 OA8, para. 86.
[21] ICC-02/05-01/20-503 OA8, para. 87.
[22] ICC-02/05-01/20-433-Corr.
[23] ICC-02/05-01/20-503 OA8, para. 91.
[24] ICC-02/05-01/20-503 OA8, para. 88.
[25] ICC-02/05-01/20-503 OA8, para. 88.

- an agreement of March 2002 between the Government of Sudan and the Sudan People's Liberation Movement ("SPLM")[26] ("3rd Factor"); and
- the customary international law definition of the crimes stated in the charges[27] ("4th Factor").

15. On the basis of these four factors, at paragraph 90 of its OA8 Judgment the Chamber states itself to be satisfied that the risk of prosecution was sufficiently acute to be foreseeable to Mr Abd-al-Rahman. It is this finding which the Defence now moves the Chamber to reconsider on the basis of the new facts set out below which came to light during the presentation of the OTP's evidence at trial, which call into question the four Factors considered by the Chamber and which, through paragraph 86 of the OA8 Judgment concerning the criminalization in Sudanese law of refusal to perform the acts referred to in the charges, introduce a 5th factor of relevance ("5th Factor").

NEW FACTS REQUIRING RECONSIDERATION OF THE OA8 JUDGMENT

16. The Defence brings to the attention of the Chamber the following new facts in connection with each of the four factors which it considered at paragraphs 88 and 89 of its OA8 Judgment in ascertaining that the criteria of foreseeability and accessibility were met, as well as in connection with the 5th Factor adverted to above.

17. **1st Factor:** That Mr Abd-Al-Rahman spent a considerable part of his life as a medical assistant in the Sudanese Armed Forces until the early or mid-1990s is a fact on which the OTP and the Defence have reached agreement[28] and is therefore not in dispute. The evidence which the OTP tendered at trial nonetheless renders this fact entirely irrelevant when it comes to examining the Test's criteria of foreseeability and/or accessibility. To be specific, the evidence tendered into the record shows that Sudanese Armed Forces personnel of Mr Abd-Al-Rahman's rank were not trained in

[26] ICC-02/05-01/20-503 OA8, para. 88, footnote 160.
[27] ICC-02/05-01/20-503 OA8, para. 89.
[28] ICC-02/05-01/20-504-AnxA, agreed facts 9-10.

or made aware of the principles of international humanitarian law and the principle of distinction between combatants and non-combatants in particular:

- When asked if Sudanese Armed Forces personnel were trained in international humanitarian law, Witness P-0547 replied:

  [REDACTED].[29]

  The OTP has never submitted or proven that Mr Abd-Al-Rahman was sent on assignment abroad in the course of his military career. According to Witness P-0547, he therefore was never trained in the principles of international humanitarian law.
- Witness P-0883 said that Sudanese Armed Forces personnel learned that they must obey the orders received, even if they had reason to believe that the orders were unlawful.[30]
- To the questions put about the content of [REDACTED], Witness P-0913 said that it was confined [REDACTED].[31]
- Witness P-0905 mentioned [REDACTED]. The witness did not specify the content of the training.[32]
- When asked if soldiers in the Sudanese Armed Forces received training in international humanitarian law, Witness P-0131 replied in the negative.[33] The witness went on to say that [REDACTED].[34] Witness P-0131 then said that soldiers and non-commissioned officers received "simplified training" in international humanitarian law,[35] and spoke of a "booklet" being given to those who had completed the training.[36] Witness P-0131 did not, however, say as of when that training started being dispensed. Nor was the content of the booklet specified. No copy of the booklet was tendered into evidence. At any rate, it is

[29] P-0547: [REDACTED] (private session).
[30] P-0883: ICC-02/05-01/20-T-073-CONF-FRA-ET, 1 September 2022, p. 15, line 23 to p. 16, line 5.
[31] P-0913: [REDACTED] (private session).
[32] P-0905: [REDACTED] (private session).
[33] P-0131: [REDACTED] (private session).
[34] P-0131: [REDACTED] (private session).
[35] P-0131: [REDACTED] (private session).
[36] P-0131: [REDACTED].

impossible to ascertain whether Mr Abd-Al-Rahman attended that training since proof of the training is, according to Witness P-0131, kept for only five years and then destroyed,[37] whereas Mr Abd-Al-Rahman left the army some thirty years ago. Absent evidence of the existence of the simplified training when Mr Abd-Al-Rahman was in the army, its content and the fact that he did attend it, it cannot be confirmed that Mr Abd-Al-Rahman had the slightest inkling about the principles of international humanitarian law.

18. The years in which Mr Abd-Al-Rahman served in the Sudanese Armed Forces do not, therefore, bear the slightest relevance to examining the criterion of foreseeability on which the Chamber relies.

19. **2nd Factor:** The Defence disputes that Mr Abd-Al-Rahman exercised the slightest authority over the Janjaweed militias and/or certain Sudanese Armed Forces personnel. According to the OTP, Mr Abd-Al-Rahman possessed that authority in his capacity as *Agid-al-Ogada*.[38] Of this the OTP strove to lead evidence at trial. That notwithstanding, a determination on the exact question as to the authority that Mr Abd-Al-Rahman did, or did not, possess is entirely without relevance to examining the criteria of foreseeability and accessibility because the evidence establishes indisputably that his status remained civilian in nature throughout the time frame of the charges and that he was no longer a member of the armed forces or the regular police force:

- Witness P-0643 clarified that the title of *Agid-al-Ogada* was not a military position, but a civilian title, tribal in origin.[39]
- Witness P-0907 said that the position of *Agid-al-Ogada* was a purely honorific title, denoting a person with responsibility for organizing social occasions, such

[37] P-0131: [REDACTED] (private session).
[38] ICC-02/05-01/20-550-Corr-Red2, para. 90.
[39] P-0643: [REDACTED] (private session).

as parades on horseback during public festivities.[40] He confirmed that it was a civilian role.[41]

- Witness P-0129 also referred to the title of *Agid-al-Ogada* as ordinarily corresponding to a civilian role of organizing social events at the behest of the *Shartay*.[42]
- Irrespective of any role Mr Abd-Al-Rahman might or might not have had as *Agid-al-Ogada*, Witness P-0883 confirmed that "[TRANSLATION] Ali Muhammad Ali Kushayb was, in reality, an ordinary person at the time, meaning a civilian".[43]

20. Taken at its highest, the OTP's evidence portrays Mr Abd-Al-Rahman as a Janjaweed militia leader, which the Defence disputes. But no evidence of the Janjaweed militia members being trained in or made aware of international humanitarian law was tendered. To the contrary, these militias were described as made up of people with no education, instruction or training, often likened to outlaws.[44] This position of member or leader of the Janjaweed militias therefore gives no reason to conclude that the criminal character of the acts described in the charges was foreseeable and accessible to Mr Abd-Al-Rahman at the material time.

21. **3rd Factor:** The OTP did not tender the agreement of March 2002 between the Government of Sudan and the SPLM[45] into evidence at trial. The agreement is therefore not included in the evidence on record and so cannot be considered in determining that the criteria of foreseeability or accessibility on which the Chamber relies are satisfied. It must be disregarded.

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[40] P-0907: ICC-02/05-01/20-T-095-CONF-FRA-ET, 10 November 2022, p. 65, lines 10-18; p. 66, lines 6-9.
[41] P-0907: ICC-02/05-01/20-T-096-CONF-FRA-ET, 11 November 2022, p. 9, lines 13-14.
[42] P-0129: ICC-02/05-01/20-T-076-CONF-FRA-ET, 6 September 2022, p. 23, lines 5-9; p. 24, lines 20-22.
[43] P-0883: ICC-02/05-01/20-T-073-CONF-FRA-ET, 1 September 2022, [REDACTED] (private session); p. 79, lines 16-20.
[44] By way of example: P-0935: ICC-02/05-01/20-T-090-CONF-FRA-ET, 13 October 2022, p. 11, lines 9-13; P-0905: [REDACTED] (private session); P-0883: ICC-02/05-01/20-T-073-CONF-FRA ET, 1 September 2022, p. 9, lines 1-10; p. 10, lines 18-19; p. 11, lines 14-18, 23-28; p. 12, lines 17-21; p. 54, line 26 to p. 55, line 6; p. 55, lines 23-24; p. 56, lines 1-7…
[45] ICC-02/05-01/20-503 OA8, para. 88.

22. **4th Factor:** The evidence tendered during the trial reveals that customary international law is not directly applicable in Sudanese domestic law and that Mr Abd-Al-Rahman could therefore not have had access to the information that the acts ascribed to him were regarded as criminal under international custom. The tendering of the Constitution of the Republic of Sudan[46] as evidence into the record was confirmed on 27 February 2023.[47] It makes no reference to customary international law or general international law as sources of law applicable in Sudanese law.

23. Article 65 ("Source of Legislation") identifies "the Islamic Sharia and national consent through voting, the Constitution and custom" as the sole sources of law and specifies that no law contrary to those sources shall be enacted.[48] The custom to which article 65 of the Constitution adverts is not customary international law, but local customs developed by Sudanese society, as article 16 of the Constitution makes clear.[49]

24. The sole sources of international law to receive a mention in the Sudanese Constitution are treaties ("international treaties and agreements"), whose application in Sudanese law is subject to promulgation through legislation[50] and approval or ratification[51] by Parliament[52] or the President.[53] Customary international law receives no mention.

25. Absent any reference to customary international law in the Constitution, the criterion of foreseeability and accessibility cannot be met in relation to Mr Abd-Al-Rahman. The requirement for Parliament or the President to approve/ratify treaties confirms that Sudan has adopted a dualist constitutional system when it comes to the application of international law in domestic law. The monist common law adage that "[i]nternational Law is part of the law of the Land" is not, therefore, intended to apply in Sudan's case. The Defence points out that the adage shows its limitations specifically

[46] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998.
[47] ICC-02/05-01/20-885-Anx, p. 2.
[48] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 65.
[49] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 16.
[50] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 49(d), 64.
[51] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 98(1)(f).
[52] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 73(1)(d).
[53] DAR-OTP-0139-0003: Constitution of the Republic of Sudan, 1 July 1998, art. 90(4).

in relation to the principle of legality which requires, even in common law countries in which it is intended to apply,[54] legislation to define offences. So the Permanent Court of International Justice underscored in its Advisory Opinion of 4 December 1935 on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City: "*Nullum crimen sine Lege*, and *Nulla pœna sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty […] In other words, criminal laws may not be applied by analogy."[55] The principle at article 22(2) of the Statute that the definition of the crimes shall be strictly construed and shall not be extended by analogy can be traced back to that 1935 decision. For example, even in common law countries, the customary international law definition of offences is adopted and enacted into national law: for instance, the United Kingdom had to pass a Geneva Conventions Act,[56] a War Crimes Act[57] limited to crimes of the Second World War, and an International Criminal Court Act[58] for the definition of crimes, which moreover customary international law defines, to be implemented in its national law and become applicable. Absent any reference to international custom in the Constitution and absent any legislation enacting into national law the definition of the crimes which international custom defines, there is, therefore, no doubt that the customary international law definition of the crimes was not applicable in Sudanese domestic law at the material time.

26. Customary international law does constitute a source of public international law to which Sudan is subject. Sudan, as a subject of public international law, is duty-bound to adhere to customary international law. That duty does not however mean that the rules of customary international law are applicable to Sudanese nationals or that Sudanese judges are authorized to rely on them in performing their task. Absent

[54] J. Dutheil de la Rochère, "*Le droit international fait-il partie du droit Anglais* ?" in *Le droit international: unité et diversité (Mélanges offerts à Paul Reuter*), Paris, Pedone, 1981, pp. 243-268.
[55] Permanent Court of International Justice, Advisory Opinion, case of the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 4 December 1935, Series A/B, no. 65, p. 14.
[56] United Kingdom, Geneva Conventions Act, 1957.
[57] United Kingdom, War Crimes Act, 1991.
[58] United Kingdom, International Criminal Court Act, 2001.

any reference to it in the Sudanese Constitution, customary international law is not applicable before the Sudanese courts. Article 65 of the Constitution so confirms. The fact that certain conduct is defined as criminal by customary international law was, therefore, not foreseeable or accessible to Mr Abd-Al-Rahman at the material time. This conclusion finds further support in the 5th Factor below.

27. **5th Factor:** Lastly, the evidence tendered during the trial reveals that, far from being criminalized in Sudanese law, the conduct alleged in the charges was made compulsory and refusal to carry out an instruction to engage in it could expose transgressors to prosecution and penalties that included death. The Defence sets out the new information revealed by the evidence tendered at this stage of the trial in connection with the Sudanese domestic law applicable at the material time:

- the People Defence Forces Act 1986,[59] applicable at the material period, contains the following provisions:
    - Article 4(f) extends the application of the act to "any forces constituted under any given Act or Regulations where such an Act or Regulation subjects them to the provisions of this Act".[60] Witness P-0120 confirmed that the article made the People Defence Forces Act 1986 applicable to the armed militias to which Mr Abd-Al-Rahman is accused of having belonged.[61]
    - Under article 48 of the People Defence Forces Act 1986 a range of conduct committed before the enemy, including (a) desertion, (c) "any refusal to obey orders […]" and (g) "committing or failing to commit some action with the deliberate intention thereby of imperilling the success of any force, supporting forces or parts thereof", carries the death penalty.[62] Witness P-0883 confirmed that "[TRANSLATION] if a soldier receives the

[59] DAR-OTP-0118-0075: People's Defence Forces Act 1986. The tendering of this document into evidence in connection with Witness P-0120's appearance was recorded by Trial Chamber I, email of 10 May 2022, 14.18.
[60] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 4(f).
[61] P-0120: ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 71, lines 20-23.
[62] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 48(a), (c) and (g).

order to face the enemy and disobeys, of course it is a crime and he will be sentenced to death".[63]

- Under article 50(a) of the People Defence Forces Act 1986 any person, "whether military or civilian", "who assists or attempts to assist the enemy with weapons, ammunition, supplies, money or information or by any other means" is liable to the death penalty:[64] under this article, participating in and/or supporting the rebellion constituted offences carrying the death penalty during the material period.
- Under article 50(d) of the People Defence Forces Act 1986 the act of "impeding or seeking to obstruct any victory, advance, deployment or re-supply of the Forces" also carries the death penalty.[65]
- When committed by accident, negligence, imprudence or "shortcoming", the offences defined by articles 48 to 50 of the People Defence Forces Act 1986 carry a determinate prison sentence of up to thirty years.[66]
- Under article 55 of the People Defence Forces Act 1986 desertion also carries the death penalty.[67]
- Article 60 of the People Defence Forces Act 1986 extends the death penalty to refusal to obey an order in circumstances other than those stated in article 48(c) above.[68]
- Under article 61(b) of the People Defence Forces Act 1986, the act of engaging in disobedience or insolence towards a superior officer is punishable by dismissal from service.[69]

[63] P-0883: ICC-02/05-01/20-T-073-CONF-FRA-ET, 1 September 2022, p. 15, lines 19-23.
[64] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 50(a).
[65] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 50(d).
[66] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 51.
[67] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 55.
[68] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 60.
[69] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 61(b).

- The Sudanese Penal Code of 1991,[70] applicable at the material period, contains the following provisions:
    - Under articles 50 and 51 of the Penal Code the act of starting or participating in a war against the Sudanese State and/or its constitutional system carries the death penalty:[71] under these articles, combined with article 50(a) of the People Defence Forces Act 1986 above, participation in the rebellion carried the death penalty.
    - Under article 89 of the Penal Code[72] a public servant's disobedience of any direction of law or failure to perform any of the duties of his post, intending thereby (b) to save a person from legal punishment is punishable by a determinate prison sentence. To not arrest, to release or to object to the execution of persons who are suspected of participating in the rebellion was, under articles 50-51 of the Penal Code above and/or article 50(a) of the People Defence Forces Act 1986, therefore likely to be thus criminalized.
    - Under article 100 of the Penal Code[73] whoever, being legally bound to render assistance to a public agent in the exercise of his or her duties, intentionally omits to give such assistance is punishable by a determinate prison sentence: refusal to support the counter-insurgency for which President Al Bashir[74] had called was therefore likely to be thus criminalized.

[70] DAR-OTP-0021-0296: Criminal Act 1991. The tendering of this document into evidence in connection with Witness P-0120's appearance was recorded by Trial Chamber I, email of 10 May 2022, 14.18.
[71] DAR-OTP-0021-0296: Criminal Act 1991, art. 50-51.
[72] DAR-OTP-0021-0296: Criminal Act 1991, art. 89.
[73] DAR-OTP-0021-0296: Criminal Act 1991, art. 100.
[74] ICC-02/05-01/20-550-Corr-Red2, paras. 57-58; DAR-OTP-0212-0100 (tendering into the record of the case in connection with Witness P-0547's appearance recorded by email from Trial Chamber I dated 28 June 2022, 16.17).

- Sudan's 3rd Periodic Report to the Human Rights Committee dated 29 June 2006[75] reveals that a state of emergency was decreed in Sudan for the first time on 11 December 1999,[76] remained in force throughout the time frame of the charges and was partially lifted only in July 2005, but not in Darfur.[77] Witnesses P-0020 and P-0120 confirmed that the state of emergency remained in place throughout the time frame of the charges.[78] According to Witnesses P-0020 and P-0120, one consequence of the declaration of the state of emergency was the suspension of all judicial guarantees.[79] Witness P-0120 confirmed the occurrence of arrest and that the hands of the judicial authorities were tied.[80] Witness P-0020 confirmed that the state of emergency could entail the death sentence with no right to a fair trial,[81] and summarized the state of affairs at the time thus:

> [TRANSLATION] Question: Does that mean that, basically, any person suspected of being a member of the rebellion or of supporting it could be arrested, detained, and executed – not to say sentenced to death – but executed, without even appearing before a judge over that period? Answer: In Darfur, yes, that was possible. Question: And you say … you said that this was even facilitated, in a way, by the declaration of the state of emergency, right? Answer. Yes.[82]

28. **Analysis of the five factors:** From the evidence tendered at trial in connection with Sudanese domestic law and the state of emergency which was in place throughout the time frame of the charges, it is apparent that a Sudanese national not educated in the law could not foresee, let alone understand, that the acts described in the charges against persons suspected of participating in or supporting the rebellion

[75] DAR-D31-0006-0032: Third Periodic Reports of States Parties due in 2001 - Sudan, doc. CCPR/SDN/3, 10 January 2007 (tendering into the record of the case in connection with Witness P-0120's appearance recorded by email from Trial Chamber dated 10 May 2022, 14.18).
[76] DAR-D31-0006-0032: Third Periodic Reports of States Parties due in 2001 - Sudan, para. 167.
[77] DAR-D31-0006-0032: Third Periodic Reports of States Parties due in 2001 - Sudan, para. 176.
[78] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 19, lines 9-18; P-0120: ICC-02/05-01/20-T-036-CONF-FRA-ET, 28 April 2022, p. 66, lines 20-24; ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 73, line 27 to p. 74, line 3.
[79] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 21, lines 6-20; P-0120: ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 14, lines 21-22; p. 17, lines 4-9.
[80] P-0120: ICC-02/05-01/20-T-036-CONF-FRA-ET, 28 April 2022, p. 68, lines 8-10; p. 68, lines 21-23; ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 14, lines 13-17; p. 74, lines 23-27.
[81] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 19, lines 24 to p. 20, line 2.
[82] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 20, lines 10-18.

were unlawful because they were carried out at the behest of the highest echelons of the Government of Sudan in relation to the call for a counter-insurgency.

29. The evidence reveals that persons suspected of participating in or supporting the rebellion could face the death penalty under articles 50 and 51 of the Sudanese Penal Code[83] and article 50(a) of the People Defence Forces Act 1986.[84] The declaration of the state of emergency[85] meant that fundamental judicial guarantees, including access to a court and the right to a fair trial, were suspended in Sudanese domestic law,[86] so much so that persons suspected of participating in or supporting the rebellion could be sentenced to death and executed without the right to a fair trial and without appearing before a court.[87] Members of the armed militias could face the death penalty for refusing to obey orders, either pursuant to article 48 or pursuant to article 60 of the People Defence Forces Act 1986[88] which applied to the militias by virtue of article 4(f) of that Act.[89] Desertion also carried the death penalty and so was not an option.[90] Objecting was also punishable.[91] Under article 100 of the Sudanese Penal Code,[92] civilians could face a determinate prison sentence for refusing to take part in the counter-insurgency operations for which President Al Bashir had called.[93]

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[83] DAR-OTP-0021-0296: Criminal Act 1991, art. 50-51.
[84] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 50(a).
[85] DAR-D31-0006-0032: Third Periodic Reports of States Parties due in 2001 - Sudan, paras. 167-176; P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 19, lines 9-18; P-0120: ICC-02/05-01/20-T-036-CONF-FRA-ET, 28 April 2022, p. 66, lines 20-24; ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 73, line 27 to p. 74, line 3.
[86] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 21, lines 6-20; P-0120: ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 14, lines 21-22; p. 17, lines 4-9.
[87] P-0020: ICC-02/05-01/20-T-042-CONF-FRA-ET, 13 May 2022, p. 19, lines 24 to p. 20, line 2; p. 20, lines 10-18.
[88] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 48(a), c and g; art. 60; P-0883: ICC-02/05-01/20-T-073-CONF-FRA-ET, 1 September 2022, p. 15, line 28 to p. 16, line 5.
[89] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 4(f); P-0120: ICC-02/05-01/20-T-037-CONF-FRA-ET, 29 April 2022, p. 71, lines 20-23.
[90] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 55.
[91] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 61(b).
[92] DAR-OTP-0021-0296: Criminal Act 1991, art. 100.
[93] ICC-02/05-01/20-550-Corr-Red2, paras. 57-58; DAR-OTP-0212-0100 (tendering into the record of the case in connection with Witness P-0547's appearance recorded by email from Trial Chamber I dated 28 June 2022, 16.17).

30. It is agreed that Mr Abd-Al-Rahman worked as a pharmacist at the material time.[94] He was no longer a member of the armed forces or the Sudanese police. The OTP has not brought any evidence of his ever being educated in the law or being in the slightest trained in or made aware of the principles of international humanitarian law, and the principle of distinction in particular. The evidence on record indicates on the contrary that he never received any such training.[95] If, as the OTP claims, Mr Abd-Al-Rahman in any event held the position and exercised the authority of a militia chief, he was duty-bound to comply with the Government of Sudan's instructions relating to the counter-insurgency, lest he face the death penalty under articles 48 and/or 60 of the People Defence Forces Act 1986.[96] If, as Mr Abd-Al-Rahman claims, he had no authority and was an ordinary pharmacist, he could nevertheless, under article 100 of the Sudanese Penal Code, face a determinate prison sentence for refusing to take part in the counter-insurgency.[97] Irrespective of the possible penalty, the fact that all persons suspected of participating in or supporting the rebellion were regarded by the Sudanese authorities as criminals and could face the death penalty with no right to a fair trial means that a person who, such as Mr Abd-Al-Rahman, was not educated in the law could not reasonably be considered as having the slightest chance of foreseeing, let alone understanding, that he could face prosecution for the acts described in the charges and committed in relation to the counter-insurgency. The criteria of foreseeability and accessibility defined by the Chamber cannot, therefore, be reasonably considered to be met as regards Mr Abd-Al-Rahman.

31. The finding made in the OA8 Judgment that these two criteria of the Test were met must, therefore, be reconsidered. The evidence tendered at trial demands that the exact opposite finding be made.

[94] ICC-02/05-01/20-504-AnxA, agreed facts 9-10.
[95] P-0547: [REDACTED] (private session); P-0131: [REDACTED] (private session).
[96] DAR-OTP-0118-0075: People's Defence Forces Act 1986, art. 48(a), c and g; art. 60.
[97] DAR-OTP-0021-0296: Criminal Act 1991, art. 100.

CONSEQUENCES OF RECONSIDERATION OF THE OA8 JUDGMENT

32. Reconsideration of the OA8 Judgment and the finding that the criteria of foreseeability and accessibility defined by the Chamber were manifestly not met vis-à-vis Mr Abd-Al-Rahman at the material time necessarily entails that the Test as to the compatibility of prosecution with the principle of *nullum crimen sine lege* and article 22 of the Statute is no longer met. In accordance with paragraph 1 of the OA8 Judgment, the Court cannot and must not exercise its jurisdiction over Mr Abd-Al-Rahman. Prosecution of Mr Abd-Al-Rahman must be brought to an immediate end and the Court must clear him of the charges.

33. Since the grounds that preclude the Court's exercise of jurisdiction over Mr Abd-Al-Rahman are not within the ambit of article 17, the avenue for prosecuting Mr Abd-Al-Rahman afresh, on the basis of new facts, which article 19(10) of the Statute offers the OTP does not apply. Notice was afforded to the OTP by the OA8 Judgment and before trial commenced and it had finalized its investigations, that it would be required to provide proof that the criteria of foreseeability and accessibility defined by the Chamber were satisfied. It had every opportunity to do so. And it failed. Accordingly, the acquittal of Mr Abd-Al-Rahman must be final and rule out reopening prosecution.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER:

1/ TO PROCEED WITH THE RECONSIDERATION OF ITS OA8 JUDGMENT foreseen at paragraph 91 of the Judgment, in the light of the relevant evidence which the OTP tendered during the trial;

2/ TO DETERMINE, in the light of that evidence, that the criteria of foreseeability and accessibility defined by the Chamber at paragraph 85 of the OA8 Judgment are not met;

3/ TO DETERMINE that the Test defined by the Chamber at paragraph 1 of its OA8 Judgment for the purpose of ascertaining that prosecution is consonant with the principle of *nullum crimen sine lege* laid down at article 22 of the Statute is not met in

the case *sub judice* and that the Court cannot, therefore, exercise its jurisdiction over Mr Abd-Al-Rahman;

4/ TO ORDER, accordingly, the immediate end to the prosecution of Mr Abd-Al-Rahman and his definitive acquittal.

[signed]

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

Dated this 10 March 2023,

At The Hague, Netherlands