

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 June 2026

THE APPEALS CHAMBER

Before: Judge Erdenebalsuren Damdin, Presiding
 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

Public redacted version of CLRV Observations on the “Defence Sentencing Appeal Brief” (ICC-02/05-01/20-1312-Conf) and the “Prosecution Appeal Brief (Sentencing)” (ICC-02/05-01/20-1313), 11 May 2026

Source: Common Legal Representative of Victims

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

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☒ Legal Representatives of the Victims

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I. INTRODUCTION

1. The Common Legal Representative of Victims (“CLRv”), pursuant to the Order of the Appeals Chamber,¹ submits these Observations on the Defence and Prosecution Sentencing Appeal Briefs.²
2. The participating victims have been unwavering in their opposition to allow the Appellant to ever return to Darfur and that this should be unambiguously reflected in the sentence imposed by the Trial Chamber, as well as the extreme gravity of the crimes that he was convicted for. Guided by consultations with her clients and the specificities of her mandate, the CLRv takes no position on the appropriate sentence for the Appellant. The participating victims have continually voiced their resolute trust in the Court to determine the appropriate sentence in the context of the case and the ICC legal framework and they still do, even though individual and very personal views may differ. This includes certain participating victims having expressed hope for a higher sentence to reflect the significant harms suffered. No sentence imposed on the Appellant, as long as it may be, can heal their long-lasting wounds and ongoing suffering.
3. Therefore, the CLRv only seeks to respond to distinct matters within the Defence Sentencing Appeal Briefs which are of primary concern to the participating victims. To a very limited extent, the CLRv wishes to make observations on arguments made in the Prosecution Sentencing Appeal Brief.

II. CLASSIFICATION

4. Subject to the provisions of Regulation 23 *bis*(1) and (2) of the Regulations of the Court, the CLRv files these observations as Confidential as they respond to a confidential document.

III. SUBMISSIONS³

A. The Defence relitigates matters without identifying any error

5. The Defence seeks to relitigate various matters which have been considered and adjudicated by this Court on numerous occasions, without substantiating the purported error committed by the Trial Chamber.
6. In Ground 1, the Defence argues that the Chamber erred by incorrectly applying non-

¹ [ICC-02/05-01/20-1314](#).

² *Respectively* [ICC-02/05-01/20-1312-Conf](#) and [ICC-02/05-01/20-1313](#).

³ The CLRv refers to and relies upon the general legal principles governing an appeal of a sentence. *See* Articles 81(2)(a), 83(2) and 83(3) of the Rome Statute; *Ntaganda* Sentencing Appeal Judgment, [ICC-01/04-02/06-2667-Red](#), paras 19-33; *Bemba et al.* Sentencing Appeal Judgment, [ICC-01/05-01/13-2276-Red](#), paras 21, 23; *Lubanga* Sentencing Appeal Judgment, [ICC-01/04-01/06-3122](#), paras 36-46.

retroactivity *ratione personae* under Article 24(2) of the Statute. The Defence states that “[n]on-retroactivity *ratione personae* constitutes, alongside the principles of *nullum crimen sine lege* and *nullum poena sine lege*, one of the facets of the principle of legality”.⁴ Article 24(2) states that “[i]n 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” (emphasis added). This Court has on multiple occasions, including by the Appeals Chamber, heard controversial submissions, analysed, deliberated and rendered judgment on the (in)applicability of Sudanese law to this proceeding in light of the accessibility and foreseeability of the Appellant being charged with international crimes during the period of the charges.⁵ The Defence fails to answer the basic question of how or why Sudanese law would now be applicable to the sentencing phase of the proceedings. This ground simply represents another iteration of the Defence’s relentless, and unconvincing, arguments that the Court’s legal framework lacks application to the Appellant.

7. This Court can only apply the laws by which it is bound, namely that contained in Article 21 of the Statute. As the ICTY Appeals Chamber pronounced, “*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.”⁶ Contrary to the Defence’s position, the law most favourable to the Appellant is not one which they can pick and choose as it suits them. Article 24(2) of the Statute applies only if the Court’s applicable law has been amended prior to a final judgment, in which case, the more favourable law must apply. Security Council Resolution 1593 does not form part of the Court’s legal framework.⁷ Neither is Sudanese law binding on this Court in determining the appropriate sentence.⁸ Rather, Article 77 of the Statute provides the applicable penalties which may be imposed by the Court, and Article 78(1) provides the principles in determining a sentence. There has been no change to these provisions since its adoption. The Chamber therefore did not err in law by dismissing the Defence’s arguments and appropriately considered the relevant law in determining the sentence.
8. In Ground 7, the Defence re-argues that the Chamber failed to consider the Appellant’s

⁴ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 8.

⁵ See Trial Judgment, [ICC-02/05-01/20-1240](#), Section 2; Judgment on the appeal of Mr Abd-al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘*Exception d’incompétence*’ (ICC-02/05-01/20-302)”, [ICC-02/05-01/20-503](#), paras 85-86. See further CLRV Oral Sentencing Submissions, T-164, p. 61, lines 7-21; p. 62, lines 7-22.

⁶ Nikolić, Judgment on Sentencing Appeal, [IT-94-2-A](#), para. 81.

⁷ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 18. See also CLRV Oral Sentencing Submissions, T-164, p. 64, lines 14-18.

⁸ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 18. See *Tadic* Judgment on Sentencing Appeals, [IT-94-1](#), para 21; Nikolić, Judgment on Sentencing Appeal, [IT-94-2](#), para. 84.

arguments of having committed a mistake of law. Not only does the Defence impermissibly incorporate by reference its arguments contained in its Appeal Brief on conviction within this ground,⁹ the Defence's arguments relating to the existence of a mistake of law was dismissed by the Trial Chamber in the Trial Judgment.¹⁰ The Chamber correctly rejected these arguments in the Sentencing Decision on the basis that the Defence sought to relitigate material issues in dispute at trial, which would improperly transform the sentencing process into a request to reconsider the Trial Judgment.¹¹ The Defence, again, resubmits the same facts in this appeal that it considers relevant to prove its mistake of law argument.¹² Not only do these arguments remain unconvincing, but a sentencing appeal is the improper forum. The Court's jurisprudence is clear that a convicted person must establish a ground excluding criminal responsibility in order to be considered as a mitigating factor at sentencing.¹³

9. The Trial Chamber thoroughly evaluated all relevant evidence relating to the Defence's mistake of law argument and considered, beyond reasonable doubt, that no mistake of law could apply to the Appellant in the circumstances.¹⁴ It is wholly inappropriate to relitigate the same facts to a lower standard of proof and absent any new and relevant evidence on appeal which might warrant reconsideration of the factual findings. What the Defence is asking the Appeals Chamber is that if an accused sought to establish, but failed, a mistake of law argument at trial, they should still benefit from Rule 145(2)(a)(i) on the basis of the same evidence.
10. Mitigating factors must play a role in ensuring that a fair sentence is pronounced, and to reflect the convicted person's culpability.¹⁵ The Defence plainly failed to establish any exclusion of criminal responsibility at trial. Any mitigation under Rule 145(2)(a) would undermine the Appellant's responsibility and culpability for the crimes as reflected in the Trial Judgment. Consequently, the Chamber did not err in law in dismissing any consideration of mistake of law under Rule 145(2)(a)(i) in determining the sentence and clearly reasoned why.¹⁶

B. The Chamber did not err in its determination of sentences for individual counts

11. The Defence asserts that the Chamber erred in considering the Appellant's personal

⁹ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 86, 90, 94-95. See *Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 92.

¹⁰ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 948.

¹¹ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 116-118.

¹² Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 90, 94-95.

¹³ *Ongwen* Sentencing Judgment, [ICC-02/04-01/15-1819-Red](#), paras 89-100.

¹⁴ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 115.

¹⁵ Rule 145(1)(a) of the Rules of Procedure and Evidence.

¹⁶ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 91-92.

circumstances and mitigating factors, in its determination of the joint sentence,¹⁷ as opposed to applying these factors to the individual counts.¹⁸ The CLRV submits that the Chamber committed no error and/or no material impact has been illustrated by the Defence in asserting this error.

12. Article 78(3) of the Statute indicates that “[w]hen 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 clearly provides a two-step process in a Chamber’s consideration of a final joint sentence for multiple crimes committed. However, the legal framework does not explicitly mandate the Chamber to consider individual circumstances and mitigating factors within this first step, namely within its determination of sentences for individual crimes.¹⁹
13. Rule 145(1) of the Rules of Procedure and Evidence states that “[i]n its determination of the sentence pursuant to article 78 of the Statute, paragraph 1, the Court shall: (a) Bear in mind that the totality of any sentence of imprisonment [...] must reflect the culpability of the convicted person”. Article 78(1) otherwise states that “[i]n determining the sentence, the Court shall [...] take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” Neither Article 78(1) nor Rule 145(1) makes clear that “the sentence” referred to therein is the individual sentence for each crime or the joint sentence as anticipated by Article 78(3).²⁰ Rule 145(1)(b) then requires that a chamber must “[b]alance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime”. Read together, what is crystal clear is that in determining a total sentence that is reflective of the culpability of the convicted person, individual circumstances and mitigating circumstances must be considered by the Chamber. The Chamber complied with these requirements in delivering its sentence.
14. The Chamber clearly and explicitly considered the Appellant’s individual circumstances and certain mitigating factors in its determination of a sentence, albeit these were applied to a “limited”²¹ extent. As such, the Chamber observed its obligations as required by Rule 145(1)(b). The Trial Chamber has broad discretion in applying relevant sentencing factors to come to a final determination of an appropriate sentence. Jurisprudence has consistently indicated that trial chambers are “endowed with a considerable degree of discretion [...], as

¹⁷ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 53, 75, 80.

¹⁸ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 26-28.

¹⁹ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 34.

²⁰ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 26, 34.

²¹ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 53, 75, 80.

well as in deciding how much weight, if any to be accorded to the mitigating circumstances identified.”²² The weight given to an individual factor, and the balancing of all relevant factors, to arrive at the appropriate sentence is at the core of a trial chamber’s exercise of discretion.²³ As the individual circumstances and mitigating factors applied in this case were not necessarily applicable to each or even any crime (namely, the Appellant’s current age and health,²⁴ good conduct in detention,²⁵ and voluntary surrender²⁶) – it was reasonable that these matters were accounted for by the Chamber as an overarching consideration. These aspects are clearly applicable to the Appellant holistically, rather than to individual counts. The latter raises the potential of double-counting of mitigating factors which is prohibited,²⁷ particularly when the Chamber is considering the appropriate joint sentence in light of the multiple convictions. As such, the Trial Chamber did not unreasonably exercise its discretion in this case.

15. The Defence cannot otherwise establish any material impact in the event that an error has been committed. The Chamber explicitly considered all relevant individual circumstances and mitigating factors in its final determination of the sentence and stated that it “would have pronounced a higher sentence [than 20 years], had it not been for the accepted mitigating circumstances”.²⁸ There is no ability to know to what extent the sentence would have increased in the absence of these factors being applied. Indeed, the Court’s legal framework does not prescribe by how much, and in what circumstances, the joint sentence may exceed the highest individual sentence.²⁹ Alternatively, a Chamber may decide that there be no increase to the minimum available sentence. What is known is that these factors were considered and had a direct impact on the sentence ultimately considered appropriate by the Chamber in all the circumstances.

16. The function of mitigating factors must seek to achieve the primary objectives of sentencing, that is of retribution and deterrence,³⁰ and to properly reflect culpability.³¹ Mitigating factors do not serve as a mechanism which “should be taken in to account in

²² *Bemba et al.* Sentencing Appeal Judgment, [ICC-01/05-01/13-2276-Red](#), para. 187; *Lubanga* Sentencing Appeal Judgment, [ICC-01/04-01/06-3122](#), para. 43.

²³ *Ntaganda* Sentencing Judgment, [ICC-01/04-02/06-2442](#), para. 12; *Lubanga* Sentencing Appeal Judgment, [ICC-01/04-01/06-3122](#), para. 3.

²⁴ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 53.

²⁵ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 75.

²⁶ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 80.

²⁷ Ambos, ‘Article 78’ in K. Ambos (ed.) *Commentary of the Rome Statute of the International Criminal Court* (2022), p. 2294.

²⁸ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 294.

²⁹ *Ntaganda* Sentencing Judgment, [ICC-01/04-02/06-2442](#), para. 25.

³⁰ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 13-14 referring to *inter alia Bemba et al.* Sentencing Appeal Judgment, [ICC-01/05-01/13-2276-Red](#), para. 205; *Ntaganda* Sentencing Judgment, [ICC-01/04-02/06-2442](#), para. 9.

³¹ Rule 145(1)(a) of the Rules of Procedure and Evidence.

reducing a sentence, nor just merely in declining to impose a greater sentence.”³² The application of mitigating factors does not alter the Trial Chamber’s broad discretion to ensure that the totality of a sentence fairly reflects the culpability of the convicted person in all the circumstances, as reflected by Rule 145(1) and (2). The present case, in the CLRV’s view, gives little room, if any, for mitigation which has been duly considered by the Chamber.

C. The Chamber did not err in its consideration of applicable mitigating factors

17. The Defence asserts that the Chamber should consider the Appellant’s good character after the events of that period, on the basis that it is mandatory for the Chamber to take both the gravity of the crimes and individual circumstances of the convicted person into account, pursuant to Article 78(1) of the Statute.³³ This argument is misconceived.
18. The Defence misinterprets the Sentencing Judgment, which clearly did consider the Appellant’s character post 2003-2004. The Defence simply disagrees that the Chamber attributed no weight to such evidence in determining the appropriate sentence. “[I]ndividual personal circumstances” under Article 78(1) are not specified. Rather, the Chamber is given broad discretion to consider wide-ranging matters as an individual personal circumstance.³⁴ Indeed, factors articulated within Rules 145(1)(c) and 145(2)(a), which provide more direction to a chamber in its sentencing deliberations, are plainly non-exhaustive. As the Defence notes, individual personal circumstances and gravity must be considered by a chamber under Article 78(1). However, this is obviously distinct to a Chamber’s deliberation of whether, or to what extent, any weight is placed on either of these factors in its final determination of an appropriate sentence.
19. The Chamber explicitly acknowledged that there was evidence of the Appellant’s good character post 2003-2004,³⁵ as such, these matters were considered by the Chamber for the purposes of Article 78(1). However, the Chamber plainly gave no weight to this evidence, stating that “even if [the Appellant] may have participated in alleged acts of sympathy for others (such as those referred to by D-0040 and D-0041), the Chamber does not find it appropriate to consider these as mitigating, in light of the large number and heinous natures of the crimes of which [the Appellant] has been convicted.”³⁶ It was not that the Chamber did not consider these matters at all, but it appropriately balanced the gravity of the crimes with a potential mitigating factor, and found that the severe gravity of the crimes

³² *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 34.

³³ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 52, 55.

³⁴ *Bemba et al.* Sentencing Appeal Judgment, [ICC-01/05-01/13-2276-Red](#), para. 352; *Ntaganda* Sentencing Appeal Judgment, [ICC-01/04-02/06-2667-Red](#), para. 5.

³⁵ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 93.

³⁶ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 98.

outweighed any potential for the Appellant's alleged good conduct to be mitigating.³⁷

20. These principles do not mandate that the Chamber definitively “take into account as a factor for mitigation” any evidence of the Appellant's good character and actions after 2002-2003. Article 78(1) does not state that any or all individual personal circumstances are automatically applied as mitigation, and certainly not on the basis of its mere existence.³⁸ Indeed, whether an Appellant's character aggravates or mitigates a sentence largely depends on all the circumstances of the case.³⁹ The Chamber must balance all relevant factors to arrive at an appropriate sentence.⁴⁰
21. The Defence's reference to *Katanga*⁴¹ as supportive case law that the Chamber ought to have considered the Appellant's good character and efforts to promote peace and reconciliation after the events of 2003-2004 is unhelpful to their argument. The extract referred by the Defence clearly indicates that the Trial Chamber in *Katanga* considered that “efforts undertaken to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence” (emphasis added). There is a plain distinction between a trial chamber taking this factor into account and the possibility that it is applied as a mitigating factor. It should be noted that active efforts to promote peace and reconciliation are entirely different to being considered a generally kind and generous man, which the Defence suggests should be taken into consideration as mitigating.⁴² In any event, the Appellant's supposed good character is strongly contradicted by the evidence at trial as well as views and concerns presented by the participating victims. As such, this factor is, at its best, irrelevant, or at its worst, aggravating given the sheer violence inflicted by the Appellant on the Fur community. The CLRV maintains her position that given the clear evidence to the contrary, the Appellant's alleged good behaviour and good character is insufficient to make a determination on the reduction of sentence.⁴³ The Chamber was correct in disregarding such matters in its consideration of mitigating circumstances.
22. Otherwise, the Chamber did not fail to consider the Appellant's arguments concerning his role as a mediator in tribal negotiations before the events of 2003-2004.⁴⁴ The Chamber clearly refers to these arguments in its discussion of applicable mitigating factors.⁴⁵ This is

³⁷ *Ntaganda*, Sentencing Appeal Judgment, [ICC-01/04-02/06-2667-Red](#), paras 277-278.

³⁸ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 57.

³⁹ *Hadžihasanović*, Judgment on Sentencing Appeal, [IT-01-47-A](#), para. 328; *Babić*, Judgment on Sentencing Appeal, [IT-03-72-A](#), para. 49.

⁴⁰ Rule 145(1)(b) of the Rules of Procedure and Evidence.

⁴¹ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 66.

⁴² Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), paras 58-61.

⁴³ CLRV's Oral Sentencing Submissions: T-164, p. 55.

⁴⁴ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), ground 4.

⁴⁵ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 42, 86.

distinct from the submission that the Appellant was a “man of peace”, which was withdrawn by the Defence and therefore not considered by the Chamber.⁴⁶ As such, the Appellant’s role as a mediator was not disregarded by the Chamber – it was correctly considered as irrelevant in light of the gravity of the offences committed.

D. The Chamber did not err in failing to consider the Appellant’s efforts to compensate victims as a mitigating factor

23. The Defence asserts that the Chamber failed to adequately consider the Appellant’s efforts to compensate the victims as a mitigating factor.⁴⁷ The Chamber committed no error and such arguments should be dismissed, not least for remaining to be a self-serving exercise. No consideration or reflection of the participating victims’ views regarding the Appellant’s actions to “compensate” can be seen within the Defence’s Sentencing Appeal Brief, despite having clearly been voiced during sentencing.
24. Again, the Defence fails to appreciate the distinction between a Chamber’s obligation to take certain matters into account under the Rules, and its discretion to apply those factors to the sentence. Whilst Rule 145(2)(a)(ii) mandates that a Chamber shall consider, as appropriate, any efforts taken by the convicted person to compensate victims, this does not result in a Chamber being obliged to take in to account “such efforts when they exist and that their mitigating impact shall be commensurate (*“as appropriate”*) to the efforts deployed”.⁴⁸ Such a reading empties the Trial Chamber of its discretion to assess any and all factors it considers appropriate to formulate a sentence.⁴⁹ The Chamber clearly complied with Rule 145(2)(a)(ii) in having taken the Appellant’s efforts into account,⁵⁰ but concluded that no weight could be placed on them in the circumstances. Article 78(1) does not assist in obliging the Chamber to apply certain mitigating factors either.⁵¹ As such, there was no legal error committed by the Chamber. Otherwise, the Defence’s assertion that the Chamber “acted unfairly”⁵² in rejecting the Appellant’s efforts and coining it as “lip-service” and “calculated and insincere” does not meet the standard of review on appeal for any unfairness, in that it affects the reliability of the sentence.⁵³ The Defence merely disagrees with the Trial Chamber’s correct analysis of such actions.
25. To be considered mitigating, the Appellant’s efforts to compensate the victims should have some moral or rehabilitative value to the victims themselves. It is devoid of such. The

⁴⁶ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 91.

⁴⁷ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), ground 6.

⁴⁸ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 74.

⁴⁹ *Ntaganda* Sentencing Judgment, [ICC-01/04-02/06-2442](#), para. 12; *Al Hassan* Sentencing Judgment, [ICC-01/12-01/18-2662](#), para. 18.

⁵⁰ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), paras 100-110.

⁵¹ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 78.

⁵² Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 84.

⁵³ Article 83(2) of the Rome Statute.

CLRV outlined, clearly and plainly, the views of the participating victims at the sentencing hearing. She stated in her oral sentencing submissions that in their view, there are no mitigating factors.⁵⁴ Additionally, the Appellant's expressions of "solidarity towards the victims" remain unclear as to who he means⁵⁵ – are these the participating victims? Or all victims of the conflict in Darfur in 2003 and 2004? Or all victims until this very day? In any event, the participating victims "don't accept this solidarity, given the harm and trauma that they have lived because of the crimes committed by Mr Abd-Al-Rahman" at the time, which is the "result of the three defence lines that he has chosen" and accordingly he "must bear the consequences".⁵⁶ The participating victims otherwise "don't buy [his empathy] and feel a further mix of disbelief and frustration".⁵⁷

26. The participating victims have maintained their astonishment with the Appellant's contention that he is not *Ali Kushayb*.⁵⁸ As such, the "continuous refusal by Mr Abd-al-Rahman to admit that he is Ali Kushayb inevitably impacts on the sincerity of his words".⁵⁹ The Appellant's "expression of empathy towards the victims in general at the end of this trial, in a short address to the public"⁶⁰ are "little [and] they are late".⁶¹ Further, "given Mr Abd-al-Rahman's line of defence, it is asking a lot from [the participating victims] to accept Mr Abd-al-Rahman's words. They don't."⁶² In light of this, the Chamber's conclusions concerning the Appellant's expressions of empathy, namely being "calculated and insincere",⁶³ were clearly reasonable. There was no ambiguity as to the basis for this finding.⁶⁴ The Defence simply neglects to engage with, or ignores, the views of the participating victims.

27. This Court has the benefit of external victims counsel to voice the interests and concerns of the victims throughout the proceedings. The ICTY did not have such a mechanism of victims participation. As such, the fact that expressions of empathy were considered as mitigating at the ICTY is not necessarily relevant in the current circumstances.⁶⁵ The victims have openly told the Court that they do not accept the Appellant's empathy or solidarity. The Appellant should not benefit from mitigation by merely positing an

⁵⁴ CLRV Oral Sentencing Submissions, T-164, p. 44, lines 17-20.

⁵⁵ CLRV Oral Sentencing Submissions, T-166, p. 14, line 20 – p. 15, line 2.

⁵⁶ CLRV Oral Sentencing Submissions, T-166, p. 15, lines 3-7.

⁵⁷ CLRV Oral Sentencing Submissions, T-164, p. 56, lines 17-20.

⁵⁸ See e.g. CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), paras 85-86.

⁵⁹ CLRV Oral Sentencing Submissions, T-164, p. 57, lines 3-5.

⁶⁰ CLRV Oral Sentencing Submissions, T-164, p. 57, lines 8-10.

⁶¹ CLRV Oral Sentencing Submissions, T-164, p. 57, lines 12-14.

⁶² CLRV Oral Sentencing Submissions, T-164, p. 57, lines 14-15.

⁶³ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 108.

⁶⁴ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 79.

⁶⁵ *Contra* Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 81.

expression of empathy when it has been refused by those who it aims to console.

28. With respect to the Defence's position that their "concrete and ambitious proposals" sought to effect reparations for the victims in this case,⁶⁶ the CLRV maintains that the Defence's actions to date have no bearing on whether the participating victims will receive reparations.⁶⁷ Indeed, by the Appellant rejecting all allegations during trial and seeking an acquittal on his conviction, fully knowing the ICC legal framework, would mean zero reparations for the victims if no conviction is ultimately entered.⁶⁸ As such, the practical and realistic outcome of any such efforts undertaken by the Defence up until the appeals are finalised merely pays "lip-service" to the suffering of the victims as the Chamber describes.⁶⁹ The CLRV reiterates that the Appellant has a fundamental right to appeal his conviction and makes no adverse observations on his decision to do so. However, the Appellant should not benefit from sentence mitigation for attempting to "pave the way" for reparations, when he continues to refuse to accept responsibility as the perpetrator in this proceeding. It is blatantly contradictory. The CLRV reasserts that the Defence "cannot use the victims' suffering and their need for reparations to mitigate his sentence."⁷⁰ Clearly, the Chamber's rejection of the Defence's arguments not only aligns with the Court's legal framework governing reparations, but also the participating victims' strong views opposing the Defence's efforts in this regard.
29. In any event, a plain reading of Rule 145(2)(a)(ii) relates to the convicted person's conduct after the act, including efforts by the person to compensate victims. This clearly requires that the Appellant's personal conduct and actions to compensate victims are to be interrogated in order to be considered as mitigating, as opposed to that of his defence counsel.⁷¹ Indeed, the Defence's position is that the Appellant "did indicate his support" for victims to be compensated.⁷² Although the CLRV accepts that "to compensate" is undefined and may be given a broad interpretation for the purposes of Rule 145(2)(a)(ii), there is absolutely no evidence to suggest that the Appellant has personally made efforts to compensate victims. The Defence's repetition of its "material, repeated, concrete and sustained efforts"⁷³ to seek reparations through the ICC framework should thus be considered moot. The Chamber made no legal or factual error in this regard.

⁶⁶ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 76.

⁶⁷ See Article 75(1)-(4) of the Rome Statute; CLRV Oral Sentencing Submissions, T-166, p. 13, line 19 – p. 14, line 7.

⁶⁸ Article 75(2) of the Rome Statute. See also CLRV Oral Sentencing Submissions, T-164, p. 58, lines 23-25.

⁶⁹ Sentencing Judgment, [ICC-02/05-01/20-1281-Conf](#), para. 102.

⁷⁰ CLRV Oral Sentencing Submissions, T-164, p. 59, lines 1-3.

⁷¹ See further K. Ambos (ed.), 'Concursus Delictorum and Sentencing' in [Treatise on International Criminal Law](#), 2nd Edition (2022), p. 344. See also CLRV Oral Sentencing Submissions, T-166, p. 12, line 24.

⁷² Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 80.

⁷³ Defence Sentencing Appeal Brief, [ICC-02/05-01/20-1312-Conf](#), para. 78.

E. The Chamber erred in failing to consider distinct harms suffered between the Bindisi, Kodoom, Mukjar and Deleig operations

30. The Prosecution submits at Sections II.A.2, II.B.1 and II.B.2 of its Sentencing Appeal Brief that the Chamber erred in failing to account for the factual differences and distinct nature of all four operations, as well as the different protected interests violated by the crimes committed in those operations. The Prosecution states that the Chamber's sentence failed to reflect the "multiplicity and diversity of serious crimes" of which the Appellant was convicted, as well as the distinct factual conduct and consequences of the crimes including between each of the operations.⁷⁴ These errors resulted in a sentence which failed to reflect the totality of the Appellant's culpability for his participation in the crimes. The CLRV sympathizes with the Prosecution's submissions on these points, particularly in light of the differing harms communicated to the CLRV by participating victims affected by each operation. Therefore, the CLRV wishes to make a few additional observations on the arguments put forward by the Prosecution.
31. Although all four operations shared a severe level of violence, the CLRV recalls that victims of Bindisi described their accounts of being raped and the physical and emotional trauma suffered thereafter, including social stigmatisation.⁷⁵ V-0001 recounted that "*those women who were raped, repeatedly raped, were still suffering. They were still sick. They couldn't [...] find proper treatment. We had those who had been suffering from diseases and sickness. Due to the rape, they ran into mental health issues. So they had both physical and mental health issues, which we couldn't find treatment for. They were not taken to other areas to be taken to other hospitals or other places where they could treat their wounds and get the proper treatment [...] The implications of war are numerous.*"⁷⁶ Such sexual violence did not form part of the charges with respect to the Mukjar, Deleig or Kodoom operations.
32. Residents of Kodoom and Bindisi were forced to flee to escape the attacking force.⁷⁷ Dual status witness P-0011 outlined that "*[t]he citizens were in a difficult situation. They were confused. They did not know what to do. Every person was trying to flee or run for their lives.*"⁷⁸ Dual status witness P-1073 also testified that "*We were able to wrap our possessions in a bed sheet and we joined the other villagers with whom we fled. [...] As a family, we were separated.*"⁷⁹ This widespread forcible transfer experienced by the civilian

⁷⁴ Prosecution Sentencing Appeal Brief, [ICC-02/05-01/20-1313](#), paras 106-128.

⁷⁵ CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), paras 188-19.

⁷⁶ V-0001: T-120, p. 15, lines 9-20.

⁷⁷ CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), paras 200-204.

⁷⁸ DS P-0011: T-091, p. 21, lines 2-8.

⁷⁹ DS P-1073: T-103, p. 9, lines 19-25.

population of Kodoom, did not form part of the charges with respect to the Mukjar and Deleig operations.

33. However, Fur men in Mukjar were subjected to torture and other cruel treatment while being held at the Mukjar Police Station.⁸⁰ Dual status witness P-0877 recalled while being detained : “[...] [REDACTED] [...] everybody is going through a difficult time and it was extremely difficult to breathe. So where you stand, you cannot leave either left or right, you have to stay there.”⁸¹ P-0919 stated the helpless situation of the detainees: “We had no choice, of course. We had been hit, because the people with Kushayb carried arms, and we had no other choice that we have to surrender and be hit and be assaulted. We had nothing else to do.”⁸² P-0919 also described that through the evening “some were crying and shouting, and some were whining as a result of their suffering” and that some were reciting verses from the Koran.⁸³ Dual status witness P-0931 described seeing the detainees: “I saw their bodies. They were covered with blood. They had been tortured, heavily tortured.”⁸⁴ P-0919 also described a horrific scene where the detainees were taken to a site outside of Mukjar: “The Janjaweed were saying to some [detainees] ‘Run’, to some ‘Speed up’. And after that, we were being shot at. And the shooting remained or endured for about 20 minutes. It went on for about 20 minutes. [...] They [the Janjaweed] were saying, ‘Tora bora, we are going to fuck you. Tora bora we are going to fuck you’. And some of the [detained] – who were still in the vehicles, they were calling on God, their mothers. And they [the Janjaweed] were shooting at people. The shooting was ongoing. [...] I could also hear others screaming and others crying.”⁸⁵ These specific types of harm were not necessarily experienced at either Kodoom or Bindisi.
34. In Deleig, Fur men were also targeted, arrested, detained, tortured, and mistreated.⁸⁶ Dual status witness P-0584 gave evidence that he was arrested with around [REDACTED] Fur men [REDACTED] and that the Janjaweed “entered the house and started beating us and told us to go [...] into an army pick up vehicle outside.”⁸⁷ Dual status victims P-0973, P-0718, P-0671, and P-0736 all gave evidence concerning the arrests of Fur men who were also brutally beaten by the Janjaweed.⁸⁸ Dual status witness P-0994 outlined how predominantly Fur males were detained over the course of one day: “The Janjaweed

⁸⁰ CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), paras 212-231.

⁸¹ DS P-0877: T-053, p. 84, lines 1-5.

⁸² P-0919: T-060, p. 49, lines 18-25.

⁸³ P-0919: T-60, p. 32, line 20-p. 33, line 15.

⁸⁴ [REDACTED] P-0931: T-062, p. 18, lines 7-17.

⁸⁵ DS P-0919: T-060, p. 38, line 25-p. 39, line 15.

⁸⁶ CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), paras 233-273.

⁸⁷ DS P-0584: DAR-OTP-0200-1540-R02, paras 92-94; DAR-OTP-00000419, paras 23, 25; T-092, p. 36, line 3-p. 37, line 17.

⁸⁸ See CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), para. 242.

rounded up a large number of displaced people, around 200-300 [...]. The detained persons were forced to lie face down on the ground [...] [and] were not allowed to lift their heads up. They got no food and no water. They were denied everything, including toilet. It was a hot day [...] [and] they were held directly under the sun. The Janjaweed had no mercy, and if any detainee would lift his head or attempted to look around, they would hit him and sometimes they would stomp on a detainee's head."⁸⁹ P-0980, [REDACTED], indicated that the Janjaweed *"beat people with canes, gun buttstocks"*.⁹⁰ These are but some examples, the trial record is replete with evidence concerning the mistreatment and arbitrary detention of Fur males in Deleig which were also not necessarily experienced in the other three operations.

35. As has been clearly evident from the beginning of this case, the participating victims have continued to endure the harms suffered as a result of the crimes committed. One victim, Samira, described to the CLRV that *"[w]hat they did to us has left a mark that nothing can erase. We carry this pain every day, in every part of our lives."*⁹¹ Halima expressed that *"[e]ven though we are [in the camp] now, supposedly safe in the camp, the harm still follows us. Every day is a reminder of the horrors we fled, and now my son bears those same marks. It feels like the suffering never ends."*⁹²
36. The CLRV further articulated in her observations on sentencing that the participating victims still remain affected by the harm they suffered as a result of the Appellant's crimes as convicted of, and the deep and long-lasting impact it has had on them and the Fur community of Darfur as a whole.⁹³

IV. CONCLUSION

37. The Defence's arguments against the sentence do not warrant intervention by the Appeals Chamber. The arguments put forward in the Defence Sentencing Appeal Brief fail to demonstrate any relevant mistake of law and/or fact and/or abuse of discretion and/or inadequate reasoning by the Chamber.
38. However, in the event that the Appeal Chamber sees fit to amend the sentence on the basis of the Prosecution Sentencing Appeal Brief, the CLRV concurs with the Prosecution and asks that this is done by the Appeal Chamber pursuant to Article 83(3) of the Statute.⁹⁴ After waiting for over 20 years for justice to be done, the participating victims in this case

⁸⁹ DS P-0994: DAR-OTP-0222-0055-R01, paras 32-39; DAR-OTP-00000268, paras 8-9; T-084, p. 56, line 1-p. 57, line 1.

⁹⁰ P-0980: DAR-OTP-0221-0553-R03, para. 22; T-043, p. 77, lines 16-24.

⁹¹ CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), para. 366, fn. 670.

⁹² CLRV Final Trial Brief, [ICC-02/05-01/20-1208-Conf](#), para. 327, fn. 633.

⁹³ See CLRV Sentencing Observations, [ICC-02/05-01/20-1260-Conf](#), paras 34-47.

⁹⁴ Prosecution Appeal Brief Sentencing, [ICC-02/05-01/20-1313](#), paras 137-139.

deserve to avoid any further delays.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a stylized, flowing script.

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 26 June 2026

At Berlin, Germany