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THE APPEALS CHAMBER

Before: Judge Erdenebalsuren Damdin , Presiding Judge
Judge Luz del Carmen Ibáñez Carranza, Judge
Judge Solomy Balungi Bossa, Judge
Judge Gocha Lordkipanidze, Judge
Judge Keebong Paek , Judge

SITUATION IN DARFUR, SUDAN

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

Public with one Public Annex

**Public Redacted Version of the
Defence Sentencing Appeal Brief**

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

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INTRODUCTION

1. This Appeal Brief is submitted by the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”, “Appellant”) before the Honourable Appeals Chamber (“Appeals Chamber”) against the Sentencing Judgment [ICC-02/05-01/20-1281](#) issued on 9 December 2025 by Trial Chamber I (“Trial Chamber”).¹

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this Appeal Brief is filed under the classification “Confidential” as it includes references to confidential information and evidence. A public redacted version will be submitted as soon as possible.

3. This Appeal Brief relies on six Grounds of Appeal provisionally identified in the Defence’s Notice of Appeal [ICC-02/05-01/20-1290 A](#) of 8 January 2026 (“Notice of Appeal”). In light of the most recent medical results received from the Registry, **Ground of Appeal 3** is no longer pursued.

4. This Appeal Brief follows the structure of the Notice of Appeal pursuant to Article 81(2) of the Statute. The Grounds of Appeal are regrouped in two **Chapters (A)** and **(B)** according to their subject matter: **Chapter (A)** concerns non-retroactivity *ratione personae* under Article 24(2) of the Statute, while **Chapter (B)** contains grounds of appeal relating to the erroneous consideration of mitigating circumstances under Article 78(1) of the Statute.

(A) Non-Retroactivity *Ratione Personae* (Article 24(2))

Ground 1 - Error of Law: Failure to correctly apply non-retroactivity *ratione personae* under Article 24(2) of the Statute

5. Paragraphs 30 to 39 of the Sentencing Judgment address the Defence’s submissions on Article 24(2) of the Statute.² These were rejected on the ground, essentially, that “*the principle of lex mitior encapsulated in Article 24(2) of the Statute goes to whether differing national criminal laws are relevant and applicable to the law governing the sentencing consideration of the Court*”, and by relying on the case law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) on this specific issue.³ This finding comes immediately after the Chamber’s finding that Sudanese law as at 2003-2004 is not applicable

¹ Public Redacted Version: [ICC-02/05-01/20-1281-Red](#).

² [Sentencing Judgment](#), paras. 30-39.

³ [Sentencing Judgment](#), para. 37, referring to ICTY, *Nikolic*, [IT-94-2-A](#), para. 81; *Deronjić*, [IT-02-61-A](#), para. 97; *Galić*, [IT-98-29-A](#), para. 398.

before the Court.⁴ By these findings, the Chamber erred in law as it deprived Article 24(2) of any substance and *effet utile* with respect to sentencing.

6. The Chamber rejected the Defence’s submissions made at paragraphs 117 to 142 of its Sentencing Brief⁵ and in its Sentencing Oral Arguments.⁶

7. According to the constant case law of the ICC, “[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32”.⁷ Among the principles governing the interpretation of treaties under these provisions, the International Court of Justice includes the “*effet utile*” principle, *ut res magis valeat quam pereat*, also known as “useful effect” or “principle of effectiveness”, according to which: “*It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.*”⁸ Before the ICC, this principle was specifically relied upon in the Uganda Situation: “*Equally inferred from article 31 of the 1969 Vienna Convention, and equally generally accepted, is the principle (commonly referred to as “effet utile”, “useful effect” or “principle of effectiveness”) that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content.*”⁹ According to this guiding principle, treaty provisions should be interpreted in a way that safeguards their effectiveness. Interpretations that result in depriving a given provision from any useful effect should be disregarded as incompatible with the object and purpose of the treaty pursuant to Article 31 of the Vienna Convention on the Law of Treaties.

8. Article 24(2), entitled “non-retroactivity *ratione personae*”, 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 [...] convicted shall apply*”. The reference made to the

⁴ [Sentencing Judgment](#), para. 36.

⁵ [Defence Sentencing Submissions](#), paras. 117 to 142.

⁶ T-166, pp. 28-49.

⁷ DRC, [ICC-01/04-168 A](#), para. 33; Lubanga, [ICC-01/04-01/06-3121-Red](#), para. 277; Bemba & al., [ICC-01/05-01/13-2275-Red A](#), para. 11; Katanga, [ICC-01/04-01/07-1213-tENG](#), para. 31; Lubanga, [ICC-01/04-01/06-1-Corr-Red](#), para. 42; Lubanga, [ICC-01/04-01/06-2138-AnxIII](#), p. 5, footnote 26.

⁸ ICJ, *Corfu Channel* (Merits), [Judgment](#), p. 24. See also PCIJ, [Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer](#) (Advisory Opinion), p. 19; PCIJ, [Free Zones of Upper Savoy and the District of Gex](#) (Order), p. 13; ICJ, *Namibia (S.W. Africa)*, [Advisory Opinion](#), para. 66; RIAA, [Canada v. France](#), para. 30; ICJ, *Libya v. Chad Territorial Dispute*, [Judgment](#), para. 47; RIAA, [Argentina v. Chile](#), p. 52, para. 169; ICJ, *Georgia v. Russian Federation*, [Preliminary Objections](#), paras. 133-134.

⁹ Uganda, [ICC-02/04-01/15-53-Red](#), para. 25. See also *Al Bashir*, [ICC-02/05-01/09-302-Anx](#), para. 45; *Palestine*, [ICC-01/18-143](#), para. 81; *Al Hassan*, [ICC-01/12-01/18-2594-OPI](#), para. 73.

“law applicable [...] to the person being [...] convicted”, without further exclusion, renders this principle applicable to the law governing penalties to which convicted persons are subject. This approach was confirmed by the Pre-Trial Chamber in the *Lubanga* Confirmation Decision¹⁰ and is consistent with the case law of the European, American and African Human Rights courts.¹¹ Non-retroactivity *ratione personae* constitutes, alongside the principles of *nullum crimen sine lege* and *nulla poena sine lege*, one of the facets of the principle of legality, which, as observed by the Appeals Chamber, “some suggest [it] has attained the level of a jus cogens norm.”¹² Although this finding of the Appeals Chamber was more focused on the *nullum crimen sine lege* limb of the principle of legality, its three components are so intertwined and interdependent that they apply to the entire provisions of Articles 22 to 24 of the Statute.

9. It is to be noted that Article 24(2) non-retroactivity *ratione personae* had no equivalent in the statutes and rules of other, earlier, international criminal tribunals. As submitted by the Defence,¹³ these other tribunals had been established *ex post facto* to prosecute crimes committed, at least in large part, prior to their establishment: retroactivity formed part of their essence; compliance with the non-retroactivity *ratione personae* principle would have prevented them from exercising most, if not the totality, of their mandate. It is thus no mystery that the case law of the ICTY relied upon by the Chamber at paragraph 37 of the Sentencing Judgment does not take into account the non-retroactivity *ratione personae* principle in the way prescribed under Article 24(2) of the Statute. The Defence had discussed this fundamental difference in its Sentencing Oral Arguments and had submitted that the differences in the case law of predecessor international criminal tribunals was actually proof of the uniqueness of the Statute with respect to the protection of the principle of legality, compared to these earlier tribunals.¹⁴ By relying on ICTY jurisprudence, the Chamber erred in law, firstly, by failing to acknowledge the legal difference between that Tribunal and this Court with respect to the protection of the principle of legality, specifically regarding the non-retroactivity *ratione personae* aspect of it in

¹⁰ *Lubanga*, [ICC-01/04-01/06-803-tEN](#), para. 303: “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).

¹¹ [Sentencing Brief](#), para. 123, relying on ECHR, *Del Rio Prada v. Spain*, [Judgment](#), para. 80; ECHR, *Achour v. France*, [Judgment](#), para. 43; ECHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, [Judgment](#), para. 72; IACtHR, *Vélez Loor v. Panama*, [Judgment](#), para. 183; ACtHPR, *Kabalabala Kadumbagula & al. v. United Republic of Tanzania*, [Judgment](#), pp. 22-26.

¹² [ICC-02/05-01/20-503 OA8](#), para. 84, footnotes 145- 147.

¹³ [Defence Sentencing Submissions](#), para. 126, footnote 199.

¹⁴ T-166, p. 29.

relation to applicable penalties. The only relevance of the ICTY case law relied upon by the Chamber was that it confirmed the uniqueness of Article 24(2) compared to predecessor international tribunals. The ICTY case law on this specific issue should only have been used as a point to be positively rejected. The Chamber erred in law by relying on it.

10. This first error of law triggered the second, more fundamental error. Relying on the ICTY case law in *Deronjić*, the Chamber finds that “*the principle of lex mitior is thus only applicable if a law that binds the Court is subsequently changed to a more favourable law which the Court is also obliged to abide*”.¹⁵ Having found that Article 23 *nulla poena sine lege* principle made no room for the application of penalties other than those provided for by Article 77 of the Statute – which excludes those provided under Sudanese Law – the Chamber concluded that the *lex mitior* principle under Article 24(2) did not apply. This conclusion is based on a flawed legal premise, which renders it erroneous.

11. The Chamber rightly found that penalties imposable by the Court were governed by Article 77. The Defence agrees.¹⁶ Article 23 *nulla poena sine lege* is clear on this. That means that the only available penalties are imprisonment (Article 77(1)), a fine (Article 77(2)(a)) and/or forfeiture of proceeds, property and assets derived directly or indirectly from that crime (Article 77(2)(b)). Other forms of sentences provided under certain domestic laws, such as capital punishment or corporal punishment, do not apply and are not available to the Court.

12. But the Chamber erred in failing to take into account the relevant ruling of the Appeals Chamber’s OA8 Judgment on the principle of legality with respect to crimes committed in a non-State Party such as Sudan: “*for conduct that takes place on the territory of a State that is not a Party to the Statute, 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*” (emphasis added).¹⁷ Although the Appeals Chamber’s focus in its Judgment OA8 was on the *nullum crimen sine lege* aspect of the principle of legality under Article 22, its findings necessarily apply equally to its *nulla poena sine lege* and non-retroactivity *ratione personae* components under Articles 23 and 24. With respect to penalties, the Appeals Chamber’s findings implied

¹⁵ [Sentencing Judgment](#), para. 37, footnote 81, referring to ICTY, *Nikolic*, [IT-94-2-A](#), para. 81; *Deronjić*, [IT-02-61-A](#), para. 97; *Galic*, [IT-98-29-A](#), para. 398.

¹⁶ [Defence Sentencing Submissions](#), para. 122.

¹⁷ [ICC-02/05-01/20-503 OA8](#), para. 86.

that in interpreting Articles 23 and 24(2) of the Statute in a manner consistent with human rights law, the Chamber should have looked beyond the Statute to the domestic criminal laws governing penalties applicable to the Appellant at the time the conduct took place.

13. To determine the applicable penalties, the Trial Chamber should have followed the same approach it undertook in the Trial Judgment to analyse the principle *nullum crimen sine lege* by looking at provisions of the Sudanese 1991 Criminal Act for the definition of offences.¹⁸ This approach would not have made penalties under Sudanese law applicable before the Court. The only penalties that the Court could have imposed are those compatible with Article 77 of the Rome Statute, namely a sentence of imprisonment or a fine, as opposed to other penalties provided under Sudanese law, such as corporal punishment. But the reference to applicable penalties of imprisonment and fines under Sudanese law was relevant to the application of the *lex mitior* principle under Article 24(2) of the Statute to ensure that any term of imprisonment and/or fine imposed were not heavier than those provided under the law applicable to the Appellant at the time of the events. This did not amount to replacing Article 77 of the Statute by the relevant provisions of Sudanese law for the purpose of determining the sentence; all that was required was to consider the law of Sudan applicable at the time of the crimes to confirm the maximum sentence of imprisonment that could be passed, and apply this maximum in the application of Article 77.

14. But the Trial Chamber did not do this. Instead, it erroneously (i) excluded the applicability of Sudanese law¹⁹ and (ii) limited the application of Article 24(2) to situations where “*differing national criminal laws are relevant and applicable to the law governing the sentencing consideration of the Court*”.²⁰ Once the Trial Chamber found that national law was not applicable, this second finding deprived Article 24(2) of any substance or *effet utile*, as a provision governing a change in law that was found to be not applicable before the Court. Also, by finding it “*impermissible for the Chamber to look beyond the Court’s legal texts to find the applicable source of law*”,²¹ the Chamber bluntly refused to follow the Appeals Chamber’s OA8 guidance on how to implement the principle of legality.

15. Other than the erroneous reliance on ICTY jurisprudence, the Trial Chamber’s limitation of the scope of Article 24(2) of the Statute to situations where “*differing national criminal laws are relevant and applicable to the law governing the sentencing consideration*

¹⁸ [Trial Judgment](#), paras. 32-51.

¹⁹ [Sentencing Judgment](#), para. 36.

²⁰ [Sentencing Judgment](#), para. 37.

²¹ [Sentencing Judgment](#), para. 38.

of the Court”²² amounted to depriving that provision of any *effet utile*. Once it found, at paragraph 36 of the Sentencing Judgment, that “*the Statute leaves no room for the applicability of penalties other than those listed under Article 77 of the Statute*”, to the exclusion of Sudanese law in force in 2003-2004,²³ no room was left for situations where “*differing national criminal laws are relevant and applicable to the law governing the sentencing consideration of the Court*”, as found in paragraph 37. If, as found at paragraph 36, the determination of penalties is governed by Article 77 only, the Court cannot be “*obliged to abide*” by a more favourable law, as found in paragraph 37. This flawed narrow interpretation deprived Article 24(2) of any *effet utile*. As such, it amounts to an error of law.

16. In her Sentencing Arguments, the Legal Representative of Victims had suggested that Article 24(2) of the Statute would only apply in the case of an amendment to the Rome Statute occurring between the commission of a crime and the determination of the sentence for that crime.²⁴ The Trial Chamber relied on this submission at paragraph 39 of the Sentencing Judgment.²⁵ This specific scenario was addressed in the Defence’s oral submissions: had the object and purpose of Article 24(2) of the Statute been to apply only in cases of amendments to the Statute, it would not have referred to “*a change in the law*”, but to “*an amendment to the Statute*”.²⁶ That matter would have been covered in Articles 121-122 of the Statute, instead of Article 24(2). The interpretation narrowing the scope of Article 24(2) to amendments to the Statute was thus also legally flawed, as incompatible with the *effet utile* rule of interpretation applicable under the Rome Statute.

17. The correct interpretation of Article 24(2) of the Statute in the present case consisted in considering that the law applicable to the Appellant had changed since 2003-2004 as a result of the referral of the Situation in Darfur, Sudan by operation of Resolution 1593 of the United Nations Security Council of 31 March 2005. Prior to 31 March 2005, the Statute was not applicable in Sudan; only Sudanese law applied. The passing of Resolution 1593 resulted in “*a change in the law applicable to [the] case prior to [the] final judgment*”, by making the Statute, in particular Article 77, applicable in Sudan. This change triggered the application of Article 24(2) of the Statute. As a result, “*the law more favourable to the person being [...] convicted shall apply*”. This interpretation of Article 24(2) was not only the one

²² [Sentencing Judgment](#), para. 37, *See also* footnote 81, referring to ICTY, *Nikolic*, [IT-94-2-A](#), para. 81; *Deronjić*, [IT-02-61-A](#), para. 97; *Galic*, [IT-98-29-A](#), para. 398.

²³ [Sentencing Judgment](#), para. 36.

²⁴ T-164, pp. 64-65.

²⁵ [Sentencing Judgment](#), para. 39, footnote 83.

²⁶ T-166, pp. 31-32.

preserving an *effet utile* to the provision, it was also the interpretation in line with internationally recognised human rights, as required under Article 21(3) of the Statute.²⁷

18. In its Sentencing Brief and during its Sentencing Oral Arguments, the Defence demonstrated that the “*more favourable*” law governing penalties applicable in 2003-2004 was Sudanese law, which excluded imprisonment for persons over 70 years of age, except for the maximum sentence of seven years’ imprisonment for those convicted of *Hiraba*, as defined under Articles 167-168 of the 1991 Criminal Act.²⁸ This evidence was not challenged by the Prosecution. Defence Witness **D-0016** was not cross-examined on this issue.²⁹ The Chamber had explained in the Trial Judgment that “*if the non-calling party challenged the accuracy or veracity of the evidence being given by a witness, then this challenge should be included in the questioning of the witness*”³⁰ (see [Defence Appeal Brief Ground of Appeal 26](#)). The absence of cross-examination of Witness **D-0016** on this crucial issue means that the Prosecution did not challenge his evidence. To summarize the “*change in the law*” that took place on 31 March 2005 as a result of the passing of Resolution 1593 making the Statute applicable in Sudan: before 31 March 2005, no prison sentence could apply for convicted persons aged 70 years and above; a sentence of imprisonment up to 30 years, or for life in exceptional circumstances, became applicable pursuant to Article 77 of the Statute after 31 March 2005.

19. In the Sentencing Judgment, the Chamber takes note of the Defence’s submissions regarding the exclusion of imprisonment for convicted persons above 70 years under Sudanese law,³¹ but makes no finding about the accuracy and/or reliability of the evidence presented in support thereof. Most importantly, the Chamber makes no adverse finding challenging the existence, content or materiality of the rule excluding imprisonment for persons above 70 years under Sudanese law applicable in 2003-2004. The Appeals Chamber should find that the fact that Sudanese law applicable in 2003-2004 excluded imprisonment for convicts above 70 years, excepting the possibility of seven years’ imprisonment for the specific offence of *Hiraba*,³² was accepted by the Trial Chamber. The Defence’s submissions with respect to the inapplicability of the *Hiraba* exception in the present case were also unchallenged; the Chamber acknowledges these submissions³³ and makes no

²⁷ Ngudjolo, [ICC-01/04-02/12-158 A](#), para. 26.

²⁸ [Defence Sentencing Submissions](#), paras. 132-133, footnotes 220- 222, T-166, pp. 38-49.

²⁹ T-165, pp. 2, 18; **D-0016**: [DAR-D31-00000363](#), paras. 78-79.

³⁰ [Trial Judgment](#), para. 199.

³¹ [Sentencing Judgment](#), para. 31.

³² Sudanese 1991 Criminal Act, Articles 33(4) and 48; **D-0016**: [DAR-D31-00000363](#), paras. 78-79; [DAR-D31-00000361](#); Judgment of 17 June 2014, T.J. 97/2017, at 003-004.

³³ [Sentencing Judgment](#), paras. 30- 31, footnote 62; para. 281.

adverse finding on this specific issue in the Sentencing Judgment. It is thus not challenged that the law in force in Sudan in 2003-2004 excluded in most cases the passing of a prison sentence for convicted persons above 70 years old and that the sole *Hiraba* exception did not apply.

20. The Statute provides no exception for the passing of a sentence of imprisonment for persons above a certain age. Under Article 77(1) of the Statute, the Appellant may receive a sentence of imprisonment for a specified number of years, not exceeding 30 years, or life imprisonment.

21. Consequently, the only two alternatives before the Trial Chamber were either no imprisonment at all based on its exclusion under Sudanese Law applicable in 2003-2004, or up to 30 years', or life imprisonment under Article 77 of the Statute that became applicable from 31 March 2005.

22. The only possible conclusion following a comparison between Sudanese law applicable to the Appellant in 2003-2004 and Article 77(1) of the Statute applicable to him as of 31 March 2005 is that the former was more favourable than the latter: no term of imprisonment *versus* imprisonment up to 30 years, or life. Pursuant to Article 24(2) of the Statute, the *lex mitior*, more favourable rule governing penalties shall apply. Consequently, and as submitted by the Defence,³⁴ no sentence of imprisonment could be passed on the Appellant. The Chamber erred in law in finding otherwise and in imposing a sentence of 20 years' imprisonment pursuant to Article 77 of the Statute, without taking into account the non-retroactivity *ratione personae* principle enshrined in Article 24(2).

23. In its Oral Sentencing Arguments, the Defence had addressed the impact that the immediate release of the Appellant based on Article 24(2) and the exclusion of imprisonment for convicted persons of 70 years or older under Sudanese Law would have on other cases in the Situation in Darfur.³⁵ It would have no consequence on the prosecution of crimes committed after 31 March 2005, including in the course of the current armed conflict in Sudan, as Article 77 of the Statute applies. It would have no consequence in the *Banda* case, as the charged crimes were allegedly committed in 2007, when Article 77 was applicable. In the last three remaining cases of *Al Bashir*, *Harun* and *Hussein*, these cases could still be prosecuted, as in the present case, subject to the Appeals Chamber's determination on the Defence's **Grounds of Appeal 1 to 5** submitted in the [Defence Appeal Brief](#), and sentences

³⁴ [Defence Sentencing Submissions](#), paras. 138-139; T-166, pp. 38-42.

³⁵ T-166, pp. 45-47.

for crimes committed after 31 March 2005, i.e. when Article 77 applies, and/or for convicts younger than 70³⁶ could be imposed on conviction. The immediate release of the Appellant would have no further consequences on the future prosecution of crimes in the Situation in Darfur as referred by the United Nations Security Council Resolution 1593 on 31 March 2005.

24. This outcome in the instant case would remain unique, without necessary consequences on other current (or future) Sudanese cases before the Court. This outcome is no more than the direct consequence of the Prosecutor's legal and strategic risk taken in 2007 to prosecute crimes committed prior to the referral made by the United Nations Security Council, when the Statute was not yet applicable in Sudan. It is true that Resolution 1593 referred the situation in Darfur "*since 1 July 2002*". But the temporal scope of that referral was a political decision taken by the Security Council, not a legal decision guided by the Rome Statute. The Security Council, which had established *ex post facto* International Criminal Tribunals several times in the past, manifestly failed to take into account Article 24(2) of the Statute of the Court on the prosecution of crimes committed prior to its Resolution 1593. But the Security Council had no authority to deprive defendants from fundamental fair trial guarantees set out in the Statute. The responsibility, by contrast, was always with the Prosecutor to take this into account and to prosecute only crimes allegedly committed after the passing of Resolution 1593 on 31 March 2005. His decision to prosecute crimes committed earlier opened the door to the prosecution of the crimes for which the Appellant has been convicted, dating back to 2003-2004, notwithstanding no sentence of imprisonment can now be passed because of his age. Younger accused, like Harun, may be subject to sentences of imprisonment under Article 77 of the Statute as there would be no contradiction with the law applicable in Sudan in 2003-2004, but the Appellant is too old. The Appellant cannot be deprived of the benefit of Article 24(2) non-retroactivity *ratione personae* as a means of neutralising the effect of the risk taken in 2007 by the Prosecution.

25. The impact of this error of law is clear: the Appellant has been sentenced to 20 years' imprisonment, whereas no sentence of imprisonment could lawfully have been passed. Had the Chamber not erred in law, it would not have passed any sentence of imprisonment. The Appellant would have been released. Of course, this would have had no impact on the Chamber's findings of guilt against the Appellant for the purpose of applying Articles 20(2)

³⁶ According to his [Warrant of Arrest](#), Harun is born in or about 1964, which makes him 62 years old.

and 75(2) of the Statute, subject to the outcome of the pending appeal against his conviction.³⁷

(B) Failure to Properly Consider Mitigating Circumstances Pursuant to Article 78(1) of the Statute

Ground 2 - Error of Law: Failure to factor in mitigating circumstances in the determination of sentences for individual counts

26. The Chamber erred in law in its consideration of mitigating circumstances. Selectively referring to the *Al Hassan* Sentencing Judgment, the Chamber finds, at paragraph 25 of the Sentencing Judgment, that “[m]itigating circumstances are relevant to determine whether the length of the sentence that would be appropriate, pursuant to consideration of gravity, ought to be reduced”.³⁸ This, however, was an incomplete and selective reference: the relevant paragraph of the *Al Hassan* Sentencing Judgment reads, in full, as follows: “whether the length of the sentence that would be appropriate on the basis of the gravity of the crime ought to be reduced” (emphasis added).³⁹ The omission of these three words, which make it clear that mitigating circumstances should to be taken into consideration in the determination of the sentence for each individual crime for which the person was convicted, and not at the later stage of determining the joint sentence, paved the way for the Chamber’s error of law in the consideration of mitigating circumstances.

27. Paragraphs 44 to 125 of the Sentencing Judgment contain the Chamber’s analysis of the mitigating circumstances advanced by the Defence.⁴⁰ The Chamber distinguishes between what it labels as “*Personal circumstances*”, that include the Appellant’s age and health, his family situation and his prospects of rehabilitation and economic situation,⁴¹ from other “*Mitigating factors*”, namely the Appellant’s good conduct in detention and during trial, his surrender to the Court, his general good character and conduct, circumstances falling short of constituting a Defence under Rule 145(2)(a)(i) of the Rules, and the Appellant’s rank and position.⁴² As a result of the error of law addressed under the present Ground of Appeal, “*personal circumstances*” were considered no differently to other mitigating factors in the Chamber’s determination. The Chamber erred in limiting their impact by declining to apply a higher joint sentence than the highest sentence imposed for

³⁷ [Defence Sentencing Submissions](#), para. 142; T-166, pp. 43-49.

³⁸ [Sentencing Judgment](#), para. 25.

³⁹ *Al Hassan*, [ICC-01/12-01/18-2662](#), para. 29.

⁴⁰ [Sentencing Judgment](#), paras. 44-125.

⁴¹ [Sentencing Judgment](#), paras. 44-70.

⁴² [Sentencing Judgment](#), paras. 71-125.

individual counts, being 20 years' imprisonment. The Chamber's distinction between "*personal circumstances*" and "*mitigating factors*" had no impact. The Defence thus takes no issue with that distinction, which might otherwise have been problematic had it resulted in excluding "*personal circumstances*" from the consideration of "*mitigating factors*". The Defence's submissions under the present Ground of Appeal apply indistinctively to both.

28. What matters is that, after consideration of each personal circumstance and mitigating factor, the Chamber found that "*it will take [the following factors] into consideration in its determination of the joint sentence, albeit to a limited extent*" (emphasis added): the Appellant's age and health,⁴³ his good conduct in detention and during trial⁴⁴ and his voluntary surrender.⁴⁵ The Chamber's legal error lies in the underlined words.

29. The other mitigating circumstances advanced by the Defence were not taken into consideration. The Chamber's findings on the mitigating impact, or lack thereof, of certain of these circumstances are addressed in **Ground of Appeal 4 to 7** below.

30. The most important aspect of the Chamber's findings, which characterizes the error of law committed in the consideration of the three factors to which the Chamber afforded some mitigating impact, is the Chamber's specification that these will only be taken "*into consideration in its determination of the joint sentence*"⁴⁶ or "*to reduce his overall sentence*".⁴⁷ Paragraph 75, dealing with the impact of the Appellant's good conduct, contains no specification of the stage at which the Chamber intends to consider this particular mitigating circumstance, but in the absence of clarity, and in the absence of any mention of it in the discussion on sentences for each individual count, the only reasonable inference to be drawn is that it was factored in at the same stage as specified in paragraphs 53 and 80 of the Sentencing Judgment, that is, the determination of the overall sentence. This was an error of law committed by the Chamber.

31. As a result of this error of law, the Chamber's determination of the sentence for each individual crime for which the Appellant was convicted is limited to a discussion of the

⁴³ [Sentencing Judgment](#), para. 53.

⁴⁴ [Sentencing Judgment](#), para. 75.

⁴⁵ [Sentencing Judgment](#), para. 80.

⁴⁶ [Sentencing Judgment](#), para. 53.

⁴⁷ [Sentencing Judgment](#), para. 80.

gravity of each crime⁴⁸ and of aggravating factors.⁴⁹ The Appellant's personal circumstances and mitigating factors are absent from that discussion. Each individual sentence, including the highest sentence of 20 years' imprisonment for Counts 17-20 and 27-30,⁵⁰ is determined without factoring in personal circumstances and mitigating factors, in breach of Article 78(1) of the Statute.

32. At paragraphs 5 to 25 of its Sentencing Brief, the Defence had made submissions on the applicable law on sentencing. With respect to the correct approach to be taken in factoring in mitigating circumstances, in particular, the Defence had submitted that these should be factored in the determination of the sentence for each and every crime: *"each individual sentence must therefore be calculated separately, with reference to all relevant facts and circumstances applicable to the crime concerned."*⁵¹

33. Article 78(1) of the Statute provides that *"in determining the sentence"*, the Court shall, *"in accordance with the Rules of Procedure and Evidence"*, take into account, *inter alia*, *"the individual circumstances of the convicted person"*. Article 78(3) addresses the particular scenario where *"a person has been convicted of more than one crime"*. In that scenario, *"the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment"*. Article 78(3) specifies that *"this period shall be no less than the highest individual sentence pronounced"*. Rule 145(1)(b) clarifies that, *"in its determination of the sentence pursuant to Article 78, paragraph 1"* (emphasis added), i.e. not Article 78(3), the Court shall *"balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime"*.

34. When a person is convicted of more than one crime, as in the present case, the sentencing procedure mandated by these provisions is thus a two-stage procedure: at the first stage, the Chamber shall determine a sentence for each crime of which the person is convicted pursuant to Article 78(1) of the Statute. It is at this stage that all relevant factors, including personal circumstances and mitigating factors, shall be balanced. The result of this

⁴⁸ [Sentencing Judgment](#), paras. 141-144 (all operations), 151-156 (Kodoom and Bindisi), 161-166 (Count 1), 168-171 (Counts 2-3), 175-176 (Count 4), 181-183 (Count 5), 187-191 (Count 6 and Count 7), 197-200 (Counts 8 and 9), 205-208 (Count 10), 212-215 (Count 11), 221-228 (Mukjar and Deleig), 236-248 (Counts 12, 13, 16, 22, 23, 26), 252-267 (Counts 17-20 and 27-30), 270-279 (Counts 21 and 31).

⁴⁹ [Sentencing Judgment](#), paras. 138-140, 145-147 (all operations), 157-159 (Kodoom and Bindisi), 172 (Counts 2-3), 177 (Count 4), 184 (Count 5), 192 (Count 6 and Count 7), 201 (Counts 8 and 9), 216 (Count 11), 229-233 (Mukjar and Deleig).

⁵⁰ [Sentencing Judgment](#), paras. 258 (Counts 17-20), 267 (Counts 27-30).

⁵¹ [Sentencing Brief](#), para. 24, quoting *Al Hassan*, [ICC-01/12-01/18-2662](#), para. 30. See also paras. 11 and 23 of the [Sentencing Brief](#).

first stage is the determination of an individual sentence for each individual crime. There then follows the second stage governed by Article 78(3) of the Statute, being the determination of the joint sentence specifying the total period of imprisonment. Personal circumstances and mitigating factors can no longer be factored in at this second stage for two reasons: (i) they should already have been factored in in the first-stage determination on the sentence for each individual crime and cannot be double-counted; and (ii) Article 78(3) specifies that the joint sentence cannot be lower than the highest individual sentence pronounced at the end of the first stage. In other words, the impossibility of reducing the joint sentence at the second stage gives no room for the application of any mitigation in the calculation of the joint sentence, other than refraining from passing a higher total sentence than the maximum individual sentence determined during the first stage. But the impact of mitigation cannot and should not be limited to not passing an increased joint sentence. Mitigation should be taken into account in reducing a sentence, not just merely in declining to impose a greater sentence. This is the reason for Rule 145(1)(b) of the Rules requiring mitigating factors to be taken into consideration in the first stage of sentence determination under Article 78(1) of the Statute, when individual sentences can be reduced as a result of personal circumstances and mitigating factors, and not in the second stage under Article 78(3). Personal circumstances and mitigating factors thus can only be factored in at the first stage of the sentencing exercise under Article 78(1) and can no longer be considered at the second stage under Article 78(3).

35. The Chamber thus erred in law when it found at paragraphs 53, 75 and 80 that it would take into account the personal and mitigating circumstances that it had found relevant at the stage of its determination on the joint sentence only. By doing so, the Chamber factored in the personal and mitigating circumstances at the wrong stage of the two-stage sentencing procedure.

36. As a result of this error of law, personal circumstances and mitigating factors could no longer reduce the individual and/or joint sentence(s) imposed on the Appellant. The Trial Chamber, having imposed the highest sentence of 20 years' imprisonment under Counts 17-20 and 27-30 without factoring in personal and mitigating circumstances,⁵² could no longer reduce the joint sentence to less than 20 years pursuant to Article 78(3) of the Statute. The only residual impact left for the personal and mitigating circumstances of the Appellant was in the determination of whether the joint sentence should be higher than the minimum 20 years. At no stage of the sentencing exercise could the personal circumstances and mitigating

⁵² [Sentencing Judgment](#), paras. 258 (Counts 17-20), 267 (Counts 27-30).

factors applicable to the Appellant be considered to reduce his sentence, in breach of Article 78(1) of the Statute and of Rule 145(1)(b) of the RPE. As a result of the Chamber's error of law, the Appellant was denied the benefit of his personal and mitigating circumstances for the purpose of reducing his sentence.

37. In combination with the other errors addressed in **Grounds of Appeal 4 to 7** below, this error of law resulted in the imposition of a higher sentence than the one the Appellant deserved in light of his personal and mitigating circumstances and of the sentencing practice of the Court.

38. In its Sentencing Oral Arguments, the Defence had referred to the sentencing practice of the Court in other cases to submit that the Appellant, in light of his personal and mitigating circumstances, should not receive a sentence heavier than 10 to 15 years (if the Court could impose upon him any sentence of imprisonment at all) (*see Ground of Appeal 1* above).⁵³ Although the Chamber erred again in law by rejecting that submission at paragraphs 285-287 of the Sentencing Judgment, the Defence could not appeal this point because this erroneous finding had no impact on the Sentencing Judgment: discussed at the second stage of the determination on the joint sentence, once an individual sentence of 20 years had already been passed under Article 78(1) of the Statute, the Defence submissions on the sentencing practice of the Court could no longer result in a joint sentence of less than 20 years. The Chamber's error of law in disregarding the sentencing practice of the Court is subsumed within the error of law addressed in the present Ground of Appeal. Subject to the Appeals Chamber's prior determination on **Ground of Appeal 1** above, once the error of law addressed in the present **Ground of Appeal 2** is reversed, the Appeals Chamber is hereby prayed to take into account the Defence's submissions on the relevance of the Court's sentencing practice in Sentencing Oral Arguments,⁵⁴ and impose, in light of the personal and mitigating circumstances of the Appellant, including those addressed in **Grounds of Appeal 4 to 7** below, a sentence not exceeding 10 to 15 years.

Ground 4 - Error of Fact: Failure to consider the Appellant's acknowledged role in mediating tribal conflicts as a mitigating factor

39. The Trial Chamber found that it was clear that, even before the conflict, the Appellant was not only well-known in the Wadi Salih area, but well respected.⁵⁵ Some Prosecution witnesses, the Trial Chamber found, came to know the Appellant "*because he was called in*

⁵³ T-164, pp. 91-93.

⁵⁴ T-164, pp. 91-93.

⁵⁵ [Trial Judgment](#), para. 680.

to mediate in tribal negotiations.”⁵⁶ The Trial Chamber erred in failing to take into account the mitigation afforded by the evidence of the Appellant’s positive actions in mediating in these tribal negotiations, as acknowledged by its own findings at paragraph 680 of the Trial Judgment, in arriving at its sentence.

40. In its Sentencing Submissions, the Defence suggested that the Trial Chamber’s finding that the Appellant’s mediator role was a positive acknowledgment that he was a “*man of peace*” (“Man of Peace Characterisation”).⁵⁷ But as the Defence conceded in the sentencing hearing, the Trial Chamber did not describe the Appellant as a “*man of peace*”.⁵⁸ The Defence’s written submissions were “*an instance of over exuberant drafting*” and its endeavour to extrapolate the Trial Chamber’s acknowledgment of the Appellant’s role as a mediator “*may have been clumsy*”.⁵⁹ Anxious as it was to correct itself and to acknowledge on the record that the Trial Chamber had not ever described him as a “*man of peace*”, the Defence did not, and never intended to, withdraw the substance of the point it advanced in mitigation: that the Appellant’s role as a mediator in tribal negotiations before the events of 2003-2004 was a valid and important matter of mitigation that should be taken into consideration by the Trial Chamber in arriving at a fair and appropriate sentence.

41. However, the Trial Chamber wrongly interpreted the Defence’s withdrawal of the Man of Peace Characterisation as a withdraw of the entire argument concerning the Appellant’s role in inter-tribal mediation. At paragraph 91 of the Sentencing Judgment, the Trial Chamber noted the withdrawal of the Man of Peace Characterisation and from this states that it “*will not address this issue further*”.⁶⁰ This is where the error lies.

42. The Defence referred in its Sentencing Submissions to the evidence of Prosecution witnesses **P-0932** and **P-0585**, as broadly supported by Defence witnesses **D-0001**, **D-0002**, **D-0005** and **D-0008**.⁶¹ Substantive Defence submissions on this issue had been made in writing,⁶² but had not been repeated in oral argument during the sentencing hearing. The Defence limited itself to replying to the OTP and LRV’s responses which refuted the Defence’s submission that the Trial Chamber had effectively acknowledged that the Appellant was a man of peace. But it was both unnecessary and unproductive for the Defence

⁵⁶ [Trial Judgment](#), para. 680 and fn 2776, referring to the evidence of **P-0932** and **P-0585**.

⁵⁷ [Defence Sentencing Submissions](#), para. 63.

⁵⁸ T-165, pp 49-50.

⁵⁹ T-165, pp 49-50.

⁶⁰ [Sentencing Judgment](#), para. 91.

⁶¹ [Defence Sentencing Submissions](#), para. 63.

⁶² [Defence Sentencing Submissions](#), paras. 63-64.

to simply repeat orally the arguments that had already been set out in writing in paragraphs 63-64 of its Sentencing Submissions.⁶³

43. The Trial Chamber correctly noted that, as a matter of principle, personality traits and good character in general may be factored as mitigation.⁶⁴ The Trial Chamber also correctly recalled that: “*Rule 145(2)(a)(ii) of the Rules is non-exhaustive, and accordingly, the Chamber may consider other acts of the convicted person, even if these are not related to the crimes or go beyond the scope of the confirmed charges or the findings in the trial judgment, insofar as they relate to the convicted person. The Chamber thus rejects the CLRV’s and Prosecution’s submissions referred to above that the conduct under this provision is irrelevant, unless connected to the scope of the crimes the convicted person committed.*”⁶⁵ As a matter of law, therefore, the available evidence of the Appellant’s good character as a mediator in tribal negotiations before the conflict in 2002-2003 formed part of the individual circumstances that the Trial Chamber was bound to take into account in its determination on the sentence, pursuant to Article 78(1) of the Statute.

44. The Trial Chamber erred in fact in concluding that the Defence’s simple correction of the record – the withdrawal of its Man of Peace Characterisation – amounted to a withdrawal of the entire argument that his mediation role was valid mitigation. It further erred by not factoring in the Appellant’s role as a mediator of tribal conflicts for the purpose of mitigating the sentence incurred for each of the crimes of which he was convicted.

45. It is clear that the final sentence of paragraph 91 of the Sentencing Judgment – “*Accordingly, the Chamber will not address this issue further*” – was not merely a statement that the Trial Chamber would no longer address the Man of Peace Characterisation. It was a declaration that the Trial Chamber would no longer address the Defence’s arguments about the Appellant as a mediator as a mitigating factor. And this is what in fact transpired.

46. This reality is borne out in the Trial Chamber’s treatment, in paragraphs 92-99 of the Sentencing Judgment, of matters that had been raised by the Defence. The Trial Chamber considered arguments and made findings relating to the Appellant’s good character, specifically his contributions to the well-being of the community in Raad-El-Berdi,⁶⁶ testimony from witnesses who said they had never heard the Appellant saying anything

⁶³ T-164, pp. 93-94.

⁶⁴ [Sentencing Judgment](#), para. 89.

⁶⁵ [Sentencing Judgment](#), para. 90 (internal footnotes omitted).

⁶⁶ [Sentencing Judgment](#), para. 93, referring to the evidence of **D-0041** ([DAR-D31-00000361](#), para. 15(i), although it should be noted that examples of these contributions were also detailed in para. 15(ii)-(iv). What is relevant is that **D-0041**’s examples of the Appellant’s good character all post-date 2003-2004.

discriminatory,⁶⁷ the context in which the Um-Sory and Teachers Videos should be analysed,⁶⁸ and the Appellant's participation "*in alleged acts of sympathy for others*".⁶⁹ The Trial Chamber did not address arguments concerning his role as a mediator *before* 2003-2004, as attested to by **P-0932**.

47. The Trial Chamber also considered evidence of the Appellant's character as a "*kind person*", a "*nice*" person, a "*humanitarian person*", a "*humane*" and "*noble*" person, and a "*good person*"⁷⁰ by assessing the testimony of **D-0001**, **D-0005**, **D-0007**, **D-0008** and **D-0040**. Of these witnesses, [REDACTED]⁷¹ [REDACTED].⁷² Neither testified about the Appellant's role as a mediator in tribal negotiations, which means that the consideration of their evidence does not encompass consideration of his mediation role. **D-0001** had never heard anything about the Appellant before 2010;⁷³ **D-0005** knew him since 2011;⁷⁴ and **D-0040** [REDACTED].⁷⁵ This serves to underscore that, having said it would "*not address this issue further*", the Trial Chamber was not limiting itself *specifically* to not considering the Man of Peace Characterisation. The Trial Chamber had decided to not consider the Defence's substantive arguments about the Appellant as a mediator *at all*. Consideration of **D-0001**, **D-0005**, **D-0007**, **D-0008** and **D-0040**'s evidence did not redress this.

48. The Appellant's mediator role was significant and relevant for sentencing. Prosecution Witness **P-0932**, relied upon by the Chamber at paragraph 680 of the Trial Judgment, stated in his witness statement that in 2001, before the war, a tribal dispute broke out over the ownership of some 300 cows.⁷⁶ This cattle had been transferred from Fur villagers to members of the Falata tribe.⁷⁷ **P-0932** described the dispute as "*a prominent local issue*."⁷⁸ It is not surprising that **P-0932** stated that "[e]veryone wanted the issue to be resolved amicably".⁷⁹ What he was unable to say was what the consequences may have been had the parties not been able to resolve the issue amicably. According to **P-0932**, the Appellant was "*an important person*" at the negotiations, and "*in a position of authority at*

⁶⁷ [Sentencing Judgment](#), paras. 93-94.

⁶⁸ [Sentencing Judgment](#), paras. 93, 95-97.

⁶⁹ [Sentencing Judgment](#), para. 98, referring to the evidence of **D-0040** ([DAR-D31-00000358](#)) and **D-0041** ([DAR-D31-00000361](#)), but it should be noted that these examples of "*alleged acts of sympathy for others*" all post-date 2003-2004.

⁷⁰ [Sentencing Judgment](#), para. 93.

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [Annex B to Trial Judgment](#), para. 572.

⁷⁴ [Annex B to Trial Judgment](#), para. 600.

⁷⁵ [REDACTED].

⁷⁶ **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 26.

⁷⁷ **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 29-30.

⁷⁸ **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 29.

⁷⁹ **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 26.

this meeting.”⁸⁰ After a first negotiation session that lasted “*most of the day*” the meeting was adjourned and reconvened after six days.⁸¹ At the second session of negotiations, according to **P-0932**’s evidence, the Appellant told the Falata to return the cows.⁸²

49. By committing the error of failing to even consider the evidence of the Appellant’s role as a mediator, the Trial Chamber wrongly failed to take it into consideration as a matter of mitigation. Yet, there was evidence on the record which was found credible by the Trial Chamber and relied upon in the Trial Judgment that the Appellant was active in mediating tribal conflicts before the events of 2003-2004, and the Trial Chamber had acknowledged so at paragraph 680 of its Trial Judgment. This was evidence of relevant individual circumstances that the Trial Chamber ought to have considered in its sentencing deliberation pursuant to Article 78(1) of the Statute.

50. Had the Trial Chamber not committed this error, there is every reason to believe that it would have concluded that the Appellant’s role as a mediator before the events of 2003-2004 was both genuine – in that there was never any suggestion his mediation efforts were “*accompanied by conduct which undermines them or are motivated by ulterior motives*”⁸³ – and concrete, given that the mediation resulted in the cattle being returned to the Fur villagers without the tribal conflict descending into something far more serious. But the Chamber’s failure to factor in mitigating circumstances (at the correct and appropriate stage of its determination) (*see Ground of Appeal 2* above), the Appellant’s acknowledged role in mediating inter-tribal conflicts should have contributed to lowering his sentence.

51. Consequently, it is respectfully requested that, for the foregoing reasons, the Appeals Chamber find that the Trial Chamber erred, conclude that the mitigation afforded by the Appellant’s role as a mediator in inter-tribal negotiations/conflict should be taken into account, and reduce his sentence accordingly.

Ground 5 - Error of Law: Exclusion of mitigation because of the gravity of the crimes

52. In addition to the evidence of the positive role that the Appellant played as a mediator in tribal negotiations *before* the conflict of 2002-2003 (*see Ground of Appeal 4* above), there was a significant volume of evidence before the Trial Chamber of the Appellant’s good

⁸⁰ **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 29.

⁸¹ **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 29-30.

⁸² **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 30.

⁸³ [Sentencing Judgment](#), para. 93.

character *after* the events of that period. The Trial Chamber summarised some of this evidence at paragraph 93 of the Sentencing Judgment:

The Chamber acknowledges that there is evidence, as submitted by the Defence, that Abd-Al-Rahman was a ‘kind person’, a ‘nice’ person, a ‘humanitarian person’, a ‘humane’ and ‘noble’ person, and a ‘good person’. The Chamber also notes that D-0041, who is an *umdah* and member of a consultation council of the Fur Tribe, and represents the Fur tribe in the tribal council in Rahad Al-Berdi, gave evidence that Abd-Al-Rahman contributed to the well-being of the community in that location. There is also evidence from D-0029 and D-0039 that they never heard Abd-Al-Rahman say anything discriminatory.[...] Moreover, there is evidence from D-0040, that Abd-Al-Rahman created and led a committee which included members of all tribes in Rahad Al-Berdi, as well as from D-0041 that Abd-Al-Rahman created a reconciliation committee and intervened in several instances to prevent conflict in Rahad Al-Berdi. as well as to protect the Fur in that location.⁸⁴

53. The Trial Chamber considered the testimony of **D-0001**, **D-0005**, **D-0007**, **D-0008**, **D-0040** and **D-0041** in “acknowledging” this evidence. The Trial Chamber made no adverse credibility findings in the Sentencing Judgment with regards to this evidence of the Appellant’s good character, even if, in the Trial Judgment, it broadly found that little if any weight could be attached to the evidence of **D-0001**,⁸⁵ **D-0005**,⁸⁶ **D-0007**⁸⁷ and **D-0008**⁸⁸ insofar as it related to non-character evidence. Of particular relevance is the fact that, despite the submissions of the Prosecution that **D-0040** and **D-0041** were not credible witnesses,⁸⁹ the Trial Chamber did not disbelieve their evidence. Rather, the Trial Chamber determined that it would only accord their evidence limited weight.⁹⁰

54. This is not a case where the Trial Chamber made a blanket finding that there was no credible evidence of the role played by the Appellant in promoting peace and reconciliation after 2003-2004. Instead, the Trial Chamber found that, even if there was such evidence, it would not be taken into consideration as mitigation in arriving at its sentence because of the gravity of the crimes of which he had been convicted. In so doing, the Trial Chamber committed an error of law.

55. Under Article 78(1) of the Statute, “*the gravity of the crime and the individual circumstances of the convicted person*” shall be taken into account in the determination of the sentence. The use of the word “shall” imposes a mandatory obligation on the sentencing Chamber to take these two factors into account. The first factor, gravity, does not and, cannot, operate to exclude the second factor, the individual circumstances of the convicted person. Among these individual circumstances, the Trial Chamber erred in finding that, as a

⁸⁴ Internal footnotes omitted.

⁸⁵ [Annex B to Trial Judgment](#), para. 580.

⁸⁶ [Annex B to Trial Judgment](#), para. 607.

⁸⁷ [Annex B to Trial Judgment](#), para. 613.

⁸⁸ [Annex B to Trial Judgment](#), para. 623.

⁸⁹ T-164, p. 30.

⁹⁰ [Sentencing Judgment](#), para. 94.

matter of principle, personality traits and good character in general *may* be factored as mitigation.⁹¹ Article 78(1) of the Statute provides no room for the exercise of discretion: relevant personality traits and good character *shall*, not *may*, be taken into account. Where the Chamber might exercise discretion is in determining the weight to be attached to these individual circumstances as mitigating factors. But the materiality of the individual circumstances, when it is reflected by the evidence, cannot be ignored. The *Al Hassan* Judgment relied upon in footnote 229 of the Sentencing Judgment makes this clear.⁹² The Appellant's actions contributing to the well-being of the community, to the resolution of conflict and to reconciliation after the events of 2003-2004, as demonstrated by the evidence acknowledged at paragraph 93 of the Sentencing Judgment,⁹³ are relevant for sentencing. These thus form part of the relevant individual circumstances that the Chamber *shall*, not *may*, take into account as mitigation pursuant to Article 78(1) of the Statute and Rule 145(2)(a)(ii) of the Rules.

56. The Trial Chamber correctly recalled that:

Rule 145(2)(a)(ii) of the Rules is non-exhaustive, and accordingly, the Chamber may consider other acts of the convicted person, even if these are not related to the crimes or go beyond the scope of the confirmed charges or the findings in the trial judgment, insofar as they relate to the convicted person. The Chamber thus rejects the CLRV's and Prosecution's submissions referred to above that the conduct under this provision is irrelevant, unless connected to the scope of the crimes the convicted person committed.⁹⁴

57. As a matter of law, therefore, the evidence of the Appellant's good character and action in favour of peace after the conflict in 2002-2003 should have been taken into account as a factor in mitigation, insofar as there was evidence of it. The Chamber's findings about the gravity of the crimes should not have had any impact on the requirement to take into account the Appellant's good character as a mitigating circumstance under Rule 145(2)(a)(ii) of the Rules.

58. Witness **D-0001** knew of the Appellant from 2010.⁹⁵ The Trial Chamber recalled that **D-0001** testified that "*the Accused had a reputation for helping the weak and standing by the poor although not a wealthy man himself.*"⁹⁶ **D-0001** also testified that the Appellant was

⁹¹ [Sentencing Judgment](#), para. 89.

⁹² *Al Hassan*, [ICC-01/12-01/18-2662](#), para. 115: Trial Chamber X discusses the weight to be attached to "selective help" as a mitigating factor, but this discussion has no bearing in the present case. There is nothing suggesting that the Appellant's action in favour of peace was selective, it merely post-dates the period of the crimes.

⁹³ [Sentencing Judgment](#), para. 93, referring to Witnesses **D-0040** and **D-0041**'s evidence about the creation and chairing of a reconciliation committee and the Appellant's efforts to prevent conflicts in several instances, and protect the Fur in Rahad Al-Berdi.

⁹⁴ [Sentencing Judgment](#), para. 90 (internal footnotes omitted).

⁹⁵ [Annex B to Trial Judgment](#), paras. 572, 576.

⁹⁶ [Annex B to Trial Judgment](#), para. 572.

very socially engaged with all the tribes that were in the territory, and a very respectful person.⁹⁷ **D-0001** stated that the Accused was a kind person.⁹⁸ The Trial Chamber made no adverse credibility findings against **D-0001** on these matters. The Trial Chamber also noted that **D-0001** stated that “*the Fur people who came to Rahad Al-Berdi during the 2003-2004 conflict were not considered refugees, were well-treated and given houses, including by the Accused, who he described as ‘a man of high ethics’.*”⁹⁹ Further, “**D-0001** also stated that when the Accused returned to Rahad Al-Berdi in 2010, the Fur welcomed him, and even asked that he stay to protect them when he was going to be deployed to Nyala at one point.”¹⁰⁰ The Trial Chamber made no adverse credibility findings against **D-0001** on these points. In the Sentencing Judgment, it simply found that **D-0001**’s character evidence had no impact on its findings in relation to the Appellant’s role in 2003-2004 in Wadi Saleh.¹⁰¹

59. Witness **D-0005** knew the Appellant from 2011.¹⁰² His character evidence was summarised by the Trial Chamber thus: “**D-0005** described the Accused as a ‘brave person, helping the vulnerable and providing aid for those who suffered’, ‘he helps people’, a ‘humanitarian person’.”¹⁰³ More completely, **D-0005** testified that the Appellant helps orphans, feeds them and provides them with clothes.¹⁰⁴ Although the Chamber concluded that “generally, **D-0005** was not a credible witness”,¹⁰⁵ it made no specific adverse credibility findings against **D-0005** on these points.

60. Witness **D-0007** [REDACTED].¹⁰⁶ The Trial Chamber noted that the witness described him as “*humane*” and “*noble*”.¹⁰⁷ Although the Trial Chamber found that there was some incongruence in his evidence regarding the pacifist nature of the Ta’aisha tribe, a contrast between his approach to answering the questions of the Defence in direct examination and those of the Prosecution in cross-examination, and a vagueness in his testimony that, combined, led it to conclude that his evidence was of limited reliability and credibility, it made no specific adverse credibility findings against **D-0007** with regards to the evidence he provided of the Appellant’s character.

⁹⁷ **D-0001**: T-154, p. 53.

⁹⁸ [Annex B to Trial Judgment](#), para. 572.

⁹⁹ [Annex B to Trial Judgment](#), para. 577.

¹⁰⁰ [Annex B to Trial Judgment](#), para. 577.

¹⁰¹ [Annex B to Trial Judgment](#), para. 580.

¹⁰² [Annex B to Trial Judgment](#), para. 600.

¹⁰³ [Annex B to Trial Judgment](#), para. 602.

¹⁰⁴ **D-0005**: T-158, p. 19.

¹⁰⁵ [Annex B to Trial Judgment](#), para. 607.

¹⁰⁶ [REDACTED].

¹⁰⁷ [Annex B to Trial Judgment](#), para. 609.

61. Witness **D-0008** [REDACTED].¹⁰⁸ He testified that he was someone with a “*nice reputation*”, who would give medication for free if someone was unable to pay, and mediate to resolve issues.¹⁰⁹ As with the other Defence witnesses referred to in the preceding paragraphs, the Trial Chamber found that **D-0008** lacked credibility in respect of those parts of his evidence that were most relevant to the issue of the Appellant’s criminal responsibility (in **D-0008**’s case, about his knowledge of the link between the Appellant and the nickname *Ali Kushayb*). But concerning the witness’s evidence about the Appellant’s character, the Trial Chamber made no specific adverse credibility finding.

62. **D-0040** [REDACTED] gave evidence that the Appellant created and led a committee that promoted conflict resolution between cattle herders and farmers which included members of all tribes in Rahad Al-Berdi.¹¹⁰ [REDACTED].¹¹¹ The Trial Chamber made no adverse credibility findings against **D-0040** on these points.

63. Witness **D-0041** [REDACTED] gave evidence that the Appellant contributed to the well-being of the community in that location and that he created a reconciliation committee and intervened in several instances to prevent conflict in Rahad Al-Berdi, and to protect the Fur in that location.¹¹² The Trial Chamber made no adverse credibility findings against **D-0041** on these points.

64. In addition, **D-0029** gave evidence that he encountered the Appellant in 2010 when the Appellant came back to Rahad Al-Berdi and was welcomed by “*all tribes*”.¹¹³ The Trial Chamber recalled that **D-0029** testified about the Appellant’s character, stating the he had “*never heard the latter say anything discriminatory, nor was he involved in politics*”.¹¹⁴ The Trial Chamber made no adverse credibility findings against **D-0029** on these points.

65. The above evidence of the Appellant’s positive role and action in favour of peace *after* 2003-2004 is consistent with the Trial Chamber’s findings about the role he played in mediating tribal conflicts *before* 2003-2004, as found at paragraph 680 of the Trial Judgment (*see Ground of Appeal 4* above).

66. As a matter of law, the Trial Chamber should have taken into account the evidence of the Appellant’s good character and efforts to promote peace and reconciliation after the

¹⁰⁸ [REDACTED].

¹⁰⁹ [Annex B to Trial Judgment](#), para. 616; **D-0008**: T-139, p. 28-29.

¹¹⁰ [Sentencing Judgment](#), para. 93, *See also* **D-0040**: [DAR-D31-00000358](#), para. 13.

¹¹¹ **D-0040**: [DAR-D31-00000358](#), para. 13.

¹¹² [Sentencing Judgment](#), para. 93.

¹¹³ [Annex B to Trial Judgment](#), para. 670.

¹¹⁴ [Annex B to Trial Judgment](#), para. 671, *See also* [Sentencing Judgment](#), para. 93.

events of 2003-2004. Indeed, in the *Katanga* Sentencing Judgment, Trial Chamber II considered that:

the efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence. It considers, however, that such efforts must be both palpable and genuine, without the need to demand results.¹¹⁵ (emphasis added)

67. The Trial Chamber did not find it appropriate to consider evidence of the Appellant's good character, his efforts to contribute to the well-being of the community, and to promote peace and reconciliation in light of the large number and heinous nature of the crimes for which he was convicted.¹¹⁶ The Trial Chamber's findings on the number and heinous nature of the crime could not exclude the consideration of mitigating circumstances. Evidence of the Appellant's good character and efforts to promote peace and reconciliation was a relevant factor that no reasonable Trial Chamber would have failed to accept as amounting to an important individual circumstance of the convicted person. The Trial Chamber should have taken this into account as a mitigating factor by virtue of Article 78(1) of the Statute, which mandates the consideration of "*such factors as the gravity of the crime and the individual circumstances of the accused*". The gravity or heinous nature of the crimes thus could not exclude the consideration of the Appellant's individual circumstances as a mitigating factor.

68. By committing the error of failing to even consider the evidence of the Appellant's good character and efforts to promote peace, the Trial Chamber erred in law by failing to take into account the personal circumstances of the Accused, as reflected in the evidence, for the purpose of mitigation, in breach of Article 78(1) of the Statute.

69. Had the Trial Chamber not committed the error, there is every reason to believe that it would have concluded that the Appellant's good character and positive action to promote peace within his community after 2003-2004 amounted to appropriate factors to be taken into consideration as mitigation, and imposed less severe sentences for each individual crime of which he was convicted (*see Ground of Appeal 2* above) and consequently a less severe joint sentence.

70. Consequently, it is respectfully requested that, for the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in law, conclude that the mitigation afforded by the Appellant's good character and efforts at promoting peace and reconciliation *before* (See

¹¹⁵ *Katanga*, [ICC-01/04-01/07-3484-tENG-Corr](#), para. 91.

¹¹⁶ [Sentencing Judgment](#), para. 98.

Ground of Appeal 4 above) and *after* 2003-2004 should be taken into account, and reduce his sentence accordingly.

Ground 6 - Error of Fact and/or Law and/or Fairness Issue: Ignoring efforts to compensate victims as a mitigating circumstance

71. As anticipated at paragraph 5 of its Notice of Appeal,¹¹⁷ the Defence hereby varies the characterization of the present ground of appeal from “Error of Law” to “Error of Fact and/or Law and/or Fairness Issue”.

72. Paragraphs 100 to 110 of the Sentencing Judgment dismiss the Defence’s submissions in relation to the Appellant’s efforts to compensate victims and his expressions of empathy for the victims. The Trial Chamber finds that the Appellant “*has done no more than pay lip-service to the suffering of the victims and does not accept the Defence submissions that he has ‘pave[d] the way to reparations proceedings [and that] it is misleading to argue that he ‘will insist that victims be afforded reparations’*” and refuses to consider these as efforts to compensate victims under Rule 145(2)(a)(ii) of the Rules.¹¹⁸ The Trial Chamber further describes the Appellant’s repeated public expressions of empathy for the victims as “*calculated and insincere*” and denies these any mitigating impact warranting a reduction of sentence.¹¹⁹

73. In its Sentencing Brief¹²⁰ and in Sentencing Arguments,¹²¹ the Defence relied on Rule 145(2)(a)(ii) of the Rules and on the Court’s sentencing practice¹²² to submit that the Appellant’s repeated public expressions of empathy throughout the proceedings¹²³ (albeit not amounting to remorse), his long-standing role in mediating tribal conflicts,¹²⁴ and the concrete procedural and non-procedural actions taken, upon his instruction, by his Defence in favour of reparations for victims¹²⁵ together amounted to unprecedented and exceptional efforts to compensate victims, which should amount to factors powerfully mitigating his sentence.

¹¹⁷ [ICC-02/05-01/20-1290 A2](#), para. 5; *Lubanga*, [ICC-01/04-01/06-3121-Red A5](#), para. 34.

¹¹⁸ [Sentencing Judgment](#), paras. 102-103.

¹¹⁹ [Sentencing Judgment](#), paras. 108, 110.

¹²⁰ [Sentencing Brief](#), paras. 91-100.

¹²¹ T-164, pp. 72-73; T-165, pp. 67-78; T-166, p. 49.

¹²² *Bemba et al.*, [ICC-01/05-01/13-2123-Corr](#), paras. 92, 96 (upheld on appeal, *Bemba et al.*, [ICC-01/05-01/13-2276-Red A](#), paras 341-342); *Al-Mahdi*, [ICC-01/12-01/15-171](#), para. 104.

¹²³ T-001, pp. 21-22; T-010, p. 3; T-162, pp. 62-64.

¹²⁴ [Judgment](#), para. 680.

¹²⁵ Procedural action: [ICC-02/05-01/20-98](#); [ICC-02/05-01/20-147-tENG OA4](#); non-procedural action: T-165, pp. 74-75.

74. Under Rule 145(2)(a)(ii) of the Rules, “*the convicted person’s conduct after the act, including any efforts by the person to compensate the victims*” shall be taken into account, as appropriate, as a mitigating factor for the purpose of sentencing. The use of “*shall*” means that a Chamber has no discretion to disregard such efforts when they exist and that their mitigating impact shall be commensurate (“*as appropriate*”) to the efforts deployed. Rule 145(2)(a)(ii) of the Rules says nothing about the concrete impact the efforts of the convicted person had, nor whether they came to fruition, nor even whether the convicted person genuinely wanted the victims to receive compensation: the test is objective. It is neither an obligation of result, nor of intent, but an obligation of means. The only question to be asked is: did the convicted person take action and make efforts for the victims to receive compensation? Whenever the answer to that question is in the affirmative, it must amount to mitigation of sentence “*as appropriate*”, that is, in a way that is commensurate to the action and efforts objectively undertaken. The sentencing practice relied upon by the Defence confirms, at least to some extent, as much, although in no earlier cases before the Court had the efforts deployed by a convicted person and his Defence (on the convicted person’s instructions) been of a level comparable to that in the present case in terms of consistency and intensity.

75. The Chamber, firstly, erred in fact in disregarding the materiality of the Appellant’s efforts, and in dismissing these as “*lip-service*”, and “*calculated and insincere*”. The Appellant’s efforts were in fact much more than that. They were repeated, including in three public speeches delivered in the courtroom¹²⁶ and two requests to observe a minute’s silence in memory and prayer for the victims.¹²⁷ That the latter requests were denied was beyond the Appellant’s control and should have no adverse impact on the assessment of his efforts.

76. Efforts also included concrete and ambitious proposals to effect an early reparations phase in favour of victims without waiting for the outcome of the trial.¹²⁸ In its consideration of this initiative, the Appeals Chamber did not summarily dismiss it as a mere “*lip-service*”. It issued a reasoned judgment in which it found that the Pre-Trial Chamber had erred in dismissing the Defence’s application *in limine* and that “*one aspect of the procedure for reparations at the Court provides that the final decision on the scope of damage and determination on the modalities for reparations takes place after the trial has concluded*”.¹²⁹ The fact that “*the final decision*” on reparations is to be issued after conviction did not, in

¹²⁶ T-001, pp. 21-22; T-010, p. 3; T-162, pp. 62-64.

¹²⁷ T-001, p. 22; [ICC-02/05-01/20-175 OA2](#).

¹²⁸ [ICC-02/05-01/20-98](#).

¹²⁹ [ICC-02/05-01/20-237 OA4](#), para. 20.

and of itself, exclude the possibility that a “non-final”, preliminary determination on reparations could be issued earlier. This was exactly what the Defence proposed in its application of 17 July 2020.¹³⁰ These proposals were legally well-founded, as demonstrated by the 58 pages of the original motion. They were concrete, with clear proposals of “*additional principles of reparation*” provided at the end of the submission; and they were genuinely aimed at the opening of a preliminary reparations phase, which, had the Defence’s propositions been followed, may have resulted in the granting of compensation for victims on the basis of voluntary contributions made through the Trust Fund for Victims (“TFV”).¹³¹ The fact that this application was denied was, again, beyond the control of the Appellant, who used the available procedural route of an interlocutory appeal OA4¹³² in an effort to overturn the decision rejecting the application. The Appellant and his Defence did everything they could possibly have done to secure compensation for victims at such an early stage of proceedings. Their lack of success was beyond their control and should have no impact on the materiality or assessment of those efforts.

77. These included, once the Article 75(2) condition of the Appellant being convicted was met, renewed efforts to solicit and obtain voluntary ear-marked contributions for victims in Darfur from both States Parties and non-States Parties through the TFV: no fewer than 168 States were approached by the Defence, consultations were held with the TFV, and meetings and correspondence took place with various Embassies.¹³³

78. These many and varied actions cannot be dismissed as merely “*lip-service*”; these are material, repeated, concrete and sustained efforts, either made by the Appellant himself¹³⁴ or by the Defence on the basis of his instructions.¹³⁵ The Trial Chamber, which was aware of these efforts, erred in fact in dismissing them as “*lip-service*” and not considering them for what they genuinely were: an unprecedented effort to ensure that victims were compensated. Under Article 78(1) of the Statute, the Trial Chamber had no discretion not to take these efforts into consideration as mitigation for the purpose of sentencing pursuant to Rule 145(2)(a)(ii) of the Rules.

79. The Chamber, secondly, erred in law when it rejected the Defence’s submissions based on its assessment that the Appellant’s efforts were “*calculated and insincere*”. The

¹³⁰ [ICC-02/05-01/20-98](#).

¹³¹ [ICC-02/05-01/20-98](#), para. 100.

¹³² [ICC-02/05-01/20-147-tEng OA4](#).

¹³³ T-164, p. 58; T-165, pp. 74-75.

¹³⁴ T-001, pp. 21-22; T-010, p. 3; T-162, pp. 62-64.

¹³⁵ T-001, p. 22; [ICC-02/05-01/20-175 OA2](#) ; [ICC-02/05-01/20-98](#); T-164, p. 58; T-165, pp. 74-75.

basis for this finding is unclear. The Trial Chamber seems to rely, *inter alia*, on the Defence's position at trial that some Prosecution witnesses, including dual status witnesses and participating victims, had not given truthful evidence, and on the fact that the Accused had not pleaded guilty.¹³⁶ However, this finding is based on two subsidiary errors of law.

80. First, the fact that the Appellant did not plead guilty, and exercised his right to have cross-examined certain Prosecution witnesses, including dual status witnesses, and challenged aspects of their evidence regarding his individual responsibility should not have been used as a ground for dismissing his expressions of empathy as insincere. Notwithstanding the absence of acknowledgement of personal responsibility for what trauma the witnesses, on any reading of their evidence, actually endured, the Appellant *did* express, on repeated occasions, his empathy towards the victims, and *did* indicate his support that they be compensated. The Appellant pleaded not guilty to all charges. His right to do so is protected under Article 64(8)(a) of the Statute. His right to challenge some or all of the Prosecution's evidence is a direct consequence of the adversarial procedure applicable before the Court and is protected under Article 67(1)(e). The Chamber erred in law in finding that his exercise of his rights should deprive the Appellant from the benefit of mitigating circumstances under Rule 145(2)(a)(ii) of the Rules.

81. Before other international criminal tribunals, expressions of empathy for victims or regret for crimes committed were considered mitigating circumstances.¹³⁷ Defendants' expressions of empathy for victims was considered a mitigating circumstance, even where they had pleaded not guilty and had challenged the evidence, and even in the absence of any positive steps to secure compensation for those victims, unlike the Appellant's concrete efforts in the instant case. Various Trial Chambers of other international criminal tribunals had no greater basis to assess the sincerity or lack thereof of defendants' expressions of sympathy towards victims. They actually had much less material before them on which to base any assessment of sincerity, as these expressions had generally not come with positive actions, such as the Appellant's motion for early reparations and the solicitations sent to States for ear-marked contributions through the TFV in the present case. What mattered in the view of Chambers of other Tribunals was that the defendants had expressed their

¹³⁶ [Sentencing Judgment](#), paras. 108-109.

¹³⁷ ICTY, *Vasiljević*, [IT-98-32-A](#), para. 177: "*The Appeals Chamber is of the view that an accused can express sincere regrets without admitting his participation in a crime, and that that is a factor which may be taken into account*"; ICTY, *Orić*, [IT-03-68-T](#), para. 752; SCSL, *Fofana et al.* ("*CDF Case*"), [SCSL-04-14-A](#), para. 490: "*The Appeals Chamber is of the view that the Trial Chamber could consider genuine and sincere expressions of empathy for the victim's suffering or regret for crimes committed, without an acknowledgement of responsibility as a mitigating circumstance*".

empathy. This, in itself, was construed as positive efforts to offer some form of non-financial compensation to the victims.

82. For someone who has been accused and then convicted of crimes against humanity and war crimes to express, on repeated occasions, his expressions of empathy for the victims of these crimes form part of the miracle of international criminal justice. This would have never happened, but for the ICC. This is one of those rare instances where an accused or convicted person freely and on his own initiative expresses his desire to return to the community of “*all peoples [...] united by common bonds, [to] their cultures pieced together in a shared heritage [and to restore] that delicate mosaic [that] may be shattered at any time*” and to affirm that the crimes he is charged with or convicted for are crimes that “*shock the conscience of humanity*”.¹³⁸ The significance of these rare and precious moments should not be underestimated, much less dismissed. On the contrary, they should be valued. The Trial Chamber was wrong in denying them any significance. Its opinion about the sincerity of the Appellant’s efforts, or lack thereof, had no real relevance to their consideration as a mitigating factor under Rule 145(2)(a)(ii) of the Rules. The only thing that really matters was the materiality of these efforts. As summarised above, these were material, sustained, ongoing and unprecedented before the Court, and should have been considered as such. The Trial Chamber erred in law in finding otherwise.

83. Second, the Trial Chamber had questioned the genuineness of the Appellant’s words in favour of victims during the sentencing hearing by observing that he was found guilty of the death, torture and other ill-treatment inflicted upon victims, and that, in order to benefit from Rule 145(2)(a)(ii) of the Rules, the Appellant should personally contribute to the compensation of the victims, for example, by using the proceeds of the sale of his properties in Rahad Al-Berdi.¹³⁹ The Defence had responded to this by submitting that, by definition, a finding of guilt cannot deprive a convicted person from the benefit of mitigating circumstances,¹⁴⁰ and that in any event the Appellant’s properties in Sudan had no value whatsoever.¹⁴¹ The Chamber acknowledged as much.¹⁴² More fundamentally, the Defence submitted that “compensation” should not be construed as being limited to “financial compensation”, as this would unfairly limit the benefit of mitigating circumstances under Rule 145(2)(a)(ii) to convicted persons who happened to enjoy the financial capacity to

¹³⁸ Statute, Preamble, paras. 1-2.

¹³⁹ T-165, pp. 68-69.

¹⁴⁰ T-165, p. 69.

¹⁴¹ T-165, pp. 75-77.

¹⁴² T-165, p. 76.

compensate victims out of their own pockets, and discriminate against other convicted persons who, like the Appellant, did not find themselves in such a fortunate position. This would amount to a violation of Article 21(3) concerning the prohibition of adverse distinction based on, *inter alia*, “social origin, wealth, birth or other status” in the application and interpretation of the applicable law before the Court.¹⁴³ The Trial Chamber thus also erred in law when it excluded mitigation under Rule 145(2)(a)(ii) of the Rules on the ground that the Appellant was found guilty and did not (in fact, could not) offer financial compensation himself.

84. Finally, the Chamber acted unfairly when it rejected the Appellant’s sustained efforts in favour of victims as “*lip-service*”, and “*calculated and insincere*”. The Chamber had no basis to make this unnecessary assessment, which is the result of the errors of fact and law mentioned above. In the ICTY and SCSL cases cited above, defendants were found sincere in their expressions of regrets while they also rejected any personal responsibility for the crimes, pleaded not guilty, challenged the evidence, had been found guilty of no less numerous and/or heinous crimes than the Appellant, and had not taken any of the positive steps undertaken by the Appellant and his Defence in this case to secure compensation for the victims. The Trial Chamber’s summary dismissal of the Appellant’s sustained efforts is irreconcilable with its duty of fairness. This fairness issue comes in addition to the abovementioned errors of fact and law.

85. As a result of these three errors of fact, law and fairness, the Appellant was denied mitigation under Article 78(1) and Rule 145(2)(a)(ii) of the Rules based on his efforts to secure compensation for victims in Darfur. In light of the unprecedented, repeated and sustained nature of his efforts, taking these into account “*as appropriate*” should have resulted in a significant reduction of the sentence passed for each of the crimes for which he was convicted, and of his joint sentence (*see Ground of Appeal 2* above).

Ground 7 - Error of Law: Failure to consider the Defence’s submissions under Rule 145(2)(a)(i) of the Rules

86. **Ground of Appeal 7** is closely related to **Grounds of Appeal 54** and **56-57** of the Defence Appeal Brief against the Trial Chamber’s Judgment.¹⁴⁴ The Defence respectfully invites the Appeals Chamber to first consider **Grounds of Appeal 54** and **56-57**, developed in the Defence Appeal Brief, as the Defence’s principal submission on this issue. The present

¹⁴³ T-165, p. 78.

¹⁴⁴ [Defence Appeal Brief](#).

Ground of Appeal comes in addition, and as an alternative, to **Grounds of Appeal 54 and 56-57**.

87. At paragraphs 111 to 118 of the Sentencing Judgment, the Trial Chamber dismisses the Defence's sentencing submissions on this aspect, which it describes as relitigating and resubmitting issues already considered in the Trial Judgment.¹⁴⁵

88. However, the Defence was not relitigating its Line 3 on mistake of law. Rather, its new submission at paragraphs 31 to 37 of its Sentencing Submissions was based on Rule 145(2)(a)(i) of the Rules. This had been explained in its written¹⁴⁶ and oral submissions.¹⁴⁷

89. Article 78(1) of the Statute provides that the Court shall consider the individual circumstances of the convicted person when deciding on the appropriate sentence. Mistakes of law form part of these individual circumstances.¹⁴⁸ Further, under Rule 145(2)(a)(i) of the Rules, "*circumstances falling short of constituting grounds for exclusion of criminal responsibility*" may constitute mitigating circumstances. If a perpetrator correctly understands the underlying facts of the situation but nevertheless believes that the situation and/or his behaviour was not unlawful, it may play a role as mitigating circumstances according to Rule 145(2)(a)(i) of the Rules.¹⁴⁹ When considered under this Rule, the applicable standard of proof is that of the balance of probabilities.¹⁵⁰

90. At trial, the Defence had raised the defence of mistake of law under Articles 30(3) and 32(2) of the Statute read together. Pursuant to Article 32(2), a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such a crime. Under Article 30(3), "knowledge" means awareness that a circumstance exists or a circumstance will occur in the ordinary course of events. It is recognised in the jurisprudence of the Court that the level of awareness that the convicted person had of the seriousness of the crimes for which he is convicted is a relevant factor in determining the appropriate sentence.¹⁵¹ The Defence's submission at trial was that, even assuming, without admitting, that the Appellant was indeed *Ali Kushayb* (Defence Line 1) and was a member

¹⁴⁵ [Sentencing Judgment](#), para. 117.

¹⁴⁶ [Defence Sentencing Submissions](#), para. 32: "*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*".

¹⁴⁷ T-165, p. 49, 82.

¹⁴⁸ K. Ambos (Ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Beck-Hart-Nomos, 4th ed., (2021), mn. 27, 40.

¹⁴⁹ K. Ambos (Ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Beck-Hart-Nomos, 4th ed., (2021), mn. 49.

¹⁵⁰ [Sentencing Judgment](#), para. 24; [Defence Sentencing Submissions](#), para. 32.

¹⁵¹ *Lubanga*, [ICC-01/04-01/06-2901](#), para. 56; *Al Hassan*, [ICC-01/12-01/18-2662](#), para. 110.

of the *Janjaweed* (Defence Line 2), he must have believed, based on his level of knowledge and life experience, that committing the crimes as instructed by the Government of Sudan, in particular Minister Harun, was both lawful and mandatory, and that refusing such an order would expose him to serious adverse consequences, such as summary execution in operation.¹⁵² This was Defence Line 3, and was summarily dismissed by the Chamber in the Judgment, referenced in one paragraph only.¹⁵³ This summary dismissal is challenged under **Grounds of Appeal 54 and 56-57** of the [Defence Appeal Brief](#). The Defence submitted that, even if Line 3 was found to fall short of establishing a complete defence, Rule 145(2)(a)(i) of the Rules nevertheless allowed the Defence to rely on it as a mitigating factor.¹⁵⁴ This is what the Defence did in its written and oral submissions on sentencing.

91. In *Ongwen*, the Appeals Chamber recalled that “*in the Conviction Decision, the Trial Chamber undertook a detailed assessment of all relevant facts and evidence to determine the potential applicability of duress as a ground excluding the criminal responsibility of Mr Ongwen and referred to this analysis in the Sentencing Decision.*”¹⁵⁵ In the instant case, unlike *Ongwen*, no such detailed assessment of mistake of law is made in the Judgment, nor is any reference to this assessment made in the Sentencing Judgment.

92. The Trial Chamber thus erred in law when it found the Defence’s sentencing submissions on this issue to be relitigating Defence Line 3, and summarily rejected those submissions without considering them on their merits as a mitigating factor under Rule 145(2)(a)(i) of the Rules. Further, the Trial Chamber erred in law by dismissing the Defence’s sentencing submissions on this point on the ground that sentencing is not the right forum to challenge how the Chamber reached its conclusion in the Trial Judgment, and that challenges against such factual findings should be brought before the Appeals Chamber.¹⁵⁶

93. In its sentencing submissions, the Defence relied, *inter alia*, on the findings of the Trial Chamber in the Judgement.¹⁵⁷ The Defence did not ask, and of course could not have asked, the Trial Chamber to go behind those findings.¹⁵⁸ But the Defence’s submissions on mistake of law as mitigation should have received full and proper consideration by the Trial

¹⁵² [Defence Final Brief](#), paras. 795-826.

¹⁵³ [Trial Judgment](#), para. 948 (related to events in Mukjar and Deleig). See the other references to the [Trial Judgment](#) referred to in **Grounds of Appeal 54 and 56-57** of the [Defence Appeal Brief](#).

¹⁵⁴ [Defence Sentencing Submissions](#), para. 32.

¹⁵⁵ *Ongwen*, [ICC-02/04-01/15-2023](#), para. 293.

¹⁵⁶ [Sentencing Judgment](#), para. 117.

¹⁵⁷ [Defence Sentencing Submissions](#), paras. 33-37.

¹⁵⁸ T-165, p. 49, 82.

Chamber based on the lower balance of probabilities standard. The Chamber erred by summarily dismissing these submissions as inappropriate relitigation.

94. The Defence's sentencing submissions were as follows: even assuming, without accepting, that the Appellant was *Ali Kushayb* (Defence Line 1), was a *Janjaweed* leader (Defence Line 2), and attended Minister Harun's speech of 9 August 2003 in Mukjar, he made a mistake of law by believing that acts and conduct as ordered by senior national officials, such as representatives of the Government or military officers, especially as demonstrated in that specific speech of Harun, were bound to be performed as an obligation, irrespective of their apparent criminal nature. In support of that submission, the Defence relied, *inter alia*, on the Trial Chamber's findings in the Judgment with respect to the way Minister Harun's speech of 9 August 2003 had been perceived by Witnesses **P-0757**,¹⁵⁹ **P-0903**,¹⁶⁰ **P-0916**,¹⁶¹ **P-0922**¹⁶² and **P-0984**.¹⁶³ Applying the balance of probabilities standard applicable to mitigating circumstances to these findings, the Defence submitted that the only reasonable conclusion to draw was that the Appellant (if, as found by the Chamber, he had attended Minister Harun's speech) must have believed that Minister Harun had authority (i) to declare the *Fur Ghanima*, and (ii) to order their looting, killing and raping, and that, irrespective of the apparent illegality of these acts, the Appellant and the other attendees to whom these orders were directed were under a legal obligation to undertake those acts.¹⁶⁴ This conclusion, to be arrived at on the balance of probabilities only, was all the more supported by virtue of the fact that **P-0916** and **P-0922** shared the same medical background and education as the Appellant, and by the fact that **P-0984** had the same (former) military profile. This conclusion was also supported by the evidence relied upon by the Defence in Defence Line 3, in particular the Appellant's relatively low military rank – *Musa'id* – within the SAF,¹⁶⁵ his absence of IHL training,¹⁶⁶ and his likely awareness of Article 48(c) of the 1986 People's Armed Forces Act punishing any refusal to obey orders with the death penalty.¹⁶⁷

¹⁵⁹ [Annex B to Trial Judgment](#), paras. 804-808.

¹⁶⁰ [Annex B to Trial Judgment](#), paras. 311-324.

¹⁶¹ [Trial Judgment](#), para. 386, footnote 965 and [Annex B to Trial Judgment](#), paras. 370, 373.

¹⁶² [Trial Judgment](#), para. 386, footnote 965 and [Annex B to Trial Judgment](#), paras. 415, 421.

¹⁶³ [Trial Judgment](#), para. 386, footnote 965 and [Annex B to Trial Judgment](#), paras. 471-483.

¹⁶⁴ [Defence Sentencing Submissions](#), paras. 33-35.

¹⁶⁵ [Defence Final Brief](#), para. 806.

¹⁶⁶ [Defence Final Brief](#), para. 807.

¹⁶⁷ [DAR-OTP-00006136](#), at 0020, article 48(c); **P-0883**; T-073, pp. 15-16, 19 (found credible by the Chamber in [Annex B to Trial Judgment](#), paras. 278-301); **P-0954**; [DAR-OTP-0221-0571-R01](#), paras. 24-27, 43; **D-0016**: T-131, p. 5.

95. 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 the Appellant's education and profile, the Defence submitted that, on the balance of probabilities and even assuming, without accepting, that the Appellant was *Ali Kushayb* (Defence Line 1), was a *Janjaweed* leader (Defence Line 2) and attended Minister Harun's speech of 9 August 2003 in Mukjar, he must have believed, as did the other five witnesses, that the latter 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 Minister Harun's and the other authorities' instructions and orders. This belief amounted to a mistake of law pursuant to Article 32(2) of the Statute. That mistake of law had the potential of excluding the Appellant's criminal responsibility pursuant to Article 32(2), read together with Article 30(3), of the Statute. The Trial Chamber having found that this circumstance fell short of excluding his criminal responsibility in the Judgment, as challenged under **Grounds of Appeal 54 and 56-57** of the *Defence Appeal Brief*, Rule 145(2)(a)(i) of the Rules required the Trial Chamber to consider it as a potential mitigating circumstance for the purpose of sentencing. The Trial Chamber erred in law in refusing to take that factor into consideration in its deliberation on the applicable sentence.

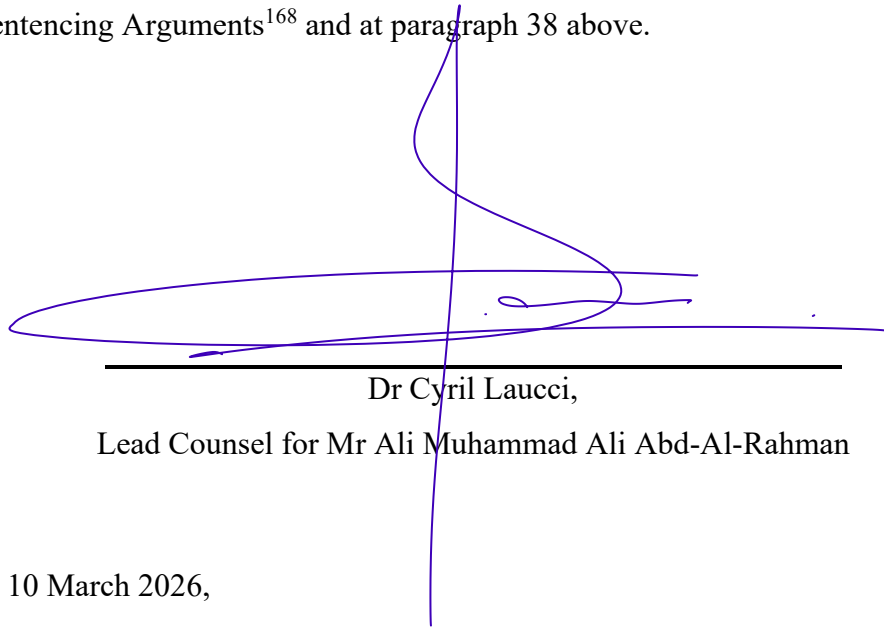
96. The impact of this error of law is that the Appellant was deprived of the benefit of a potential mitigating factor provided for under Rule 145(2)(a)(i) of the Rules in the determination of its sentence. This mitigating factor, which relied on the findings of the Trial Chamber in the Trial Judgment taken as a basis for the limited purpose of the Sentencing Submissions, had the potential of reducing the Appellant's sentence, but the Chamber failed to factor in this mitigating circumstance at this appropriate stage (*see Ground of Appeal 2* above). The sentence should be reduced accordingly.

CONCLUSION

97. The present Appeal Brief on Sentencing comes as an alternative to the principal Defence submissions made in the *Defence Appeal Brief* against conviction. For the reasons exposed in its principal Appeal Brief, the Defence's main submission is that the Appellant should be acquitted on all counts. As an alternative, the Defence submission is that, even if his guilt is confirmed on one or more counts, the non-retroactivity *ratione personae* principle enshrined in Article 24(2) excludes the application of any sentence of imprisonment (**Ground of Appeal 1** above). Mr Abd-Al-Rahman should be released immediately. His release in such circumstances should have no impact on his being able to benefit from the application of the *ne bis in idem* principle enshrined in Article 20(2) of the Statute. Further,

his immediate release should not deprive victims in Darfur from being able to benefit from reparations under Article 75(2) of the Statute.

98. Were the Appeals Chamber to nevertheless deny the benefit of Article 24(2) non-retroactivity *ratione personae* to the Appellant, or find that this principle does not prevent the passing of a sentence of imprisonment, the Defence submits, as a final alternative, that the sentence should be reduced as a result of the correct application of mitigating circumstances and should not exceed a maximum of 10 to 15 years' imprisonment, to be consistent with the Court's sentencing practice in other cases, as exposed in the Defence Oral Sentencing Arguments¹⁶⁸ and at paragraph 38 above.



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

Dated this 10 March 2026,
At The Hague, The Netherlands.

¹⁶⁸ T-164, pp. 91-93.