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No.: **ICC-02/05-01/20**

Date: **11 May 2026**

THE APPEALS CHAMBER

Before:

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
("ALI KUSHAYB")***

Public with Public Annex A

Prosecution Response Brief (Sentencing)

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INTRODUCTION

1. The Prosecution respectfully requests the Appeals Chamber to reject Abd-Al-Rahman's appeal¹ against the Sentencing Judgment² issued by Trial Chamber I.³
2. Abd-Al-Rahman merely disagrees with the Chamber's discretionary findings and conclusions without showing error. Many of his arguments fail to clearly set out the alleged errors, repeat prior submissions that were properly rejected by the Chamber, and misrepresent the Chamber's findings in the Sentencing Judgment and the evidentiary record. In addition, Abd-Al-Rahman fails to show any error in his submissions under grounds 1-2 and 4-6 that materially affected the Sentencing Judgment.
3. To the contrary, as submitted in the Prosecution's appeal against the Sentencing Judgment, the Appeals Chamber should find that the Chamber abused its discretion and/or erred in law and/or fact and/or failed to provide adequate reasoning by imposing certain individual sentences and the joint sentence. As a result, it should determine an appropriate increase of those sentences. In the alternative, under article 83(2) of the Statute, having confirmed the applicable law, and reversed the findings material to the errors identified, the Appeals Chamber should remand the matter to Trial Chamber I with suitable directions.⁴

SUBMISSIONS

I. Ground 1: The Chamber correctly applied the principle of non-retroactivity *ratione personae* under article 24(2) of the Statute

4. The Chamber correctly dismissed Abd-Al-Rahman's argument that article 24(2) of the Statute required it to apply the purportedly "more favourable" 2003-2004 Sudanese law, rather than the Statute and the penalties set out in article 77.⁵ In his first ground of appeal, Abd-Al-Rahman merely repeats his flawed trial arguments—that the Jurisdiction Appeal Judgment rendered in this case requires the application of Sudanese law,⁶ and that UNSC Resolution 1593 of 31 March 2005 (referring the Darfur situation to the ICC) resulted in "a change in the law applicable to [the] case prior to [the] final judgment".⁷ However, he fails to show any error in

¹ [Sentence Appeal](#).

² [Sentencing Judgment](#).

³ The "Chamber".

⁴ [Prosecution Appeal Brief \(Sentencing\)](#); see in particular paras. 140-141.

⁵ [Sentencing Judgment](#), paras. 30-39 referring to [Defence Sentencing Brief](#), paras. 130, 137, 138, 141 and [Defence Oral Sentencing Submissions](#): T-166, pp. 30, 40-41. See [Sentence Appeal](#), paras. 5-25.

⁶ [Sentence Appeal](#), paras. 12-13 referring to [Jurisdiction Appeal Judgment](#).

⁷ [Sentence Appeal](#), para. 17.

the Chamber's Sentencing Judgment; and there is none. Further, even assuming *arguendo* that the Chamber had erred because Sudanese law could apply to these ICC proceedings (which it did not), Abd-Al-Rahman fails to show how the alleged error materially impacted the sentences imposed.

I.1. The Chamber correctly found that Sudanese law was not applicable in determining Abd-Al-Rahman's sentence

5. The Chamber correctly held that Abd-Al-Rahman misinterpreted the Jurisdiction Appeal Judgment, noting that "the Appeals Chamber's Judgment did not accept Sudanese law to be applicable to the present case".⁸ Instead—and to assess whether Abd-Al-Rahman's case fell within the Court's jurisdiction *ratione materiae*—the Appeals Chamber considered whether a reasonable person in Abd-Al-Rahman's position could have expected (or foreseen), at the time of his conduct, to find himself faced with the crimes charged.⁹ This "foreseeability and accessibility test" requires a Chamber to consider the criminal laws (national or international) applicable to the accused at the time the conduct took place.¹⁰ This interpretation arose from article 22(1) (*nullum crimen sine lege*) in accordance with internationally recognised human rights,¹¹ since the relevant conduct took place on the territory of Sudan (a non-State Party to the Statute) and Abd-Al-Rahman, who was alleged to have engaged in such conduct, is a Sudanese national.

6. The Appeals Chamber reasoned that, in such scenarios, it is not enough that the crimes charged can be found in the text of the Statute; instead, the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could reasonably foresee facing prosecution under national or international law.¹² The Appeals Chamber then concluded that Abd-Al-Rahman was reasonably capable of taking steps to comprehend and comply with his obligations under international law, and that he was capable of appreciating the attendant penal consequences.¹³ The Chamber followed this approach in the Trial Judgment and confirmed that the requirement of *nullum crimen sine lege*, found in article 22(1) of the Statute, was met in this case.¹⁴

⁸ [Sentencing Judgment](#), para. 33.

⁹ [Jurisdiction Appeal Judgment](#), paras. 82, 85, 88; see also [Trial Judgment](#), paras. 30, 52-55.

¹⁰ [Jurisdiction Appeal Judgment](#), para. 86; see also [Trial Judgment](#), paras. 30-51.

¹¹ [Jurisdiction Appeal Judgment](#), paras. 83-85.

¹² [Jurisdiction Appeal Judgment](#), paras. 85-86.

¹³ [Jurisdiction Appeal Judgment](#), paras. 88-90.

¹⁴ [Trial Judgment](#), paras. 22-65.

7. This assessment—to establish that the Court has jurisdiction in this case—does not mean that Sudanese law *applies* to ICC criminal proceedings against Abd-Al-Rahman once the Court’s jurisdiction has been confirmed.¹⁵ The applicable law is that contained in the Court’s legal framework, as provided for in article 21 of the Statute. Contrary to Abd-Al-Rahman’s suggestion,¹⁶ ICC Chambers can only apply the sentencing regime exhaustively regulated in the Statute.¹⁷ The Appeals Chamber has confirmed as much when it held that:

the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person and specify mandatory aggravating and mitigating circumstances as well as the parameters to be considered for the determination of the quantum of such penalties. The corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute.¹⁸

8. Abd-Al-Rahman submits that restricting the applicable penalties to those “forms of sentences” provided in Sudanese law that are *also* foreseen in the Statute—namely imprisonment, excluding capital and corporal punishment—does not breach article 23 of the Statute (*nulla poena sine lege*).¹⁹ But this plainly disregards both the text and object of the provision, as well as the Statute more broadly.²⁰ Article 23 requires that “[a] person convicted by the Court may be punished only *in accordance with this Statute*”.²¹ This logically requires application of the Court’s legal framework, as set out in article 21. A convicted person at the Court can never be sentenced on the basis of domestic law, regardless of whether such law provides for a penalty (such as imprisonment) which is also foreseen in the Rome Statute.

9. In conclusion, the Chamber correctly held that “the Statute leaves no room for the applicability of penalties other than those listed under Article 77 of the Statute and rejects the Defence’s arguments regarding the applicability of Sudanese law in 2003 and 2004”.²² Since

¹⁵ [Sentencing Judgment](#), para. 34.

¹⁶ [Sentence Appeal](#), para. 12 (“With respect to penalties, the Appeals Chamber’s findings implied that in interpreting Articles 23 and 24(2) of the Statute in a manner consistent with human rights law, the Chamber should have looked beyond the Statute to the domestic criminal laws governing penalties applicable to the Appellant at the time the conduct took place”).

¹⁷ [Sentencing Judgment](#), para. 35 citing [Ongwen SAJ](#), para. 103 (referring to [Bemba et al. SAJ](#), para. 77).

¹⁸ [Bemba et al. SAJ](#), para. 77; [Ongwen SAJ](#), para. 103; see also [Ongwen SJ](#), para. 26.

¹⁹ [Sentence Appeal](#), para. 11 (Abd-Al-Rahman erroneously suggests that article 23 solely relates to the “penalties” applicable, that is, imprisonment, fines and forfeiture of proceeds, property and assets derived from that crime, with no regard to other aspects of the sentencing regime such as the parameters and quantum); see also para. 13.

²⁰ See Schabas and Ambos, “Art. 23”, in Ambos, p. 1174, mn. 9 (“Article 23 serves as a limit on the discretionary powers of the Court, which cannot impose punishment that is not set out in the Statute, or provided in accordance with its delegated legislation, and specifically the RPE.”).

²¹ Emphasis added. See [Sentencing Judgment](#), para. 35 (observing that “[t]he Court’s regime of penalties and sentencing is directly and explicitly constrained by the principle of legality under Article 23 of the Statute (*nulla poena sine lege*)); see also [Bemba et al. SAJ](#), para. 77; [Ongwen SAJ](#), para. 103; [Ongwen SJ](#), para. 26.

²² [Sentencing Judgment](#), para. 36.

Abd-Al-Rahman misrepresents the Jurisdiction Appeal Judgment, conflates two distinct assessments (the determination of the Court’s jurisdiction *and* the sentencing regime applicable to ICC proceedings), and misconstrues article 23 of the Statute, his ground of appeal should be rejected on that basis alone.

10. In any event, Abd-Al-Rahman’s interpretation of article 24(2) (encapsulating the principle of *lex mitior*),²³ and his arguments that UNSC Resolution 1593 of 31 March 2005 (referring the Darfur situation to the ICC) resulted in “a change in the law applicable to [the] case prior to [the] final judgment”, equally fail.²⁴ As shown below, the Chamber reasonably relied on apposite ICTY jurisprudence, and correctly interpreted article 24(2) to conclude that “there has been no change in the applicable law (namely, the Statute and the Rules) to warrant consideration of Article 24(2) of the Statute”.²⁵

11. *First*, the Chamber reasonably considered ICTY jurisprudence as persuasive in interpreting the principle of *lex mitior* captured in article 24(2).²⁶ The Chamber observed that “the convicted person can only benefit from the more lenient sentence if the law is binding on the Court. The principle of *lex mitior* is thus only applicable if a law that binds the Court is subsequently changed to a more favourable law which the Court is also obliged to abide.”²⁷ That the ICTY was established *ex post facto* to prosecute prior crimes does not render its interpretation of this general principle automatically unhelpful for the ICC. Nor does Abd-Al-Rahman explain why this would be the case.²⁸ To the contrary, the Chamber reasonably considered ICTY Chambers’ interpretation of this general legal principle to be of guidance.²⁹ As shown below, the Chamber also reached its conclusion based on its interpretation of the Court’s legal framework.

12. *Second*, the Chamber correctly held that article 24(2) uses the word “law”, and what constitutes the applicable law of the ICC is determined by article 21 of the Statute.³⁰ The

²³ See Statute, art. 24(2) (Non-retroactivity *ratione personae*): In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

²⁴ *Contra* [Sentence Appeal](#), para. 17.

²⁵ [Sentencing Judgment](#), para. 38. *Contra* [Sentence Appeal](#), paras. 9-10, 14-22.

²⁶ [Sentencing Judgment](#), para. 37 (fns. 80 and 81 referring to [Deronjić SAJ](#), para. 97, [Galić AJ](#), para. 398 quoting [Dragan Nikolić SAJ](#), para. 81 (“It is an inherent element of [the] principle [of *lex mitior*] that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide”); *contra* [Sentence Appeal](#), para. 9.

²⁷ [Sentencing Judgment](#), para. 37.

²⁸ See [Sentence Appeal](#), para. 9.

²⁹ See e.g. [Lubanga AJ](#), para. 63.

³⁰ [Sentencing Judgment](#), para. 38.

Chamber reasoned that “[article 21] states that the Court shall apply, in the first place, the Statute, the Elements of Crimes and the Rules of Procedure and Evidence,” and, as noted, “article 77 provides an exhaustive list of the applicable penalties before the Court”.³¹ The Appeals Chamber has also confirmed this.³² The Chamber thus correctly concluded that “[i]t is therefore impermissible for the Chamber to look beyond the Court’s legal texts to find the applicable source of law”³³ and that “there has been no change in the applicable law (namely, the Statute and the Rules) to warrant consideration of Article 24(2) of the Statute”.³⁴ Abd-Al-Rahman’s purported textual interpretation of article 24(2) is instead speculative.³⁵ It is also incorrect since it disregards article 21 which sets out the law to be applied by ICC Chambers.³⁶

13. Finally, the Chamber’s correct interpretation of article 24(2) does not deprive this provision of its ‘*effet utile*’.³⁷ If the Assembly of States Parties had amended articles 77 and 78 of the Statute after the beginning of the trial and before its conclusion to include a less favourable sentencing regime than the present one, the Chamber would have had to apply the most favourable regime to the accused.³⁸

14. On this basis, Ground 1 of Abd-Al-Rahman’s appeal should be dismissed.

I.2. The alleged error does not materially affect the sentences

15. In any event, Abd-Al-Rahman fails to demonstrate that the alleged error materially affected his individual sentences or the joint sentence.

16. Even assuming that Sudanese law could apply to the ICC proceedings against Abd-Al-Rahman (which it does not), it would not be “the more favourable law” under article 24(2),

³¹ [Sentencing Judgment](#), para. 38.

³² [Bemba et al. SAJ](#), paras. 76-77.

³³ [Sentencing Judgment](#), para. 38.

³⁴ [Sentencing Judgment](#), para. 38.

³⁵ [Sentence Appeal](#), para. 16 (“had the object and purpose of Article 24(2) of the Statute been to apply only in cases of amendments to the Statute, it would not have referred to ‘a change in the law’, but to ‘an amendment to the Statute [that] would have been covered in Articles 121-122 of the Statute, instead of Article 24(2)’”).

³⁶ See also Halling, “Art. 24”, in Ambos, p. 1182, mn. 36 (“In general, Article 24(2)’s reference to the changed ‘law’: (i) is best understood as limited to changes in the applicable law set forth in Article 21(1) of the Statute and (ii) should not be extended to new judicial interpretations of existing law”).

³⁷ *Contra* [Sentence Appeal](#), para. 15.

³⁸ The *lex mitior* principle—also encapsulated in article 51(4) with respect to amendments of the Rules of Procedure and Evidence—was applied in the Ruto & Sang case when rule 68 of the Rules was amended after the commencement of trial and prior to its conclusion: [Ruto & Sang Admission Prior Recorded Testimony AD](#), paras. 78-96. See also paras. 70 (“The Appeals Chamber finds that, in principle, article 24 (2) of the Statute concerns substantive law. [...] it is clear that article 24 of the Statute concerns conduct giving rise to criminal responsibility. It follows that the “law” referred to in article 24 (2) of the Statute is the substantive law which relates to such conduct”), 73 (finding that “article 24(2) of the Statute is not applicable to amendments to the Rules, which are governed by the specific provisions of article 51(4) of the Statute”). The same logic would apply if articles 77 and 78 were amended to include a less favourable regime.

because of the severity of the punishments enshrined in Sudanese law.³⁹ Abd-Al-Rahman offers a highly selective reading of Sudanese law,⁴⁰ which the Prosecution does not accept.⁴¹ Rather than a “maximum sentence of seven years’ imprisonment”,⁴² Sudanese law provides for the death penalty including for persons over 70 years old who are convicted of crimes of *qisas* and *hudud*, which include serious offences such as murder, rape and bodily harm.⁴³

17. For the above reasons, Ground 1 of Abd-Al-Rahman’s appeal should be dismissed.

II. Ground 2: The Chamber correctly considered mitigating circumstances pursuant to article 78(1)

18. The Chamber correctly considered Abd-Al-Rahman’s personal and mitigating circumstances when determining his joint sentence pursuant to article 78(3).⁴⁴ Under his second ground of appeal, Abd-Al-Rahman erroneously contends that the Chamber legally erred in so doing.⁴⁵ According to Abd-Al-Rahman, article 78(1) and rule 145(1)(b) required the Chamber to consider these factors when determining each individual sentence.⁴⁶

19. Abd-Al-Rahman’s arguments are misplaced, and Ground 2 of his Appeal should be dismissed. Article 78(1) requires a chamber, when determining a sentence, to consider the

³⁹ See [Prosecution Oral Sentencing Submissions](#), T-165, p. 85, lns. 11-16.

⁴⁰ As noted above, Abd-Al-Rahman only considers the same type of punishments as those foreseen in the Statute (i.e. imprisonment) while disregarding harsher punishments foreseen in Sudanese law, such as the death penalty and crucifixion.

⁴¹ *Contra* [Sentence Appeal](#), para. 18; see also [Prosecution’s Response on Additional Evidence for Sentencing](#), paras. 4, 16-25.

⁴² [Sentence Appeal](#), para. 18.

⁴³ [Trial Judgment](#), para. 44 (“In addition, the Chamber notes Article 32 of the 1998 Sudanese Constitution, which specified that the death penalty may only be imposed as punishment for the most serious crimes, in accordance with the law, and that it cannot be imposed on persons below the age of 18, ‘on pregnant or lactating women, except two years after the birth’ and those above the age of 70, ‘except when they have committed the crimes of *qisas* [i.e. retribution] or *hudud* [prescribed penalties]’”); see also fn. 74 citing 1998 Sudanese Constitution, DAR-OTP-0139-0003 at 0007, art. 33(2) (Death Penalty); CERD Report, DAR-OTP-00006618 at 0012, paras. 56-57). See further 1991 Sudanese Criminal Act, DAR-OTP-0021-0296, articles 27(2) (providing that death penalty shall not be passed against persons under 18 or over 70, “[w]ith the exception of *Hudud* and retribution (*qisas*) offences”), 28 (providing that “Retribution(*qisas*)” includes “murder” and “[causing] wounds”), 33(4) read in conjunction with section “Interpretation and Explanation at 0002 (providing that *Hiraba* (armed robbery) is a *Hudud* offence, and its corresponding penalty of imprisonment may also be passed for persons over 70). See further articles 130(2)(providing that whoever commits murder shall be punished with death by retribution [*qisas*]), 139 (providing that whoever commits intentional wounds shall be punished with retribution (*qisas*)), 168 (providing that *Hiraba* may be punished with death or death and then crucifixion, amputation, or imprisonment, depending on whether it results on murder, rape, grievous hurt or robbery or others). See further [CLRV Oral Sentencing Submissions](#): T-164, pp. 63:16-64:3; D-16’s Statement, DAR-D31-00000363 at 0011, paras. 24-26 (murder), at 0012 to 0013, paras. 32-33 (*Hiraba*)).

⁴⁴ Abd-Al-Rahman’s Ground 2 does not concern the weight that the Chamber gave to his personal and mitigating circumstances. In its own appeal against the Sentencing Judgment, the Prosecution argues that the Chamber erred by giving these factors excessive weight in determining the joint sentence (see [Prosecution Appeal Brief \(Sentencing\)](#), paras. 129-133).

⁴⁵ [Sentence Appeal](#), paras. 26-38.

⁴⁶ [Sentence Appeal](#), para. 34.

individual circumstances of the convicted person, and rule 145(1)(b) requires it to take into account any mitigating factors. However, these provisions do not specify the stage at which such circumstances must be considered. Given that sentencing is inherently discretionary, the Chamber was entitled to consider these factors when determining the joint sentence. In any event, even if the Chamber had erred, such an error would not have materially affected Abd-Al-Rahman's joint sentence in light of the specific circumstances of the case.

II.1. The Chamber was not required to consider personal and mitigating circumstances when determining the individual sentences

20. The Chamber found that Abd-Al-Rahman's advanced age,⁴⁷ good conduct during detention and trial,⁴⁸ and voluntary surrender to the Court⁴⁹ were relevant to sentencing, albeit only to a limited extent. It took these factors into account when determining the joint sentence and imposed a term of 20 years' imprisonment,⁵⁰ equivalent to the highest individual sentences.⁵¹ The Chamber emphasised that, absent the accepted personal and mitigating circumstances, it would have imposed a higher joint sentence.⁵²

21. Contrary to Abd-Al-Rahman's contention, article 78(1) and rule 145(1) do not require a chamber to consider personal and mitigating circumstances when determining each individual sentence.⁵³

22. Article 78(1) provides that "[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account [...] the individual circumstances of the convicted person." Similarly, rule 145(1)(b) provides that in its determination of the sentence pursuant to article 78(1), the Court shall "[b]alance all the relevant factors, including any mitigating [...] factors and consider the circumstances [...] of the convicted person [...]."

23. The wording of these provisions leaves it open to a chamber to consider personal and mitigating circumstances either when determining the sentence for each individual crime or—where there are multiple convictions—when determining the joint sentence pursuant to article 78(3). This approach ensures that the joint sentence reflects the convicted person's "total culpability" in accordance with rule 145(1)(a).⁵⁴

⁴⁷ [Sentencing Judgment](#), para. 53.

⁴⁸ [Sentencing Judgment](#), para. 75.

⁴⁹ [Sentencing Judgment](#), para. 80.

⁵⁰ [Sentencing Judgment](#), para. 294.

⁵¹ See [Sentencing Judgment](#), paras. 258 (Counts 17, 18, 19, 20), 267 (Counts 27, 28, 29, 30).

⁵² [Sentencing Judgment](#), para. 294.

⁵³ *Contra* [Sentence Appeal](#), para. 26.

⁵⁴ [Yekatom & Ngaiisonga TJ](#), paras. 4646, 4823.

24. As with the classification of factors under article 78(1) and rule 145, what matters is not into which category the Chamber places a particular fact, but rather “that the Trial Chamber identifies all relevant factors and attaches reasonable weight to them in its determination of the sentences, carefully avoiding that the same factor is relied upon more than once”.⁵⁵

25. This approach is consistent with the principle that a chamber, having intimate knowledge of the case, enjoys broad discretion in weighing relevant factors.⁵⁶ In the *Lubanga* case, the Appeals Chamber recalled these provisions—including article 78(3)⁵⁷—and held that sentencing involves an exercise of discretion aimed at imposing a proportionate sentence that reflects the convicted person’s culpability.⁵⁸

26. There are also sound reasons why article 78(1) and rule 145(1) allow a chamber to consider personal and mitigating circumstances at the stage of determining the joint sentence. According to the Court’s consistent jurisprudence, such circumstances must be related to the convicted person, but not necessarily to the crimes they are convicted of.⁵⁹ Moreover, they are not limited by the scope of the confirmed charges or findings in the judgment.⁶⁰ Accordingly, because these circumstances may be detached from the underlying crimes, they may be more appropriately addressed when determining the joint sentence, thus ensuring that “the totality of any sentence [...] reflect[s] the culpability of the convicted person,” as required by rule 145(1)(a).⁶¹

27. On the other hand, aggravating circumstances may relate to the crimes for which the person is convicted or to the convicted person.⁶² For a factor to be considered as aggravating, there must be a sufficiently proximate link between the factor and the crime that forms the basis of the conviction.⁶³ Accordingly, aggravating circumstances are most appropriately considered when determining the individual sentences for each crime.

⁵⁵ *Bemba et al. SAJ*, para. 112.

⁵⁶ *Lubanga SAJ*, para. 34; see also *Ntaganda SJ*, para. 12; *Lubanga SJ*, para. 3.

⁵⁷ *Lubanga SAJ*, paras. 32-33.

⁵⁸ *Lubanga SAJ*, para. 34.

⁵⁹ *Yekatom & Ngaïssona TJ*, para. 4409; *Al Hassan SJ*, para. 28; *Ongwen SJ*, para. 54; *Ntaganda SJ*, para. 24; *Bemba et al. SJ*, para. 24; *Al Mahdi TJ*, para. 74; *Bemba SJ*, para. 19.

⁶⁰ *Yekatom & Ngaïssona TJ*, para. 4409; *Al Hassan SJ*, para. 28; *Ongwen SJ*, para. 54; *Ntaganda SJ*, para. 24; *Bemba et al. SJ*, para. 24; *Bemba SJ*, para. 19. See also *Sentencing Judgment*, para. 25.

⁶¹ See e.g. *Sentencing Judgment*, para. 90.

⁶² *Yekatom & Ngaïssona TJ*, para. 4405; *Al Hassan SJ*, para. 24; *Ongwen SJ*, para. 57; *Ntaganda SJ*, para. 18; *Bemba et al. SJ*, para. 25; *Al Mahdi TJ*, para. 73; *Bemba SJ*, para. 18.

⁶³ *Yekatom & Ngaïssona TJ*, para. 4405; *Bemba et al. SAJ*, para. 115; *Ntaganda SJ*, para. 18; *Bemba et al. SAJ*, para. 115, 151; *Bemba et al. Re-SJ*, para. 18(iv); see also *Đeronjić SAJ*, para. 124 (“The statement [...] that aggravating circumstances must relate “to the offender himself” is not to be taken as a rule that such circumstances must specifically pertain to the offender’s personal characteristics. Rather, it simply reflects the general principle

28. The Chamber’s approach in the present case—considering personal and mitigating circumstances only when determining the joint sentence—is consistent with the Court’s prior practice. Notably, in the *Ongwen* case, after the Trial Chamber determined the individual sentence for each crime, it considered Ongwen’s individual circumstances in determining the joint sentence.⁶⁴ It observed that given the “extreme gravity of the crimes [...] a joint sentence of life imprisonment would surely be in order in the present case”.⁶⁵ However, it ultimately declined to impose such a sentence in light of Ongwen’s individual circumstances, in particular his abduction and integration into the LRA at the age of nine.⁶⁶

29. On appeal, Ongwen argued that the Trial Chamber had failed to properly consider personal and mitigating circumstances when determining his joint sentence.⁶⁷ The Appeals Chamber rejected this argument, noting with approval that “it is clear that [...] the Trial Chamber did ‘balance relevant factors, including individual circumstances and mitigating factors’ when determining the joint sentence.”⁶⁸ In doing so, the Appeals Chamber endorsed the Trial Chamber’s assessment of Ongwen’s personal and mitigating circumstances in determining the joint sentence.

30. Similarly, in the *Yekatom and Ngaïssona* case, the Trial Chamber, having held that the joint sentence must reflect the convicted persons’ “total culpability,”⁶⁹ considered potential personal and mitigating circumstances when determining their joint sentences.⁷⁰ Although it ultimately found that such circumstances were not applicable in that case, the fact that it examined them at this stage demonstrates that it considered this to be the appropriate point at which to do so.

31. Certain findings in the Court’s jurisprudence, if read in isolation, may suggest that all factors under rule 145 should be considered when determining a sentence “for each crime for which a conviction was entered.”⁷¹ However, these statements do not limit a chamber’s discretion to consider personal and mitigating circumstances at the stage of determining the

of individual responsibility that underlies criminal law: a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible”). See further [Sentencing Judgment](#), para. 22.

⁶⁴ [Ongwen SJ](#), para. 374.

⁶⁵ [Ongwen SJ](#), para. 386.

⁶⁶ [Ongwen SJ](#), para. 388.

⁶⁷ [Ongwen SAJ](#), para. 302.

⁶⁸ [Ongwen SAJ](#), para. 309.

⁶⁹ [Yekatom & Ngaïssona TJ](#), paras. 4659, 4823.

⁷⁰ [Yekatom & Ngaïssona TJ](#), paras. 4660-4661 (for Yekatom), 4837-4938 (for Ngaïssona).

⁷¹ See e.g. [Bemba SJ](#), para. 12; [Ntaganda SAJ](#), paras. 124, 129 [Al Hassan SJ](#), para. 29 (cited in [Sentence Appeal](#), para. 26).

joint sentence, provided that the same factor is not counted more than once. As the Appeals Chamber has emphasised, “what is of importance is that the Chamber identifies all relevant factors, attaches appropriate weight to them and does not ‘double-count’ them”.⁷²

32. In conclusion, while a chamber may consider personal and mitigating circumstances when determining individual sentences, it is not required to do so under article 78 or rule 145. In the present case, the Chamber exercised its discretion properly by considering these circumstances when determining Abd-Al-Rahman’s joint sentence.

33. On this basis, Ground 2 of Abd-Al-Rahman’s appeal should be dismissed.

II.2. The alleged error does not materially affect the sentence

34. In any event, Abd-Al-Rahman fails to demonstrate that the alleged error under Ground 2 of his appeal materially affected his joint sentence. His sole argument is that, because article 78(3) provides that a joint sentence cannot be lower than the highest individual sentence, the Chamber’s failure to consider personal and mitigating circumstances when determining the individual sentences prevented it from imposing a joint sentence below 20 years—equivalent to the highest individual sentence.⁷³

35. *First*, Abd-Al-Rahman’s argument that the Chamber was prevented from imposing a lower joint sentence, and that such a sentence might hypothetically have been imposed, is speculative. Abd-Al-Rahman does not demonstrate how the Chamber, absent the alleged error, would have imposed a sentence of less than 20 years in this case. An appellant is required to specify, with sufficient precision, how the alleged error would materially affect the impugned decision.⁷⁴ The Appeals Chamber has previously observed that this is a high standard: it must be shown that the decision *would*—not merely *could* or *might*—have been substantially different absent the error.⁷⁵ Speculations about the possibility of a different outcome do not establish material impact.⁷⁶

36. *Second*, any suggestion that the joint sentence would have been less than 20 years is unsupported by the record. Abd-Al-Rahman was convicted of crimes committed in the context of three distinct operations affecting hundreds of victims. In Kodoom and Bindisi, he was found guilty, *inter alia*, of the murder of at least 46 persons, the rape of no fewer than 16 women and

⁷² [Ntaganda SAJ](#), para. 124; [Bemba et al. SAJ](#), para. 112. See also [Yekatom & Ngaïssona TJ](#), para. 4412.

⁷³ [Sentence Appeal](#), paras. 27, 34, 36.

⁷⁴ [Gbagbo Third Detention AD](#), para. 18; [Kony et al. Admissibility AD](#), para. 48.

⁷⁵ [Ngudjolo AJ](#), para. 285.

⁷⁶ [Ngudjolo AJ](#), para. 285.

girls, the destruction of homes, pillaging, and the forcible transfer of civilians, including children. In Mukjar, he was convicted, *inter alia*, of the murder of 48 persons, the attempted murder of two individuals, and the torture and abuse of at least 100 persons. In Deleig, he was convicted, *inter alia*, of the murder of no fewer than 114 men and boys—including three children aged between 12 and 14 years—the attempted murder of two individuals, and the torture and abuse of at least 100 persons. All of these crimes were committed with discriminatory intent against vulnerable and defenceless victims. Many were perpetrated with particular cruelty, and some were committed personally by Abd-Al-Rahman.⁷⁷ Even assuming, *arguendo*, that the highest individual sentences for the murders and attempted murders in Mukjar and Deleig might have been lower than 20 years,⁷⁸ this would not imply that the joint sentence would also have been below that threshold. As the Chamber correctly held, pursuant to rule 145(1)(a), the total sentence must be proportionate and reflect the totality of the convicted person's culpability, thus it must capture Abd-Al-Rahman's cumulative responsibility for all crimes of which he was convicted.⁷⁹

37. *Third*, and in any event, there is no space in the Chamber's reasoning for speculating that the joint sentence could have been less than 20 years. First, the Chamber fully took into account any factual overlap between the crimes of which Abd-Al-Rahman was convicted; and second,⁸⁰ it reduced the joint sentence on account of the personal and mitigating circumstances it identified.⁸¹ Although it assigned these factors only limited weight,⁸² it expressly stated that it "would have pronounced a higher sentence, had it not been for the accepted mitigating circumstances."⁸³ Abd-Al-Rahman's claim that the alleged error would have led to a higher joint sentence is therefore inconsistent with the Chamber's reasoning. While the Prosecution accepts that the three personal and mitigating circumstances found to be present may be given some limited weight in determining the joint sentence, it argued in its appeal against the Sentencing Judgment that the Chamber erred by giving undue weight to those circumstances.⁸⁴

⁷⁷ [Prosecution Appeal Brief \(Sentencing\)](#), paras. 3-7.

⁷⁸ See [Sentencing Judgment](#), paras. 258 (Counts 17, 18, 19, 20), 267 (Counts 27, 28, 29, 30).

⁷⁹ In its appeal against the Sentencing Judgment, the Prosecution submitted that the Chamber erred in imposing the minimum possible joint sentence ([Prosecution Appeal Brief \(Sentencing\)](#), paras. 97-136).

⁸⁰ [Sentencing Judgment](#), paras. 290-292.

⁸¹ [Sentencing Judgment](#), paras. 293-294.

⁸² [Sentencing Judgment](#), paras. 53, 75, 80.

⁸³ [Sentencing Judgment](#), para. 294.

⁸⁴ The Prosecution argued that the Chamber erred in law and/or fact and/or abused its discretion by either (i) failing to appropriately reflect the gravity of the crimes and the individual circumstances of Abd-Al-Rahman in the joint sentence, and/or (ii) disproportionately reducing the joint sentence in light of its findings on the limited weight to be afforded to the three mitigating circumstances ([Prosecution Appeal Brief \(Sentencing\)](#), paras. 129-133).

38. For the reasons set out above, Ground 2 of Abd-Al-Rahman's appeal should be dismissed.

III. Ground 4: The Chamber correctly and reasonably assessed Abd-Al-Rahman's role in mediating tribal conflicts prior to 2002-2003

39. The Chamber was not bound, "[a]s a matter of law", to take into account, for the purposes of sentencing, [Abd-Al-Rahman's] purported role in mediating tribal conflicts before 2002-2003 or to prescribe it any mitigating weight.⁸⁵ To the contrary, the Chamber correctly applied rule 145(2)(a). Abd-Al-Rahman's fourth ground of appeal—arguing that the Chamber failed to consider P-0932's evidence—misrepresents the Chamber's analysis and merely disagrees with the Chamber's reasonable exercise of its discretion in assessing the totality of the evidence. In any event, even assuming *arguendo* that the Chamber erred in not considering P-0932's evidence, such error would not have materially affected his sentences. Ground 4 of Abd-Al-Rahman's appeal should therefore be dismissed.

III.1. The Chamber correctly and reasonably considered Abd-Al-Rahman's purported role as conflict mediator prior to 2002-2003

40. Article 78(1) of the Statute provides that in determining the sentence, the Court "shall, in accordance with the Rules of Procedure and Evidence, take into account [...] the individual circumstances of the convicted person." Consistent with the jurisprudence of the Appeals Chamber, the Chamber correctly held that individual circumstances of a convicted person do not automatically amount to mitigating circumstances.⁸⁶ Rule 145(2)(a) of the Rules provides a non-exhaustive list of circumstances which *shall* be considered as *potentially* mitigating circumstances when determining a sentence,⁸⁷ namely "circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress" and "[t]he convicted person's conduct *after* the act, including any efforts by the person to compensate the victims and any cooperation with the Court."⁸⁸

41. As established by the Appeals Chamber, while the Chamber *may* consider mitigating circumstances *in addition* to those explicitly set out in rule 145(2)(a), it is "endowed with a considerable degree of discretion" in determining what constitutes mitigating circumstances

⁸⁵ *Contra* [Sentence Appeal](#), para. 43; *see also* paras. 49-51.

⁸⁶ [Sentencing Judgment](#), para. 25 *citing* [Ntaganda SAJ](#), para. 5 ("the individual circumstances of a convicted person will not as a matter of routine amount to a mitigating circumstance.").

⁸⁷ [Sentencing Judgment](#), paras. 24, 90.

⁸⁸ Rule 145(2)(a) of the Rules (emphasis added).

and the weight, *if any*, to be afforded to such circumstances.⁸⁹ Abd-Al-Rahman’s identification of circumstances that the Chamber *may* have considered in mitigation but did not do so—namely Abd-Al-Rahman’s purported role in conflict mediation prior to 2002-2003—does not demonstrate an error. The Appeals Chamber should reject his submissions on this basis.

42. In any event, the Chamber did not misinterpret Abd-Al-Rahman’s withdrawal of his previous submission that he was a “man of peace”, which stemmed from his misrepresentation of the Trial Judgment.⁹⁰ The Chamber noted the Defence’s clarification at the sentencing hearing, and still considered the Defence’s submissions on Abd-Al-Rahman’s purported personality traits and good character as well as his alleged mediating role (albeit after the crimes), relying on evidence of the same nature as Abd-Al-Rahman alleges the Chamber ignored.⁹¹ That the Chamber did not explicitly refer to P-0932’s evidence does not demonstrate an error.⁹² A chamber is not obliged to explicitly refer to every single piece of evidence that it considered.⁹³

43. However, the Chamber did address Abd-Al-Rahman’s submissions that witness evidence purportedly demonstrates his “humane and generous disposition”, including his “good reputation and his participation in reconciliation and prevention of violence”, although in the context of his post-offence conduct.⁹⁴ While the Chamber acknowledged that there was evidence on the record that Abd-Al-Rahman “was a ‘kind person’, a ‘nice’ person, a ‘humanitarian person’, a ‘humane’ and ‘noble’ person”⁹⁵ it correctly also considered compelling evidence to the contrary, which did not permit the Chamber to establish, on a balance of probabilities, that Abd-Al-Rahman was, as argued by the Defence, “a man who forcefully and

⁸⁹ *Bemba et al. SAJ*, para. 187 citing *Lubanga SAJ*, para. 43, fn. 73; *D. Milošević AJ*, para. 316. See also *Al Hassan SJ*, para. 27; *Ongwen SJ*, para. 54; *Ntaganda SJ*, para. 22; *Lubanga SAJ*, paras. 43, 111.

⁹⁰ *Contra* *Sentence Appeal*, para. 41. At the sentencing hearing, the Defence withdrew its submission that Abd-Al-Rahman was “a man of peace” based on a misrepresentation of the Trial Judgment: *Defence Sentencing Brief*, para. 63 (*referring to* Judgment, para. 680, which relied on P-0932 and P-0585); see *Sentencing Judgment*, para. 91 (*citing* *Defence Oral Sentencing Submissions*: T-165, pp. 49-50) and *Sentence Appeal*, para. 40.

⁹¹ *Sentencing Judgment*, paras. 85-99. See also below response to Ground 5.

⁹² *Contra* *Sentence Appeal*, para. 42.

⁹³ See *Bemba et al. AJ*, para. 105 (“[T]o fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision. [...] [I]t is to be presumed that the Trial Chamber evaluated all the evidence before it, ‘as long as there is no indication that [it] completely disregarded any particular piece of evidence’.”).

⁹⁴ *Sentencing Judgment*, para. 85 citing *Defence Sentencing Brief*, paras. 59-62, and *referring to* D-0001, D-0005, D-0007, D-0029, D-0040, and D-0041.

⁹⁵ *Sentencing Judgment*, para. 93.

publicly reject[ed] racism and tribalism’ or called for equality of or full respect of any individual”.⁹⁶

44. Ground 4 of Abd-Al-Rahman’s appeal should therefore be dismissed.

III.2. The alleged error does not materially affect the sentences

45. In any event, even assuming *arguendo* that the Chamber erred in failing to consider P-0932’s evidence, Abd-Al-Rahman fails to show that such error materially affected his sentences. P-0932’s evidence does not demonstrate genuine and concrete efforts by Abd-Al-Rahman to promote peace, reconciliation, or social cohesion, and much less merit sentence mitigation in light of the gravity of his crimes and the lack of actions seeking to assist the victims or to minimise the harm he caused.

46. *First*, Abd-Al-Rahman’s reliance on P-0932’s evidence overstates both the centrality of his alleged role in mediation and the potential mitigating weight on the basis of the evidence relied on.⁹⁷ P-0932 testified that, in 2001—years before, and unrelated to, the crimes of which he was convicted—Abd-Al-Rahman participated in two meetings convened to resolve a tribal dispute concerning the ownership of cows.⁹⁸ P-0932 did not identify Abd-Al-Rahman as a “neutral” mediator and was uncertain why he was there.⁹⁹ He explained that the negotiations were convened by another individual,¹⁰⁰ and that Abd-Al-Rahman participated alongside representatives from multiple villages¹⁰¹ and appeared to preside on the side of the Arabs.¹⁰² Although the evidence suggests that, following the second meeting, Abd-Al-Rahman instructed a party to return the cows,¹⁰³ that instruction came only after his earlier refusal, at the first meeting, to allow their return to the rightful owners.¹⁰⁴

47. Abd-Al-Rahman’s sole reliance on P-0932’s evidence, even taken at its highest, reflects an isolated act, incapable of establishing genuine or concrete efforts by Abd-Al-Rahman to

⁹⁶ [Sentencing Judgment](#), paras. 94-97.

⁹⁷ See also [Al Hassan SJ](#), para. 117 (through his role in the Islamic Police, the accused “helped protect the property of the local population, facilitated peaceful resolution of disputes, assisted members of the population, in particular in relation to a person killed in a car accident [and] ‘intervened to stop armed men from looting property’.”). Further, the Chamber considered that certain “good actions” that superseded the accused’s normal role were minor in nature and could only be accorded very limited weight particularly considering the nature of the crimes of which he was convicted. See [Al Hassan SJ](#), paras. 118-119.

⁹⁸ P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607-0608, paras. 26-30.

⁹⁹ P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607-0608, para. 29.

¹⁰⁰ P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607, para. 27.

¹⁰¹ P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607, paras. 26-27.

¹⁰² P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607, para. 27.

¹⁰³ [Sentence Appeal](#), para. 48 citing P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0608, para. 30.

¹⁰⁴ P-0932’s Statement, DAR-OTP-0222-0602-R02, at 0607, para. 27.

promote peace, reconciliation, and social cohesion.¹⁰⁵ This is particularly true when assessed against compelling evidence that contradicts Abd-Al-Rahman's 'peaceful' character in the context of his post-offence conduct.¹⁰⁶ Abd-Al-Rahman fails to show that the Chamber would not have discounted the mitigating effect of his conduct in inter-tribal negotiations prior to 2002-2003 for these same reasons.

48. *Second*, even if the Chamber had considered specifically Abd-Al-Rahman's role in two tribal negotiations on the ownership of cattle prior to the charging period, this would not necessarily have led to a reduction of his sentences. Sentencing requires a chamber to carefully balance all factors it considers relevant, and then to exercise its broad discretion to determine the appropriate sentence.¹⁰⁷ As part of this assessment, the Chamber would have weighed this factor—an isolated act of marginal significance in the context of the case—against multiple competing factors, including the gravity of the crimes, the discriminatory intent underlying them, and the substantial harm caused. Abd-Al-Rahman provides no argument on how the Chamber would necessarily have imposed lower sentences after considering all these factors in context.

49. For the reasons set out above, Abd-Al-Rahman's Ground 4 should be dismissed.

IV. Ground 5: The Chamber correctly did not give mitigating weight to Abd-Al-Rahman's post-offence conduct

50. Consistent with rule 145(2)(a)(ii) and relevant jurisprudence, the Chamber duly considered and reasonably weighed evidence of Abd-Al-Rahman's good character and post-offence peace efforts, and concluded that his sentence could not be reduced as a result.¹⁰⁸ Under his fifth ground of appeal,¹⁰⁹ Abd-Al-Rahman misrepresents the Chamber's reasoning by arguing that the Chamber accepted that there was credible evidence of his good character and

¹⁰⁵ See [Sentencing Judgment](#), para. 98; [Yekatom and Ngaïssona TJ](#), para. 4467; [Ntaganda SJ](#), para. 218 ("The Chamber considers that promotion of peace and reconciliation may only constitute a mitigating circumstance if it is genuine and concrete.").

¹⁰⁶ See *below* response to Ground 5. In the Judgment, the Chamber relied on P-0932's evidence to support its finding that Abd-Al-Rahman was well known and respected, rather than as evidence of his "good character". [Trial Judgment](#), para. 680. *Contra* [Sentence Appeal](#), para. 43. The remaining evidence relied on by the Chamber—which was omitted by Abd-Al-Rahman in Ground 4—concerns P-0585's evidence (i) that Abd-Al-Rahman oversaw unrest in a village following accusations that its inhabitants had stolen a Janjaweed weapon, during which his security officers beat villagers, and (ii) that complaints of mistreatment by the Janjaweed, including rapes of women, were submitted to Abd-Al-Rahman but resulted only in his false assurances, with no ensuing action. As the Defence was forced to concede, the Chamber's findings and the underlying evidence of his role as a mediator do not, in fact, reflect his 'peaceful' character. P-0585: [T-100](#), pp. 3-6 and [T-102](#), pp. 35-36 *referenced in* [Trial Judgment](#), para. 680, fn. 2276.

¹⁰⁷ See e.g. [Lubanga SAJ](#), para. 34; [Ntaganda SJ](#), para. 12; [Lubanga SJ](#), para. 3.

¹⁰⁸ [Trial Judgment](#), paras. 85-99.

¹⁰⁹ [Sentence Appeal](#), paras. 52-70.

post-offence peace efforts,¹¹⁰ yet declined to mitigate his sentence “because of the gravity of the crimes of which he has been convicted.”¹¹¹ In any event, even assuming *arguendo* that the Chamber erred as alleged, any such error would not have materially affected the sentence.

51. Ground 5 of Abd-Al-Rahman’s appeal should be dismissed.

IV.1. Abd-Al-Rahman’s argument is based on a misunderstanding of the Chamber’s reasoning

52. In assessing whether evidence of Abd-Al-Rahman’s good character and his post-offence conduct warranted a reduction of his sentence pursuant to rule 145(2)(a)(ii), the Chamber concluded that it did not.¹¹² Contrary to Abd-Al-Rahman’s contention¹¹³ and as described above,¹¹⁴ the Chamber did consider evidence of his good character and post-offence conduct, including his speeches following the acts. It referred, *inter alia*, to evidence that he was described as “kind,” “humane,” and “good”; that he contributed to the well-being of the community; that he did not make discriminatory statements; and that he established a reconciliation committee and intervened on several occasions to prevent conflict in Rahad Al-Berdi and to protect the Fur.¹¹⁵

53. Abd-Al-Rahman further incorrectly submits that the Chamber refused to accord this evidence mitigating weight “because of the gravity of the crimes of which he had been convicted.”¹¹⁶ In fact, the Chamber relied on different reasons for declining to reduce the sentence on this basis.

54. *First*, while accepting that some witnesses had not heard Abd-Al-Rahman make discriminatory remarks, the Chamber assigned this evidence limited weight in light of compelling contrary evidence from witnesses and victims of the crimes.¹¹⁷

55. *Second*, the Chamber identified evidence contradicting claims regarding Abd-Al-Rahman’s speeches and his role in preventing conflict and promoting peace among tribes. It found that, given the inflammatory nature of his speeches, it had not been established on a balance of probabilities that he rejected racism and tribalism, advocated equality, or fully

¹¹⁰ [Sentence Appeal](#), paras. 55, 68.

¹¹¹ [Sentence Appeal](#), paras. 54-57, 67.

¹¹² [Sentencing Judgment](#), paras. 85-99.

¹¹³ [Sentence Appeal](#), paras. 67-68.

¹¹⁴ *See above* paras. 42-43.

¹¹⁵ [Sentencing Judgment](#), paras. 85-99.

¹¹⁶ [Sentence Appeal](#), para. 54; *see also* paras. 55-57, 67.

¹¹⁷ [Sentencing Judgment](#), para. 94.

respected all individuals.¹¹⁸ In this context, the Chamber further held that evidence of good behaviour or character that is strongly contradicted by the record is insufficient to justify a reduction of sentence, including on the basis of prospects for rehabilitation.¹¹⁹

56. *Third*, the Chamber recalled its findings in the Trial Judgment, including that Abd-Al-Rahman directly committed crimes such as beating detainees—including children—causing some deaths, and walking and jumping on detainees. It also recalled its findings regarding his use of derogatory language.¹²⁰ The Chamber concluded that these findings contradict his claims of good character. It further held that, even if he had engaged in acts of sympathy toward others, it was not appropriate to treat such conduct as mitigating in light of the scale and heinous nature of the crimes of which he was convicted.¹²¹ Finally, it noted the absence of any evidence that he assisted victims or took steps to mitigate the harm caused by his crimes.¹²² This demonstrates that the Chamber did not decline to give mitigating weight to evidence of Abd-Al-Rahman's good character and peace efforts on account of the gravity of the crimes. Rather, it found that any evidence of good character was undermined by other compelling evidence and its factual findings regarding the crimes, as well as the lack of evidence regarding Abd-Al-Rahman's assistance to victims or actions to minimise the harm he caused, which in turn called into question the genuineness of his post-offence conduct.¹²³

57. As Abd-Al-Rahman's arguments do not accurately reflect the Chamber's reasoning, Ground 5 of his appeal should be dismissed on this basis alone.

IV.2. The Chamber correctly considered and reasonably weighed Abd-Al-Rahman's post-offence conduct

58. In determining whether a sentence should be mitigated, rule 145(2)(a)(ii) requires a trial chamber to consider post-offence conduct.¹²⁴ Jurisprudence further confirms that evidence of a convicted person's good character *may* be taken into account as a mitigating factor.¹²⁵ The Chamber fully complied with these requirements. It expressly acknowledged the existence of

¹¹⁸ [Sentencing Judgment](#), paras. 95-97.

¹¹⁹ [Sentencing Judgment](#), para. 89.

¹²⁰ [Sentencing Judgment](#), para. 92.

¹²¹ [Sentencing Judgment](#), para. 98.

¹²² [Sentencing Judgment](#), para. 98.

¹²³ [Sentencing Judgment](#), para. 98.

¹²⁴ See e.g. [Katanga SJ](#), para. 115; see also [Sentence Appeal](#), paras. 56-57.

¹²⁵ [Sentencing Judgment](#), para. 89; [Al Hassan SJ](#), para. 115; see also [Sentence Appeal](#), para. 55.

evidence relating to Abd-Al-Rahman's good character, post-offence statements, and peace efforts,¹²⁶ and addressed that evidence in detail in its reasoning.¹²⁷

59. Neither rule 145(2)(a)(ii) nor the relevant jurisprudence requires a Chamber to *necessarily* assign mitigating weight to such evidence and to reduce the sentence. As held by the Appeals Chamber in the *Katanga* case, genuine efforts to promote peace and reconciliation “*must be taken into account and could potentially mitigate the sentence*”.¹²⁸ The weight given to an individual factor and the balancing of all relevant factors in arriving at a sentence is at the core of a trial chamber's exercise of discretion.¹²⁹ A trial chamber, having “intimate knowledge of the case”,¹³⁰ has broad discretion in “deciding how much weight, *if any*, to be accorded to the mitigating circumstances identified”.¹³¹

60. In particular, the Chamber was entitled to accord no mitigating weight to evidence of Abd-Al-Rahman's good character and post-offence peace efforts, having found that the evidence as a whole did not establish that any such efforts or other acts were genuine.¹³² This conclusion was not only well within the Chamber's discretion,¹³³ but also consistent with the practice of other Chambers of this Court.¹³⁴ Notably, the legal authority relied upon by Abd-Al-Rahman in support of Ground 5 expressly supports this approach.¹³⁵

61. In sum, Abd-Al-Rahman fails to demonstrate any legal error in the Chamber's assessment of evidence relating to his good character and post-offence conduct. Ground 5 should therefore be dismissed.

IV.3. The alleged error does not materially affect the sentence

62. In any event, Abd-Al-Rahman fails to demonstrate that the alleged error under Ground 5 materially affected either his individual sentences or his joint sentence.¹³⁶

63. *First*, his arguments are unsubstantiated and speculative. Abd-Al-Rahman merely asserts that had the Chamber not committed the error alleged under Ground 5, “there is every

¹²⁶ [Sentencing Judgment](#), para. 93.

¹²⁷ [Sentencing Judgment](#), paras. 94-98.

¹²⁸ [Katanga SJ](#), para. 91 (emphasis added).

¹²⁹ [Ntaganda SJ](#), para. 12; [Lubanga SJ](#), para. 3; [Lubanga SAJ](#), paras. 40, 43.

¹³⁰ [Lubanga SAJ](#), para. 34. *See also* paras. 66, 68, 70, 73.

¹³¹ [Bemba et al. SAJ](#), para. 187 (emphasis added). *See also* para. 188; [Lubanga SAJ](#), paras. 40, 43.

¹³² [Sentencing Judgment](#), para. 98.

¹³³ *Contra* [Sentence Appeal](#), para. 67.

¹³⁴ *See* [Yekatom & Ngaissona TJ](#), paras. 4467-4468; [Katanga SJ](#), para. 91; [Ntaganda SJ](#), para. 218; [Bemba SJ](#), para. 72; [Lubanga SJ](#), para. 87.

¹³⁵ [Sentence Appeal](#), para. 66 citing [Katanga SJ](#), para. 91.

¹³⁶ [Sentence Appeal](#), paras. 49-70.

reason to believe” that it would have “imposed less severe sentences”.¹³⁷ This general assertion fails to identify, with sufficient precision, how the alleged error had a material impact on the sentences imposed.¹³⁸

64. *Second*, even if the Chamber had accorded some mitigating weight to evidence of Abd-Al-Rahman’s good character and post-offence conduct, this would not necessarily have resulted in lower sentences. Sentencing is not a mathematical exercise. It requires the Chamber to balance all relevant factors and to exercise its broad discretion in determining the appropriate sentence.¹³⁹ Abd-Al-Rahman’s claim fails to account for the gravity and scale of the hundreds of crimes of which he was convicted, including that they were committed with discriminatory intent against vulnerable and defenceless victims, that many were perpetrated with particular cruelty, and that some were committed personally by him.¹⁴⁰

65. For the reasons set out above, Ground 5 of Abd-Al-Rahman’s sentencing appeal should be dismissed.

V. Ground 6: The Chamber correctly assessed and reasonably dismissed Abd-Al-Rahman’s alleged compensation efforts and expressions of empathy

66. Consistent with rule 145(2)(a)(ii) and relevant jurisprudence, the Chamber duly considered Abd-Al-Rahman’s purported efforts to compensate victims and his alleged expressions of empathy for victims, and reasonably exercised its discretion in concluding that they did not warrant a reduction of sentence.¹⁴¹ In his sixth ground of appeal, Abd-Al-Rahman argues, without merit, that rule 145(2)(a)(ii) imposes a mandatory and objective assessment of any efforts undertaken—irrespective of their outcome or sincerity—and of any statements made—regardless of their context or credibility.¹⁴² In doing so, he misstates the legal test under rule 145(2)(a)(ii) and merely seeks to substitute his own assessment of the alleged mitigating factors for that of the Chamber.¹⁴³ In any event, even assuming *arguendo* that the Chamber erred as alleged, any such error would not have materially affected his sentences. Ground 6 of Abd-Al-Rahman’s appeal should therefore be dismissed.

¹³⁷ [Sentence Appeal](#), para. 69.

¹³⁸ [Kony et al. Admissibility AD](#), para. 48; [Gbagbo Third Detention AD](#), para. 18.

¹³⁹ [Lubanga SAJ](#), para. 34. *See also* paras. 66, 68, 70, 73.

¹⁴⁰ [Prosecution Appeal Brief \(Sentencing\)](#), paras. 3-7. *See also* [Sentencing Judgment](#), para. 92.

¹⁴¹ [Sentencing Judgment](#), paras. 100-110.

¹⁴² *See, e.g.*, [Sentence Appeal](#), paras. 74, 80, 82.

¹⁴³ [Sentence Appeal](#), paras. 71-85.

V.1. Abd-Al-Rahman misstates the legal test under rule 145(2)(a)(ii)

67. Contrary to Abd-Al-Rahman’s submission,¹⁴⁴ there is no “objective” legal test governing the assessment of a person’s post-offence conduct under rule 145(2)(a)(ii). As set out in response to Ground 5 above,¹⁴⁵ although a Chamber *must* consider post-offence conduct, including efforts to compensate victims, as potentially mitigating circumstances,¹⁴⁶ it is not required to assign such conduct any weight. Rather, the weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a trial chamber’s exercise of discretion.¹⁴⁷

68. Abd-Al-Rahman argues that the sentencing practice he relies on confirms “at least to some extent” that any effort to compensate victims, regardless of the intent or result, “*must* amount to mitigation of sentence ‘as appropriate’”.¹⁴⁸ The two cases he cites do not support that position. In *Bemba et al.*, the issue of compensation of victims under rule 145(2)(a)(ii) did not even arise, but the Trial Chamber did hold that post-offence conduct “does not *per se* represent mitigating circumstances within the meaning of Rule 145(2)(a)”.¹⁴⁹ In *Al Mahdi*, the Trial Chamber likewise confirmed that it retains “a considerable degree of discretion” in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to it.¹⁵⁰ It exercised its discretion in considering the convicted person’s offer of reimbursement as part of its assessment of relevant factors under article 145(1).¹⁵¹ Neither decision establishes a rule that *all* asserted efforts to compensate victims must mitigate sentence.

69. Moreover, comparisons to other cases before this Court are of limited relevance, if any. The assessment of a convicted person’s post-offence conduct, like sentencing generally, is inherently case-specific.¹⁵² Findings made in other cases, on different facts and evidentiary records, do not demonstrate any legal error in the Chamber’s assessment in this case.

V.2. The Chamber correctly assessed and reasonably dismissed Abd-Al-Rahman’s alleged post-offence conduct

70. *First*, the Chamber reasonably concluded that the initiatives relied upon by Abd-Al-Rahman did not amount to efforts to compensate victims within the meaning of rule

¹⁴⁴ [Sentence Appeal](#), para. 74.

¹⁴⁵ *See above* paras. 58-600.

¹⁴⁶ *See e.g.* [Katanga SJ](#), para. 115.

¹⁴⁷ [Ntaganda SJ](#), para. 12; [Lubanga SJ](#), para. 3; [Lubanga SAJ](#), paras. 34, 40, 43; [Bemba et al. SAJ](#), para. 187.

¹⁴⁸ [Sentence Appeal](#), para. 74 (emphasis added).

¹⁴⁹ [Bemba et al. SJ](#), para. 88.

¹⁵⁰ [Al Mahdi TJ](#), para. 74.

¹⁵¹ [Al Mahdi TJ](#), paras. 75, 104.

¹⁵² [Lubanga SAJ](#), paras. 76-77; [Yekatom & Ngaißona TJ](#), paras. 4648, 4825; [Al Mahdi TJ](#), para. 107.

145(2)(a)(ii).¹⁵³ In so finding, it correctly assessed their nature together with the fact that Abd-Al-Rahman denied, and continues to deny, responsibility for the suffering of victims, and concluded that such an incongruous message did not “pave[...] the way to reparation proceedings”.¹⁵⁴ The Chamber was not bound to treat the alleged efforts as mitigating merely because they were repeated or framed as concrete proposals.¹⁵⁵ Accordingly, its conclusion that they did not warrant a reduction of sentence was well within its discretion.

71. Abd-Al-Rahman’s related argument that the Chamber impermissibly limited mitigation to cases involving personal financial compensation¹⁵⁶ mischaracterises the Chamber’s reasoning. The Chamber did not hold that only a convicted person with personal financial means can benefit from mitigation under that provision.¹⁵⁷ Abd-Al-Rahman’s argument challenges a statement made by the Presiding Judge during a court hearing in which she referred to the personal compensation of victims through the sale of property as an example of potentially relevant post-offence conduct under rule 145(2)(a)(ii).¹⁵⁸ This remark is not part of the Chamber’s reasoning in the Sentencing Judgment, and is therefore irrelevant to this appeal.

72. *Second*, the Chamber reasonably assessed and dismissed, for mitigation purposes, Abd-Al-Rahman’s public expressions of empathy.¹⁵⁹ Abd-Al-Rahman is incorrect to suggest that the Chamber required a guilty plea as a condition for according mitigating weight.¹⁶⁰ It referred to the guilty plea in *Al Mahdi*, after the Defence had compared that case to his own, only to distinguish the circumstances of the two cases.¹⁶¹

73. Instead, the Chamber correctly held that a statement by the convicted person on the general plight of victims, “in and of itself, does not automatically amount to a mitigating factor.”¹⁶² It then assessed the sincerity of Abd-Al-Rahman’s unsworn statements in their broader context, including in light of his line of defence, through which he consistently suggested that participating victims and other Prosecution witnesses “have either lied or at best negligently failed to state the truth.”¹⁶³ Having regard to both the content of the statements and the broader context in which they were made, the Chamber was plainly entitled to consider that

¹⁵³ [Sentencing Judgment](#), para. 103.

¹⁵⁴ [Sentencing Judgment](#), para. 102.

¹⁵⁵ *Contra* [Sentence Appeal](#), paras. 76-78.

¹⁵⁶ [Sentence Appeal](#), para. 83.

¹⁵⁷ *Contra* [Sentence Appeal](#), para. 83.

¹⁵⁸ [Defence Oral Sentencing Submissions](#): T-165, p. 69:1-2 (referenced at [Sentence Appeal](#), fn. 129).

¹⁵⁹ [Sentencing Judgment](#), paras. 107-110.

¹⁶⁰ [Sentence Appeal](#), para. 84.

¹⁶¹ [Sentencing Judgment](#), paras. 107, 109.

¹⁶² [Sentencing Judgment](#), para. 107.

¹⁶³ [Sentencing Judgment](#), para. 108.

his brief and general references to the suffering of victims, made in his final address, did not reflect genuine empathy warranting mitigation.¹⁶⁴ Rather than being a “miracle of international criminal justice”,¹⁶⁵ the Chamber reasonably found it to be “calculated and insincere”,¹⁶⁶ and concluded, within its discretion, that his unsworn statements generally did not provide any mitigation warranting a reduction of his sentence.¹⁶⁷

74. *Finally*, Abd-Al-Rahman’s assertion that the Chamber acted unfairly in rejecting his alleged efforts and statements¹⁶⁸ shows no separate error. The Chamber addressed Abd-Al-Rahman’s relevant submissions, evaluated the purported conduct and statements, and gave reasons for declining to treat them as mitigating.¹⁶⁹ Once his complaints of factual and legal error fail, there is no independent basis for any finding of unfairness.

75. Ground 6 of Abd-Al-Rahman’s appeal should therefore be dismissed.

V.3. The alleged error does not materially affect the sentences

76. In any event, even assuming *arguendo* that the Chamber erred in the manner Abd-Al-Rahman alleges, he fails to demonstrate that any such error materially affected his sentences.¹⁷⁰ He merely speculates that proper consideration of his alleged conduct and statements “*should* have resulted in a significant reduction of the sentence passed for each of the crimes for which he was convicted, and of his joint sentence”.¹⁷¹ This argument fails to meet Abd-Al-Rahman’s burden. As noted above,¹⁷² an appellant is required to specify, with sufficient precision, how the alleged error would materially affect the impugned decision.¹⁷³ It must be shown that the decision *would* have been substantially different absent the error.¹⁷⁴

77. Even if the Chamber had considered Abd-Al-Rahman’s actions as amounting to efforts to compensate victims under rule 145(2)(a)(ii), and his unsworn statements as genuine expressions of empathy for victims warranting mitigation, this would not necessarily have resulted in a reduction of his sentences. The Chamber would still have had to weigh any such post-offence conduct against other competing factors, such as the gravity of the crimes, the

¹⁶⁴ [Sentencing Judgment](#), para. 108.

¹⁶⁵ [Sentence Appeal](#), para. 82.

¹⁶⁶ [Sentencing Judgment](#), para. 108.

¹⁶⁷ [Sentencing Judgment](#), para. 110.

¹⁶⁸ *Contra* [Sentence Appeal](#), para. 84.

¹⁶⁹ [Sentencing Judgment](#), paras. 100-110.

¹⁷⁰ [Sentence Appeal](#), paras. 71-85.

¹⁷¹ [Sentence Appeal](#), para. 85 (emphasis added).

¹⁷² *See above*, para. 355.

¹⁷³ [Gbagbo Third Detention AD](#), para. 18; [Kony et al. Admissibility AD](#), para. 48.

¹⁷⁴ [Ngudjolo AJ](#), para. 285.

discriminatory intent underlying them, and the substantial harm caused.¹⁷⁵ Abd-Al-Rahman does not show that the Chamber would necessarily have imposed lower sentences after considering all these factors in context.

78. For the reasons set out above, Ground 6 of Abd-Al-Rahman’s sentencing appeal should be dismissed.

VI. Ground 7: The Chamber correctly found that mistake of law did not amount to a mitigating circumstance under rule 145(2)

79. The Chamber correctly found that Abd-Al-Rahman’s arguments in relation to mistake of law did not constitute a mitigating circumstance under rule 145(2)(a)(i).¹⁷⁶ In reaching this conclusion, the Chamber recalled its Trial Judgment findings—made beyond reasonable doubt—that Abd-Al-Rahman had an adequate level of literacy and exposure to the rules and institutions of the Sudanese State and that he “was able to appreciate that his conduct was criminal”.¹⁷⁷ Accordingly, in its Sentencing Judgment, the Chamber rejected his argument that, on a balance of probabilities, he probably believed he was obligated to commit the crimes in question.¹⁷⁸ The Chamber correctly concluded that Abd-Al-Rahman’s submissions amounted to an impermissible request to reconsider its Trial Judgment findings.¹⁷⁹

80. Under his seventh Ground of Appeal, Abd-Al-Rahman argues that, even if the evidence established beyond reasonable doubt that he made no mistake of law—and he was able to appreciate that his conduct was criminal—when determining his sentence, the Chamber should nevertheless have: considered the evidence under the lower standard of balance of probabilities;¹⁸⁰ established that he probably mistakenly believed that he acted lawfully;¹⁸¹ and considered this in mitigation.¹⁸² His submissions merely reiterate arguments rejected at trial and misrepresent the Chamber’s findings and applicable law. Ultimately they fail to show any error of fact or law in the Chamber’s conclusion.

¹⁷⁵ See further above para. 64.

¹⁷⁶ [Sentencing Judgment](#), para. 118. The Prosecution notes that the Chamber erroneously refers to rule 145(1)(a), instead of 145(2)(a).

¹⁷⁷ [Sentencing Judgment](#), para. 115 recalling [Trial Judgment](#), paras. 52-54.

¹⁷⁸ [Sentencing Judgment](#), para. 112. See also paras. 111, 113-118.

¹⁷⁹ [Sentencing Judgment](#), para. 116.

¹⁸⁰ [Sentence Appeal](#), para. 93.

¹⁸¹ [Sentence Appeal](#), paras. 94-95.

¹⁸² [Sentence Appeal](#), para. 95.

81. The Chamber did not “summarily dismiss” but rather gave due consideration to his trial¹⁸³ and sentencing¹⁸⁴ submissions regarding mistake of law. The Chamber was not obliged to address Abd-Al-Rahman’s specific factual arguments regarding P-0757, P-0903, P-0916, P-0922, and P-0984, having correctly found that he was “wrongly relitigating and resubmitting arguments already considered” in the Trial Judgment.¹⁸⁵ Although Abd-Al-Rahman asserts that the “Defence did not ask, and of course could not have asked, the Trial Chamber to go behind those [trial] findings”, he does precisely that:¹⁸⁶ after acknowledging that “[a]pplying the standard of proof beyond reasonable doubt applicable at trial, the Defence’s argument [...] failed”,¹⁸⁷ he argues that “applying the relaxed balance of probabilities standard applicable to mitigating circumstances [...] it is reasonable to conclude that, [...] it is probable that [...] he would have believed [...] that Harun had authority [...] to order [...] and he and the other attendees were under an obligation to commit those crimes”.¹⁸⁸

82. The Chamber correctly found Abd-Al-Rahman’s sentencing submissions that his “belief that acts and conduct instructed by the authorities [...] had to be performed irrespective of their apparent criminal nature”¹⁸⁹ directly contradicted the Trial Judgment findings that Abd-Al-Rahman had an adequate level of literacy and exposure to the rules and institutions of the Sudanese State and that he “was able to appreciate that his conduct was criminal”.¹⁹⁰ Accordingly, the Chamber found they constituted an improper re-litigation of the Trial Chamber’s findings under a lower standard.¹⁹¹ Ground 7 should be dismissed on that basis alone.

83. However, for the sake of completeness, the Prosecution will also address the merit of Abd-Al-Rahman’s submissions and show that the Chamber’s approach was legally sound.

84. *First*, under rule 145(2)(a)(i), “circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or

¹⁸³ [Trial Judgment](#), paras. 54, 948. *Contra* [Sentence Appeal](#), para. 90. *See also* Prosecution Response to Defence Conviction Appeal, paras. 321-347.

¹⁸⁴ [Sentencing Judgment](#), paras. 111-118. *Contra* [Sentence Appeal](#), paras. 92-93.

¹⁸⁵ [Sentencing Judgment](#), para. 117.

¹⁸⁶ [Sentence Appeal](#), para. 93 *referring to* [Defence Sentencing Brief](#), paras. 33-37.

¹⁸⁷ [Defence Sentencing Brief](#), para. 34.

¹⁸⁸ [Defence Sentencing Brief](#), para. 35.

¹⁸⁹ [Defence Sentencing Brief](#), para. 33.

¹⁹⁰ [Sentencing Judgment](#), para. 115 *recalling* [Trial Judgment](#), paras. 52-54.

¹⁹¹ [Sentencing Judgment](#), paras. 116-117. *See e.g.* [Bemba et al. SAJ](#), para. 138 (“even though a decision on sentence will, to a certain extent, rely on findings made in the conviction decision the appropriate avenue to challenge these findings is in an appeal against the conviction decision [...] and not in an appeal against sentence.”); *see also* paras. 139-140, 170, 176.

duress”,¹⁹² may constitute mitigating circumstances for sentencing purposes. The existence of such mitigating circumstances is established on a balance of probabilities standard and not a beyond reasonable doubt one.¹⁹³ However, this does not mean that a Chamber may make sentencing conclusions on a balance of probabilities that contradict prior factual findings made beyond reasonable doubt under article 74. The lower evidentiary standard for mitigating factors at sentencing governs new or unresolved factual questions, not ones already determined, such as in this case. Ultimately, the sentence “must reflect the culpability of the convicted person”¹⁹⁴ as established under article 74.

85. In this case, the Chamber found beyond reasonable doubt that Abd-Al-Rahman “was able to appreciate that his conduct was criminal”¹⁹⁵ and that he made no mistake regarding the illegality of his conduct.¹⁹⁶ In light of these findings, it is not open for Abd-Al-Rahman to argue that the Chamber should have concluded the opposite—that he must have mistakenly believed that the crimes were lawful and mandatory¹⁹⁷—under the lower sentencing evidentiary standard of balance of probabilities.¹⁹⁸ Abd-Al-Rahman’s submission conflates two distinct propositions: that a chamber may treat an established but legally insufficient circumstance as a mitigating factor—which rule 145(2)(a)(i) permits—and that a chamber may make fresh findings at sentencing on a balance of probabilities contradicting earlier factual determinations under article 74—which rule 145(2)(a)(i) does not permit.

86. Abd-Al-Rahman’s reference to the *Ongwen* case is misplaced and, in fact, undermines his position.¹⁹⁹ In *Ongwen*, the Trial Chamber found, in its article 74 trial judgment, that the accused did not suffer from a ‘*mental disease or defect*’ which could exclude criminal responsibility under article 31(1)(a).²⁰⁰ In its sentencing judgment under article 76, the Trial Chamber agreed to assess whether Ongwen acted with ‘*substantially diminished mental capacity*’ under rule 145(2)(a)(i) because, unlike Abd-Al-Rahman’s position here, Ongwen’s “submissions for sentencing [did] *not directly contradict* the findings of the Trial Judgment”.²⁰¹ Even then the *Ongwen* Trial Chamber concluded that “the results of the detailed evidentiary analysis of the possibility of *mental disease or defect* in Dominic Ongwen are also *incompatible*

¹⁹² Rule 145(2)(a).

¹⁹³ [Bemba SJ](#), para. 19; [Lubanga SJ](#), para. 34; [Katanga SJ](#), para. 34.

¹⁹⁴ Rule 145(1)(a).

¹⁹⁵ [Sentencing Judgment](#), para. 115 recalling [Trial Judgment](#), para. 54.

¹⁹⁶ [Trial Judgment](#), para. 948.

¹⁹⁷ [Sentence Appeal](#), para. 90.

¹⁹⁸ [Sentence Appeal](#), paras. 94-95.

¹⁹⁹ *Contra* [Sentence Appeal](#), para. 91.

²⁰⁰ [Ongwen TJ](#), Section IV.D.1, *in particular* paras. 2517-2521, 2580 referred to in [Ongwen SJ](#), para. 93.

²⁰¹ [Ongwen SJ](#), para. 93 (emphasis added).

with any consideration of *substantially diminished mental capacity*.”²⁰² The *Ongwen* Trial Chamber applied the same logic to duress under article 31(1)(c). Since the Trial Chamber found that Dominic Ongwen’s criminal conduct had not been caused by any threat and therefore excluded the defence of duress in its article 74 trial judgment, it held that duress was equally “not applicable [...] as a mitigating circumstance pursuant to Rule 145(2)(a)(i) of the Rules.”²⁰³ It observed that Ongwen’s “arguments relate[d] *squarely to issues already resolved* in the Trial Judgment.”²⁰⁴

87. The *Ongwen* case thus reaffirms the principle that when sentencing submissions directly contradict factual findings made beyond reasonable doubt in the article 74 trial judgment, a chamber will not re-engage with the underlying evidence in its sentencing judgment. Abd-Al-Rahman’s submissions directly contradict the Trial Judgment’s findings. The *Ongwen* case therefore undermines, rather than supports, his position. Abd-Al-Rahman cannot now ask the Chamber to consider his alleged mistake of law in mitigation for the purposes of sentencing, when the Chamber has already determined at trial, as a matter of fact and against a higher evidentiary standard, that no such mistake existed.

88. *Second*, and in any event, the application of a mitigating circumstance under rule 145(2)(a)(i) also depends on *which* conditions for excluding criminal responsibility are not satisfied. For example, regarding duress under article 31(1)(d), the Trial Chamber in *Ongwen* held that, to be considered in mitigation under rule 145(2)(a)(i), “a finding of duress is still necessary, in the sense of the conduct constituting a crime being caused by duress resulting from a threat [...]”²⁰⁵ The Trial Chamber in that case further clarified that “this mitigating circumstance can be found in cases of duress not meeting the thresholds of necessity or reasonableness of the action taken by the perpetrator to avoid the threat, or where the specific mental element is not met”.²⁰⁶ But it emphasised that a finding of an actual threat also remains a prerequisite for sentencing considerations under rule 145(2)(a)(i). The same logic applies to mistake of law under article 32(2): to consider this in mitigation, the Chamber needed to have

²⁰² [Ongwen SJ](#), para. 93 (emphasis added).

²⁰³ [Ongwen SJ](#), para. 111; *see also* paras. 108-109 (“In the view of the Chamber, this mitigating circumstance can be found in cases of duress not meeting the thresholds of necessity or reasonableness of the action taken by the perpetrator to avoid the threat, or where the specific mental element is not met. [...] Importantly, in all cases, a finding of duress is still necessary, in the sense of the conduct constituting a crime being caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.”).

²⁰⁴ [Ongwen SJ](#), para. 112 (emphasis added). The Appeals Chamber upheld this conclusion (*see* [Ongwen SAJ](#), para. 293).

²⁰⁵ [Ongwen SJ](#), para. 109.

²⁰⁶ [Ongwen SJ](#), para. 108.

found, at a minimum, that the accused genuinely and mistakenly believed he was acting lawfully. A mistaken belief that does not negate the mental element, for instance, is legally insufficient under article 32(2),²⁰⁷ but may in some circumstances be considered in mitigation under rule 145(2)(a)(i).²⁰⁸ However, given the Chamber's finding that Abd-Al-Rahman knew that he was acting unlawfully, there was no mistake and no residual mental state of diminished awareness left to be considered in mitigation pursuant to rule 145(2)(a)(i).²⁰⁹

89. For these reasons, Ground 7 of Abd-Al-Rahman's sentencing appeal should be dismissed.

²⁰⁷ See Prosecution Response to Defence Conviction Appeal, paras. 327-340.

²⁰⁸ See similarly, but in relation to mistake of fact, Triffterer and Ohlin, "Art. 32", in Ambos, p. 1393, mn. 27 ("If criminal responsibility is still appropriate because the mistake does not negate the required mental element, the Court nevertheless may rule that the mistake of fact was of such a character that it should mitigate punishment"). See also [Al Hassan Sentencing Judgment](#), para. 110 ("Nonetheless, it is recognised in the jurisprudence of the Court that the level of awareness that the convicted person had of the seriousness of the convicted crimes is a relevant factor in determining the appropriate sentence").

²⁰⁹ See [Al Hassan Sentencing Judgment](#), para. 111.

CONCLUSION

90. For all these reasons, the Prosecution respectfully requests the Appeals Chamber to reject Abd-Al-Rahman's appeal against the Sentencing Judgment.



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 11th day of May 2026

At The Hague, the Netherlands