

1 International Criminal Court
2 Pre-Trial Chamber II
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Rosario Salvatore Aitala, Judge Antoine Kesia-Mbe Mindua and
7 Judge Tomoko Akane
8 Confirmation of Charges Hearing - Courtroom 3
9 Wednesday, 26 May 2021
10 (The hearing starts in open session at 9.33 a.m.)
11 THE COURT USHER: [9:33:45] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE AITALA: [9:34:18] Good morning, everyone.
15 Mr Court Officer, would you please call the case.
16 THE COURT OFFICER: [9:34:25] Good morning, Mr President, your Honours.
17 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
18 Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), case number ICC-02/05-01/20.
19 And for the record, we're in open session.
20 PRESIDING JUDGE AITALA: [9:34:48] Thank you very much.
21 Before I give the floor to the counsel for the Defence, I will read a decision, an oral
22 decision of the Chamber. For the record, it is an oral decision on Defence request to
23 postpone annual hearing on detention, which was notified yesterday, 25 May 2021.
24 It's number ICC-02/05-01/20-408.
25 The annual hearing on detention was convened by the Chamber pursuant to

1 Rule 118(3) of the Rules of Procedure and Evidence in its order setting the schedule
2 for the confirmation of charges hearing and convening annual hearing on detention,
3 which was filing ICC-02/05-01/20-378, issued on 5 May 2021.

4 The hearing was scheduled to take place on 27 May 2021 from 1430 until 1600, in light
5 of the fact that Mr Abd-Al-Rahman first appeared before the Chamber on
6 15 June 2020.

7 The Defence requests the Chamber to postpone the annual hearing on the ground that
8 the Chamber's latest decision on the review of detention has been appealed by
9 the Defence on 14 April 2021, with filing ICC-02/05-01/20-342, and the decision of this
10 appeal is still pending before the Appeals Chamber.

11 The Defence claims that it is unable to make any submissions on the question of
12 detention without knowing the Appeals Chamber's reasoning and conclusion on that
13 appeal.

14 On 25 May, yesterday, the Office of the Prosecutor indicated to the Chamber via email
15 that, whilst it does not per se oppose the request, Rule 118(3) of the Rules requires
16 that a hearing must be held at least once a year following the first appearance.

17 Second, the date for the delivery of the Appeals Chamber decision is not yet known.

18 And third, it remains expedient to hold the hearing as scheduled at a time when all
19 parties and participants are present in the courtroom following the completion of the
20 confirmation hearing.

21 On the same day, the Office of Public Counsel for the victims via email noted that,
22 since the pending appeal has no suspensive effect, it cannot be an obstacle to
23 the hearing. The Chamber notes that, according to Rule 118(3) of the Rules,
24 a hearing on pretrial detention must be held at least once every year.

25 Second, this obligation is not subject to any exception.

1 And third, the main purpose of the annual hearing on detention is to ascertain
2 the conditions of detention.

3 In light of the specific object and purpose of a hearing under Rule 118(3), and of the
4 fact that it is not known when the Appeals Chamber will issue its judgment,
5 the Chamber does not consider it appropriate to reschedule the hearing.

6 The Chamber recalls that lead counsel is responsible to ensure that
7 Mr Abd-Al-Rahman has adequate legal representation at all stages of the proceedings
8 and his presence during the hearing is therefore required.

9 The Defence request to postpone the annual hearing on detention is therefore rejected.

10 I will also add that, should we find ourselves tomorrow morning ahead of schedule,
11 the hearing will be held immediately as soon as the confirmation proceedings are
12 concluded.

13 Thank you very much.

14 Now, Mr Laucci, the floor is yours to continue your presentation. I am told by
15 the court officer that you have left with 1 and 54 minutes. Please.

16 MR LAUCCI: [9:39:28](Interpretation) Thank you very much, your Honour.

17 Your Honour, your Honours, vice-president, distinguished colleagues, I would like to
18 continue this morning with the second part of my submissions on the substantive
19 matters related to the case, which will be radically different from what I presented
20 yesterday.

21 Yesterday, as you will remember, my presentation was based exclusively on the facts
22 and the evidence.

23 Today, I'm looking at a much more legal means, which I'm going to present to you.

24 And this is something which is only applied in the furthest alternative, the main
25 Defence line was presented yesterday.

1 The furthest alternative that I'm going to present today only applies in the hypothesis
2 that the honourable Pre-Trial Chamber II considers that, despite what was shown
3 yesterday, that the Office of the Prosecutor has demonstrated proof that there are
4 reasonable grounds to believe that Mr Abd-Al-Rahman could be responsible for all or
5 some of the crimes in the Document Containing the Charges. So it is therefore
6 within this hypothesis that I'm going to present my submissions this morning.
7 Of course, this hypothesis implies no admission of that hypothesis, but I would also
8 like to offer the most complete defence possible.

9 Just by way of reminder, to go back into the discussion this morning with regards to
10 the identity of Mr Abd-Al-Rahman, his civil population status, was born in '49,
11 1 January, according to the estimation, the official estimation, DAR-OTP-0216-0777.
12 He is from Rehed al Birdi. He is from the Ta'aisha tribe. I'm sorry, the link was
13 0216-0777 (sic). Thank you.

14 So, we heard that he had medical training, he was registered with the auxiliary
15 medical professions council in 1984, that's DAR-0001-0005. And he also joined
16 the central police reserves on 28 July 2005 with the grade or title of new recruit. I use
17 the word *bleu*, realising afterwards that this word was used by the distinguished
18 Legal Representative of Victims, Madam Clooney, with a complete other meaning.
19 So the rookies, this is quite -- the word used in the context of my presentation
20 yesterday meant that this was a new recruit into the ranks of the police.
21 He obtained a certificate in pharmaceuticals in 2012 and his salary of January 2020, as
22 a warrant officer, was 660 Sudanese pounds, D31-0002-0006.

23 So I would also like to remind everyone about some of the questions that -- to which
24 there was no answer on the part of the Prosecutor, which I mentioned yesterday.
25 And in particular, who is Mr Abd-Al-Rahman or Ali Kushayb, who was that person

1 before the event of 2003/2004.

2 And I repeat what I said, there's no information with regards to the origin of his
3 authority or power of Ali Kushayb before 2003. He left the army at the start of the
4 1990s with the grade of warrant officer. Several witnesses describe him as a soldier,
5 DAR-OTP-0215-9919, on page 9935 thereof. Or Witness P-117 in the document
6 DAR-OTP-0128-0042, page 71 thereof. And I would like to just stop, making
7 a reminder mentioning the CV of Ali Kushayb which was shown yesterday on
8 the screen, which told us that he joined the army in 1965 and that he worked in
9 the medical corps.

10 And on that basis, and that's the real point of departure of my presentation this
11 morning, we have no information, no start of evidence that either Mr Abd-Al-Rahman
12 or Ali Kushayb, or both of them, followed the slightest military training, or any
13 training or awareness raising with respect to international humanitarian
14 law - international -- or international law of armed conflicts, these are synonyms in
15 my presentation - or either any awareness raising in the principles of the distinction
16 between combatants and non-combatants.

17 So within the framework of the preparation of his defence, the Defence obtained or
18 tried to obtain the report of an expert in law of armed conflict. I'm going to present
19 it very briefly. And this is -- was written by Madam Linda Strite Murnane who is
20 a colonel in the armed forces of the United States and who spent a long career as
21 a jurist in the army of her country. She was also employed by the International
22 Criminal Tribunal for the Former Yugoslavia as a jurist for the Chambers, and during
23 certain months she was exercising the function of a deputy registrar of the Former
24 Yugoslavia Tribunal, and she also worked as the chief of the Court Management
25 Service of the Yugoslavia Tribunal and the Lebanon Tribunal. I think I have made

1 no mistake there.

2 Now, the expert report which we asked for from Madam Murnane was about six
3 different questions which were put by the Defence and they were put into the report.
4 I will give the number, DAR-D31-0005-0001. So there were six questions that were
5 put in the report. Here, I would have to state that Madam Murnane was not familiar
6 with the case Abd-Al-Rahman, and that for the needs of her expert report the Defence
7 didn't consider it to be useful to share with her the Document Containing the Charges
8 or other information related thereto. All that was asked of her was to answer as best
9 as she could the six questions that were put to her.

10 And I would start by quoting one of the excerpts from her report, which is on
11 page 0005, which is very interesting information. It wasn't asked for, but it speaks
12 about the Sudan. Madam Murnane refers to a study of the United States Institute of
13 Peace, USIP, under the signature of Blank and Noone, Law of War Training:
14 Resources for Military and Civilian Leaders. This dates from March 2008. And she
15 refers to page 8 of the said report and she states that: (Speaks English)
16 "In the USIP study, the authors incorporate a directory of law of war training
17 programmes. For the Sudan, they report that domestic law in Sudan includes
18 a military order issued by the army chief of staff to conduct such training, but
19 the report notes that there is no designated unit responsible for carrying out
20 the training. The report further indicates that the Sudanese rely upon self-generated
21 training materials. Recipients of the training are listed as being junior officers and
22 non-commissioned officers."

23 (Interpretation) This passage from the report therefore inform us that, in the Sudan,
24 there is not real training in law of armed conflict which is available for soldiers.
25 I will come back to the report by Madam Murnane, and I'm now going to mention

1 the law of interest to us, namely the law of the Court. So, according to the law of the
2 Court concerning the mental element common to all the crimes of the Court under
3 Article 5, which is the knowledge.

4 Article 30(1) of the Statute, entitled "Mental element", provides that:

5 "Unless otherwise provided, a person shall be criminally responsible and liable for
6 punishment for a crime within the jurisdiction of the Court only if the material
7 elements are committed with intent and knowledge."

8 That is the word, "knowledge", that is of interest to is. Article 30(3) continues:

9 "For the purposes of this article, 'knowledge' means awareness that a circumstance
10 exists or a consequence will occur in the ordinary course of events. 'Know' and
11 'knowingly' shall be construed accordingly."

12 I would ask the Honourable Chamber to retain for my demonstration the word

13 "knowledge" when a person is aware that a circumstance exists, because that is what I
14 would like to use for my demonstration.

15 Now, Article 32(1) of the Statute, entitled "Mistake of fact or mistake of law", states
16 that:

17 "A mistake of fact shall be a ground for excluding criminal responsibility only if it
18 negates the mental element required by the crime."

19 Article 32(2) states:

20 "A mistake of law as to whether a particular type of conduct is a crime within
21 the jurisdiction of the Court shall not be a ground for excluding criminal
22 responsibility. A mistake of law may, however, be a ground for excluding criminal
23 responsibility if it negates the mental element required by such a crime ..."

24 Article 33, "Superior orders and prescription of law" states:

25 "The fact that a crime within the jurisdiction of the Court has been committed by

1 a person pursuant to an order of a Government or of a superior, whether military or
2 civilian, shall not relieve that person of criminal responsibility unless:

3 (a) the person was under a legal obligation to obey orders of the Government or
4 the superior in question;

5 (b) The person did not know that the order was unlawful; and.

6 (c) The order was not manifestly unlawful."

7 And finally Article 33(2):

8 "For the purposes of this article, orders to commit genocide or crimes against
9 humanity are manifestly unlawful."

10 A last text that I'm going to read from the Court -- well, not exactly, I'm going on to
11 the Elements of Crimes now. The general introduction paragraph 2 states:

12 "As stated in article 30, unless otherwise provided, a person shall be criminally
13 responsible and liable for punishment for a crime within the jurisdiction of the Court
14 only if the material elements are committed with intent and knowledge. Where no
15 reference is made in the Elements of Crimes to a mental element for any particular
16 conduct, consequence or circumstance listed, it is understood that the relevant mental
17 element, [that's to say] intent, knowledge or both, set out in article 30 applies.

18 Exceptions to article 30, based on the Statute, including applicable law under its
19 relevant provisions, are indicated below."

20 What I would propose to retrain from these texts are the following: In the light of
21 these texts, the Office of the Prosecutor, who has the burden of proof with regards to
22 the crimes, must demonstrate the knowledge of the perpetrator at the time of the act
23 and what are the circumstances, this is that there's a circumstance which exists under
24 Article 30(3).

25 In the case of errors with regards to the fact of the existence of such circumstances,

1 there's exoneration from criminal responsibility under Article 32(1) if the mental
2 element of the crime disappears. And in case of error of law, on the existence of such
3 circumstance, there is exoneration from criminal responsibility under Article 32(2) if
4 the mental element of the crime disappears or if it goes into the illegal nature of the
5 order received under Article 33(1) unless it is an order to commit genocide or a crime
6 against humanity.

7 I'm going into more details now with regards to the particular circumstances which
8 are required in the case of a crime against humanity.

9 In the Elements of Crimes, Article 7(2), tells us that:

10 "The last two elements for each crime against humanity describe the context in which
11 the conduct must take place. These elements clarify the requisite participation in
12 and knowledge of a widespread or systematic attack against a civilian population.

13 However, the last element" -- I just have to have a drink.

14 "... the last element should not be interpreted as requiring proof that the perpetrator
15 had knowledge of all characteristics of the attack or the precise details of the plan or
16 policy of the State or organisation."

17 And the relevant exceptions from the Elements of Crimes relevant to the crimes
18 against humanity which figure in the Document Containing the Charges, these are
19 the sections 7(1)(a)(3), 7(1)(d)(5), 7(1)(f)(5), 7(1)(g)-1(4), 7(1)(h)(6) and 7(1)(k)(5) of the
20 Elements of Crimes, they require that the perpetrator knew that the behaviour -- that
21 the conduct was part of a widespread or systematic attack against a civilian
22 population or intended it to be part thereof. And what I would propose that you
23 take from this text is that the existence of a widespread and systematic attack against
24 a civilian population was a circumstance in -- so the perpetrator has to be aware of
25 that under Article 30(3) of the Statute with regards to crimes against humanity.

1 The fact that the person referred to in crimes against humanity was part of the civilian
2 population, and one of the circumstances is to demonstrate this knowledge under
3 Article 30(3) of the Statute.

4 In the case of errors with regards to the existence of such circumstances, there is
5 exoneration from criminal responsibility under Article 32(1) if the psychological
6 element of the crime against humanity disappears.

7 In the case of error of law with regards to these circumstances, there is exoneration
8 from criminal responsibility under Article 32(2) of the Statute if the mental element of
9 the crime against humanity disappears.

10 And finally, there's hierarchical superior orders under 33 does not occur in crimes
11 against humanity.

12 I now go on to the knowledge in the case of war crimes.

13 The Elements of Crimes 8 states that, where it concerns the two last elements of each
14 crime, it is not necessary to establish that the perpetrator determined at a legal level
15 the existence of an armed conflict or the international or non-international character
16 of the conflict. And, in this regard, it's not necessary to establish that the perpetrator
17 had knowledge of the facts establishing the international or non-international nature
18 of the conflict. It is only necessary that the perpetrator had knowledge of the
19 circumstances establishing the existence of an armed conflict, which is implicit in
20 the terms in the context of or associated with.

21 Where it concerns the war crimes or attacks against a civilian population which is in
22 the Document Containing the Charges, charges -- charge number 1, the section
23 8(2)(3) -- 8(2)(e)(i)(3), you have to prove that the perpetrator intended the civilian
24 population, as such, to be the object of the attack, or civilians not taking directly part
25 in the hostilities.

1 Where it concerns the charges, pillaging; charge 9, rape, the Elements of Crimes,
2 sections 8(2)(e)(i) -- (2)(e)(v) and 8(2)(e)(vi)-1(4), Roman VI, of the Elements of Crimes
3 requires that:

4 "The perpetrator was aware of [the] factual circumstances that established
5 the existence of an armed conflict."

6 With regards to the destruction of property without military necessity, section
7 8(2)(e)(xii)(4), the Elements of Crimes indicates that: "The perpetrator was aware of
8 the factual circumstances that established the status of the property."

9 And finally, for all the other charges for war crimes pleaded in the Document
10 Containing the Charges, you have the requirement that the perpetrator was aware of
11 factual circumstances that establish this status, this status being the status of person
12 *hors de combat*, so civilians or members of medical or religious staff not taking actively
13 part in the hostilities, so having the status of protected persons under international
14 humanitarian law.

15 What I suggest you note from these texts is that the question of an armed conflict,
16 international or non-international, is not one that is relevant here. This is not
17 something that has to be established by the Prosecutor that there was an international
18 and not an international conflict. I will not insist on this. However, the knowledge
19 of the circumstances of fact establishing the statute of victims as persons protected by
20 international humanitarian law has to be established in virtue of Article 30(3)
21 of the Statute.

22 With regard to the attack against the civilian population, the knowledge of
23 circumstances of fact establishing the statute of the group of victims as a civilian
24 population or civilians not taking part directly in the hostilities does have to be
25 proved in virtue of Article 30(3) of Statute.

1 In the case of mistake of fact on the existence of this circumstance, there is exoneration
2 of criminal responsibility under Article 32(1) if the mental element of the war crime
3 disappears in the event of a mistake of law on the existence of this circumstance.

4 There is exoneration of the criminal responsibility under Article 32(2) if the mental
5 element of the war crimes disappears or if this mistake relates to the illegal character
6 of the hierarchical order or law under Article 33(1)(b) of the Statute.

7 This brings -- I have now finished with the text from the Court and I now move to the
8 subject of national law of Sudan.

9 I will start with the Sudanese Penal Code, which is in the filings under
10 DAR-OTP-0021-0296. This is the Criminal Act of 1991. And I would ask if this
11 could please be displayed on the screen. Thank you.

12 We're already at Article 50 of this code, which I will read in English:

13 (Speaks English)

14 "Whoever commits any act with the intention of undermining the constitutional
15 system of the country, or exposing to danger the unity and independence thereof,
16 shall be punished with death, life imprisonment or for a lesser period. He may be
17 subject to forfeiture of all his property."

18 (Interpretation) Article 51: (Speaks English)

19 "There shall be deemed to commit the offence of waging war against the State, and
20 punished with death, or life imprisonment, or imprisonment for a lesser term, and
21 may also be subject to forfeiture of all property thereof, whoever:-"

22 (Interpretation) In fact, I've gone further than I intended to. I'll leave it there on that.
23 Article 53, you can see it on the screen in English.

24 So Article 53, Espionage:

25 "There shall be deemed to have committed the offence of espionage and be

1 punishable with death, or life imprisonment, ... whoever spies against the country, by
2 communicating with any foreign state, or the agents thereof, or communicates, or
3 conveys secrets thereto, with intent to assist it in its military operations against the
4 country, or prejudice the military position thereof."

5 So I would now like to move to the Armed Forces Act and Article 50 of this Act.

6 You will see it appear in a moment.

7 So Article 50 of the People's Armed Forces Act of 1986. Obviously, these versions,
8 1991 version of the Penal Code and the 1986 version of the People's Armed Forces Act
9 are those that were applicable at the time of the events.

10 So this Act states in Article 50: (Speaks English)

11 "Any persons subject to the provisions of this Act, whether military or civilian, who
12 commit any of the following actions shall be sentenced to death or some lesser
13 punishment:

14 (a) assisting or attempting to assist the enemy with weapons, ammunition, supplies,
15 money or information or by any other means;

16 (b) Facilitating or concealing the entry of the enemy into Sudanese territory, or
17 assisting in surrendering any towns, establishments, military locations, property or
18 vehicles;

19 (c) Surrendering or divulging any defence secrets to the enemy or to any other person
20 working on their behalf in any way, or aiming somehow to obtain any of these secrets
21 with the intention of surrendering or divulging them to the enemy or to any person
22 working for them or destroying them on the enemy's behalf, imperilling the country's
23 defence or that of the People's Armed Forces, or that which is considered to be
24 a defence secret, rendering worthless by disclosure [...]"

25 (Interpretation) I will not continue to read paragraph (d). I will return to that later.

1 The articles from the Penal Code and the People's Armed Forces Act, which I have
2 just read, relate to acts of rebellion, thus the articles inform us that rebels, those who
3 support them, those who hide them, those who supply them with shelter, money,
4 food or any other form of support, and those who communicate information to
5 the rebels in order to assess their military operations are seen as criminals and run
6 the risk of capital punishment under Sudanese law.

7 I would now like to move to another series of articles of these two same acts, which
8 do not relate to rebellion but to the refusal to obey orders.

9 So, firstly, Article 49 (sic) of the Penal Code of 1991:

10 "Any public servant disobeying any direction of law, as to the way in which he is to
11 conduct himself, as a public servant ..."

12 I know move to (b):

13 "to save any person, from any legal punishment, or mitigates the penalty, or delays
14 the infliction thereof" is punished by prison.

15 And now 91:

16 "... a public servant, whose duty as such ... is to arrest, or, keep any person in custody
17 [who] intentionally, or negligently omits to arrest such person, or intentionally, or
18 negligently allows such person to escape ... [is] punished according to the following
19 provisions:-" (a) and (b).

20 Article 100:

21 "Whoever, being legally bound to render assistance to any public servant in
22 the exercise of his public duty, will be punished with a fine or imprisonment."

23 Now, Article 102:

24 "Any person under order by a public servant to undertake certain measures shall be
25 punished, with imprisonment, if this order is not obeyed."

1 And now once again the People's Armed Forces Act, Article 48: (Speaks English)

2 "Any persons subject to the provisions of this Act who commit any of the following
3 actions intentionally in the face of the enemy shall be sentenced to death or some
4 other penalty:

5 (a) Desertion in the face of the enemy;"

6 I jump to (c):

7 "any refusal to obey orders or any behaviour deliberately intended to imperil any
8 headquarters, unit, position or military property."

9 (Interpretation) And now moving to (g): (Speaks English)

10 "Committing or failing to commit some action with the deliberate intention thereby of
11 imperilling the success of any force, supporting forces or part thereof."

12 (Interpretation) And now if we could return to Article 50 once more, I did not earlier
13 read article (d), so penalty of death or lesser punishment for: (Speaks English)

14 "Any persons subject to the provisions of this Act ... who commit any of the following
15 actions intentionally in face of the enemy" -- (Interpretation) sorry, it wasn't (d) I want
16 to read, it's (a).

17 (Speaks English) "Desertion in the face of the enemy; [...]"

18 (c) any refusal to obey orders or any behaviour deliberately intended to imperil any
19 headquarters, unit, position or military property; [...]"

20 (g) Committing or failing to commit some action with the deliberate intention thereby
21 of imperilling the success of any force, supporting forces or parts thereof."

22 (Interpretation) So, to move back to 48. I do apologise, I am slightly muddled here.

23 I had already read 48 to you and now I want to read (d), paragraph (d) of 50:

24 (Speaks English)

25 "Any persons subject to the provisions of this Act, whether military or civilian, who

1 commit any of the following actions [...] (d) Impeding or seeking to obstruct any
2 victory, advance, deployment, or re-supply of the forces."

3 (Interpretation) And then one last text that I'd like to bring to your attention from
4 these codes, because a number of these articles are subject to the People's Armed
5 Forces Act, state that they can apply to military or civilian personnel.

6 So is it now says the People's Armed Forces Act applies to (d) (Speaks English) "any
7 person appointed or enlisted under the provisions of this Act," (Interpretation) which
8 means under Article 50 where we read (Speaks English) "whether military or civilian".

9 "(f) Any forces constituted under any given Act or Regulation where such an Act or
10 Regulation subjects them to the provisions of this Act ...

11 (i) All civilian personnel working with the Ministry of Defence or with the services
12 during field service, or who belong or accompany the [above] or any part thereof."

13 (Interpretation) So, in summary, under Sudanese law, resisting an order of the law or
14 a competent public servant in detention, arrest or punishment of a person under
15 the Penal Code is -- or the Armed Forces Act is an infraction. And if the person,
16 civilian or military, is subject to the 1986 Armed Forces Act, then
17 the -- the punishment is nothing less than capital punishment.

18 We can now take this down from the screen. I have finished with the Sudanese
19 national law.

20 And I now return to the Court, not to its text, but to its case law.

21 The Defence of Mr Abd-Al-Rahman is not the first to rely on Article 30(3) knowledge.

22 The Defence of Thomas Lubanga also followed this path during the confirmation of
23 charges. And I would like to welcome at this point Catherine Mabile, my learned
24 colleague who is listening to us.

25 In the Lubanga case for the confirmation of charges, the honourable Preliminary

1 Chamber I took an argument presented by the Defence saying that the accused could
2 not know that enrolling child soldiers and using them in the forces was illegal and
3 engaged his criminal responsibility. This was based on Congolese law, so an
4 articulation of the principle of legality and an error of law under 32(2) of the Statute.
5 In the absence of incrimination the accused could not know that the recruitment of
6 child soldiers constituted a crime.

7 The argument presented by the Lubanga Defence is different from the one I present to
8 you today. I am not talking about the absence of incrimination under crimes, war
9 crimes, crimes against humanity. I will not come to that point, but our argument is
10 based on paragraph 30(3).

11 So I would say, furthermore, that Sudan is not a State Party. The conclusion of
12 Preliminary Chamber I in paragraph 37 of the Lubanga decision against -- according
13 to which DRC was a State Party to the Statute does not therefore apply in the case of
14 Sudan.

15 The definition of crimes against humanity and war crimes under Article 7 and 8 does
16 not figure in the Sudanese Penal Code applicable at the time of the facts.

17 And in the Lubanga decision, paragraph 316, said:

18 "In consequence, given that there is recourse to Article 33 of the Statute, the excuse of
19 the error in law cannot be admitted under Article 32 of the Statute only if Thomas
20 Lubanga was unaware of the existence of a normative objective element of the crime
21 because he did not have any awareness of its current significance -- social significance.
22 However, the elements of proof admitted to the hearing of the confirmation of
23 charges did not indicate that Thomas Lubanga could have committed an error of this
24 type in the context of the commission of these crimes."

25 So, difference to that, in this case the elements of proof being submitted are that

1 Mr Abd-Al-Rahman could not have had the level of proof necessary for this
2 Article 30(3) given the -- concerning the Statute of protected persons.
3 And if supposing, without admitting in any way, that he did commit all the acts
4 alleged by the OTP, Mr Abd-Al-Rahman would have acted under the order of the law,
5 the representatives of the government and/or military authorities in the sense of
6 Article 33(1).

7 So what is the proof that I'm referring to in this case?

8 As stated earlier, knowledge, whose existence has to be proved, and the knowledge of
9 the status of civilian population for crimes against humanity, and the knowledge of
10 the circumstances of fact establishing the statute of victims as protected persons by
11 international humanitarian law for war crimes.

12 So, Mr Ali Muhammad Ali Abd-Al-Rahman, or Ali Kushayb, did he have this
13 knowledge at the time of the facts? And any reply to this question has to take
14 account of the absence of proof provided by the OTP of the fact that either of these
15 two persons had had any military training or training on law of armed conflicts, or on
16 the distinction between combatants and non-combatants during the fact.

17 In the filings of the OTP, the PCB, the question of knowledge is covered on two
18 occasions. In paragraph 156 of the Brief it states simply under charge 2, murder as
19 part of crimes against humanity in Bindisi, Kodoom: (Speaks English)

20 "The perpetrators of the killings were aware of the factual circumstances that
21 established their status."

22 (Interpretation) This is a statement, but not any sort of proof. We simply have
23 a footnote which refers to the Appeals Chamber III (sic) in Bemba case, refers to
24 the Chamber in Bemba case. Okay, but this is not a matter of proof.

25 The second reference in the Brief is paragraph 168 where, in relation to charge 3,

1 murder as a war crime in Bindisi and Kodoom, the OTP refers to a footnote at the
2 bottom of page 563 citing the judgment in the Katanga case, which is
3 ICC-01/04-01/07-3436 and paragraph 784 thereof, which confirms --

4 THE INTERPRETER: The speaker says he has realised he is going rather fast and
5 will now endeavour to speak more slowly.

6 MR LAUCCI: [10:27:19](Interpretation) This confirms the need to prove
7 the awareness of the status of the victims as a civilian population, Article 7, or
8 non-combatants, Article 8. But there again, there is a reference to the obligation to
9 furnish the proof, but no proof at all is furnished.

10 Conversely, the memorandum of the --

11 PRESIDING JUDGE AITALA: [10:27:54] Yes, Mr Nicholls.

12 MR NICHOLLS: [10:27:57] Sorry. Again, sorry to interrupt, no objection.

13 The paragraph being discussed is not in the transcript and I didn't hear it, so if you
14 could just -- if I could just have the paragraph where we are again.

15 PRESIDING JUDGE AITALA: [10:28:10](Overlapping speakers)

16 MR LAUCCI: [10:28:11](Interpretation) The paragraph from the decision in Katanga
17 was 784. Or the paragraph from the Brief, which paragraph did you need?

18 MR NICHOLLS: [10:28:23] I actually meant the Brief first, but --

19 MR LAUCCI: [10:28:26](Interpretation) 168.

20 So, this Brief says on a number of occasions, and we heard it two days ago and
21 yesterday, that victims of the crimes in the document covering the charges were
22 mentioned as rebels or persons supporting rebels, so persons who under Sudanese
23 law were subject to capital punishment.

24 The OTP kindly allowed us to use three of its pages taken from the presentation on
25 persecution. This is now on the screen. We will go through these quite swiftly.

1 But you can see here that the motive for why these people were targeted, that they
2 were, correctly or incorrectly, seen as rebels: (Speaks English) To threaten any Fur
3 village as a rebel village. Fur males arrested on suspicion of being rebels. Most of
4 the prisoners in the police station ... (Interpretation) were Fur. If we took -- the word
5 "rebel" is a recurring theme here and the victims were targeted on the basis of
6 the information to which we attach no credibility, but information that they were
7 apparently rebels or supported rebels.

8 So if I can now move to the next slide, there are -- men are targeted because it's
9 the idea that the men are allegedly rebels, or they participated more actively in
10 the acts of rebellion. And finally, the last one, political grounds supporting
11 the rebellion.

12 So all three grounds of persecution pleaded by the Prosecution, beyond that all
13 the crimes are committed, according to the Office of the Prosecutor, within the idea
14 that the persons who are targeted are rebels or they support them, that is to say
15 under -- under Sudanese criminal law that is punishable by the death penalty.

16 And once again I would like to clarify, in particular for the community of victims who
17 could be listening to us, that the Defence is not questioning the idea that these victims
18 were victims, but as the Office of the Prosecutor said, they were described as rebels.

19 And I go back to the report of the colonel, Colonel Linda Murnane, the document
20 DAR-D31-0005-0001, and I'm going to read certain relevant passages therefrom.

21 And on page 0004, it is written by Madam Murnane: (Speaks English) "In the
22 absence of such formalised training," (Interpretation) training in the law of armed
23 conflict (Speaks English) "it cannot be presumed that military members, or civilians,
24 will intuitively be familiar with the national obligations under the Geneva
25 Conventions in terms of the required behaviour of military members and civilians in

1 conflict situations."

2 (Interpretation) On page 5: (Speaks English)

3 "The principle of distinction is a particularly challenging concept which requires
4 careful training in the context of non-traditional combat."

5 (Interpretation) Quoting an author, Madam Murnane writes: (Speaks English)

6 "In new warfare, the blurring of civilian and fighter, of military objective and
7 protected object, make application of the principles of distinction and proportionality
8 very difficult. [...] New warfare's complexities confound the classic bifurcation
9 between combatants and civilians in the law of armed conflict. A distinct
10 asymmetry between the military and ... hostile persons predominate in

11 new war"-- (Interpretation) No, I missed a line here: (Speaks English)

12 "A distinct asymmetry between the military and technological capabilities of the state
13 and non-state parties and the intermingling of civilians and hostile persons
14 predominate in new warfare. Both challenge the effective application of the law of
15 armed conflict. First, the 'disadvantaged party has an incentive to blur
16 the distinction between its forces and the civilian population in the hope that this will
17 deter the other side from attack.'"

18 (Interpretation) So it wasn't just adult men among the victims. According to
19 the description made by the Office of the Prosecutor, there were also women, there
20 were children, and there were the elderly as well.

21 Now, the question was put to Colonel Murnane, who replies as follows:

22 (Speaks English) "For the reasons explained above, and particularly in
23 the circumstances where one is untrained and engaged in non-international tribal
24 conflict or insurgency, the clarity of the existing principles would be limited."

25 (Interpretation) Quoting an author: (Speaks English)

1 "... the term 'innocent civilians' which encompasses the persons identified in the ... list
2 inclusive in (i) through (iv) ..." (Interpretation) Adult males, children, elderly:
3 (Speaks English) "... is intended to refer only to those persons who retain immunity
4 from attack at all times. Persons who engage in hostilities, however, are legitimate
5 targets and are not protected under the Geneva Convention. In the absence of
6 training, and in the context of an insurgency or tribal warfare these categories of
7 protected persons can be difficult to discern. [...] Where a variety of persons who are
8 neither soldiers nor members of armed groups play a continuous role in
9 [the] hostilities, the level of direct participation arguably makes them legitimate
10 targets at all times. [...] The distinction is further blurred when you consider
11 the ongoing discussion about the concept of self-defence complicated by current
12 dialogue among IHL scholars with respect to hostile acts and hostile intent."
13 (Interpretation) Page 7: (Speaks English)
14 "As noted above, where a person was placed in a situation where irregular or 'rebel'
15 forces are mixed in with the general population, the challenges posed in proper
16 application of the principle of the distinction would be particularly difficult for
17 the reasons cited above."
18 (Interpretation) What you have to remember from that, from Colonel Murnane's
19 report, is that the intuitive understanding of the principle of distinction between
20 combatants and non-combatants cannot be presumed, particularly in the absence of
21 specific training in the implementation of this principle of distinction. This
22 understanding is all the more difficult, and therefore improbable, in the context of an
23 armed conflict, not international, in which the distinction between combatants and
24 non-combatants is not clear. This appears without distinction to all categories of
25 persons, unfortunately, including women, children and the elderly.

1 There are examples in the report of Colonel Murnane's report here, which I shall not
2 quote here, but the use of children in the armed conflict is done in certain conflicts.
3 And this knowledge of these where, for example, the use of children as human bombs
4 is something that happens in certain conflicts.

5 The totality of the evidence which is relevant and available in this case goes in
6 the sense of a lack of knowledge, a lack of understanding of the distinction between
7 combatants and non-combatants. We have the proof in the case file that Mr Rahman
8 only got to the level of warrant officer and he left the army at the beginning of the '90s
9 to become a chemist. I therefore don't have to repeat the references, I mentioned
10 them yesterday.

11 We have the proof that the training in international humanitarian law was
12 non-existent in the Sudan army. You have Colonel Murnane's report on page 5
13 referring to the study of the United States Institute of Peace.

14 We have in the case file the demonstration of the existence of a state policy on the part
15 of the government of Sudan. These are in paragraphs 23 to 47 of the Pre-trial Brief.

16 And according to this state policy, according to the OTP, the logic of it was to
17 assimilate the entire non-Arab population with the rebels and to repress them in
18 the name of the -- on -- and to repress them due to the counter-insurrection.

19 So, to target villages and civilians that were perceived as being associated with or
20 supporting the rebel armed groups, this is in paragraph 24.

21 In paragraph 131, Harun authorised Mr Abd-Al-Rahman (Speaks English) "to treat
22 any Fur village as a rebel village".

23 (Interpretation) Paragraph 132: (Speaks English) "since the children of the Fur had
24 become rebels," you can attack.

25 (Interpretation) Paragraph 133: (Speaks English) "... the commissioner of Mukjar,

1 Torshain, informing the attendees, on behalf of the Government of Sudan, that 'if
2 the rebels did not return [to] the mountains, the Janjaweed had the power to destroy
3 the area' because 'the children of the Fur had become rebels.'"
4 (Interpretation) Paragraph 135: (Speaks English) attack the "predominantly Fur
5 villages and therefore assumed to harbour supporters of the rebel armed groups."
6 (Interpretation) This perception at the time, deliberately used by the Sudanese
7 authorises to push some of the population against another part of the population, was
8 furthermore fed by the number and frequency of attacks in the region.
9 We have in the case file the document DAR-OTP-0153-0686, which is entitled
10 (Speaks English) "Acts or Rebel Aggression Against the Towns, Villages and Camps
11 of Darfur", (Interpretation) and it goes from 7 January 2002 to 3 November 2004.
12 And just in this period the report, 37 pages thereof, lists 364 rebel attacks which are
13 listed in Darfur during this period, which averages out at approximately one attack
14 every two days.
15 Mukjar, so attack number 34 in this document, 23 April 2003, seven Arabs injured,
16 several animals killed, so 3,000 livestock stolen.
17 Attack 40, 30 May 2003, a person tortured to death and 119 heads of livestock stolen.
18 Attack 53, 2 July 2003, police office in Mukjar attacked, arms stolen, the shop and
19 the armoury was burned.
20 108, 29 November 2003, attack on the camp Kaskaldu, five Arabs killed, and 150
21 camels were stolen.
22 In Bindisi, attack number 36, on 9 May 2003, seven people were attacked on the road
23 from Bindisi to Khor Baranda, horses, livestock and camels were stolen, et cetera,
24 et cetera.
25 This perception made the local population look -- look the accomplice of the rebels.

1 This was re-enforced by the provisions of Sudanese law which I quoted which make
2 rebels or those who support them and/or who provide them with support, or money,
3 or food, or any other support, and those who communicate information with a view
4 to assisting their military operations, makes them criminals who are subject to
5 the death penalty.

6 The exercise of the distinction between rebels and the civilian population under
7 Article 7 between combatants and non-combatants, for the purposes of Article 8, was
8 therefore particularly difficult due to the overall context of prolonged armed violence,
9 and the provisions of Sudanese law and the state policy described by
10 the Office of the Prosecutor consisting of using part of the population against another
11 in the counter-insurrection or counterinsurgency.

12 Another factor which is notable with regards to the complexity is that other
13 dispositions incriminate the resistance to law which -- when the code of criminal
14 justice applies. And this is the case in the counter-insurrection, there is the death
15 penalty for those who refuse to obey it.

16 So, if we suppose that, without admitting anything, that Mr Abd-Al-Rahman was in
17 a position to decide to obey or to disobey the order that was given to him by Harun,
18 Torshain, anyone else, any other civilian or military authority speaking on behalf of
19 the Sudanese government, under the circumstances in the case in point and due to ...

20 PRESIDING JUDGE AITALA: [10:46:55] Yes, please.

21 MS PADBERG: [10:46:57] Apologies, your Honour. The connection with
22 the English channel has been lost.

23 PRESIDING JUDGE AITALA: [10:47:06] Yes, we know, we are trying to understand
24 whether they can follow anyway, or simply we don't see them.

25 MS PADBERG: Thank you.

1 PRESIDING JUDGE AITALA: [10:47:11] We do now, we're checking.

2 Mr Laucci, just wait a second for the court officer to check what's happening.

3 THE COURT OFFICER: [10:47:25] Your Honours, we will need to re-establish
4 the connection, but it's unclear how long this will take. We beg your indulgence,
5 perhaps one or two minutes. Thank you.

6 (Pause in proceedings)

7 PRESIDING JUDGE AITALA: [10:49:38] Well, what I would do, I would allow
8 the technicians to do their job. We adjourn the hearing now, reconvene at 11.20, in
9 half an hour. In meanwhile -- yes.

10 MR LAUCCI: [10:49:54](Interpretation) Just a question. According to your
11 calculations, how much time is left?

12 PRESIDING JUDGE AITALA: [10:50:00] Court officer.

13 THE COURT OFFICER: [10:50:01] Your Honour, The Defence has 47 minutes
14 remaining.

15 MR LAUCCI: [10:50:06](Interpretation) That will be more than sufficient.

16 PRESIDING JUDGE AITALA: [10:50:08] Okay. Then we adjourn for half an hour.
17 11.20 sharp we start. Thank you very much.

18 THE COURT USHER: [10:50:17] All rise.

19 (Recess taken at 10.50 a.m.)

20 (Upon resuming in open session at 11.24 a.m.)

21 THE COURT USHER: [11:24:38] All rise.

22 Please be seated.

23 PRESIDING JUDGE AITALA: [11:24:59] Welcome back, also to the Legal
24 Representative of Victims who were disconnected.

25 Mr Laucci, please continue.

1 MR LAUCCI: [11:25:09](Interpretation) Thank you.
2 So I'll continue where I stopped, hoping that the persons listening to us at a distance
3 didn't miss more of it.
4 So, I was saying that the exercise of the distinction between rebels and the civilian
5 population under Article 7, between combatants and non-combatants for
6 the purposes of Article 8, is made particularly difficult by the general context of
7 armed prolonged violence. This is something I described a moment ago.
8 And the description made by the Sudanese government of all the Fur population as
9 being rebels or persons who supported the rebels, which ultimately according to
10 Sudanese law is the same thing. And it was more complicated because of the
11 provisions of Sudanese law sanctioning a refusal to obey an order or the law from
12 a competent public authority - for example, a state minister - which would incur also
13 the death penalty for whoever disobeyed it.
14 And in this context it is highly improbable that a person who had not received
15 training on the principle of distinction was able to understand and perceive
16 the factual circumstances which make it possible to determine the status of persons as
17 belonging to the civilian population under Article 7 or as non-combatants in Article 8.
18 The mental element, knowledge, under Article 30(3) of the Statute is therefore not
19 established, neither in the case of crimes against humanity nor in the case of war
20 crimes.
21 And just by way of precision before going on to the next point, I am not telling you
22 that the fact that a person who incurs the death penalty under law, the fact that this
23 authorises any other person to kill them without a trial, without appearing before
24 judges, without a judicial decision, a summary execution. That is not the Defence
25 counsel who will tell you that. But, the question that has to be put is whether -- or to

1 understand what knowledge, the guarantees of a fair trial, is it possible to expect from
2 a non-educated person who stopped their studies without even having finished
3 secondary school?

4 And the more relevant question linked to that first question is that of knowing what
5 assurance one could expect from this person who is not educated. What could they
6 know that would make it possible for them to resist a given order to kill, to raze
7 villages to the ground, knowing that this resistance to this order, whatever
8 the grounds for it, whether legal or not, would incur the death penalty.

9 I am not pleading a Defence, Erdemović. I would recall here for the public, before
10 the International Criminal Tribunal for Yugoslavia, one of the first cases, Erdemović is
11 one of a person who participated in an execution squad. In the day, according to his
12 own estimation, he would have killed more than 70 people within the framework of
13 this execution squad. And Erdemović, when he participated in the death squad,
14 knew what he was doing was wrong. He didn't want to participate in the execution
15 squad, he wanted to say, "No, I'm not going to shoot." Well, if you don't shoot, go
16 and join the group who are being shot at. And under this constraint of death, that is
17 a defence Article 30(3), Erdemović participated in the crime. But the difference with
18 our case is that, unlike Erdemović who understood that something bad was
19 happening, there is no evidence of knowledge for all the reasons that I indicated.
20 There is no proof of knowledge, of understanding that what is happening is illegal,
21 that the people who are being attacked are not rebels, that they do not support
22 the rebels, that they do not incur the death penalty under Sudanese law. This
23 knowledge is not there and this is all the difference between our case and
24 the Erdemović case.

25 The circumstances in the case in point I describe, they demonstrate that even

1 assuming, without admitting that Mr Abd-Al-Rahman committed the crimes alleged
2 by the Office of the Prosecutor, all the conditions related to the facts under
3 Article 32(1) have been met. And here I'm referring to the evidence of the absence of
4 knowledge in the sense of Article 30(3), and I add the possibility of knowing that
5 the victims weren't rebels or people who supported rebels, and therefore would not
6 incur the death penalty, because the government authorities went directly to
7 the location, to them, describe as rebels and to ensure that the villages were razed to
8 the ground.

9 As a consequence, error or mistake of fact in this context of prolonged violence, all
10 the circumstances relating to the fact that the populations that were targeted were not
11 rebels or persons supporting them incurring the death penalty under Sudanese law
12 were met.

13 Even in assuming, without admitting, that Mr Abd-Al-Rahman participated in
14 the crimes set out in the charges, he would have acted on the basis of a mistake of fact,
15 believing that the populations targeted were either rebels or they supported them and
16 thereby would incur the death penalty.

17 The circumstances in the case at point also show that even if we assume, without
18 admitting, that Mr Abd-Al-Rahman committed the facts alleged by
19 the Office of the Prosecutor, all the conditions of mistake of law under 32(2) are met.

20 The absence of knowledge and the possibility of knowing under the circumstances
21 that the -- Mr Ali Muhammad Ali Abd-Al-Rahman, that's who we're talking about,
22 must not attack these people, which makes the mental element be negated under
23 Article 32(2).

24 And in this context of regular and prolonged violence, all the circumstances of
25 mistake of law, not knowing that these people piece were protected people, that they

1 shouldn't be attacked, these circumstances are met.

2 Mr Ali Muhammad Ali Abd-Al-Rahman would have acted in this case on the basis of

3 a mistake of law consisting of believing that he could legally attack these populations

4 because they were rebels or they were persons supporting rebels and they incurred

5 the death penalty under Sudanese law. Of course, what I say is something that he

6 would have known, that's no admission, these are the facts alleged by the Prosecution,

7 assuming they are considered to be sufficient.

8 And a last point that I would like to make in the circumstances in the case in point,

9 there was also -- it was also impossible to know that the order to attack the population

10 or the civilians was illegal in the sense of Article 32(2) of the Statute, which constitutes,

11 at least for war crimes, a cause of excluding criminal responsibility under Article 32(2).

12 The Sudanese law incriminating resistance to law or a public authority and giving

13 a death sentence for that, in the case the People's Armed Forces Act applies shows,

14 well, that the person who acts knew, at least this time, or thought, that he was acting

15 on the basis of a legal obligation and that if he did not do it he would also be subject

16 to the death penalty.

17 In the Prosecution Brief, the Office of the Prosecutor alleges on several occasions that

18 there were specific orders to attack the population given by the civilian or military

19 authorities.

20 The policy of the Government of Sudan, paragraphs 23 to 47; counterinsurgency

21 campaign, paragraph 29; the order to mobilise the Mujahedin, paragraph 31; and

22 the meetings and speeches, paragraphs 32 to 36, and here I'm going to quote

23 paragraph 32: (Speaks English) A person "issued operational instructions", "discussed

24 regional implementation", "delivered motivational speeches".

25 (Interpretation) Paragraph 33: (Speaks English) Harun directing to "clean the area",

1 "crush and wipe", "sweep and mop up". (Interpretation) These meetings, according
2 to the Office of the Prosecutor: (Speaks English) "immediately preceded large-scale
3 offensives against the rebel armed groups."
4 (Interpretation) Paragraph 34: (Speaks English) "discussed mobilisation of
5 militia/Janjaweed to attack supporters of the rebel armed groups, especially the Fur."
6 "Harun gave a speech stating the Government of Sudan was ready to kill
7 three-fourths of the population in Darfur so that one-fourth could live."
8 (Interpretation) Paragraph 35: (Speaks English) "Harun addressed militia/Janjaweed
9 pledging Government of Sudan support to those who agreed to fight the rebels [...]
10 Harun stated his aim to 'clean the area from Mukjar to Sindu.' [...] declaring the Fur
11 were rebels so their belongings had become '*ghanima*' (the spoils of war)."
12 (Interpretation) Paragraph 36, to finish: (Speaks English) "Harun yet again
13 addressed the crowd stating that the Fur fought and initiated a rebellion against
14 the government and indicated that they should be targeted for attack."
15 (Interpretation) So the orders are there. That was the law. You have the code of
16 military justice and you have the orders given by the competent authorities,
17 a minister within the government.
18 Paragraphs 37 to 41 of the Brief speak about recruitment, training, arming and
19 financing of the militia, the Janjaweed to participate in these attack.
20 Paragraphs 42 to 47 speak of the impunity guaranteed to the perpetrators of the
21 alleged crimes.
22 Colonel Murnane indicates to us, in page 9 and 10 of the report, information which is
23 very precious on this particular circumstance. I quote: (Speaks English)
24 "While the defence of obedience to superior orders is strictly limited under Article 33,
25 proof that a service member has received adequate training on the principles which

1 attend to the issuance of lawful orders in combat are a necessary consideration when
2 determining whether the person knew or did not know that the order given was
3 unlawful. Additionally, such training would be essential in deciding whether
4 the accused person knew or should have been aware that the order was manifestly
5 unlawful.

6 "It is against this obligation for compliance with orders and, in the absence of
7 meaningful training on the complexities of the Geneva Convention obligations in
8 the context of ongoing tribal conflict, that a decision must be made whether
9 the person knew or did not know the order given was lawful, and whether the person
10 knew or did not know that the order was 'manifestly' unlawful. Given the added
11 notions of hostile intent, this particular issue must be carefully considered [where]
12 there is evidence that relevant training has not been delivered."

13 (Interpretation) I interrupt just to say that, taking into account the information that
14 was given to Colonel Murnane, the six questions at the beginning of the report,
15 the code, a criminal code and military justice was not brought to his attention.
16 So in this context of regular and prolonged violence, all the circumstances for
17 a mistake of law consisting of not knowing that the persons targeted were protected
18 and must not be attacked and that the repeated orders given to attack were illegal are
19 met.

20 Even if assuming, without admitting it in any way, that Mr Abd-Al-Rahman
21 committed the acts described in the charges, he would have acted on the basis of an
22 error of law consisting of believing that he was obliged, under Sudanese law and
23 repeated orders of governmental authorities, to attack these populations at the risk, if
24 he did not do so, of disobeying the law and himself incurring the death penalty.

25 By way of conclusion, in the particular circumstances of the case in point, there's

1 a lack of -- or there's an absence of training in international humanitarian law or in
2 the principle of distinction between combatants and non-combatants. There was
3 prolonged and regular violence punctuated by, on average, an attack every two days
4 by the rebels at the time of the events.

5 The Sudanese law sanctioned with the death penalty rebellion and providing
6 assistance to rebels. It also sanctioned with the same death penalty a refusal to obey
7 orders given by the law or by competent public authorities. All the available
8 evidence demonstrates, even if assuming without admitting it in any way, that
9 Mr Abd-Al-Rahman participated in the acts described in the charges, he would have
10 therefore acted, firstly, without knowledge in the sense of Article 30(3) of the Statute.

11 The absence of proof of this mental element common -- constituting part in all
12 the crimes set out in the charges, as such, the charges must be set aside in total.

13 A mistake of fact as grounds for excluding criminal responsibility under Article 32(1)
14 of the Statute, namely a mistake in perception, widely propounded by the Sudanese
15 authorities, according to which the victims were rebels or persons who supported
16 them incurring the death sentence under Sudanese applicable law.

17 And thirdly, that he would have acted on the basis of a mistake of law as a ground for
18 excluding criminal responsibility, Article 32(2), if it negates the mental element,
19 namely an erroneous perception widely propounded by the Sudanese authorities that
20 he could legally attack victims or target their property due to the fact that these
21 people were rebels or they were persons who supported them and thereby incur
22 the death penalty under Sudanese law.

23 And finally, he would have acted on a mistake of law as a ground for excluding his
24 criminal responsibility under Article 32(2) of the Statute, superior orders and
25 prescription of law, namely the perception -- mistaken perception imposed by

1 the Sudanese authorises that he was obliged under Sudanese law to attack these
2 populations at the risk, if he did not do so, to disobey the law and to himself incur
3 the death sentence.

4 For all these reasons, as mentioned yesterday with regards to the facts and
5 the absence of proof of a link between Mr Abd-Al-Rahman and the -- and
6 Ali Kushayb, and the absence of proof of the involvement of Mr Abd-Al-Rahman in
7 the commission of the crimes, that he was manifestly not in a position to exercise
8 the authority that is accorded to him, and for those his lack of knowledge of the fact
9 that the acts described in the charges were illegal and that he had not only the power
10 but also the duty to not commit them, the absence of knowledge of this element, I
11 would therefore ask by way of conclusion for the Pre-Trial Chamber II to reject all
12 the charges against Mr Ali Muhammad Ali Abd-Al-Rahman.

13 I have finished and I thank you.

14 PRESIDING JUDGE AITALA: [11:47:33] Thank you very much, Mr Counsel. Also
15 for taking a bit less than the time that was allowed to you.

16 Now, I'll tell you what, the plan of the Chamber is to conclude today, so tomorrow
17 morning we will be -- we will be devoting one session to the detention hearing, and
18 this will also allow to cut on cost which are quite substantial.

19 Now, before I give the floor to the Prosecution for the concluding statement, I will
20 make a request for a clarification that, if you wish, you can include in your
21 statements.

22 Now, the matter is about the surrounding areas. Now, in the first observations
23 under Rule 122(3), the Defence has submitted that the systematic reference to
24 the surrounding areas of the charged locations in the DCC, in the Document
25 Containing the Charges, would render it impossible to clearly define the geographical

1 scope of the charges against Mr Abd-Al-Rahman. The term "surrounding areas" is
2 also used frequently in the Pre-Confirmation Brief by the Office of the Prosecutor.
3 Now, on Monday the Defence has requested a clarification as to the statement
4 of the Prosecutor to the effect that, "when we speak of various surrounding, Kodoom
5 and Bindisi, these include the villages which surrounds these areas," I'm quoting.
6 The Prosecutor has responded that, "when we speak of the surrounding areas in
7 respect of Kodoom and Bindisi, we are speaking about the outer limits such as
8 the fields and connected mountains."

9 So, Mr Prosecutor, if you wish so, it could help the Chamber and everyone to
10 understand, to hear a clarification on what this term "surrounding areas" mean in
11 the charging documents.

12 So now the floor is yours for the concluding statement. You have 45 minutes.

13 MR NICHOLLS: [11:50:25] Thank you very much, your Honours. We will use less
14 than that 45 minutes, I can, I believe, assure you.

15 First, Mr Kamran Choudhry will go through a brief response to one of the issues
16 raised by the Defence, and then I will turn to your question and -- and wrap up very
17 briefly. Thank you.

18 PRESIDING JUDGE AITALA: [11:50:50] Thank you very much.

19 Please, sir.

20 MR CHOUDHRY: [11:50:53] Good afternoon, your Honours.

21 My name is Kamran Choudhry, as has been stated, and I shall be addressing you on
22 matters that were raised by the Defence yesterday. In particular, I shall be
23 addressing you and responding to the claim made by the Defence that the Court has
24 before it the wrong man, and that Mr Abd-Al-Rahman was never known by the alias
25 Ali Kushayb.

1 Your Honours are aware that the Prosecution has already provided written
2 submissions on this issue in filing 224 that was submitted on 7 December 2020, as well
3 as in its Pre-Confirmation Brief.

4 As the evidence referred to in those submissions demonstrates, multiple sources
5 establish that Mr Abd-Al-Rahman and Ali Kushayb are the same person. This
6 evidence is provided by persons who knew from Abd-Al-Rahman before, during and
7 after the conflict. It is provided by his victims, as well as members of the armed
8 forces of the Government of Sudan, who directly observed him during operations.

9 The submissions made by the Defence yesterday on this issue only serve to
10 strengthen that evidence. And I shall address your Honours on that.

11 I shall also address you on the topic that the Defence failed to provide an explanation
12 for yesterday, and that is Mr Abd-Al-Rahman's own words and conduct which show
13 that he himself uses the name Ali Kushayb.

14 But I turn first to the Defence submissions that support the Prosecution's case.

15 Yesterday, your Honours heard Defence counsel accept as true various facts on behalf
16 of Mr Abd-Al-Rahman. At between pages 64 and 66 of the real-time transcript,
17 submissions made by the Defence show that they agree with the Prosecution in
18 a number of respects.

19 The Defence agrees that Mr Abd-Al-Rahman was a warrant officer in the Sudanese
20 Armed Forces. They agree that he was the owner and operator of a pharmacy
21 located in Garsila. And they agree that he was a member of the Central Reserve
22 Forces in 2005.

23 These facts reinforce and corroborate the evidence provided by Prosecution witnesses
24 that are relied on to prove the link between the two names.

25 For example, Witness P-117 states, and I quote: "Ali Muhammad Ali Abd-Al-Rahman

1 had the nickname of Ali Kushayb." He also provides that Mr Abd-Al-Rahman was
2 a warrant officer in the Sudanese Armed Forces.

3 Witnesses P-112, P-769 and P-123 all knew Mr Abd-Al-Rahman by both his legal
4 name and his alias Ali Kushayb. All three of those witnesses state that the person
5 they knew by both of those names owned and operated a pharmacy located in
6 Garsila.

7 Witness P-769 states, and I quote: "Ali Muhammad Ali Abd-Al-Rahman is known as
8 Ali Kushayb." And he provides that Mr Ali Abd-Al-Rahman was a member of the
9 Central Reserve Forces. Witness P-883 says the same thing.

10 Several more witnesses are listed in the Prosecution's filing number 224. The sheer
11 possibility that these witnesses are wrong, or that they are speaking about an entirely
12 different person with both names is implausible.

13 Furthermore, the Defence have not offered any explanation of why, since
14 Mr Abd-Al-Rahman surrendered to this Court, no one has come forward to say that
15 a terrible mistake of identity has been made. That is, not a single one of the victims
16 who the Defence have expressed their regret at disappointing have come forward to
17 say that, after waiting for justice for 18 years, regrettably, the wrong man is before this
18 Court.

19 In addition, not a single member of the Government of Sudan has come forward to
20 say that either.

21 I turn now to the next subject, and that is Mr Abd-Al-Rahman's own words and
22 conduct.

23 Despite it being raised in the Prosecution's written submissions, the Defence appears
24 to have chosen not to address your Honours on the circumstances that has led him to
25 appearing before this Court today.

1 This is not a case in which a suspect was arrested unwillingly.

2 Your Honours, I see my learned friend rise.

3 MR LAUCCI: [11:56:58](Interpretation) The rule that you fixed for the presentation
4 on the merits, does that rule still apply, because if it does then I feel I will need to
5 intervene immediately?

6 PRESIDING JUDGE AITALA: [11:57:16] Well, sir, I would tend to believe that
7 the right thing is that you will challenge any in your -- when it's your turn to make
8 your final statements.

9 MR LAUCCI: [11:57:25](Interpretation) Thank you, your Honour.

10 PRESIDING JUDGE AITALA: Please continue.

11 MR CHOUDHRY: [11:57:29] Your Honour, as I left off, this is not a case on which
12 a suspect was arrested unwillingly. Rather, Mr Abd-Al-Rahman voluntarily
13 surrendered to this Court, and upon an arrest warrant which clearly specified both
14 names. In order to do so, he had to undertake a long and difficult journey from
15 Sudan to the Central African Republic. The Defence cannot now reasonably claim
16 that the arrest warrant had nothing to do with Mr Ali Abd-Al-Rahman.

17 Reflection on Mr Ali Abd-Al-Rahman's conduct during the surrender process itself
18 serves as another basis from which your Honours may conclude that he accepts that
19 the name Ali Kushayb applies to himself. This is because at no time during
20 the surrender process did he ever refute or take issue with the name Ali Kushayb.
21 This includes when he was arrested and when the arrest warrant was read to him in
22 Arabic by the Central African Republic authorities, or when he interacted with
23 the Registry of the Court.

24 On the contrary, what the evidence shows is that, in arranging his voluntary
25 surrender, Mr Abd-Al-Rahman expressly used the name Ali Kushayb when speaking

1 about himself.

2 On 20 March 2020, several months in advance of his surrender, Mr Ali

3 Abd-Al-Rahman provided an unsolicited video message to

4 the Office of the Prosecutor. In the video, he can be heard to introduce himself in

5 Arabic by both his legal name, as well as the alias Ali Kushayb.

6 The Defence provides no explanation for this.

7 I shall play you the video, and that's at ERN DAR-OTP-0216-0119.

8 Your Honours will be able to note from the video that at the start Mr Abd-Al-Rahman

9 says in Arabic the following: (Speaks Arabic) Which translates as, "In the name of

10 Allah, the lord of mercy, the giver of mercy, I am Ali Muhammad Ali

11 Abd-Al-Rahman, and my name -- my nickname is Kushayb."

12 I shall now play the video, and if I could just ask your assistance to see whether

13 they're ready.

14 (Viewing of the video excerpt)

15 PRESIDING JUDGE AITALA: [12:00:49] We could hear it but -- sorry, is it a video or

16 just a --

17 MR CHOUDHRY: [12:00:56] It's a video clip of 9 seconds, your Honour.

18 THE COURT OFFICER: [12:01:06] Would counsel kindly drag the video to the

19 evidence (Overlapping speakers)

20 PRESIDING JUDGE AITALA: [12:01:06] I think it's on the side. It's on the side.

21 MR CHOUDHRY: [12:01:10] Is that it? Right.

22 (Viewing of the video excerpt)

23 MR CHOUDHRY: [12:01:24] Your Honours, Mr Ali Abd-Al-Rahman's words and

24 conduct, and his express use of the name Ali Kushayb when speaking about himself,

25 renders the claims that he makes now unreasonable.

1 I conclude by briefly addressing you on the Defence submissions that were raised
2 yesterday and that relate to discrepancies in some of the evidence.

3 Much was said yesterday in relation to discrepancies with respect to dates,
4 Mr Abd-Al-Rahman's age, his date of birth, or his progression through the Sudanese
5 Armed Forces. But such discrepancies fail to undermine the multiple sources of
6 evidence that have been put forward and which establish that Mr Abd-Al-Rahman
7 and Ali Kushayb are the same person.

8 The Prosecution submits that these discrepancies the Defence raised are neither
9 problematic, they're not uncommon, nor are they unusual in trials that come before
10 this Court and which involve conflicts that may span several years. It is understood
11 that evidence, as is the case in this instance, may be obtained several years after
12 the events. Record-keeping may not be precise.

13 There is also a cultural dynamic. Dates and reference points differ amongst different
14 communities.

15 The Defence itself acknowledged as much when it made its submissions yesterday
16 and accepted that Mr Abd-Al-Rahman's date of birth varied amongst documents it
17 relied on.

18 Mr President, your Honours, the Court has the right person before it. This matter
19 should proceed to trial, where Mr Abd-Al-Rahman will have the opportunity to
20 confront the many witnesses that say they know him by both names.

21 This concludes my presentation, your Honour.

22 PRESIDING JUDGE AITALA: [12:03:49] Thank you very much, sir.

23 Mr Nicholls.

24 MR NICHOLLS: [12:04:17] Thank you very much, your Honours. I'll try to first
25 briefly address your question on the meaning of surrounding areas.

1 Now, in regard to the crime bases in Deleig and Mukjar, as Ms Whitford spoke about,
2 and Mr Sachithanandan, in relation to Mukjar, the crime involved detained men,
3 persons, being held inside the towns. And I'll put them together, because it was very
4 similar in both incidences, of Mukjar, and then shortly after Deleig.
5 These victims were placed on vehicles taken outside the limits of the towns, Mukjar
6 and Deleig, and then executed nearby in other locations.
7 And as Ms Whitford said, we cannot say the exact precise location of these execution
8 sites. We're relying on the witness testimony of how many kilometres it was outside
9 from the centre of the town, et cetera.
10 So there we're talking about surrounding areas for the crimes in Mukjar and Deleig.
11 There are several counts that occur within the crimes, torture, some of the murders,
12 and other crimes within the actual towns and the police stations and the square, but
13 other murders are carried out outside.
14 In relation to Bindisi and Kodoom in August 2003, this was one attack between about
15 15 and 16 August 2003, one course of conduct that we tried to make clear in
16 the Pre-Confirmation Brief and in our presentation. And now in the DCC, in
17 the Document Containing the Charges, in paragraph 5, we specify that other towns
18 which were attacked at or around the same time are not charged.
19 And we repeat this explanation as well, you can see in paragraph 149. And I'll make
20 a note to -- it's redacted in the -- in the redacted version of the Pre-Confirmation Brief,
21 but in the unredacted version there's relevant information in footnote 631 as well.
22 Now, as these crimes are occurring, as the evidence shows from the witnesses, and as
23 Ms Simms discussed and it's set out in our brief, many of the citizens, the villagers,
24 fled the towns of Kodoom and Bindisi, and during this attack crimes were committed
25 along the roads and in the fields nearby outside of these towns.

1 So that is, in essence, what we are discussing. At this time, victims of this type of
2 crime in Kodoom and Bindisi would not have had GPS device, anything like that that
3 would provide an exact precise location of how many metres or kilometres outside of
4 the village proper, the village itself.

5 So that is what we are referring to. I hope that is helpful.

6 And the jurisprudence I would point you to quickly. It's in the Ntaganda case,
7 the reparations order 8 March 2021, at paragraph 107. And in that same case, in
8 the decision on the updated Document Containing the Charges, 6 February 2015, at
9 paragraph 74, where the Chambers discuss that all the crimes may not have occurred
10 in the actual location mentioned but some were nearby.

11 That would be my explanation, your Honour, but I'm happy, if you have a further
12 question, to try to address it.

13 PRESIDING JUDGE AITALA: [12:08:47] Please continue with your statement.

14 Thank you.

15 MR NICHOLLS: [12:08:50] Okay. Thank you.

16 Now, to conclude, as I said, very briefly. What we have done in this hearing is to try
17 to set out as clearly as possible the line of reasoning that shows that

18 Mr Abd-Al-Rahman, Ali Kushayb, is responsible for all the counts in the Document
19 Containing the Charges. We've shown that in our presentations over the last days
20 and it's set out in our DCC and in our PCB.

21 Nothing we've heard from the Defence, nothing, changes the fact that we have met
22 the substantial grounds standard.

23 The name issue, Kamran Choudhry has discussed, and the Defence there seems to be:
24 Well, it's not me. But if it is me, I'm relying on an expert report that was deliberately
25 designed to focus on a hypothetical conflict in a hypothetical country or region, with

1 hypothetical combatants, a hypothetical defendant with a hypothetical training level.

2 And there was the purposeful decision not to provide the military expert with
3 information surrounding this case.

4 So all the issues, I would say, your Honours, raised by the Defence point to one thing,
5 that it's time for a trial on this case. These are all potential defences we have heard
6 which can be raised at trial. The confirmation standard is met, we should have
7 a trial to sort out all of these issues, and there can be cross-examination on whether
8 there are hearings and all of these matters.

9 So we request your Honours that all of the counts be bound over for trial.

10 And just finally I'll respond to one point raised by the various representatives for
11 the victims, because you've raised it. We will 100 per cent continue to investigate.

12 We are guided by the evidence and the law and our burdens that we must meet.

13 And when and if we meet those burdens, it will sustain additional charges, we will
14 present them to the Chamber and it will be up to the Chamber to decide.

15 Thank you, your Honours.

16 PRESIDING JUDGE AITALA: [12:11:54] Thank you very much, Mr Prosecutor.

17 Well, now is the time for the Legal Representative of the Victims to make their closing
18 statements.

19 Ms Massidda, can you please tell the Chamber what are the arrangements with you
20 and your colleagues. Thank you.

21 MS MASSIDDA: [12:12:13] Yes, your Honour. I'm ready to start for the legal

22 representative. With the indulgence of the Chamber, it may be necessary for

23 Ms Clooney and Mr Amin to conclude after the lunch. I understand they are

24 coordinating amongst them. But I'm certainly ready to start and I will take, I think,

25 20, 25 minutes.

1 PRESIDING JUDGE AITALA: [12:12:41] Okay. Well, you know, you've been given
2 one hour. The thing is that I could be -- I could accept the request of the two other
3 Legal Representative of Victims, provided that they will not exceed the time, because
4 then we need to give 45 minutes to the Defence, and of course I will not curtail at all --

5 MS MASSIDDA: [12:13:06] I see my colleague nodding.

6 PRESIDING JUDGE AITALA: [12:13:07] -- the time of the Defence.

7 MS CLOONEY: [12:13:09] Yes, your Honour. I'm very grateful for your indulgence,
8 and I can confirm that we won't exceed, between the two of us, the half an hour that
9 I believe we have allocated for the legal representatives.

10 PRESIDING JUDGE AITALA: [12:13:24] Then, Ms Massidda, please, the floor is
11 yours.

12 MS MASSIDDA: [12:13:28] Thank you very much, your Honour. Much obliged.
13 Mr President, your Honours, I -- I have few remarks following the Defence
14 presentation.

15 As explained in our opening statements, victims have waited for justice for almost
16 20 years, and they are following these proceedings. As you can imagine, the main
17 line of arguments developed by the Defence yesterday was particularly unacceptable
18 for victims and they have asked me to convey the following views and concerns:

19 First, on the fact that Mr Abd-Al-Rahman is not Ali Kushayb, all of them,
20 participating victims and persons who are still applicants, recognise
21 the person -- the suspect as the person who inflicted on them or on their family
22 members sufferings and caused their displacement, leaving them destitute today.
23 I aver Mr President, your Honours, that this identification by victims is not to be
24 regarded as evidence, but can such a large number of people really be mistaken?
25 But what is more, victims insist on the following issues:

1 On the Kushayb nickname, according to Defence counsel it took a lot of effort to find
2 the *sens* or the meaning of the nickname Kushayb, and eventually reached
3 the conclusion that it is something to do with alcohol.
4 Now, your Honours, the victims we represent are older Furians, they know their
5 language, so maybe the Defence should know that Kushayb has indeed two meanings,
6 one, alcohol, only in West Darfur, not really popular nickname but referring to
7 a tough fighter in a much more accepted meaning.
8 Finally on this point, your Honours, I incidentally note that Mr Abd-Al-Rahman
9 himself acknowledged it is his nickname in the video which was just shown by
10 the Prosecution 15 minutes ago.
11 Second aspect, on the discrepancies regarding the year of birth of the suspect, age in
12 Darfur is not significant at all. It is based on an estimation, as also recognised by
13 the Defence on Thursday and also this morning. Actually, your Honour, if you lose
14 your birth certificate, the authorities of the ministry of health will issue you another
15 one likely to contain a different year because they will just estimate your age as there
16 is no database recording these kinds of data, or at least there was no database at least
17 very recently.
18 So, your Honour, your date of birth will likely to be 1 January in any event. And on
19 this point, I am sure, your Honours, you have certainly noted, in reviewing
20 the application forms of participating victims, that practically all are born on
21 1 January in a certain year.
22 Third point that the victims would like this Chamber to hear. On the ethnic
23 composition of the Janjaweed militia, Abd-Al-Rahman, as acknowledged by
24 the Defence, is from Ta'aisha ethnicity. The Ta'aisha are Arabs, although of
25 darker -- darker skin colour. But this is not really so important since, in any event,

1 people from non-Arab ethnic groups also joined the Janjaweed for financial purposes,
2 contrary to Ms Flint's study as read by the Defence yesterday.

3 Indeed, as already explained yesterday during my opening statements, the wealth of
4 Darfuri people is not based on salary, but on cattle size. And whatever the salary of
5 Mr Abd-Al-Rahman was, as repeated several times by the Defence in its presentation,
6 thanks to the pillages he was a very wealthy man, so were the members of the
7 Janjaweed.

8 And in any case, contrary to the Defence assertions, the Janjaweed was not composed
9 only of Rizeigat people, and I may refer to the list of authorities I have provided to
10 the Chamber yesterday, the first part in relation to the background and cause of the
11 conflict.

12 On the fact that, contrary to other Janjaweed leaders, Abd-Al-Rahman has no social,
13 political or economic situation. The victims insist on the fact that Hemeti, to whom
14 the Defence compared Mr Abd-Al-Rahman yesterday -- I'm referring to the Janjaweed
15 leader now number two in the transitional government. So the fact that Hemeti had
16 no military training and that if he has money now, it's not because he comes from
17 a wealthy family but because of the pillages when he was fighting with
18 the Janjaweed.

19 Mr Abd-Al-Rahman owes his nickname Kushayb to the fact that he was a though
20 fighter, and that is exactly what lead him at the top of the Janjaweed militia.

21 It doesn't matter if he was educated or not, whether he received military training or
22 not, whether his father was a *nazir* or not, he made it to the top because of his
23 operational abilities.

24 It has nothing to do with the possible social lift referred to by the Defence yesterday.

25 Regarding the "colonel of colonels" title, or the *agid al-ogada* in Arabic, victims insist on

1 the fact that he should not be regarded as a comparison with the regular army titles.
2 Indeed, although it takes from the word *agid*, which refer to the rank of colonel in
3 standard Arabic, in Sudanese Arabic it refers to a traditional military chief in Darfur,
4 and therefore merely demonstrates that Mr Abd-Al-Rahman was indeed
5 commanding over the Janjaweed.

6 Second issue that I would like to address your Honour is the legal argument of the
7 Defence presented this morning in relation to the knowledge of the attack under
8 Article 7 of the Statute and knowledge of the conflict under Article 8 of the Statute.
9 First, on the knowledge on the part of a suspect that there was an attack against
10 the civilian population and that his act was part thereof, the determination of the
11 elements comprising the *mens rea* of crimes against humanity has proved particularly
12 difficult and controversial. Nevertheless, the requisite *mens rea* for crimes against
13 humanity appears to be comprised of two elements, one, the intent to commit
14 the underlying offence, combined with, two, knowledge of a broader context in which
15 that offence occurs.

16 And I refer your Honour to the Kupreškić trial judgment, paragraph 322. A list of
17 authorities will be provided to the Chamber during the lunch break. A more
18 detailed one.

19 This however -- this element, however, does not entail knowledge of the details of the
20 attack. It is sufficient that through his acts or function which he willingly accepted,
21 he knowingly took the risk of participating in the implementation of the attack.

22 Tadić trial judgment paragraph 656, 659.

23 The accused, as it was for the Trial Chamber in Blaškić in this case, the suspect need
24 not have sought all the elements of the context in which his acts were perpetrated.

25 It suffices that, for the functions willingly accepted, he knowingly took the risk of

1 participating in the implementation of that context.

2 Furthermore, the suspect need not share the purpose or goal beyond the attack. It is

3 also irrelevant whether the suspect intended his acts to be directed against

4 the targeted population or merely against his victims.

5 Accordingly, in our submission, your Honour, the Prosecution does not need to prove

6 that the suspect chose his victims for their civilian status. The Prosecution must

7 show that the perpetrator -- the alleged perpetrator could not reasonably have

8 believed that the victim was a member of the armed forces.

9 However, and as a minimum, the perpetrator must have known or considered

10 the possibility that the victim of his or her crime was a civilian.

11 In the Kunarac case, the Trial Chamber of the ICTY stressed that, in case of doubt as

12 to whether a person is a civilian, that person shall be considered as a civilian. So it

13 must be only showed that the alleged perpetrator could not reasonably have believed

14 that the victim was a member of the armed forces.

15 Given that the members of the respective forces on the ground were acting in

16 a concerting manner, it suffice that the Pre-Trial Chamber finds substantial grounds

17 to believe that either the principal perpetrators, or the ones on the ground at whose

18 behest they were acting, meaning were commanding them during the operation, were

19 aware that their acts comprised part of a larger attack against the Fur population in

20 the region. Therefore, we submit that the Defence argument in this regard should be

21 dismissed.

22 On this first point, it is our submission that there is no reasonable possibility that

23 Mr Abd-Al-Rahman could not have known about the situation of the Fur civilian

24 population in those areas. There is sufficient evidence to establish substantial

25 grounds to believe that the suspect wilfully pursued the goals of the attack against

1 the Fur civilian population in the areas and therefore also knew that his acts fit into
2 the pattern of the attack.

3 On the issue, your Honour, that the suspect was aware of the factual circumstances
4 that establish the existence of an armed conflict, the element of crimes provide
5 a common mental element for each war crime under Article 8(2)(a). The suspect was
6 aware of the factual circumstances that established the existence of an armed conflict.
7 This element is supplemented by the following interpretive clarification as to
8 the mental element included in the introduction to the war crimes section of the
9 Elements of Crimes text. In particular, there is no requirement for a legal evaluation
10 by the alleged perpetrator as to the existence of an armed conflict or its
11 characterisation.

12 In that context, there is no requirement for awareness by the alleged perpetrator of
13 the facts that established the character of a conflict as international or
14 non-international. There is only a requirement for the awareness of the factual
15 circumstances that establish the existence of an armed conflict that is implicit in
16 the terms, took place in the context of and was associated with.

17 Therefore, the Pre-Trial Chamber in Katanga and Chui stated -- same decision which
18 was I think also recalled this morning by the Defence, I quote:

19 "... the war crime of wilful killing provided for in article 8(2)(a)(i) of the Statute also
20 requires that the perpetrator is 'aware of the factual circumstances that established the
21 protected status' of the victims. Thus, ..." - this is an important one - "... it is not
22 necessary for the perpetrator to have made the necessary value judgment to conclude
23 that the victim did in fact have protected status under any of the 1949
24 Geneva Conventions."

25 Is the Katanga and Chui confirmation of charges decision, paragraph 305.

1 Mr President, your Honours, there is sufficient evidence to establish (Overlapping
2 speakers)

3 PRESIDING JUDGE AITALA: [12:31:59] I heard the Arabic translation. What's
4 happening?

5 THE INTERPRETER: [12:32:08] Your Honours, the error is fixed now. Thank you.

6 PRESIDING JUDGE AITALA: [12:32:12] Thank you.

7 Please continue.

8 MS MASSIDDA: [12:32:17] Mr President, your Honours, there is sufficient evidence
9 to establish, substantial grounds to believe that, when directing attacks on the civilian
10 population, as described by the Prosecution, and when killing the civilian population,
11 the suspect, one, intended to kill civilians not taking direct part in the hostilities and
12 the civilian population as such.

13 Two, knew that in the ordinary course of events the attack would include killings
14 targeted at protected persons and unarmed persons, including women, children and
15 the elderly, most of whom could not have been mistaken for combatants, and civilian
16 victims who belonged to the adverse party to the conflict. Such awareness can be
17 inferred on an objective basis and in accordance with the precedents established by
18 international criminal tribunals, as also previously indicated.

19 To conclude, Mr President, your Honours, the Prosecution has shown, in the victims'
20 view, that there is sufficient evidence to establish, substantial grounds to believe, that
21 Mr Abd-Al-Rahman committed all crimes as charged, and therefore all counts should
22 be confirmed.

23 The victims' account of events corroborates the Prosecution case. The Defence has
24 been unable to provide any valid argument, either in fact or in law, to challenge
25 the Prosecution case as presented.

1 Pre-Trial Chambers of this Court have consistently understood the evidentiary
2 threshold established in Article 61(7) of the Statute as requiring the Prosecution to
3 merely offer concrete and tangible proof demonstrating a clear line of reasoning
4 underpinning its specific allegations.

5 At the current stage of the proceeding, the Chamber is not meant to determine
6 the suspect's criminal liability or lack thereof. Instead, at this stage the Chamber is
7 meant to assess whether sufficient evidence has been presented by the Prosecution to
8 commit the suspect for trial.

9 Considering the entire evidence presented by the Prosecution, and the corroboration
10 by the accounts of the participating victims, we submit that there is sufficient
11 evidence to establish, substantial grounds to believe, that Mr Abd-Al-Rahman
12 committed the crimes alleged against him, reaching the standard of proof required by
13 Article 61 of the Statute.

14 Victims therefore request the Chamber to confirm all charges brought against
15 Mr Abd-Al-Rahman and to commit him for trial.

16 Thank you, your Honour.

17 PRESIDING JUDGE AITALA: [12:36:02] Thank you very much.

18 (Pre-Trial Chamber II confer)

19 PRESIDING JUDGE AITALA: [12:36:19] Well, thank you very much.

20 Then we will break now and I will adjourn the hearing to 10 past 2, 10 minutes past 2.

21 Okay. For the two other Legal Representative of Victims.

22 Thank you very much.

23 THE COURT USHER: [12:36:38] All rise.

24 (Recess taken at 12.36 p.m.)

25 (Upon resuming in open session at 2.10 p.m.)

1 THE COURT USHER: [14:10:20] All rise.
2 Please be seated.

3 PRESIDING JUDGE AITALA: [14:10:40] Good afternoon. Welcome back.
4 Now it's the time for the other Legal Representative of Victims, starting with you, I
5 understand, Ms Clooney. The floor is yours, please.

6 MS CLOONEY: [14:10:55] Yes, your Honour, Mr President. Thank you very much.
7 It is a pleasure and a privilege to be addressing you once again. I believe I have
8 15 minutes, so in that time I will focus on the victims' views regarding the key issues
9 that have arisen during this hearing, and I will try not to go so fast that I will make
10 the interpreters' lives too difficult.

11 Mr President, you have heard from the Office of the Prosecutor of the compelling
12 grounds to commit this case to trial. And in my earlier submissions I sought to
13 illustrate the extent to which the views of the victims accord with the Prosecution's
14 case.

15 As the evidence shows, the suspect in this case was not only commanding his men
16 from afar, nor merely present, but as the Prosecution put it on Monday, he was
17 a knowing, willing, and energetic perpetrator who would show no mercy to his
18 victims.

19 We have now heard a detailed account about his actions, commanding thousands of
20 troops, choosing the routes for fighters, ordering them to shoot and kill, supervising
21 arrests and the loading of cars to execution sites, beating detainees with his axe and
22 whip, and when he felt like it, killing them.

23 We heard his words, "Prepare their graves. Just shoot. Just kill. Repeat for these
24 people. Maybe there are some you have missed. Don't leave me one person alive.
25 Wipe out and sweep." Your Honours, these are merely illustrations and my

1 submission is that the evidence is more than sufficient to meet the burden required at
2 confirmation.

3 Your Honours, in my submission, the Defence arguments about a supposed mistake
4 of identity did nothing to change this conclusion. This Chamber has made clear, in
5 its confirmation decision in Yekatom, that this stage of the proceedings does not
6 involve the full presentation of the evidence and that you are generally not required
7 to resolve any apparent contradictions in the evidence or address its probative value
8 at this stage.

9 And, in any event, the Prosecution has easily demonstrated, both in their written
10 filings and before the Court, that this suspect and Ali Kushayb are the same man.

11 The suspect has indeed said it himself, and you heard this in the video that was
12 played this morning.

13 I can also confirm that none of the victims I have consulted since the beginning of this
14 hearing have suggested that this court has the wrong man. Quite the contrary, they
15 are elated to see him here. As one victim stated just this morning, "I've been
16 following the hearing and the man sitting in that courtroom is Ali Kushayb exactly.
17 We've seen him up close because he attacked and killed us in Mukjar and elsewhere.
18 If his lawyer needs people to identify him and the Court needs clarification, we
19 the victims are ready to testify."

20 And, of course, your Honours, this argument can be quickly and easily tested at trial
21 when witnesses are in the courtroom. As I said in my opening, the victims in this
22 case know Ali Kushayb, they knew him before the conflict, they saw him commit
23 crimes during the conflict, and they would recognise him if they saw him again.

24 Of course, the Defence is free to raise any arguments they wish to raise, it is their duty
25 to defend their clients to the best of their abilities, and of course we all respect that.

1 But, I have to confess, this Defence argument was rather difficult to understand.
2 We heard basically that the man in this courtroom is not Ali Kushayb. So does that
3 mean there is another man hiding somewhere who is Ali Kushayb who the Defence
4 agrees should face trial for the 31 counts presented by the Prosecution? Or are they
5 saying that all Prosecution witnesses and victims conspired to concoct uncannily
6 consistent stories about a man who does not exist?
7 And what then of the man who is in the courtroom today? Is the Court being told
8 that he was simply selling medication at his pharmacy while the charged events
9 unfolded? If so, why did the Defence not invoke a defence of alibi for the suspect
10 under Rule 79, specifying where he claims to have been at the time of the alleged
11 crimes and the names of the witnesses who can confirm this.
12 Your Honours, I'm afraid that your analysis of whether the "substantial grounds" test
13 has been met by the Prosecution may not be taken much further based on what you
14 heard yesterday. You heard that the suspect could not be the Janjaweed leader he is
15 accused of being because he has a different tribal background to other Janjaweed
16 leaders, a different military background to them, and because he was not as famous
17 as the other leaders until he was subject to an ICC warrant.
18 But it is not clear why any of these issues would undermine the Prosecution's case.
19 You heard that the suspect was a bicycle delivery boy and that he would have to rise
20 to a position of power so quickly that it begs the question of how such a rise to the top
21 could take place in this time frame. There was even an ironic reference to the film
22 *Slumdog Millionaire*.
23 Your Honours, I'm afraid this argument is as spurious as it is insulting to victims.
24 The trajectory to becoming a Janjaweed commander is not a precocious rise to the top,
25 it is a precipitous slide to the bottom.

1 There was also much discussion yesterday about what the suspect did in 2005 or 2012,
2 events clearly irrelevant since they post-date the incidents described in the charges.
3 You heard as well that the suspect's official title did not reflect what he is accused of
4 doing in this case. Well, your Honours, this Court has affirmed an arrest warrant for
5 crimes against humanity against the suspect's colleague Mr Ahmad Harun, and his
6 official title at the time of the warrant was Minister of State for Humanitarian Affairs,
7 so clearly official titles are not determinate of the issues you are dealing with.
8 Nor is there a need for me to discuss the argument put forward that the suspect could
9 not be Kushayb because Kushayb is a type of wine and this suspect is not a drunk.
10 Your Honours, this argument simply does not warrant further response from
11 the victims' representative in the limited time available.
12 Your Honours, the other Defence argument is that there was no way the suspect
13 could have known that - and here I quote something that the Defence said this
14 morning - no way he could have known that, quote "Something bad was happening,"
15 end quote, without extensive legal training. And this is also, at best, I would submit,
16 an issue for trial.
17 Let us remember that the suspect is accused of hacking unarmed people to death with
18 an axe, commanding men who shot people in the back as they ran away, inducing
19 troops to rape young girls, torturing innocent farmers and young boys and working
20 with Janjaweed to burn villages full of defenceless civilians to the ground. I'm not
21 convinced that the Court will need much assistance in analysing the merits of this
22 argument, but I'm grateful to the Prosecutor and to my colleague from the OPCV for
23 providing a detailed response to it earlier today.
24 So, your Honours, my submission to you is that the Prosecution evidence was
25 compelling, certainly sufficient for purposes of confirmation, and that nothing this

1 Court has heard from the Defence changes that.

2 Your Honours, I'd also like to note what Mr Nicholls, the Prosecutor, said this
3 morning. He stated that the Prosecution will, quote, "100 per cent continue to
4 investigate," and that this would be with a view to potentially adding or seeking to
5 add more charges in this case. And this is in response to some of the most important
6 submissions I've made on behalf of the victims I represent, an issue of great concern
7 to them, and so I'm grateful that the Prosecutor has agreed that more investigations
8 are needed and that a request for further charges could follow in due course.

9 Your Honours, I'd like to end with two final points which are important to
10 the victims.

11 First, the victims have conveyed to me that accountability in this case means bringing
12 the other suspects sought by the ICC to The Hague as well. The Prosecution has
13 clearly shown through their arguments this week that the Janjaweed acted pursuant
14 to a state policy. We know that this Court has approved arrest warrants for three of
15 the top state officials, that's Bashir, Hussein and Harun, and we heard the Prosecution
16 describe the chilling testimony of Witness P-106 that the victims were told, quote:
17 "you Fur kept saying Allah, Allah but your God will not protect you from us. Bashir
18 is our God!"

19 So it is perhaps not surprising, your Honours, that when asked about their views and
20 concerns some of the victims point to the empty chairs in this courtroom where they
21 believe the other perpetrators should be sitting.

22 In the words of one victim, quote: "I want those in power who are in so-called prison
23 to be taken, put beside Ali Kushayb and held accountable for the same crimes."

24 Your Honours, my final point is about what this hearing has already meant for
25 victims who have waited so long for the chance to see justice being done.

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 Your Honours, the victims know that if this case moves to trial the world will finally
6 hear what happened in these forgotten prisons and execution sites, in these villages
7 that were people's homes.

8 When I consulted victims this week about the ongoing hearing, they highlighted that
9 for the first time they know they are not alone, that someone finally is listening.

10 One of my clients, a 40-year-old merchant living in an IDP camp put it this way,
11 quote:

12 "Since yesterday I feel relaxed and comfortable. It is as if we were reborn. Since
13 2003 the perpetrators made us feel like we were in a box. Seeing the perpetrators
14 before the Court, we feel we will be free and get our rights back."

15 Another client explained, quote: "I am happy because the impossible became possible.
16 Ali Kushayb appeared before the Court."

17 And finally, in the words of another victim who is an *umdah* or chief, quote:

18 "We are so happy today because we thought the international community turned
19 a blind eye to us and that our case fell on deaf ears. But finally, after 18 years, we
20 feel that the international community will deliver justice to us and this is all we want."

21 Your Honours, the victims in this case are prepared to testify to this suspect's crimes
22 and they wish to participate in his trial. I stand with the victims and their march for
23 justice and I urge you to move this case forward to trial.

24 Thank you very much.

25 PRESIDING JUDGE AITALA: [14:25:27] Thank you very much.

1 Now, Mr Amin, *masa' alkhayr*. Good afternoon. The floor is yours now.

2 MR AMIN: [14:25:42](Interpretation) Mr President, your Honours, I will try as much
3 as I can to be concise in what I say and to speak about what the Defence has already
4 presented to us.

5 With regards to what the Defence has mentioned, that the suspect was forced to
6 commit those crimes because of the Sudanese, Sudanese laws that actually say that he
7 should be sentenced to death, and this actually does not constitute that he has
8 actually broken these rules.

9 But I would like to point out that there are rules in Sudan and there are laws in Sudan
10 which actually, these laws that I mean, yes, they do not fall under the international
11 armed conflict but they condemned committing these crimes. And here in
12 the submission of the Defence the -- here I would like to point out that the Sudanese
13 government has signed the international treaty against nondiscrimination and it -- it
14 has also signed the treaty against racial discrimination and the protection of children
15 and vulnerable people, and also the respect of human rights and all of the agreements
16 that have been ratified by the Sudanese government. These -- these treaties that
17 have been ratified by the Sudanese government hold a higher position even than any
18 of the Sudanese laws, therefore the Defence relying on the fact that he did not know
19 that he was breaking all of these rules is non-valid.

20 The suspect was obeying what has been -- the orders that have been given to him by
21 the officers that were higher than him, this was one of the things that the Defence has
22 mentioned in his submission. Here I would like to remind the Honourable Court
23 and to remind the Defence that the situation is very different to this, we cannot
24 actually conclude that this is a situation which is similar to Mr Ali Kushayb's because,
25 if we take the case of the -- the tribunal for Yugoslavia, then this soldier that was in

1 the Yugoslavia tribunal refused actually to carry out the act of genocide. He felt that
2 he, by forming this -- this -- by forming the treaties and the soldiers there that he was
3 not able to -- that he should not be implementing these rules and he was only ordered
4 to carry out -- to carry out the genocide in the square and on the field of the war.
5 Therefore, in front of Lemović (phon), he did not have, except to actually -- he could
6 not except abide by the rules or the orders that he has been given. Therefore, he was
7 scared of being killed if he was to disobey the officers, and the officers actually told
8 him that if you do not carry out the genocide and kill over a hundred people, then
9 you will be murdered.

10 On the other hand, here Mr Kushayb, Abd-Al-Rahman, we cannot say that he was
11 fearing the same thing, that he -- he was fearing that any of these laws that would
12 condemn him to death would be applied to him, because there could be trials, there
13 could be sentences to death, and so on. And therefore he was representing -- he did
14 not have any risk that was being forced upon him, he did not have this risk to be
15 enforced upon him and, therefore, that we cannot relying on this as an excuse for him
16 to carry out these crimes.

17 When we talk -- when we talk here, when the Defence mentions here that he does not
18 want us to believe that this person who was a seller of medicines and he was
19 a pharmacy, selling from a pharmacy, that he was not educated, and I believe that this
20 is a very weak reasoning. In fact, this is a natural situation here and this has
21 really -- can really happen in Sudan. This can happen in any place around the world
22 because the qualifications which are required to kill somebody or the qualifications
23 which are required of the person who is requested or ordered to kill people, he does
24 not need very high qualifications, however, he just needs somebody who is ferocious,
25 who is able to carry out these crimes. So the transformation and the idea of the

1 transformation that the Defence spoke about is a very possible idea, in fact. And it is
2 possible that he becomes a leader of an armed militia.

3 We cannot speak here about the education, for example, that you need to be
4 education -- educated to carry out these. And this is within the paragraph 2(a), and I
5 will not talk very long about this because my colleague has spoken in detail about this,
6 therefore we cannot say that if he was not educated means that he was not part of this
7 armed conflict. However, he was here trying to say that he cannot have been acting
8 on a military basis and so on, that because he was uneducated he could not be part of
9 an armed conflict.

10 He said, the Defence has mentioned that he was a famous person, he was working on
11 selling veterinary medicines. And he had many relationships, he was a civilian, he
12 was a merchant, therefore his relationships allowed him very -- in fact, to know very
13 well that the Fur were part of the conflict and that the rebels were part of the conflict
14 and also that the government was a party in this conflict and that the government has
15 requested him to carry out these crimes and has ordered him to these crimes.

16 Therefore, I would say that he was fully knowledgeable, as mentioned in
17 the Article 8(a).

18 Finally, I would like to thank the Prosecution because it has offered us hope.

19 The Prosecution has shown how this investigation can be widened. We feel as
20 representatives of the victims that we really need additional crimes to be added and
21 we will assist as much as we can in the next stage with the investigations.

22 Mr President, your Honours, the souls of the victims, the voices of the women who
23 have fallen under the power and the authority and the violence that have been
24 committed, call upon us all and they are now hovering over this courtroom and over
25 this Chamber and calling for us to allow for the trial of Mr Abd-Al-Rahman. There is

1 very strong evidence to this and this strong evidence was offered by
2 the Office of the Prosecutor and these -- this evidence actually show that Mr Ali
3 Abd-Al-Rahman, known as Mr Ali Kushayb, has committed all of these crimes which
4 are mentioned in the Pre-Confirmation Brief, and he has carried out all of the crimes
5 which have been mentioned in the charges of the Office of the Prosecutor.

6 Therefore, as a representative of the victims, I call upon you and urge you to put this
7 case forward for trial.

8 Thank you very much.

9 PRESIDING JUDGE AITALA: [14:35:48] Thank you very much, sir.

10 Well, now, I give the floor to the counsel of the Defence for his concluding statement.

11 You have 45 minutes. Please, the floor is yours.

12 MR LAUCCI: [14:36:22](Interpretation) Thank you, your Honour.

13 I seem to recall at the beginning of this hearing I talked about the critical situation of
14 Defence, the only voice facing all of you and the representatives of victims. I now
15 have 45 minutes, during which time I will try to respond to what we have heard from
16 the Office of the Prosecutor and the representatives of the victims.

17 I will start with the question that you asked regarding the surrounding areas and
18 the attempt to provide clarification on behalf of the Office of the Prosecutor. I say
19 "attempt" because, I don't know about you, but things were not made much clearer
20 for me with regard to surrounding areas. Once I had heard this clarification, it was
21 no clearer than before.

22 The Deputy Prosecutor spoke of Deleig and Mukjar and the environs, saying that
23 there was no clear site for the executions, and we understand that, of course. But at
24 the same time, he spoke - and that's in paragraph 226 of the brief, the PCB - he also
25 spoke about Tendy, Tendy, which is one of the locations specifically excluded from

1 paragraph 5 of the DCC.

2 I will try and summarise what I understand and say that for Deleig and Mukjar, for
3 the Prosecutor it's important that the victims were there, that they were held there, no
4 matter where they came from and where they were executed later. But the question
5 of the other locations remains open and we have no further news on Kodoom and
6 Bindisi.

7 Tendy is both a location, including the surrounding areas of Mukjar in paragraph 226,
8 yet still a location excluded from the charges in paragraph 5 of the DCC.

9 The OTP has tried to reintroduce proof, evidence with regard to the identity of
10 Mr Abd-Al-Rahman and Ali Kushayb. This was done in a number of stages, which I
11 would like to run through now.

12 Firstly, it was stated that our point of departure was the same. Mr Abd-Al-Rahman
13 was in the army in the past, he left as a warrant officer. He, at the time of the facts,
14 was a pharmacist in Garsila. And the OTP agreed for the first time to
15 the information provided by the Defence - and we thank you for that - the OTP
16 admitted that Mr Abd-Al-Rahman joined the police reserve in 2005. That's fine.
17 2005, which is of course after the events.

18 The OTP legitimately asked the question: Well, Ali Muhammad Ali
19 Abd-Al-Rahman left the army as a warrant officer and as a pharmacist in Garsila, and
20 he spent a long time as a pharmacist in Garsila, and that is a good basis to try and
21 establish identity between the two.

22 I come back to the work of Ms Flint that I said -- that I quoted earlier, and after
23 the facts we rewrote history. We rewrote history in a way that put the responsibility
24 for the crimes on to others, other than those who were responsible for the crimes, so
25 that the crimes would not be investigated. And when you do that it is wise to base

1 this rewriting of history on some clear events. They chose the accused
2 Mr Abd-Al-Rahman to be a certain Ali Kushayb, saying that both were -- both were
3 former warrant officers and former pharmacists in Garsila, which is quite true, and on
4 the basis of this history could be rewritten.

5 I understand that my strategy was described as conspiracy based, but I didn't say that,
6 it was Madam Flint, Ms Flint who described that in Sudan.

7 The OTP cited a number of witnesses, saying that they were capable - I mean we
8 haven't heard any witnesses, which is a great pity, but I mean let's leave that to one
9 side - but we've been assured that if we'd heard these witnesses they would have
10 been able to confirm it.

11 P-177 --

12 THE INTERPRETER: Sorry, I have missed the reference.

13 MR LAUCCI: (Interpretation) -- he says on 0071 of the document that

14 Mr Ali Kushayb (Speaks English) used to work in administrative units of medical
15 treatment. (Interpretation) Well, for a military chief, well, (Speaks English) that he
16 was recruited in the PPF. (Interpretation) We've never heard anything of this from
17 the OTP. That he came from the Habbaniya tribe. Wrong. Ta'aisha. And
18 because he was part of the counterinsurgency he had received a military rank in
19 the PPF. This was not mentioned by the OTP, so presumably there was not much
20 credence given to this witness as he was not quoted.

21 And finally on the subject of this witness 177, he identified Mr Abd-Al-Rahman on
22 the basis of the photo of the Court which was on the site for Ali Kushayb wearing
23 a white turban. It's a photo that's been seen on the Court site, and elsewhere, so it's
24 difficult to disagree with this photo.

25 Similar identification is common to P-769, which was from 2018, so this was to do

1 with accusing Mr Abd-Al-Rahman under the pseudonym Ali Kushayb. And this
2 witness said that he never met Ali Kushayb in person and this witness says to us that
3 the Popular Defence Forces were excluded from the counterinsurgency because they
4 were mostly Darfuri. And this witness also produces and comments on 0215-4658,
5 a document that talks about a transfer of I don't know how many vehicles, heavy
6 weapons, and what have you, to Mr Abd-Al-Rahman on 6 November 2005, at which
7 time, as the OTP recognised earlier, Mr Abd-Al-Rahman had joined the police reserve
8 as a new recruit.

9 I don't think the Prosecution can have much credence in this witness either because
10 it's not included in the PCB.

11 Another witness giving hearsay evidence, not direct evidence, talks about
12 Ali Kushayb at Garsila. 0125-0002. Ali Kushayb is coordinator of the PDF, says
13 the Prosecutor. Again, he's not quoted in footnote number 1 of the Brief, therefore
14 that also is indicative of the level of credence, the level of credibility. Another
15 witness who speaks of the huge transfer of money, the 480 plus several zeros, which
16 took place in the early -- or in the mid-2000s, that is -- there is doubt, let's say, that it's
17 likely to be after the facts, roughly at the time when Mr Abd-Al-Rahman is following
18 the training that allows him to join the police, or has joined as a new recruit, so
19 perhaps the Sudanese government is very generous giving 480 plus several zeros of
20 money to them.

21 And P-883, in DAR-OTP-0218-0059, explains that -- I don't know what to call him,
22 Abd-Al-Rahman, Ali Kushayb, was deployed in the army medical corps, that he
23 became a master sergeant. I won't -- I'll leave it at that name, and that there he
24 acquired the reputation of being a fearless warrior.

25 None of these witnesses is quoted in footnote 1 of the Prosecution, which is

1 the page devoted to this matter.

2 Perhaps their credibility is deemed limited, and this is why I feel that the Prosecution

3 did not want to include them.

4 There was another argument from the OTP which is profoundly irritating. The OTP

5 says - well, the victims say the same thing - no victim has said that

6 Mr Abd-Al-Rahman was not Ali Kushayb. So I would say to the OTP on this point

7 that, without wishing to cause any offence to the victims or any presumed offence to

8 the victims, I would refer them to the writings on the reparations. There are reasons

9 why reparations and the culpability need to be treated as separate questions. As

10 long as they remain linked, the victims have no choice but to support the OTP in

11 the hope of a conviction which could lead to reparation. They merit more than that,

12 given what they've been through. And to link reparations to conviction so that they

13 can finally retrieve something is really not acceptable.

14 And then we have this video, which I will link to the video and the reference to

15 the Registry report. These have already been responded to in Defence submission --

16 THE INTERPRETER: And I apologise for not getting the reference.

17 MR LAUCCI: (Interpretation) but it's 34, 35 for the video and 37, 38 for the Registry.

18 Let us recall the context. In 2007, the Court issued an arrest warrant against

19 Ali Kushayb. That is the only name on the arrest warrant. The name

20 Abd-Al-Rahman appears, technically, in the case name but -- and then in this arrest

21 warrant all the communications speak only of Ali Kushayb. No mention at all of

22 Abd-Al-Rahman.

23 So let's come back to the context. As the OTP accepted, Mr Abd-Al-Rahman, from

24 his own initiative, took a long and difficult journey from Sudan, the place of his last

25 residence, to the Central African Republic. Why did he take -- undertake this

1 difficult journey? He did this because he was informed that the Sudanese authorities
2 intended to arrest him because the International Criminal Court was seeking him as
3 Ali Kushayb.

4 Mr Abd-Al-Rahman works for the police. He's in a good position to have -- to be
5 familiar with Sudanese prisons. He knows very well why he has no desire to spend
6 any time there. So better to go and to go towards the Court in the Central African
7 Republic, and in that context this video was taken. And he knows when he filmed
8 this video -- or he believes, he believes, when taking this video that the Court only
9 knows him under the alias Ali Kushayb, because all the Court's communications and
10 the -- even the arrest warrant use only this name.

11 So, during the initial hearing he says he came to the initial -- the International
12 Criminal Court to find justice. Mr Ali Muhammad Ali Abd-Al-Rahman is -- needs to
13 be taken on by the Court. He doesn't know whether he's going to be arrested, how
14 will that happen. He had no idea what would happen to him at that stage. But he
15 needs to put himself under the control of the Court and, therefore, he needs to make
16 himself known and he needs to make himself known by the name by which the Court
17 knows him, of Ali Kushayb.

18 As well as putting this into context I would refer to the case law of this Court in
19 the Katanga case. ICC-01/04-07/2635 of December 2010, and it relates to Article 61(g)
20 (sic). I quote: --

21 THE INTERPRETER: [14:57:04] I'm sorry, this is being quoted far too fast, I cannot
22 follow it.

23 PRESIDING JUDGE AITALA: Mr Laucci, sorry, quote it again.

24 THE INTERPRETER: [14:57:16] I apologise, from the interpreters booth. And
25 the speaker apologies to the interpreters.

1 MR LAUCCI: (Interpretation)

2 "The Chamber considers that what is important in the right of a counsel in
3 pre-confirmation briefs is to protect the right of the accused who is to be presumed
4 innocent, to remain silent, and to not contribute to his own incrimination. Even if
5 the counsel is not physically present, the rights of the accused may, under certain
6 conditions, be sufficiently protected and this came into an appropriate opinion before
7 the examination. One condition is that there must be no constraint put on
8 the accused during the examination."

9 Constraint, no, that's not our defence. Even though the forced departure from Sudan
10 in itself does represent a sort of constraint, not from the Court but from
11 the Prosecution. And now appropriate, well, in the middle of a Central African
12 Republic forest, I think it could be said that reasonably this was not possible for him,
13 and the right to silence, to get this respected in these conditions, you will understand
14 that the OTP has the decency not to use this video clip.

15 In our submissions, this was made known to the OTP and this was not mentioned in
16 the Brief. We thought that this matter was now closed. But, when faced with an
17 emergency, the video reappears.

18 In the decision from the Rwanda tribunal from Zigiranyirazo case, (Speaks English)
19 decision on the voir dire hearing of the accused's curriculum vitae (Overlapping
20 speakers).

21 (Interpretation) In the case in question, the accused gave to the OTP, without
22 knowing that he might be prosecuted, his CV, and the OTP took the CV, but later
23 attempted to introduce this as evidence, a CV that had been voluntarily submitted.
24 The Chamber observes that the Office of the Prosecutor had not informed the accused
25 of his rights, that the accused did not use the right to have a counsel when submitting

1 the CV (Speaks English) (Overlapping speakers) antithetical to and would seriously
2 damage the integrity of the proceedings (Interpretation) to admit the CV in question.
3 I believe that the same words could be used here, (Speaks English) antithetical to and
4 would seriously damage the integrity of the proceedings. (Interpretation) And in
5 the same sense I would quote a decision by an Extraordinary Chamber in
6 the Cambodian Tribunal, Douch, (Speaks English) a decision on the admissibility of
7 material of the case file as evidence, (Interpretation) and that was in 2009, May 2009.
8 0001/18-07-2007, name of the Court.

9 I will not provide any further references, but I would just like to say that it is most
10 regrettable that the Prosecutor showed this video in these conditions. And, I'm sorry,
11 you can't take the Registry as a witness, the Registry report cannot be used in this way.
12 The Defence has daily contact with the Registry for all types of support,
13 communication with the accused, and can I really take seriously this idea? I think
14 that smacks of desperation.

15 The OTP tried to put to one side Colonel Linda Strite Murnane, saying that she was
16 a hypothetical expert during a hypothetical conflict in a hypothetical country. I have
17 two things to say in reply, Colonel Murnane is an expert, she's not a witness. And
18 she has shared her immense knowledge in the area, partly from her US military career
19 and partly on the basis of her career in the ICTY and the Special Tribunal for Lebanon.
20 These qualifications were not contested by the OTP. It is important to distinguish
21 between a witness and an expert.

22 And now the investigations. In reply to the understandable request, the OTP says
23 that they will carry out new investigations, new charges, if necessary. And to
24 put -- this gives rule 222(3) (sic), looking at this, we have discovered a number of
25 charges for which the Defence had never seen any notification since the arrival of

1 Mr Abd-Al-Rahman at the Court, and therefore we requested that these all be rejected
2 because of an absence of notification. I won't dwell on this. It's a matter you're
3 dealing with, your Honours. And so the investigation can continue if the charges are
4 confirmed, and that would be in the phases preliminary to the trial. But that would
5 be a part of the trial.

6 So that's all I want to say on the observations of the OTP.

7 How much time do I have left, your Honour?

8 PRESIDING JUDGE AITALA: [15:05:34] Court officer.

9 THE COURT OFFICER: [15:05:38] Your Honours, the Defence have 18 minutes to
10 go.

11 MR LAUCCI: [15:05:41] Ten minutes?

12 THE COURT OFFICER: [15:05:44] 1-8.

13 MR LAUCCI: [15:05:46] 1-8. Thank you.

14 PRESIDING JUDGE AITALA: [15:05:48] Mr Nicholls, do you want to say anything?

15 MR NICHOLLS: [15:05:52] Apologise, your Honours. Again, not an objection, but
16 just to correct a portion of the transcript. It was said that I called Ms Murnane
17 a hypothetical expert. That is not correct. What I said is at page 53, line 12 of today.
18 I talked about a -- I used the word hypothetical, but not in relation to Ms Murnane.
19 Thank you.

20 MR LAUCCI: [15:06:14](Interpretation) My learned friend, you are entirely right in
21 so saying and I correct what I said. The hypothesis was on the substance and not on
22 the identity of the individual. Thank you.

23 PRESIDING JUDGE AITALA: [15:06:26] This is not a problem. It is noted in
24 the record.

25 Please continue.

1 MR LAUCCI: [15:06:39](Interpretation) Now, with regard to newly received
2 documents without prior notice, we received one from the distinguished member of
3 the LRV team on the other meaning of the word *Kushayb*, which means (Speaks
4 English) tough fact fighter, (Interpretation) that is to say a hardheaded fighter.
5 So, you told us, Madam Legal Representative for Victims, that we should have been
6 in the know. And I would answer you by saying that this is all news to us. How
7 would we have been in the know? What is more, I would note that
8 the Office of the Prosecutor did not know itself, because the explanation that it
9 furnished was indeed the one that the Defence referred to and responded to, that is
10 the one of alcohol. So this is a new item or element that you give no substantial
11 evidence underpinning it, and I believe that it should be set to one side.
12 Now, as to the richness associated with the -- the defendant, you repeated on
13 a number of occasions that rich -- people -- rich people in Sudan could be counted on
14 the number of heads of livestock, and I agree entirely with that. How many heads of
15 livestock does Mr Ali Abd-Al-Rahman have, he and his family? Well, at the time
16 that he had left Sudan the family had two cows, one of which died. So only one is
17 remaining. And that information was not in your possession but it is, I believe, in
18 the classified documents and it is in the Court file and the Chamber has it in its
19 possession.
20 Now, you compared this with Mr Hemeti, or you compared this with Mr Hemeti,
21 who is not an aka or alias, he is not a *nazir* but he is the grandson of a *nazir*, according
22 to Madam Flint, and from a different tribe entirely.
23 Now, as to the origin of said person's richness, I have no idea whatsoever, but
24 the onus of evidence is not on my back. But all I can say to you is that Mr Ali
25 Abd-Al-Rahman was no rich man, he had 13 euros a day in terms of salary in 2010,

1 and with the devaluation it is now down to €1.30 centimes.

2 Now, as to the title of colonel of colonels, this title colonel of colonels you explained to
3 us is a tribal title that might have been obtained spontaneously in a generational sense.

4 Okay. Fine. However, the OTP's file says something quite different. Their case
5 says something quite different, that this is one of the proposals on the agreed facts,
6 proposal number 9, that was refused by the Defence: (Speaks English) "From at least
7 April 2003 until at least April 2004, the parties to the armed conflict on both sides
8 were well organised and armed."

9 (Interpretation) I would refer you to the absence of description on the part of the
10 Office of the Prosecutor for chains of command, for structure, for details on this
11 mysterious organisation, that is to say the Janjaweed, and to draw the simple
12 conclusion that the evidence is not in the file. And if it's not there, well, the charges
13 should be set aside.

14 Paragraph 305 of the decision, the Katanga decision 717, the Chamber writes, and I
15 quote:

16 "For intentional homicide to be a war crime under Article 8(2)(1) of the Statute,
17 the perpetrator also has to know the" --

18 THE INTERPRETER: [15:11:20] Far too fast. The counsel is quoting far too fast,
19 impossible to interpret.

20 PRESIDING JUDGE AITALA: [15:11:27] Mr Laucci, you need to go slower.

21 MR LAUCCI: [15:11:30](Interpretation) Katanga 717, paragraph 305:

22 "For intentional homicide to constitute a war crime under Article 8(2)(a)(i)
23 of the Statute, the perpetrator also has to have the knowledge of the circumstances,
24 the factual circumstances establishing the status of protected individual of the victim."

25 I would say nothing further on the subject.

1 "As a result," the Chamber continues to say that "it is not necessary for the perpetrator
2 to have assessed the situation and have reached the conclusion that the individual or
3 victim has indeed the statute of protected person."
4 Yes, of course, we're not asking for the perpetrator or the suspect to deduce, we are
5 asking him to have knowledge. And that is exactly what the Defence and
6 the Chamber in the Katanga case said in unison.
7 The distinguished Legal Representative for Victims, Ms Clooney, asked us if,
8 according to the Defence, there would be somewhere in this world another
9 Ali Kushayb. And I will ask -- answer that question the most humble manner
10 possible, that I do not know and that it is not up to me to say. You suggested to us
11 that we use an alibi defence to say that he is a pharmacist in Garsila and that he was
12 selling medication. We did not defence an -- defend or develop an alibi defence
13 because we were not in a position to go and gather evidence of any possible alibi in
14 Sudan. And I'm not complaining about that, it is a fact. We would have liked to go
15 there, I can assure you. We would have liked to present a defence alibi -- an alibi of
16 defence, but we were not able to go. The Prosecutor has certain historical obligations,
17 having commenced prosecutions without having reached an agreement, as the Statute
18 requests, but we were not able to do so.
19 Now, I have finished providing my responses and I now come to my conclusion.
20 We are at the end of the confirmation of charges hearing and at the very outset of the
21 hearing, in my preliminary comments, 1223 that is, I regretted that
22 the Pre-Trial Chamber II has, on occasion, retained a limited or restrained concept of
23 the rights of the Defence in the pretrial phase in a number of its decisions.
24 This regret brings me to ask you solemnly to fully exercise your functions as
25 Pre-Trial Chamber, which consists or consist in the selection of cases presented by

1 the Office of the Prosecutor which are sufficiently ready and solid, for which there is
2 enough evidence to take the heavy decision to commit an individual to trial, which
3 means years or months of procedure during which the individual - and I'm talking
4 here in terms of probability and statistics uniquely - will remain in detention and, if
5 there are no charges, then there are consequences. That is the request that I'm
6 addressing to you.

7 Now, last of all, I will finish off with the pharmacist from Garsila. The pharmacist
8 comes -- or term "pharmacist" comes from the Greek *pharmakós*. And *pharmakós* had
9 two meanings, or has two meanings in the Greek language, and in the past this might
10 have meant somebody who delivered medications, but it means the person who is
11 immolated in the expiation of the errors of another individual, giving rise in our
12 language of the modern day to the word scapegoat.

13 Where does that scapegoat come? Well we also need to go to the Greek language to
14 find the origin of this word. The scapegoat is the Greek translation of *bouc pour*
15 *Azazel*, and *bouc pour Azazel* comes directly from chapter 16, verses 21 to 22:

16 "Aaron put his two hands on the head of the living goat and he will confess to him all
17 the inequities of the children of Israel and all the transgressions via which they have
18 sinned. He shall put them on the head of the billy goat and he will drive him away
19 into the desert with the assistance of an individual whose job it will be. The billy
20 goat will take with him all the inequalities into a desolate environment. He will be
21 chased away into the desert." End of quote.

22 I took this passage and read it to you because I wanted to compare this with what
23 Madam Julie Flint said to us, a very great expert on the Sudanese conflict. In the
24 year 2009 and after the crimes in Sudan, history was rewritten and the responsibility
25 for the crimes was put on certain individuals with a view to ensuring that the true

1 people responsible remain unpunished.

2 Mr Ali Abd-Al-Rahman is a Ta'aisha. He belongs to one of those tribes that has
3 refused the call to the tribal militia. He has refused to take part in the
4 counterinsurgency in which all the crimes described by the Office of the Prosecutor to
5 us have been committed.

6 There is, for sure, one other reason. He is not the only Ta'aisha in Darfur. There is
7 probably one other reason why he was targeted and designated as being Ali Kushayb.
8 We do not know what they are, these reasons. What is the most important thing to
9 us is that the Office of the Prosecutor has not borne the evidence that Mr Ali
10 Abd-Al-Rahman could or can be Mr Ali Kushayb and has or had exercised
11 the authority to commit the crimes contained in the Document Containing the
12 Charges. And it is on this basic observation that I request that the Pre-Trial Chamber
13 decline the charges in their totality.

14 Thank you.

15 PRESIDING JUDGE AITALA: [15:20:11] Thank you very much, Mr Counsel.

16 Now, with the concluding statements of the Defence, we come to the end of the
17 confirmation of charges hearing.

18 The decision on the confirmation of charges against Mr Abd-Al-Rahman will be
19 delivered in due course.

20 We will be seeing, all being well, tomorrow morning 9.30 for the detention hearing
21 with the same parties and participants.

22 Before closing, I would like to thank very much the parties, the participants. And
23 very, very much the interpreters, the court reporters, technicians, security officers,
24 and all Registry staff for their timely and professional cooperation.

25 I wish everything a pleasant afternoon and evening and the hearing is adjourned.

- 1 Thank you very much.
- 2 THE COURT USHER: [15:21:10] All rise.
- 3 (The hearing ends in open session at 3.21 p.m.)