

**Cour
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**International
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Court**

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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 Ibañez Carranza
Judge Solomy 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 I**

Defence response to “Prosecution Appeal Brief (Sentencing)”

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

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I - INTRODUCTION

1. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman ("Mr Abd-Al-Rahman", "Defence") submits its response to the "Prosecution Appeal Brief" filed by the Office of the Prosecutor ("Prosecution") on 10 March 2026.¹
2. On 6 October 2025, Trial Chamber I ("Trial Chamber") delivered its judgment pursuant to Article 74 of the Rome Statute ("Statute"), convicting the Appellant of 27 counts of crimes against humanity and war crimes.² On the same day, the Trial Chamber rendered its Decision on the sentencing procedure, instructing the parties and participants to file written submissions and to submit additional evidence relevant to the sentence.³ On 5 November 2025 and 6 November 2025, the Prosecution and the Defence filed, respectively, their submissions on sentencing.⁴ Sentencing arguments were heard before the Trial Chamber on 17 to 19 November 2025.⁵
3. On 9 December 2025, pursuant to Articles 76 and 78 of the Statute, the Trial Chamber sentenced Mr Abd Al Rahman to a joint sentence of 20 years of imprisonment ("Sentencing Judgment").⁶
4. On 9 January 2026, the Prosecution gave notice of its intent to appeal the Sentencing Judgment.⁷
5. On 10 March 2026, the Prosecution submitted its sentencing appeal brief ("Prosecution Appeal Brief").⁸
6. The primary relief sought by the Prosecution is an increase of the individual sentences of certain crimes committed in Kodoom and Bindisi (Counts 2-3, 6-9, 11),

¹ [Prosecution Appeal Brief](#).

² [Trial Judgment](#).

³ [Decision on the Sentencing Procedure](#), para. 7.

⁴ [Prosecution's Submissions on Sentence](#); [Defence Sentencing Submissions](#).

⁵ T-164; T-165; T-166.

⁶ [Sentencing Judgment](#). A public redacted version of the [Sentencing Judgment](#) is available.

⁷ [Prosecution Notice of Appeal](#).

⁸ [Prosecution Appeal Brief](#).

Mukjar (Counts 17-18,21) and Deleig (Counts 27-28, 31) and a significant increase of the joint sentence (Grounds 1 and 2).⁹

7. In the alternative, the Prosecution requests that the Appeals Chamber should remand the matter to the Trial Chamber with clear directions on increasing the individual sentence and the joint sentence, significantly exceeding 20 years' imprisonment, including potentially of life imprisonment.¹⁰

8. The Prosecution's appeal is in fact nothing more than a disagreement about the joint sentence of 20 years' imprisonment passed by the Trial Chamber. Whilst some effort is expended in an attempt to demonstrate various errors of fact, law, and abuses of discretion, often employing arguments revolving around semantics, the Prosecution is in reality simply dissatisfied that the Trial Chamber decided not to follow its recommendation of a sentence of life imprisonment.¹¹ But merely preferring that the Trial Chamber had imposed a harsher sentence is no valid basis for an appeal.

II - APPLICABLE LAW

9. Article 81(2)(a) of the Statute provides that a sentence may be appealed on the ground of disproportion between the crime and the sentence. Pursuant to Article 81(2)(b) of the Statute, the appeal against sentence may also, where applicable, rely on grounds under Article 81(1)(a) or (b) identified by the Parties. In the case of an appeal by the Prosecution, these include (i) procedural error, (ii) error of fact or (iii) error of law.

10. Under Articles 83(2) and (3) of the Statute, the Appeals Chamber's primary task (with respect to appeals against sentencing decision) is to review whether the Trial Chamber made any error in sentencing the convicted person. It should only vary and determine an appropriate sentence when it has found that the sentence imposed by

⁹ [Prosecution Appeal Brief](#), paras 12, 140.

¹⁰ [Prosecution Appeal Brief](#), para. 141.

¹¹ [Prosecution Appeal Brief](#), para. 11.

the Trial Chamber is disproportionate to the crime.¹² The potential identified error must have materially affected the sentence; minor or harmless errors are insufficient.¹³ The error may consist in giving weight to extraneous or irrelevant considerations, failing to give weight or sufficient weight to relevant considerations, making a clear error as to the facts upon which it exercised its discretion, or issuing a decision that was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.¹⁴ The Appeals Chamber will have to “*measure the reasonableness of the sentence as pronounced by a trial chamber.*”¹⁵ The Appeals Chamber shall then only intervene if “(i) *the Trial Chamber’s exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber’s weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.*”¹⁶

11. The material effect of such an error is only established if the Trial Chamber’s exercise of discretion led to a disproportionate sentence.¹⁷ The Appeals Chamber will only revise a sentence where the Trial Chamber has committed a “discernible error” in exercising its discretion.¹⁸

12. With respect to abuse of discretion specifically, “[t]he Appeals Chamber will not interfere with the Pre-Trial Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre Trial Chamber. [...] [T]he Appeals Chamber’s functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion.

¹² Lubanga, [Sentencing Appeals Judgment](#), para. 39; Ongwen, [Sentencing Appeals Judgment](#), paras. 29-30; See also, Bemba et al., [Sentencing Appeal Judgment](#), paras. 21-22.

¹³ Lubanga, [Sentencing Appeals Judgment](#), para. 46; Ongwen, [Sentencing Appeals Judgment](#), para. 37.

¹⁴ Triffterer, Rome Statute Commentary, p. 1467; Lubanga, [Sentencing Appeals Judgment](#), para. 46, footnote 75;

¹⁵ Bemba et al., [Sentencing Appeal Judgment](#), para. 90.

¹⁶ Lubanga, [Sentencing Appeals Judgment](#), para. 44.

¹⁷ Lubanga, [Sentencing Appeals Judgment](#), para. 45; Ntaganda, [Sentencing Appeal Judgment](#), para. 32; Ongwen, [Sentencing Appeals Judgment](#), para. 36.

¹⁸ Lubanga, [Sentencing Appeals Judgment](#), para. 46.

However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.”¹⁹

13. Later on, the Appeals Chamber added the following alternative standard from the ICTY Milošević Case: *“Even if an error [...] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the Chamber failed to exercise its discretion judiciously”*.²⁰ This new standard did not replace the earlier standard set out in the Lubanga Sentencing Appeal Judgment; it complemented it. The word *“judiciously”* must be read in light of that earlier standard: it cannot be interpreted as allowing the Appeals Chamber to enter a face-value assessment of a trial chamber's findings and replace it with its own ruling whenever it disagrees. That would amount *“to usurp[ing] powers not conferred on it and to render[ing] nugatory powers specifically vested”* in the first instance chamber.²¹ Read in this context, the word *“judiciously”* only means that whenever the final result appears radically unfair or unreasonable despite the absence of clearly identified error, notably because the reasoning followed is not detailed enough or contains some shortcuts circumventing

¹⁹ Lubanga, [Sentencing Appeals Judgment](#), para. 41, quoting Kony *et al.*, [OA3 Judgment](#), paras 79-80 and Ruto *et al.*, [OA Judgment](#), paras. 89-90. In Lubanga, [Sentencing Appeals Judgment](#), para. 42, the Appeals Chamber found that this standard of review also applies to sentencing decisions.

²⁰ First quoted in Kenyatta Appeal Judgment OA5, para. 25, importing this standard from ICTY Appeals Chamber, Slobodan Milošević v. Prosecutor, *“Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel”*, para. 10; later appearing in Bemba *et al.*, Sentencing Appeal Judgment, para. 22; Ongwen, [Sentencing Appeal Judgment](#), para. 35; Ntaganda, [Sentencing Appeal Judgment](#), para. 31.

²¹ Lubanga, [Sentencing Appeals Judgment](#), para. 41, quoting Kony *et al.* OA3 Judgment, paras. 79-80 and Ruto *et al.*, OA Judgment, paras. 89-90. In Lubanga, [Sentencing Appeals Judgment](#), para. 42, the Appeals Chamber found that this standard of review also applies to sentencing decisions.

the errors vitiating its conclusion without exposing these, the Appeals Chamber may vary the decision. It is not an open-door to substituting the Appeals Chamber's assessment to any initial ruling that it would not have reached itself, had it been in charge of deciding first on the matter.

14. The Prosecution contends in Ground 1 and Ground 2 that the Trial Chamber erred in imposing manifestly inadequate and disproportionate individual sentences for certain crimes and erred in imposing the minimum joint sentence.²²

III – PROSECUTION'S FIRST GROUND OF APPEAL (GoA 1)

(i) Summary of the Prosecution's Submissions on GoA 1

15. The Prosecution submits that the Trial Chamber erred in law and/or fact, and/or abused its discretion, and/or failed to provide adequate reasoning in imposing certain individual sentences, which were inadequate and disproportionately low; that the individual sentences did not accurately reflect the gravity of certain crimes and the culpability of the Appellant (crimes related to Kodoom and Bindisi: counts 2-3; counts 6-7, counts 8-9, count 11; crimes related to Mukjar : counts 17-18, count 21; crimes related to Deleig: counts 27-28, and 31).²³

16. The Prosecution also alleges that the Trial Chamber committed an error of fact, as being inconsistent in its evaluation of the gravity of certain crimes from "serious gravity" to "very serious gravity", and in the sentences imposed for certain crimes.²⁴

17. Furthermore, the Prosecution argues that the Trial Chamber omitted to take into account its own findings from the Trial Judgment and considers that the crimes of murder and persecution committed in Deleig (counts 27-28 and 31) were graver than

²² [Prosecution Appeal Brief](#), paras. 10, 13-14.

²³ [Prosecution Appeal Brief](#), paras. 2, 8, 10 a, 13-; GoA 1, regarding counts 2, 3, 6-9, 11, 17, 18, 21, 26-98.

²⁴ [Prosecution Appeal Brief](#), paras. 73-77.

those committed in Mukjar (counts 17-18 and 21) requesting therefore higher individual sentences for that latter operation.²⁵

18. The Prosecution alleges additionally that the Trial Chamber erred in law and provided inadequate reasoning in entering a lower individual sentences for the crime of persecution than the individual sentence imposed for the underlying crimes of murder and attempted murder in factually distinct operations in Mukjar and Deleig.²⁶

19. Finally, the Prosecution submits that these errors on the individual sentences under Ground 1 materially affected the sentencing judgment.²⁷

(ii) *The Prosecution failed to show an error in the assessment of the gravity of the crimes and the culpability of the Appellant, and failed to show an abuse of discretion in its determination on individual sentences for each crime*

20. In the introduction to its submissions under GoA 1, the Prosecution announces that it intends to demonstrate that “*the Chamber abused its discretion, and/or erred in law and/or fact, and/or failed to provide adequate reasoning*”.²⁸ The perusal of its following submissions under GoA 1 shows that the Prosecution’s principal submission is that the Trial Chamber abused in the exercise of its discretion, with subsidiary submissions that the Trial Chamber erred in fact (a.) or in law (b.) or failed to provide sufficient reasoning in the Sentencing Judgment (c.). The Defence addresses these submissions prior to turning to the main submissions regarding the exercise of the Trial Chamber’s discretion (d.).

a. The Prosecution fails to substantiate its allegations of error of fact

21. Beyond its initial, generic submission that the Trial Chamber erred in fact at paragraph 13 and 14 of its Appeal Brief, the Prosecution’s submissions under its GoA

²⁵ [Prosecution Appeal Brief](#), paras. 78-83.

²⁶ [Prosecution Appeal Brief](#), paras. 84-93.

²⁷ [Prosecution Appeal Brief](#), paras. 94-96.

²⁸ [Prosecution Appeal Brief](#), para. 13. This generic submission is repeated at para. 14 (2nd and 3rd bullet points).

1 identify two specific instances of alleged errors of fact: at paragraph 75, the Prosecution submits that the Trial Chamber failed “*to synchronise its gravity assessments of all crimes and operations and ensure that its assessment was conducted through the same lens throughout*” (“First Error of Fact”); at paragraph 81, the Prosecution submits that the Trial Chamber failed to consider that the crimes in Deleig were graver than in Mukjar (“Second Error of Fact”).

22. The First Error of Fact alleged by the Prosecution relies on a purported classification of crimes in different categories, namely those of “*serious gravity*” versus those of “*very serious gravity*”.²⁹ The Prosecution provides no legal basis, no authority in support of the existence and/or relevance of any such categorisation. Neither did the Trial Chamber in its Sentencing Judgment. These alternative qualificatives were simply used by the Trial Chamber in the exercise of its discretion, without bearing any legal consequence on the determination of the sentence. The only categorisation of gravity that bears legal consequences is that of “*extreme gravity*”, defined as the threshold for the imposition of a life sentence under Article 77(1)(b) of the Statute. Below that threshold, categorisations like “*serious*” or “*very serious*” are no more than qualificatives used by the Trial Chamber, in the exercise of its discretion, to describe its subjective assessment of the gravity of the crimes. The Prosecution tries to detect some alleged inconsistencies in the reasoning of the Trial Chamber, which it describes as an error of fact. But the Prosecution’s categorisation of crimes in accordance with their purported gravity is entirely reliant on the exercise of the Trial Chamber’s discretion as to its subjective assessment of the gravity of the crimes. What the Prosecution tries to present as a legal, or quasi-legal categorisation, is nothing more than a purely subjective assessment reached in the course of the Trial Chamber’s deliberations. There is no such thing as the proposed legal categories of “*serious*” or “*very serious*” gravity. There can thus be no error, factual or otherwise, in failing to

²⁹ [Prosecution Appeal Brief](#), para. 73.

“synchronise” such gravity assessments. If there was one, the Prosecution at least failed to characterise and demonstrate it.

23. The Second Error of Fact alleged at paragraph 81 of the Prosecution Appeal Brief is also not demonstrated. At paragraph 82, the Prosecution accepts that it recommended the same sentences for murder and persecution in Mukjar and Deleig.³⁰ The Prosecution seeks to explain that it could not recommend higher sentences than the maximum determinate sentence of 30 years, but its logic is flawed: had the Prosecution considered that the crimes of Deleig required higher sentences than those of Mukjar, it could have either recommended lower sentences for Mukjar, or attempted to persuade the Trial Chamber that the crimes of murder and/or persecution in Deleig were of an extreme gravity meriting a sentence of life imprisonment pursuant to Article 77(1)(b) of the Statute. It pursued neither of these options and instead recommended the same sentences for Mukjar and Deleig. Having done so, the Prosecution can no longer complain that the Trial Chamber imposed identical sentences for the two sets of crimes, much less argue that the Trial Chamber’s approach amounts to an error of fact.

b. The Prosecution fails to substantiate its allegations of error of law

24. Beyond its initial, generic submission that the Trial Chamber erred in law at paragraphs 13 and 14 of its Appeal Brief, the Prosecution’s submissions under its GoA 1 identify two specific instances of alleged error of law: at paragraph 80, the Prosecution submits that the Trial Chamber erred in law by violating the applicable sentencing principles, namely failing to assess all relevant circumstances in determining a proportionate sentence (“the First Error of Law”); at paragraph 93, the Prosecution submits that the Trial Chamber erred in imposing lower sentences for the crime of persecution than for the underlying crimes of murder and attempted murder (“the Second Error of Law”). At paragraph 92, the Prosecution mentions a third

³⁰ [Prosecution Appeal Brief](#), para. 82; [Prosecution’s Submissions on Sentence](#), paras. 132, 140.

possible error of law that the Trial Chamber may have committed, had it followed a different reasoning, but the Prosecution does not submit that it did, so this submission does not form part of the Prosecution's actual grounds of appeal. It is thus not addressed.

25. At the outset, the Defence notes that the Prosecution does not challenge the factors relied upon by the Trial Chamber in the Sentencing Judgment: at paragraph 15 of its Brief, the Prosecution submits that "*the Chamber referred to the relevant legal principles for determining individual sentences*", but disagrees with the way it exercised its discretion in applying these.³¹ The Prosecution's disagreement with the exercise of the Trial Chamber's discretion is addressed under (d.) below. In and of itself, it cannot amount to an appealable error of law.

26. At paragraphs 8 and 13 of its Appeal Brief, the Prosecution also acknowledges that the Trial Chamber only took mitigating circumstances into account for the joint sentence. This is a confirmation of the factual basis of the Defence Ground of Appeal 2 developed in the Defence's Sentencing Appeal Brief.³² After submitting so, the Prosecution is estopped and can no longer challenge it in its forthcoming response to the Defence appeal on sentencing. As submitted in the Defence Appeal on Sentencing, the Trial Chamber erred in law in failing to factor in mitigating circumstances in its determination of individual sentences for each charge.³³ This was in addition to the Trial Chamber's error of law in its application of the non-retroactivity *ratione personae* under Article 24(2) of the Statute.³⁴

27. The First Error of Law is actually an alternative description of the Second Error of Fact mentioned at paragraph 81 of the Prosecution Appeal Brief and addressed at paragraph 23 above. At paragraph 82 of its Appeal Brief, the Prosecution concedes that the Trial Chamber did no more than follow its recommendations to impose the same

³¹ [Prosecution Appeal Brief](#), para. 15.

³² [Defence Sentencing Appeal Brief](#), Ground of Appeal 2, paras. 26-38.

³³ [Defence Sentencing Appeal Brief](#), Grounds of Appeal 2-7, paras. 26-96.

³⁴ [Defence Sentencing Appeal Brief](#), Ground of Appeal 1, paras. 5-25.

sentences for the charges of murder and persecution in Mukjar and Deleig. Although the sentences imposed by the Trial Chamber for these charges are lower than those recommended by the Prosecution, this is the outcome of the exercise of the Trial Chamber's discretion, with which the Prosecution disagrees. But the Prosecution cannot submit that the Trial Chamber erred in law in imposing similar sentences for the charges of murder and persecution in Mukjar and Deleig after itself having recommended the imposition of similar sentences. The Prosecution fails to demonstrate that the Trial Chamber erred in law in this aspect.

28. The Second Error of Law should be dismissed, as the Prosecution does not demonstrate its impact on the Sentencing Judgment. At paragraph 88 of its Appeal Brief, the Prosecution refers to the *Ongwen* case where similar sentences were imposed for murder and persecution as an example of the approach that the Trial Chamber should have followed in the present case. Had the Trial Chamber imposed the same sentences of 20 years for murder, attempted murder and persecution, instead of just murder and attempted murder, and 18 years for persecution, the maximum individual sentence that would have served as the basis for the determination of the joint sentence would still have been the same. The only true disagreement of the Prosecution is related to the *quantum* of the sentence, i.e. 20 years being too low where they recommended 30 years, not the fact that the sentence for persecution was lower than for murder. Even assuming that the Trial Chamber erred in imposing a lower sentence for persecution, which is not accepted, that error had no impact.

29. The Trial Chamber exercised its discretion and imposed a sentence of 18 years for persecution, instead of 20 years for murder and attempted murder in Mukjar and Deleig. Though disagreeing with that approach and referring to one case in the ICC's canon of jurisprudence, the *Al-Hassan* case, where the Trial Chamber imposed a slightly higher sentence for persecution compared to the underlying crimes,³⁵ the

³⁵ [Prosecution Appeal Brief](#), para. 88, referring to *Al Hassan Sentencing Judgment*, para. 131, imposing 10 years for persecution versus 9 years for underlying torture.

Prosecution fails to demonstrate that the Trial Chamber erred in law in the present case by imposing a lower sentence for persecution than for underlying murder. The Prosecution fails to point to any binding principle of sentencing practice by which persecution must inevitably attract a high sentence than its underlying crimes. Quite the opposite, the Prosecution refers to the similar approach followed in the *Yekatom and Ngaïssona* case.³⁶ The Prosecution submits that the *Yekatom and Ngaïssona* trial chamber “committed the same error as in this case”,³⁷ but it did not appeal the *Yekatom and Ngaïssona* Judgment. The Prosecution cannot successfully relitigate issues that it has accepted in prior cases by electing not to appeal on this issue. The Prosecution is allowed to disagree with the approach followed in the *Yekatom and Ngaïssona* case and in the present case, but such disagreement falls short of meeting the standard of a valid ground to appeal. The Prosecution further fails to justify what the possible impact of this alleged error could have been on the overall sentence. Its submission on the Second Error of Law should be dismissed accordingly.

- c. The Prosecution fails to substantiate its allegations of insufficient reasoning

30. Beyond its initial, generic submission that the Trial Chamber provided insufficient reasoning at paragraphs 13 and 14 of its Sentencing Appeal Brief, the Prosecution’s submissions under its GoA 1 identify two specific instances where it finds the reasoning of the Trial Chamber insufficient: at paragraph 77 of its Appeal Brief, with respect to its reasons for applying an allegedly inconsistent gravity categorization (“the First Insufficient Reasoning”); and at paragraphs 90 and 93, with respect to reasons for imposing lower sentences for persecution than for certain underlying crimes (“the Second Insufficient Reasoning”).

³⁶ [Prosecution Appeal Brief](#), para. 89, referring to *Yekatom and Ngaïssona Trial Judgment*, imposing 10 years for persecution versus 11 and 14 years, respectively, for underlying murder.

³⁷ [Prosecution Appeal Brief](#), para. 89.

31. As submitted at paragraph 22 above with respect to the First Error of Fact, the Prosecution errs in law in relying on a strict categorization of the “*serious*” and “*very serious*” gravity of the crimes. No such categorization is provided in the law applicable before the Court. The Prosecution attaches undue weight to the qualifier “*very*” as used by the Trial Chamber in its assessment of the gravity of each crime, as part of the exercise of its discretion. In the absence of legal categorization, the Trial Chamber had no further reasoning to provide, other than its assessment of the evidence, for its characterization of the crimes as “*serious*” or “*very serious*”. The Prosecution’s submissions rely on an error of law and are thus devoid of any merit. The submissions should be rejected in their entirety.

32. The Prosecution’s submissions on the Second Insufficient Reasoning should also be rejected in the absence of demonstrated impact on the Sentencing Judgment. This is the same issue as addressed at paragraphs 28-29 above with respect to the Second Error of Law. The Prosecution’s submissions on this aspect are also devoid of any merit, since the Trial Chamber provided full reasoning for its determination on the individual sentences for murder³⁸ and for persecution³⁹ in Mukjar and Deleig. The Prosecution fails to demonstrate that the Trial Chamber should have, in addition to providing its reasons for each individual sentence, provided further reasons for the difference between the two. Its submissions on this aspect should be rejected accordingly.

d. The Prosecution’s disagreement with the way the Trial Chamber exercised its discretion offers no valid ground for appeal

33. The Prosecution fails to show that the Trial Chamber’s exercise of discretion was so unreasonable as to constitute an abuse of discretion.⁴⁰

³⁸ [Sentencing Judgment](#), paras. 249-267.

³⁹ [Sentencing Judgment](#), paras. 268-279.

⁴⁰ *Ongwen*, [Sentencing Appeals Judgment](#), para. 31; *Lubanga*, [Sentencing Appeals Judgment](#), para. 44; *Bemba et al.*, [Sentencing Appeal Judgment](#), para. 90; *Celebici*, [Appeal Judgment](#), para. 725; *Khieu Samphan*, [Appeal Judgment](#), para. 2036.

34. In determining a sentence, the Trial Chamber enjoys a large discretionary power to individualise penalties to the circumstances of the person convicted and the gravity of the crime.⁴¹ As required under Article 77(1) of the Statute and in application of sentencing principles that the Prosecution acknowledges as valid,⁴² the Trial Chamber imposed an individual sentence for each of the crimes of which the Appellant was convicted. This determination relied on a comprehensive and thorough assessment of the gravity of the crimes and of some of the individual circumstances related to each crime, including the degree of participation of the Appellant. This determination was arrived at by a Trial Chamber composed of three highly experienced criminal judges that was highly familiar with the evidence in the case and was uniquely placed to make its assessment of the aggravating factors that were present. The Appeals Chamber should be slow to substitute its own assessment of gravity. The only category of factors that the Trial Chamber erred in failing to consider at the stage of its determination on individual sentences are mitigating factors, as submitted in the Defence Appeal Brief on Sentencing under Ground of Appeal 2.⁴³

35. To succeed in its Appeal, the Prosecution must demonstrate a discernible error of law and/or fact or an abuse of the Trial Chamber's discretion, leading to disproportion between the crimes and the given individual sentences. A mere disagreement with the Sentencing Judgment is not enough to support the existence of a discernible error and or an abuse of discretion.

36. Beyond its initial, generic submission that the Trial Chamber abused its discretion at paragraphs 13 and 14 of its Sentencing Appeal Brief, the Prosecution submits that the Trial Chamber specifically abused its discretion in the determination of individual sentences on multiple occasions with respect to sentences imposed for murder in Kodoom and Bindisi (Counts 2-3) ("1st Abuse"),⁴⁴ Other Inhumane Treatment in

⁴¹ Rome Statute, Article 78(1); *Al Hassan*, [Sentencing Judgment](#), para. 17; Triffterer, Rome Statute Commentary, 2nd ed, p. 1467; [Sentencing Judgment](#), para. 16.

⁴² [Prosecution Appeal Brief](#), para. 15.

⁴³ [Defence Sentencing Appeal Brief](#), Ground of Appeal 2, paras. 26-38.

⁴⁴ [Prosecution Appeal Brief](#) para. 34.

Kodoom and Bindisi (Counts 6-7) (“2nd Abuse”),⁴⁵ Rape in Kodoom and Bindisi (Counts 8-9) (“3rd Abuse”),⁴⁶ Persecution in Kodoom and Bindisi (Count 11) (“4th Abuse”),⁴⁷ Murder in Mukjar (Count 17-18) (“5th Abuse”),⁴⁸ Persecution in Mukjar (Count 21) (“6th Abuse”),⁴⁹ Murder in Deleig (Counts 27-28) (“7th Abuse”),⁵⁰ Persecution in Deleig (Count 31) (“8th Abuse”),⁵¹ and an allegedly inconsistent categorisation of the gravity of the crimes (“9th Abuse”).⁵²

37. The first eight alleged abuses of the Trial Chamber’s discretion can adequately be summarised as instances where the Prosecution merely disagrees with the Trial Chamber’s exercise of its discretion. For none of these eight alleged abuses of discretion does the Prosecution provide even the beginning of a demonstration of an error of fact and/or law, nor that the decision is so unfair or unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously. In each of the eight instances, the Sentencing Judgments provides a full and complete reasoning of the Trial Chamber,⁵³ applying a standard of law accepted by the Prosecution as valid.⁵⁴ The Prosecution does not even try to engage with the Trial Chamber’s reasoning under each relevant count. Instead, the Prosecution focuses its entire criticism on the application of the purported categorisation of crimes as “*serious*” or “*very serious*”, the disregard of which forms the basis of the 9th Abuse. As mentioned above under the First Error of Fact, the Prosecution is unable to provide any authority supporting the existence or relevance of such categorisation. Disregarding a phantasmal categorisation that does not exist anywhere else than in the Prosecution’s submissions falls short of constituting a valid ground of appeal though.

⁴⁵ [Prosecution Appeal Brief](#), para. 43.

⁴⁶ [Prosecution Appeal Brief](#), para. 47.

⁴⁷ [Prosecution Appeal Brief](#), para. 51.

⁴⁸ [Prosecution Appeal Brief](#), para. 58.

⁴⁹ [Prosecution Appeal Brief](#), para. 62.

⁵⁰ [Prosecution Appeal Brief](#), para. 69.

⁵¹ [Prosecution Appeal Brief](#), para. 72.

⁵² [Prosecution Appeal Brief](#), para. 76.

⁵³ [Sentencing Judgment](#), paras. 167-173 (1st Abuse), 185-193 (2nd Abuse), 194-202 (3rd Abuse), 210-217 (4th Abuse), 252-259 (5th Abuse), 260-267 (7th Abuse), 270-274 (6th Abuse), 275-279 (8th Abuse).

⁵⁴ [Prosecution Appeal Brief](#), para. 15.

38. The Prosecution entirely speculates and mischaracterises the Chamber's obligations when it asserts that the Chamber failed *"to synchronise its gravity assessments of all crimes and operations ensure that its assessment was conducted through the same lens throughout."*⁵⁵ Article 78 of the Statute requires an individualised assessment of the gravity of each crime in order to subsequently pronounce an individualised sentence.⁵⁶ *"[...] Gravity is generally measured in the abstract by assessing the constitutive elements of the crime and the mode of liability in general terms, and measured concretely by assessing particular circumstances of the case looking at the degree of harm caused by the crime and the culpability of the perpetrator [...]"*⁵⁷ The Prosecution fails in discerning any error in that exercise of the Trial Chamber's discretion.

39. The Prosecution's submissions on abuse of discretion provide no basis for the Appeals Chamber to *"interfere with the Pre-Trial Chamber's exercise of discretion"*.⁵⁸ Even in the case where it would have made a different ruling, the Appeals Chamber would *"usurp powers not conferred on it and [...] render nugatory powers specifically vested in the Pre-Trial Chamber."*⁵⁹ The Prosecution's submissions on the nine alleged abuses should be dismissed as devoid of any merit.

(iii) *Conclusion on Ground of Appeal 1*

40. The Prosecution's Ground of Appeal 1 is devoid of any merit. The Prosecution fails to demonstrate any error of fact, error of law, insufficient reasoning or abuse in the exercise of the Trial Chamber's discretion in its determination on individual sentences. The only errors committed by the Trial Chamber are those addressed in the Defence Appeal Brief on Sentencing. The Prosecution's Ground of Appeal 1 should be dismissed in its totality accordingly.

⁵⁵ [Prosecution Appeal Brief](#), para. 75-76

⁵⁶ See specifically Article 78(1) and (3) of the Statute.

⁵⁷ *Al Hassan*, [Sentencing Judgment](#), para. 17

⁵⁸ *Lubanga*, [Sentencing Appeals Judgment](#), para. 41.

⁵⁹ *Lubanga*, [Sentencing Appeals Judgment](#), para. 41.

IV - PROSECUTION'S SECOND GROUND OF APPEAL (GoA 2)

(i) *Summary of the Prosecution's Submissions under GoA 2*

41. In its second Ground of Appeal, the Prosecution submits that the joint sentence of 20 years' imprisonment was disproportionately low compared to the number and gravity of the crimes and the personal circumstances of Mr Abd-Al-Rahman. The Prosecution's GoA 2 often repeats the same arguments addressed under GoA 1 with respect to the alleged failure to reflect the true culpability of Mr Abd-Al-Rahman or the different aspects of the crimes of which he was convicted. The Prosecution submits that the Trial Chamber erred by imposing the minimum joint sentence of 20 years' imprisonment, which it suggests is disproportionately low⁶⁰ and not reflecting the distinct criminal conduct and harm for the three different locations (Kodoom and Bindisi, Mukjar and Deleig).⁶¹

42. Also, the Prosecution considers that the weight given by the Trial Chamber to mitigating factors excessively reduced the joint sentence.⁶²

43. Lastly, the Prosecution alleges that these errors materially affected the Sentencing Judgment and that, absent these errors, a much heavier sentence, including a sentence of life imprisonment, would have been entered.⁶³

(ii) *The Prosecution failed to show an error in the Trial Chamber's exercise of its discretion to determine the appropriate joint sentence*

44. The Defence recalls that Article 78(3) of the Statute prescribes that any joint sentence of imprisonment may not exceed 30 years, unless the criterion of extreme gravity under Article 77(1)(b) is met, warranting a term of life imprisonment.⁶⁴ The Court's legal framework does not prescribe by how much, and in what circumstances,

⁶⁰ [Prosecution Appeal Brief](#), paras. 8-11, 140

⁶¹ [Prosecution Appeal Brief](#), paras. 97-128.

⁶² [Prosecution Appeal Brief](#), paras. 129-133.

⁶³ [Prosecution Appeal Brief](#), paras. 134-136.

⁶⁴ *Al Hassan*, [Sentencing Judgment](#), para. 132.

the joint sentence imposed under Article 78(3) may exceed the highest individual sentence set under Article 77(1) for each individual crime.⁶⁵ What is specifically required is that the joint sentence imposed under Article 78(3) shall not be less than the highest individual sentence pronounced under Article 77(1).⁶⁶

45. The same way as it did under its GoA 1, the Prosecution starts its submissions under GoA 2 by a generic assertion that “*the Chamber erred in law and/or fact, and/or abuse its discretion, and/or failed to provide adequate reasoning*”, with the result that it finds the sentence “*so manifestly low and inadequate that it constituted an abuse of direction [sic]*”.⁶⁷

46. The Prosecution merely expresses its disagreement and frustration with the way the Trial Chamber exercised its discretion in the determination of the joint sentence. It fails to engage with the Trial Chamber’s reasoning, fails to demonstrate any error of fact, law, insufficient reasoning or abuse of the Trial Chamber’s discretion (a.). The Prosecution erroneously describes the minimalistic weight attached to mitigating circumstances as excessive (b.) and finally repeats merely its unsuccessful sentencing submissions in support of a life sentence without addressing the oral arguments of the Defence showing that imposing a joint life sentence was not an option in this case (c.) The Prosecution fails to substantiate its allegations of error of fact, law, insufficient reasoning or abuse of discretion.

47. Contrary to GoA 1 above, the Prosecution keeps its allegations of error of fact, law, insufficient reasoning and abuse of discretion as generic and interchangeable throughout its submissions under GoA 2.⁶⁸ These consist in an alleged failure to consider the distinct factual conduct and consequences of the crimes and their different

⁶⁵ *Ntaganda*, [Sentencing Judgment](#), para. 25; *Al Hassan*, [Sentencing Judgment](#), para. 30.

⁶⁶ Article 78(3) of the Statute. See also *Ntaganda*, [Sentencing Judgment](#), para. 25; *Bemba*, [Sentencing Judgment](#), para. 12; *Bemba et al.*, [Sentencing Appeal Judgment](#), para. 57; *Al Hassan*, [Sentencing Judgment](#), para. 132; *Bemba et al.* [Re-Sentencing Judgment](#), para. 18(ii).

⁶⁷ [Prosecution Appeal Brief](#), paras. 97, 119, 124.

⁶⁸ [Prosecution Appeal Brief](#), paras. 113, 117-118, 133.

protected interests (“First Error”);⁶⁹ an alleged failure to distinguish between the crimes committed in Mukjar and Deleig and those committed in Kodoom and Bindisi (“Second Error”);⁷⁰ and an alleged failure to appropriately reflect the gravity of the crimes and the individual circumstances of Mr Abd-Al-Rahman in the joint sentence and/or disproportionately reducing the joint sentence as a result of mitigating factors (“Third Error”).⁷¹

48. The First Error is alleged after the Prosecution agreed with the principles applied by the Trial Chamber⁷² and in conclusion to the Prosecution’s discussion of the precedents in the *Ongwen*, *Ntaganda* and *Yekatom and Ngaïssona* cases before the Court.⁷³ But none of these support its case.

49. In *Ongwen*, the majority of the Trial Chamber imposed a joint sentence of 25 years’ imprisonment under Article 78(3), which was higher than the maximum individual sentence of 20 years imposed under Article 78(1), but this aggravated joint sentence was based on “a long list of *extremely serious crimes*” (emphasis added) of which Ongwen had been found guilty.⁷⁴ In comparison, the Trial Chamber enters not a single finding as to extreme gravity of any of the charges Mr Abd-Al-Rahman is convicted for in the present case.

50. In *Ntaganda*, the trial chamber imposed individual sentences ranging up to the maximum of 30 years under Article 78(1) and did not go beyond that maximum individual sentence in imposing the joint sentence of 30 years’ imprisonment. But the Prosecution is wrong when it submits that the possibility of imposing a life sentence was not considered in that case.⁷⁵ The trial chamber did consider it. At paragraph 250

⁶⁹ [Prosecution Appeal Brief](#), para. 113.

⁷⁰ [Prosecution Appeal Brief](#), para. 117.

⁷¹ [Prosecution Appeal Brief](#), para. 133.

⁷² [Prosecution Appeal Brief](#), paras. 98-99.

⁷³ [Prosecution Appeal Brief](#), paras. 100-112.

⁷⁴ *Ongwen*, [Sentencing Judgment](#), para. 384: indeed, the Trial Chamber uses the qualificative “extreme” in its description of the suffering of victims of various individual crimes, like the “*extreme difficulty*” of the situation of abducted women who were forced to marriage and endured torture (para. 342); and the conscription of children under 15 and the “*extremely harsh treatment*” suffered by conscripted children (para. 361).

⁷⁵ [Prosecution Appeal Brief](#), paras. 103, 112.

of its sentencing judgment, it finds that *“Life imprisonment is permissible as a penalty under the Statute when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”* and concludes that, *“having regard to its conclusions per crime”* (emphasis added), none of which attracted a life sentence under Article 77(1)(b),⁷⁶ imposing a joint sentence of life imprisonment was not an option open to the exercise of the trial chamber’s discretion: *“as a result of the highest individual sentence and the statutorily mandated maximum term of imprisonment for the joint sentence being the same, no further discretion is given to the Chamber in the determination of the overall joint sentence, which shall therefore be 30 years of imprisonment”*⁷⁷ (emphasis added). The Prosecution did not appeal this ruling of the *Ntaganda* Sentencing Judgment, which is thus final. The *Ntaganda* precedent is useful in demonstrating two things: first, whether the joint sentence under Article 78(3) needs to be higher than the highest individual sentence(s) imposed under Article 78(1) to capture the multiplicity of the crimes and the accountability of the convict falls entirely within the discretion of the trial chamber; second, when none of the individual sentences imposed for separate charges under Article 77(1) reaches life imprisonment under Article 77(1)(b), imposing a joint life sentence under Article 78(3) is not an option. The Defence will address this aspect further under (c.) below.

51. In *Yekatom and Ngaïssona*, the joint sentence for each convict was indeed 1 year higher than the maximum individual sentence imposed under Article 77(1). But what this precedent confirms is that aggravating the joint sentence compared to the maximum individual sentence indeed falls within the discretion of the trial chamber. In the *Yekatom and Ngaïssona* case, the trial chamber exercised its discretion in finding that the large number of crimes, their commission in the context of multiple separate incidents, in different geographical areas, their distinct nature and the array of fundamental interests these violated, together justified a slight increase of the joint

⁷⁶ *Ntaganda*, [Sentencing Judgment](#), para. 250.

⁷⁷ *Ntaganda*, [Sentencing Judgment](#), para. 251.

sentence by one year for each convict.⁷⁸ In the present case, the Trial Chamber exercised the same discretion and, based on its consideration of the relevant factors, found differently that the highest individual sentence of 20 years “*is proportionate to Abd-Al-Rahman’s specific individual circumstances, conforms with the purposes of punishment under the Court’s legal framework and adequately acknowledges the victims’ suffering and harm, whilst acknowledging Abd-Al-Rahman’s good conduct in detention and during trial, as well as his surrender to the Court*” and “*constitutes a sufficient penalty*”.⁷⁹ This is the way the Trial Chamber exercised its discretion; exercising it that way was open to the Trial Chamber; the *Yekatom and Ngaïssona* precedent suggests nothing else. In any case, the difference of one year variation between the present case and the *Yekatom and Ngaïssona* case in no way can be described as a “disproportion” for the purpose of Article 81(2)(a) of the Statute.

52. Beyond agreeing with the principles applied by the Trial Chamber and relying on unsupportive case law before the Court, the Prosecution fails to engage with the Sentencing Judgment in relation to the alleged First Error and substantiate what, in its view, amounts to a failure to consider “*the distinct factual conduct and consequences of the crimes and their different protected interests*”. The Prosecution’s submissions on the First Error are thus unsubstantiated and should be dismissed accordingly.

53. The alleged Second Error simply has no materiality. The Trial Chamber considered at length the differences between the crimes in Kodoom and Bindisi, those in Mukjar and those in Deleig and from one another in both the Trial Judgment and the Sentencing Judgment. Although these all formed part of the same counterinsurgency operation ordered by the Government of Sudan, the Trial Chamber clearly distinguished between the various events in Kodoom and Bindisi,⁸⁰ in Mukjar⁸¹ and in

⁷⁸ *Yekatom and Ngaïssona*, [Trial Judgment](#), paras. 4657-4659, 4834-4835.

⁷⁹ [Sentencing Judgment](#), para. 295.

⁸⁰ [Trial Judgment](#), paras. 368-441; [Sentencing Judgment](#), paras. 148-217.

⁸¹ [Trial Judgment](#), paras. 442-574; [Sentencing Judgment](#), paras. 218-243, 252-259, 270-274.

Deleig⁸² and provided a substantial reasoning on each individual charge.⁸³ The Prosecution fails to characterise any error; its submissions should be dismissed accordingly.

54. The Third Error is alleged in conclusion to the Prosecution's submissions regarding the excessive weight given, in its view, to mitigating factors in the determination of the joint sentence.⁸⁴ Beyond what is addressed below under b., the Prosecution fails to point to any error of fact and/or law in the Sentencing Judgment. Its submissions under this section of its Appeal Brief are limited to (i) announcing its grounds of appeal,⁸⁵ (ii) summarising the Trial Chamber's findings on mitigating factors,⁸⁶ (iii) agreeing with the Trial Chamber's approach,⁸⁷ (iv) observing that the Trial Chamber did not state the joint sentence it would have imposed had it not found mitigating factors,⁸⁸ and (v) concluding that the Trial Chamber erred or abused its discretion.⁸⁹ These submissions nowhere identify an error and do not explain the reasons for which the Prosecution is of the view that the Trial Chamber abused its discretion. These alleged flaws are not substantiated.

55. The only possible insufficiency in the Trial Chamber's reasoning seems to relate to point (iv), i.e. the fact that the Trial Chamber did not specify what would be the joint sentence had it found no mitigating factors. But the Prosecution provides no justification, no legal authority supporting its assertion that the Trial Chamber ought to provide such information in its Sentencing Judgment. This information would have served no purpose and would have been entirely *obiter*. Article 78(1) of the Statute requires the Trial Chamber to "*take into account such factors as the gravity of the crime and*

⁸² [Trial Judgment](#), paras. 575-651; [Sentencing Judgment](#), paras. 218-235, 244-251, 260-269, 275-279.

⁸³ [Trial Judgment](#), paras. 840-941; [Sentencing Judgment](#), paras. 160-166 (Count 1), 167-173 (Counts 2-3), 174-179 (Count 4), 180-184 (Count 5), 185-193 (Count 7), 194-202 (Counts 8-9), 203-209 (Count 10), 210-217 (Count 11), paras 234-248 (Counts 12-13, 16, 22-23, 26), paras 249-267 (Counts 17-20, 27-30), paras 268-279 (Counts 21, 31).

⁸⁴ [Prosecution Appeal Brief](#), paras. 129-133.

⁸⁵ [Prosecution Appeal Brief](#), para. 129.

⁸⁶ [Prosecution Appeal Brief](#), para. 130.

⁸⁷ [Prosecution Appeal Brief](#), para. 131.

⁸⁸ [Prosecution Appeal Brief](#), para. 132.

⁸⁹ [Prosecution Appeal Brief](#), para. 133.

the individual circumstances of the convicted person." This is exactly what the Trial Chamber did, quoting the Legal Representatives of Victims to highlight the gravity of the crimes,⁹⁰ which had already been exposed at length in the determination on individual charges, taking into account overlaps,⁹¹ and finally taking into account the individual circumstances that it had found relevant.⁹² The Prosecution fails to identify any error in the Trial Chamber's reasoning. Nowhere does the law applicable at the ICC require a two-step reasoning, stating what would have been the joint sentence absent mitigating factors prior to reducing it as a result thereof. Similarly, once the Trial Chamber finds that a joint sentence of 20 years is appropriate,⁹³ it is no longer required to provide reasons for not imposing 21, or 22, or 23 years up to 30 years instead: this would once again be totally *obiter* and serve no purpose. The Prosecution's submission that the Trial Chamber did not provide sufficient reasons is thus also devoid of any merit.

- a. The weight attached to mitigating factors was minimalistic, not excessive

56. At paragraphs 129 to 133 of its Appeal Brief, the Prosecution submits that the Trial Chamber gave excessive weight to mitigating factors in determining the joint sentence. This is a speculative argument. As mentioned above under the Third Error under a., the Prosecution fails to identify any error on that aspect in the Sentencing Judgment. Far from being excessive, the Defence submits that the weight attached to mitigating factors must have been limited, actually far below the standard set under Article 78 of the Statute and Rule 145 of the RPE.

57. The Defence refers to its submissions under GoA 2, 4, 5, 6 and 7 of its Appeal Brief on Sentencing.⁹⁴ In particular, the Trial Chamber erred in law in considering mitigating

⁹⁰ [Sentencing Judgment](#), paras. 288-289.

⁹¹ [Sentencing Judgment](#), paras. 290-292.

⁹² [Sentencing Judgment](#), para. 293.

⁹³ [Sentencing Judgment](#), paras. 293-294.

⁹⁴ [Defence Sentencing Appeal Brief](#), GoA 2 (paras. 26-38), GoA 4 (paras. 39-51), GoA 5 (paras. 52-70), GoA 6 (paras. 71-85) and GoA 7 (paras. 86-96).

circumstances only at the late stage of its determination on the joint sentence,⁹⁵ when these could no longer “*reduce [the] overall sentence*”⁹⁶ pursuant to Article 78(3) of the Statute, instead of factorising these in its determination on individual sentences, as required under Article 78(1). This is the subject matter of the Defence’s GoA 2 on Sentencing. In a nutshell, Rule 145(1)(b) of the RPE specifies that any mitigating factors and personal circumstances of the convicted person shall be balanced in the determination of each individual sentence for each “*crime*” (singular) under Article 78(1), not in the determination of the joint sentence under Article 78(3). This is entirely logical since the joint sentence cannot be lower than the highest individual sentence, which gives no room for reduction based on mitigating circumstances at the stage of its determination under Article 78(3).

58. The Prosecution acknowledges that the Trial Chamber did not factor mitigating circumstances in its determination of individual sentences and reserved their consideration for its determination on the joint sentence.⁹⁷

59. After such acknowledgement, the assertion that mitigating circumstances resulted in an excessive reduction of the joint sentence can no longer be true and is entirely misconceived. The consideration of mitigating circumstances did not result in a reduction of the sentence at all. These could no longer have that effect, because they were considered at the only stage of determination of the joint sentence under Article 78(3) of the Statute, when reduction was no longer possible. The highest individual sentence imposed by the Trial Chamber was 20 years. The joint sentence is exactly of the same length. The consideration of mitigating factors in the determination of the joint sentence did not reduce it, because it simply could not. There was no reduction based on mitigating factors. The Prosecution’s assertion that the joint sentence was reduced would suggest that 20 years at a joint sentence is shorter than 20 years as an

⁹⁵ [Sentencing Judgment](#), paras. 53, 75, 80.

⁹⁶ [Sentencing Judgment](#), para. 80.

⁹⁷ [Prosecution Appeal Brief](#), paras 8, 13.

individual sentence. It is not: 20 years is the same duration, be it as an individual or as a joint sentence. The Prosecution's argument thus has no materiality and no merit.

60. Mitigating circumstances were actually denied any potential impact in reducing the sentence, in breach of Rule 145(1)(b) of the RPE. Their impact was limited to avoiding an increase in the joint sentence, compared to the highest individual sentence imposed under Article 78(1). The fact that the exact period of imprisonment by which the joint sentence may have increased, absent the mitigating circumstances, is unknown bears no materiality. The mitigating circumstances were denied any reducing effect. The consequences of that error of law are addressed in the Defence Sentencing Appeal Brief under GoA 2. What matters for the response to the Prosecution's GoA 2 is that there was no reduction of the sentence as a result of mitigating circumstances. The submission that these were given excessive weight is thus without merit and should be dismissed accordingly.

b. Life sentence was not an option

61. The Prosecution repeats its unsuccessful sentencing submissions in support of a life sentence.⁹⁸ The Prosecution asserts that the Chamber's refusal to make a finding of "extreme gravity" so as to justify the imposition of a life sentence in this case "*does not accord with the Chamber's numerous findings on the seriousness of the gravity of each crime of which Mr Abd-Al-Rahman was convicted*".⁹⁹ Ultimately, the Prosecution suggests that the Appeals Chamber should rely on the Chamber's factual findings to conclude that Mr Abd-Al-Rahman's crimes are extremely grave – warranting in turn a significant increase of his sentence, potentially to life imprisonment.¹⁰⁰

62. While acknowledging the Trial Chamber's finding rejecting its submissions with respect to the "*extreme gravity*" of the crimes,¹⁰¹ the Prosecution finds no argument to

⁹⁸ [Prosecution Appeal Brief](#), paras. 134-138.

⁹⁹ [Prosecution Appeal Brief](#), para. 135.

¹⁰⁰ [Prosecution Appeal Brief](#), para. 138.

¹⁰¹ [Sentencing Judgment](#), para. 296.

challenge it, other than the expression of its disagreement that “*the Chamber’s numerous findings on the seriousness of the gravity of each crime*” justified the imposition of a life sentence. Expressions of disagreement and frustration fall short of a valid ground of appeal. The Prosecution is offering no basis for the Appeals Chamber to interfere with the Trial Chamber’s exercise of discretion and findings on this issue.

63. It is well established that the Appeals Chamber does not conduct a *de novo* review of sentencing, nor does it substitute its own assessment of facts unless a clear error of law or fact that materially affects the decision has been detected. In the absence of demonstration by the Prosecution of any error by the Trial Chamber, there is no basis for the Appeals Chamber to re-assess the crimes to establish whether they reach the threshold of extreme gravity required for the imposition of a life sentence under Article 77(1)(b) of the Rome Statute.

64. Had the Prosecution really meant for the Trial Chamber to impose a life sentence, the burden was on it to respond to the Defence’s demonstration, made in the course of oral arguments on sentencing,¹⁰² that imposing a joint life sentence was no longer an option after limiting individual sentences for each charge to a maximum sentence of 20 years. In a nutshell, relying on the *travaux préparatoires*,¹⁰³ on most authoritative commentaries on the Rome Statute¹⁰⁴ and on the use of the singular “*crime*”, instead of plural “*crimes*”, in Article 77(1)(b), to which Article 78(3) refers, and Rule 145(3) of the

¹⁰² T-164, pp. 82-87.

¹⁰³ UN Doc. A/CONF.183/C.1/WGP/L.9: “Chairman’s Working Paper on Article 77”: “*When a person has been convicted of more than one crime, the court shall: indicate a sentence for each crime and pronounce on the total period of imprisonment to be served, which shall not exceed half of the longest term of imprisonment prescribed for the gravest crime*” (quoted in W.A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, p. 908); see also UN Doc. A/CONF.183/C.1/WGP/L.9/Rev.1: “Chairman’s Working Paper on Article 77”: “*When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and may not exceed the maximum prescribed in article 75, paragraph ..., which may only be applied where justified by the circumstances of the crimes.*” Both versions impose a maximal number of years for the joint sentence, thus excluding life imprisonment, unless life sentence was imposed for at least one individual crime.

¹⁰⁴ A. Cassese, P. Gaeta, J. Jones (Eds.), *The Rome Statute of the International Criminal Court*, 2002, W. A. Schabas, “Penalties”, pp. 1529-1530; W.A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, p. 908; O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd Edition, 2008, M. Jennings, “Article 78”, p. 1437.

RPE, the Defence submitted that for a joint life sentence to be entered under Article 78(3), at least one individual sentence imposed under Article 78(1) had itself to be one of imprisonment for life and that, absent that pre-condition, no joint life sentence could be entered.

65. As submitted at paragraph 50 above, the Defence's reasoning on this issue is also confirmed by the exclusion of a joint life sentence in the *Ntaganda* case relied upon in the Prosecution's Appeal Brief: *"having regard to its conclusions per crime"* (emphasis added), none of which imposed a life sentence under Article 77(1)(b),¹⁰⁵ the trial chamber found that imposing a joint sentence of life imprisonment was not an option open to the exercise of the trial chamber's discretion: *"as a result of the highest individual sentence and the statutorily mandated maximum term of imprisonment for the joint sentence being the same, no further discretion is given to the Chamber in the determination of the overall joint sentence, which shall therefore be 30 years of imprisonment"*¹⁰⁶ (emphasis added).

66. At paragraph 284 of the Sentencing Judgment, the Trial Chamber rejected the Defence's argument and found that *"a joint sentence of life imprisonment can be imposed even if none of the underlying counts carries a sentence of joint life imprisonment"*, but this finding was purely *obiter* and had no impact on the sentencing judgment, since no life sentence was contemplated. The Defence was thus barred from appealing it under Regulation 57(e) of the Regulations of the Court. Adversely, the Prosecution ought to respond to the Defence's argument in order to have, as it requests, a life sentence imposed. It does not respond to it in its Appeal Brief and cannot be authorized to respond to it in any future reply, as the Prosecution was fully on notice of the Defence's argument and should have addressed it in the first place in its Brief.

67. In its submissions on sentencing to the Trial Chamber, the Prosecution never claimed a life sentence was warranted for any of the individual charges: the highest

¹⁰⁵ *Ntaganda*, [Sentencing Judgment](#), para. 250.

¹⁰⁶ *Ntaganda*, [Sentencing Judgment](#), para. 251.

individual sentences proposed were 30 years' imprisonment.¹⁰⁷ Also, under its GoA 1, the Prosecution nowhere challenges the Trial Chamber's findings as to the "*serious*" or "*very serious*", by opposition to "*extreme*", gravity of individual crimes. Having failed to ask for a life sentence for any of the individual charges under Article 78(1) and after accepting the Trial Chamber's characterization of the gravity of the individual crimes as "*serious*" or "*very serious*" but not "*extreme*", the Prosecution cannot consistently propose a joint life sentence should be imposed under Article 78(3).

68. In its Oral Arguments, the Defence had also submitted that the drafters of the Rome Statute had intended to reserve sentences of life imprisonment for the crimes of the most extreme gravity. Relying on the practice of sister Tribunals, the Defence referred in particular to the crimes of genocide, aggression and extermination.¹⁰⁸

69. The Defence also rebutted the Prosecution's argument that the common element of crimes against humanity, "widespread or systematic attack against a civilian population" was enough to fulfil the criterion of "extreme gravity", otherwise all crimes against humanity would qualify as crimes of extreme gravity incurring a sentence of life imprisonment.¹⁰⁹

70. The Defence further challenged the Prosecution's submissions in relation to the gravity of the crimes of persecution and murder, highlighting that these relied on no legal authority and amounted to asking the Trial Chamber to be innovative in the development of a new principle of International Criminal Law without providing any legal foundation for the suggested innovation.¹¹⁰

71. The Defence eventually submitted that, outside the specific context of a conviction for a crime of "extreme gravity" such as genocide or extermination,¹¹¹ life sentences

¹⁰⁷ [Prosecution's Submissions on Sentence](#), paras. 44 (Count 2-3), 76 (Count 11), 132 (Counts 17-18, 27-28), 140 (Counts 21, 31).

¹⁰⁸ T-164, p. 86.

¹⁰⁹ T-164, pp. 86-87.

¹¹⁰ T-164, pp. 87-89.

¹¹¹ T-164, p. 86, referring to *Stakic*, [Appeals Judgement](#) (life sentence in first instance for extermination; reduced to 40 years imprisonment on appeal) and *Lukic and Lukic*, [Trial Judgment](#) (life sentence for extermination).

had only been imposed on convicts holding the very most senior positions in their countries, much higher positions within their country than the position that Mr Abd-Al-Rahman was found to hold in the Trial Judgment.¹¹² The Prosecution was also on notice of the Defence's position. At least implicitly, the Trial Chamber agreed with the Defence on this aspect when it found that it was "*not persuaded by the Prosecution's arguments in support of a finding of 'extreme gravity'*",¹¹³ despite the convictions for crimes under Article 7.

72. To obtain the imposition of a life sentence, the onus was on the Prosecution to rebut the above arguments of the Defence and/or the Trial Chamber's findings on (i) the inapplicability of a joint life sentence in the absence of any individual life sentence, (ii) the limitation of life sentence for crimes of extreme gravity like genocide and extermination or (iii) in cases where the convicted person held the most senior positions of authority, (iv) the difference between the common element of crimes against humanity "widespread or systematic attack against a civilian population" and "extreme gravity" and (v) the absence of any legal basis for systematically categorizing murder and persecution as crimes of extreme gravity under Article 77(1)(b).¹¹⁴ The Prosecution advances no argument in response to these in its Appeal Brief. It cannot be authorized to address these in any further reply as it was on notice of the Defence's arguments and should have addressed these in its Appeal Brief in the first place.

73. For the above reasons, the Prosecution's submissions supporting the imposition of a joint sentence of life imprisonment should be dismissed.

(iii) *Conclusion on GoA 2*

74. As with GoA 1, the Prosecution's Ground of Appeal 2 is devoid of any merit. The Prosecution fails to demonstrate any error of fact, error of law, insufficient reasoning

¹¹² T-164, pp. 89-91, referring specifically to *Galić*, [Appeals Judgement](#), para. 2; Major General, Commander of the *Sarajevo Romania Corps*, 3rd in command in the *Army of Republika Srpska* (VRS) after Karadžić and Mladić and comparing the position of Mr Abd-Al-Rahman with Al-Bashir, Hussein, Harun.

¹¹³ [Sentencing Judgment](#), para. 296.

¹¹⁴ [Sentencing Judgment](#), para. 296.

or abuse in the exercise of the Trial Chamber's discretion in its determination on the joint sentence. The Prosecution's Ground of Appeal 2 should be dismissed in its totality accordingly.

V – THE SENTENCE WAS DISPROPORTIONATELY HIGH, NOT DISPROPORTIONATELY LOW

75. The Prosecution's Appeal essentially consists in describing the sentence of 20 years' imprisonment imposed on Mr Abd-Al-Rahman as disproportionately low, compared to the number and gravity of the crimes he has been convicted for. For the reasons stated in its own Appeal Brief A2 on Sentencing, the Defence is submitting the exact opposite, i.e. that the sentence was disproportionately high: even assuming that he could have been sentenced to any term of imprisonment at all, which is challenged in the first place,¹¹⁵ the maximum sentence compatible with the non-retroactivity *ratione personae* principle under Article 24(2) of the Statute would have been a maximum of 7 years,¹¹⁶ not 20.

76. As an alternative, should its principal argument fail, the Defence is submitting that the sentence imposed on Mr Abd-Al-Rahman should not exceed 10 to 15 years.¹¹⁷ This alternative submission, which is subsumed under the Defence GoA 2, relies primarily on the analysis of the sentencing practice of the Court, which was exposed in the course of the Sentencing Arguments:¹¹⁸ Thomas Lubanga Dyilo, commander in chief of the UPC/FPLC and National Secretary for Defence,¹¹⁹ with *de jure* and *de facto* authority, sentenced to 14 years' imprisonment, upheld on appeal; Germain Katanga, President of the Combatants,¹²⁰ with *de jure* and *de facto* authority, sentenced to 12 years' imprisonment; Bosco Ntaganda, second-in-command in the UPC/FPLC after Thomas

¹¹⁵ [Defence Sentencing Appeal Brief](#), paras. 5-25.

¹¹⁶ [Defence Sentencing Appeal Brief](#), paras. 18-19.

¹¹⁷ [Defence Sentencing Appeal Brief](#), para. 38.

¹¹⁸ T-164, pp. 91-93.

¹¹⁹ Lubanga [Trial Judgment](#), para. 1142.

¹²⁰ Katanga [Trial Judgment](#), para. 1246.

Lubanga Dyilo,¹²¹ with *de jure* and *de facto* authority and about 10,000 identified victims, sentenced to 30 years, upheld on appeal; Dominic Ongwen, Major then Colonel then Brigadier,¹²² with *de jure* and *de facto* authority and about 50,000 identified victims, sentenced to 25 years, upheld on appeal; Al-Hassan, Commissioner of the Islamic Police, with *de jure* and *de facto* authority, sentenced to 10 years' imprisonment; Alfred Yekatom, leader of the Anti-Balaka and Member of Parliament,¹²³ sentenced to 15 years' imprisonment; and Patrice Edouard Ngaïssona, General Coordinator of all Anti-Balaka in Central African Republic and Member of Parliament,¹²⁴ sentenced to 12 years' imprisonment.

77. The Defence submitted that the position and authority that the Trial Judgment found that Mr Abd-Al-Rahman held was much lower, in comparison to the positions and authority of all convicts in the above cases. Although Mr Yekatom's position as group leader of the Anti-Balaka may, arguably, be compared to the position of *Janjaweed* leader that the Trial Chamber found Mr Abd-Al-Rahman held, he, unlike the first, was far from being the only *Janjaweed* leader in Darfur and had never been a Member of Parliament in his country, nor held any comparable position of authority. Mr Yekatom was sentenced for a term of 15 years' imprisonment. Together with the other cases, this led the Defence to make the highly reasonable submission that the maximum term for which Mr Abd-Al-Rahman could be sentenced ranged between 10 and 15 years.¹²⁵ This was of course under the condition that the Defence main submission with respect to non-retroactivity *ratione personae* being a bar to any term of imprisonment of more than 7 years would not succeed.

78. In response to the Defence's Oral Arguments, the Prosecution challenged the relevance of any comparison with the Court's sentencing practice and any other case

¹²¹ Ntaganda [Trial Judgment](#), paras. 321-323.

¹²² Ongwen [Trial Judgment](#), paras. 1013-1016, 1078-1083.

¹²³ Yekatom and Ngaïssona, [Trial Judgment](#), para. 4474.

¹²⁴ Yekatom and Ngaïssona, [Trial Judgment](#), paras. 60-62, 896.

¹²⁵ T-164, pp. 92-93.

law from sister Tribunals to rebut its request for life sentence.¹²⁶ The Prosecution's submission was upheld by the Trial Chamber which rejected the Defence reference to other cases as irrelevant.¹²⁷

79. The Prosecution's position and the concurring ruling of the Trial Chamber were certainly wrong. As submitted by the Defence,¹²⁸ the principles and rules of law as interpreted in the Court's previous decisions form part of the applicable law before the Court pursuant to Article 21(2) of the Statute, which makes no exception for sentencing. Without being bound by it, the Court has systematically sought guidance in the case law of sister international criminal tribunals since its earliest days.¹²⁹ Denying any relevance to the sentencing practice of the Court and of other sister Tribunals was thus an error of law. The impact of this error is subsumed within the Defence's GoA 2 and addressed therein.¹³⁰

80. But after having challenged its relevance for sentencing and persuaded the Trial Chamber of its irrelevance, the Prosecution cannot, in good faith, suddenly rely on the existing case law of the Court and sister Tribunals in support of its Appeal, as it does at paragraphs 20 to 24 and 100 to 112 of its Appeal Brief. These submissions should be entirely disregarded as estopped by the earlier position of the Prosecution before the Trial Chamber.

¹²⁶ T-164, pp. 98-99.

¹²⁷ [Sentencing Judgment](#), para. 287.

¹²⁸ T.164, pp. 79, 91, 93.

¹²⁹ **Pre-Trial Chambers:** *Kony et al.*, [ICC-02/04-01/05-20](#), Decision On Prosecutor's Application For Leave To Appeal In Part Pre-Trial Chamber I's Decision On The Prosecutor's Applications For Warrants Of Arrest Under Article 58, paras. 21-22; *Lubanga*, [ICC-01/04-01/06-512](#), Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute, p.10;

Trial Chambers: *Lubanga*, [ICC-01/04-01/06-1981](#), Decision on the admission of material from the "bar table", paras. 28-31; *Katanga et al.*, [ICC-01/04-01/07-1547-tENG](#), Decision on the Filing of a Summary of the Charges by the Prosecutor, para. 18;

Appeals Chamber: *Lubanga*, [ICC-01/04-01/06-773 OA5](#), Judgment on the appeal against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", para. 20; *Lubanga*, [ICC-01/04-01/06-1433 OA11](#), Judgment on the appeal against the Oral Decision of Trial Chamber I of 18 January 2008, paras. 78-81;

Presidency: *Lubanga*, [ICC-01/04-01/06-937](#), Decision on the "*Demande urgente en vertu de la Règle 21-3 du Règlement de Procédure et de Preuves*" and on the "Urgent Request for Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively, para. 25.

¹³⁰ [Defence Sentencing Appeal Brief](#), para. 38.

81. The Prosecution's reliance on the sentencing practice of the Court at paragraphs 100 to 112 of its Appeal Brief has already been addressed in the response to its GoA 2 above.¹³¹ For the sake of completeness only, the Defence briefly addresses the case law of sister Tribunals relied upon by the Prosecution:

- Veselin Šljivančanin's sentence¹³² was increased on appeal after the quashing of his acquittal by the Trial Chamber under Count 4 (Murder of Prisoners at Ovčara hangar on 20 November 1991):¹³³ in the absence of appeal on acquittals issued in the present case, this precedent bears no relevance;
- Stanislav Galić¹³⁴ held the position of Major General and Commander of the *Sarajevo Romanija Corps*. He was the 3rd in command in the *Army of Republika Srpska* (VRS) after Karadžić and Mladić.¹³⁵ This made Stanislav Galić, at the lowest, the equivalent of Hussein for the armed forces, assuming that President Al Bashir was number 1, Vice-President Taha was number 2 and that no one else fitted in the Government of Sudan's hierarchy above Hussein. His senior position was in any case incomparably higher than the position of, at best, a local *Janjaweed* leader held by Mr Abd-Al-Rahman according to the Trial Judgment;
- Radovan Karadžić¹³⁶ was convicted, *inter alia*, for genocide and extermination;¹³⁷ these convictions were upheld on appeal. He was also the President of *Republika Srpska* and Supreme Leader of the *Army of Republika Srpska* (VRS),¹³⁸ i.e. a position equivalent to Al-Bashir's in Sudan. Both the crimes he was convicted for and the position he held fulfil the criteria of extreme gravity and personal circumstances to

¹³¹ Paras. 49-51 above.

¹³² [Prosecution Appeal Brief](#), para. 20.

¹³³ *Mrkšić and Šljivančanin*, [Appeal Judgment](#), paras. 418-419.

¹³⁴ [Prosecution Appeal Brief](#), para. 21.

¹³⁵ *Galić*, [Appeal Judgement](#), para. 2.

¹³⁶ [Prosecution Appeal Brief](#), para. 22.

¹³⁷ *Karadžić*, [Appeal Judgment](#), paras. 3-4.

¹³⁸ *Karadžić*, [Appeal Judgment](#), para. 2.

which a life sentence normally applies. These have nothing comparable with the gravity of the crimes and personal circumstances of the convict in the present case;

- Sylvestre Gacumbitsi¹³⁹ was convicted for genocide and extermination.¹⁴⁰ These convictions were upheld on appeal. In addition, his acquittal under Count 4 (Murder as a Crime against Humanity) was quashed by the Appeals Chamber. His initial sentence of 30 years' imprisonment was consequently quashed and replaced by a sentence of life imprisonment.¹⁴¹ This aggravation on appeal is largely explained by the fact that the crimes he was convicted for fulfil the criteria of extreme gravity and by the additional conviction entered by the Appeals Chamber. None of these two factors are applicable in the present case; and
- Kaing Guek Eav *alias* Duch¹⁴² was convicted for, *inter alia*, the extermination of no fewer than 12,272 victims.¹⁴³ This conviction was upheld on appeal. The crime of extermination he was convicted for squarely fulfils the criterion of "extreme gravity" justifying the passing of a sentence of life imprisonment.¹⁴⁴ Mr Abd-Al-Rahman was neither charged, nor convicted for extermination. This precedent thus bears no relevance for the present case.

82. The Prosecution and the Trial Chamber erred in law in finding other cases irrelevant.¹⁴⁵ The comparison with the sentencing practice of the Court and of sister Tribunals was relevant to establish that the maximum sentence that Mr Abd-Al-Rahman should have received, if any, was one of 10 to 15 years' imprisonment maximum. The sentence of 20 years imposed by the Trial Chamber was thus disproportionately high, not disproportionately low as submitted by the Prosecution;

¹³⁹ [Prosecution Appeal Brief](#), para. 23.

¹⁴⁰ *Gacumbitsi*, [Appeal Judgment](#), para. 3.

¹⁴¹ *Gacumbitsi*, [Appeal Judgment](#), para. 207.

¹⁴² [Prosecution Appeal Brief](#), para. 24.

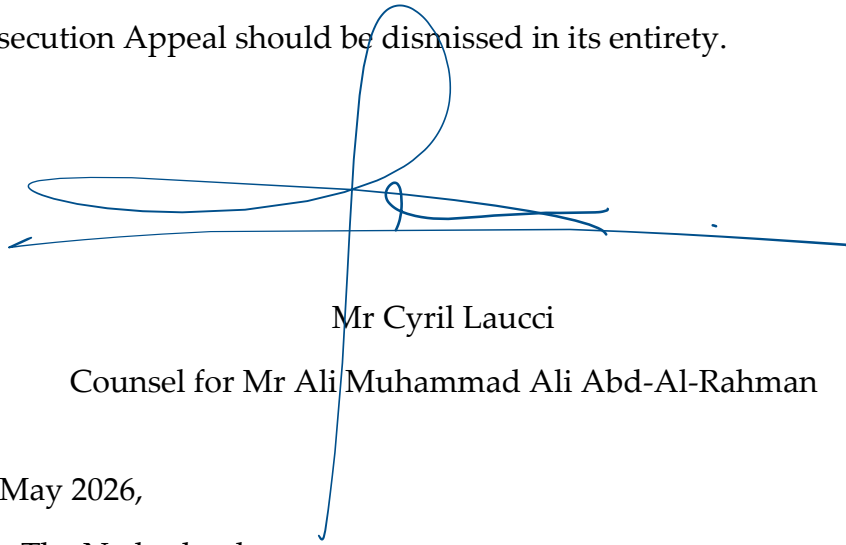
¹⁴³ *Duch*, [Appeal Judgment](#), para. 7.

¹⁴⁴ T.164, pp. 86-87.

¹⁴⁵ T.165, pp. 98-99; [Sentencing Judgment](#), para. 287.

and it was so as a result of errors of law, fact and/or fairness made by the Trial Chamber,¹⁴⁶ not an abuse of its discretion.

83. The Prosecution Appeal should be dismissed in its entirety.



Mr Cyril Laucci

Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 11 May 2026,

At The Hague, The Netherlands.

¹⁴⁶ [Defence Sentencing Appeal Brief](#).