

**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 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 A**

**Public redacted version of CLRV Observations on the "Defence Appeal Brief"
 (ICC-02/05-01/20-1303-Conf), 17 April 2026**

Source: Common Legal Representative of Victims

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I. INTRODUCTION

1. The Common Legal Representative of Victims (“CLRV”) in accordance with the Appeals Chamber Decision on the modalities of victims participation on 23 January 2026,¹ respectfully submits these observations on the “Defence Appeal Brief”² (“Appeal Brief”).

2. The CLRV submits that the Defence has failed to demonstrate any error of law, fact, or abuse of discretion committed by the Trial Chamber (“Chamber”) in its Trial Judgment dated 6 October 2025,³ or illustrate any fair trial violation, that would materially affect the Chamber’s findings and the Appellant’s ultimate conviction on 27 counts. Instead, the Appeal Brief is replete with errors. The Defence misinterprets or misrepresents the evidence and/or the Chamber’s findings. The Defence rehashes former factual and procedural arguments that were already dismissed by the Pre-Trial Chamber, Trial Chamber, and in some instances the Appeals Chamber. The Defence incorporates arguments from its Final Trial Brief and other submissions. The Defence fails to substantiate the errors it says it exists with appropriate references and crucially does explain how the Trial Chamber erred in fact or law, or how the supposed error materially affected the Judgment, that would have resulted in a different outcome. The Defence appears to be throwing whatever it can at the wall and seeing what sticks, resulting in an Appeal Brief that is wholly unconvincing and should be dismissed in its entirety.

3. The Defence had more than ample opportunity to substantiate their case theory or put forward evidence to effectively counter the Prosecution’s case but has simply failed to do so. It does not get a second chance on appeal to change this fact. Rather, the Defence’s unsubstantiated and contradictory arguments at trial remain on display in the Appeal Brief. This can be exemplified by the Defence’s overall approach to the Appellant’s *alias* as *Ali Kushayb*: First, *Ali Kushayb* was not Mr Abd-al-Rahman – this was a legend created by the OTP.⁴ Then, *Ali Kushayb* was an invented person who did not exist.⁵ Or, *Ali Kushayb* was someone else completely and who had met with the OTP in June 2006.⁶ Mr Abd-al-Rahman was then *Ali Kushayb*, but only for the purposes of being transferred to custody in The Hague.⁷ It goes on. The Defence cannot have their cake and eat it too.

¹[ICC-02/05-01/20-1299](#). See also [ICC-02/05-01/20-1311](#).

²[ICC-02/05-01/20-1303-Conf](#).

³Trial Judgment, [ICC-02/05-01/20-1240](#).

⁴T-162, p. 29, lines 3-7 (Conf).

⁵*Contra* Defence’s Closing Statement: T-161, p. 69; T-162, pp. 41-42; Defence Pre-Trial Brief, [ICC-02/05-01/20-616](#), para. 5, Trial Judgment, [ICC-02/05-01/20-1240](#), para. 268.

⁶T-161, p. 59, line 22 - p. 60, line 2 (Conf).

⁷Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), paras 187-188.

4. The simple conclusion is that the Appellant is *Ali Kushayb* and committed the crimes he was convicted of beyond reasonable doubt. The participating victims have always maintained that Mr Abd-al-Rahman is *Ali Kushayb*. They have no doubt about this. This was the person who ordered crimes and committed the crimes himself. The impact of which remains felt throughout the victim community until this day. No participating victim lives on their ancestral land. Almost the entire participating victim group continues to live in either refugee camps or IDP camps, more than 20 years after the commission of these crimes. Families and communities have been torn apart. Livelihoods, including land, livestock and local economies, are gone. Traditional governance structures were destroyed as community leaders were targeted to be killed. The fabric of the Fur community will never be the same.

5. The CLRV will not address each and every ground of appeal contained in the Appeal Brief. Her focus is on her own mandate which is to guarantee the specific rights and interests of the participating victims. Consequently, she solely seeks to make observations on the matters raised by the Defence which go to the heart of the participating victims' concerns.

II. CLASSIFICATION

6. 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. SUBMISSIONS

A. The Appeal Brief suffers from extensive procedural defects

7. The Appeal Brief is noncompliant with certain procedural requirements which must result in the Appeals Chamber dismissing entire grounds *in limine*. This includes a lack of substantiation under Regulation 58(2) of the Regulations of the Court ("Regulations") and the incorporation of previous arguments without any analysis of the Trial Judgment.

1. Extensive violations of Regulation 58(2) of the Regulations

8. The Appeals Chamber has consistently reiterated that Regulation 58(2) requires an appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue, for each ground of appeal.⁸ This is a fundamental component of an appeal brief, which seeks to ensure clarity and precision of the alleged errors committed.

⁸See *Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 88 referring to *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 47; *Gbagbo* Appeal Judgment, [ICC-02/11-01/15-1400](#), para. 73.

9. The Defence routinely states that the Chamber “erred in law”, but does not provide the relevant article, rule, regulation or other applicable law, or authority, to support the existence of the legal error that they purport the Chamber committed. This is the case for grounds 9, 10, 11, 14, 22, 24, 26, 29, 31, 35, 45-47, 72, and 73.⁹ The Defence further regularly asserts that a procedural error exists, without providing any factual or legal reference in support. This is the case for grounds 21, 36, 38, 54, and 56.¹⁰ Such an extensive lack of substantiation within the Appeal Brief clearly violates Regulation 58(2) and nullifies the reader’s ability to meaningfully assess these purported errors.

10. This lack of clarity is further complicated by the Defence referring to the existence of multiple different errors in a ground of appeal, such as: “procedural error and/or error of fact and/or law and/or breach of fairness”;¹¹ “error of fact and/or law and/or procedural error”;¹² “error of law and/or fairness and/or reliability”;¹³ “error of law and/or procedural error and/or fairness/reliability issue”;¹⁴ “error of fact and/or law and/or fairness error”.¹⁵ While the CLRV acknowledges that certain errors can overlap to some extent, without any evident references to the factual and/or legal bases for each error, it becomes impossible to differentiate the arguments which are supposed to correspond to the errors of fact, law, procedure, fairness and/or reliability. Rather, the Defence will broadly discuss all errors in each ground as a general collective, resulting in further non-compliance with Regulation 58(2).

11. To add further confusion, the Defence combines several grounds of appeal, into one ground, without distinguishing between the arguments or the factual and/or legal reasons said to support each ground. This deficiency relates to grounds 6 and 7, 9 and 11, 16 and 17, 45 to 47, 49 to 52, 66 and 67, 77 and 78. Although the Defence claims that such grounds have been presented together for the purposes of “concision”,¹⁶ the Appeals Chamber has previously considered that grouping grounds of appeal without distinguishing between the legal and/or factual reasons in support of each of these grounds infringes on Regulation 58(2).¹⁷ The Chamber in that decision addressed those three grouped arguments so as not to prejudice the appellant, however this procedural defect is so extensive and overarching in the Appeal Brief,

⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 9 and 11, para. 72 *et seq.*; ground 10, para. 77 *et seq.*; ground 14, para. 109; ground 22, para. 142 *et seq.*; ground 24, para. 151 *et seq.*; ground 26, para. 167 *et seq.*; ground 29, para. 178 *et seq.*; ground 31, para. 197 *et seq.*; ground 35, para. 221 *et seq.*; ground 45-47, para. 268 *et seq.*; ground 72, para. 384 *et seq.*; ground 73, para. 392 *et seq.*

¹⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 21, paras 139-140; ground 36, para. 236 *et seq.*; ground 38, para. 242 *et seq.*; ground 54, para. 300 *et seq.*; ground 56, para. 307 *et seq.*

¹¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 21.

¹²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 4. *See also* grounds 56, 77 and 78.

¹³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 6 and 7. *See also* grounds 25, 26, 28, 31

¹⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 37.

¹⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), , ground 10. *See also* ground 14.

¹⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 4.

¹⁷*Ongwen Reparations Appeal Judgment*, [ICC-02/04-01/15-2108](#), para. 100.

impacting a total of 17 grounds of appeal, that the Appeals Chamber, in the CLRV's view, should not even engage with the merits therein.

12. The Defence had 180 pages to substantiate their arguments regarding the Trial Judgment – delivered unanimously and among the shortest at the Court – which was more than enough. It is not for the prosecution or the CLRV or the Appeals Chamber to decipher or dissect the Defence's arguments to ascertain the errors they suggest exist in the Judgment. The Defence's clear failure to substantiate numerous grounds of appeal does not allow for the ability to properly analyse the errors as stipulated in those grounds. The Appeals Chamber should dismiss *in limine* those grounds for a failure to comply with the substantiation requirements under Regulation 58(2).

2. *Incorporation of previous arguments*

13. The Defence Appeal Brief is replete with attempts to incorporate by reference its previous submissions and arguments,¹⁸ which must also be dismissed *in limine*. The Defence repeatedly fails to demonstrate how these arguments substantiate the error purportedly committed and instead, simply refers to the fact that these matters were raised in its Final Trial Brief. The Appeals Chamber has previously considered that this is inappropriate, as an appellant is required to set out its arguments on appeal *in the appeal brief*.¹⁹ Notably, the Appeals Chamber has previously cautioned against the Defence from incorporating arguments developed in other filings.²⁰

14. Many of these incorporated arguments within the Appeal Brief were previously litigated *ad nauseam*, in the pre-trial and trial phase of the present case, including before the Appeals Chamber.²¹ The Appeals Chamber has clearly indicated that if “raising on appeal an issue which the appellant previously raised before the trial chamber and on which the trial chamber ruled, he or she must identify alleged errors in the relevant ruling of the trial chamber, to the extent that that ruling deals with that issue raised on appeal.”²² Without having identified or substantiated errors in those specific ruling(s), the Defence simply seeks to re-litigate submissions which have already been ruled against them. This is wholly inappropriate, and these arguments should be dismissed for abuse of process. The CLRV will address those instances in more detail in the course of these observations.

¹⁸See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 10, 26, 36-37, 71, 88, 91, 99, 107, 183, 210, 213, 222, 247, 269, 277, 287, 294, 301, 308, 385, 443; and footnotes 552-553; 606.

¹⁹*Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 92.

²⁰[ICC-02/05-01/20-982](#), para. 77.

²¹See Trial Judgment, [ICC-02/05-01/20-1240](#), paras 22-26 (Relevant Background concerning Jurisdiction); Section 3(I) (Fair trial issues including Sudan's non-cooperation).

²²*Ongwen* Reparations Appeal Judgment, [ICC-02/04-01/15-2108](#), para. 207 (emphasis added).

15. To the extent that these previous arguments are raised by the Defence in order to establish that the Trial Chamber failed to render a reasoned opinion pursuant to Article 74(5),²³ it is recalled that the Trial Chamber is not obligated to consider each and every argument raised by the Defence to discharge its duty to provide reasons.²⁴ Article 74(5) of the Statute mandates that a Trial Chamber must render a Judgment that “shall contain full and reasoned statements of the Trial Chamber’s findings on the evidence and conclusions.” A “full and reasoned opinion” requires a Trial Chamber to be clear as to which facts it found to be established beyond a reasonable doubt and how the Chamber assessed the evidence to reach these factual findings, in order to provide sufficient clarity as to the basis for the factual and legal Chamber’s decision.²⁵ Instead of substantiating any error on the part of the Trial Chamber, the Defence’s incorporated arguments reinforce the fact that it merely disagrees with the Chamber’s findings or reasoning with respect to those submissions, or alternatively simply seeks to relitigate previous issues, and ought to be dismissed without any findings on the merits.

16. The incorporation of these previous submissions results in a further lack of substantiation regarding the errors that exist, as it is not possible to comprehend the full extent of the Defence’s arguments in support. Instead, the Defence seeks that the Appeal Chamber review these previous filings which is not appropriate. The Defence has failed to set out all arguments *in the Appeal Brief* as is required.

B. The Trial Chamber did not err in its legal and factual findings within the Judgment, and/or no material impact is proven by the Defence²⁶

17. Even if the Appeals Chamber is satisfied that the Appeal Brief is not defective due to the above procedural errors, the Appeal Brief is non-substantiated due to a general failure by the Defence to present cogent arguments that set out the alleged error and explain how the Trial Chamber erred,²⁷ or demonstrate how the error materially affected the Judgment.²⁸

1. The Defence’s fair trial rights were not infringed

²³See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 26-27; 301-302, 305.

²⁴*Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 53; *Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 106.

²⁵O. Triffterer and A. Kiss, 'Article 74' in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2022).p. 2233; *Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), paras 50-53; *Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 106.

²⁶The CLRV refers to and relies upon the general law applicable to appellate standards of review in this section. See Article 81(1)(a) and (b), Article 83(2) of the Rome Statute. See further *Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), paras 76-80, 88-89, 92; *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), paras 36-39, 40-41, 48-49; *Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), paras 18-19; *Gbagbo* Appeal Judgment, [ICC-02/11-01/15-1400](#), paras 66, 68-70.

²⁷*Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 88 referring to *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 48; *Gbagbo* Appeal Judgment, [ICC-02/11-01/15-1400](#), para. 74; *Ongwen* Reparations Appeal Judgment, [ICC-02/04-01/15-2108](#), para. 31.

²⁸*Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 88 referring to *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 48; *Gbagbo* Appeal Judgment, [ICC-02/11-01/15-1400](#), para. 74.

18. The Defence – again – raises fair trial issues which were extensively litigated throughout the pre-trial and trial proceedings.²⁹ These matters were further considered by the Trial Chamber in the Judgment, where it correctly dismissed the Defence’s arguments.³⁰

19. The Defence fails to illustrate what error of law or fact the Chamber committed in reaching its findings on these matters. Instead, the Defence simply repeats its previous arguments on these issues, or incorporates arguments raised in its Final Trial Brief,³¹ which should warrant dismissal *in limine*.³² The fact that the Defence was unsuccessful in its past litigation on these matters does not warrant intervention by the Appeals Chamber. The Defence must illustrate a material factual or legal error in the Chamber’s conclusions or that it suffered such prejudice that results in the Judgment, as a whole, being considered unreliable. It didn’t.

20. The Appeals Chamber has held that “[w]hether any unfairness that is established affects the reliability of the decision is not a question that can be decided *in abstracto*; it is dependent on the nature of the particular case that is before the Appeals Chamber and must be determined as such.”³³ In this context, the Appeals Chamber was clear that not every instance of unfairness, if established, may warrant intervention – some may lead to a reversal of conviction, while others may have no impact on the reliability of the conviction.³⁴ Accordingly, the “reliability” test requires the Appeals Chamber to assess whether, despite the alleged issues of unfairness that occurred in the proceedings, the Judgment can still be relied upon in order to convict.³⁵ Even if the Appeals Chamber accepts to entertain the Defence’s arguments at all, the Defence fails to establish that the Judgment is unreliable to affect the conviction entered.

21. The Defence raises particular issues that it considers to undermine the reliability of evidence before the Chamber³⁶ by submitting that “[t]he entirety of the evidence collected in Sudan was collected in violation of Article 4(2) of the Statute and this violation cast substantial doubt on its reliability”³⁷ as well as “the [Prosecution’s] violation of the Confidentiality Policy” which both impacted the reliability of the evidence.³⁸ These arguments are duplicative of the

²⁹See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 46 (grounds 6 and 7); para. 60 (ground 8); paras 67-68 (grounds 9 and 11); para. 77 (ground 10); para. 89 (ground 12); para. 113 (grounds 16 and 17); para. 120 (ground 19).

³⁰Trial Judgment, [ICC-02/05-01/20-1240](#), Section 3.

³¹See e.g. Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 71, 91, 99, 107.

³²*Supra* Part A(2).

³³*Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 62.

³⁴*Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 62.

³⁵Triffterer and Kiss, ‘Article 74’ in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2022), pg. 2353.

³⁶See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 6,7 and 19.

³⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 59.

³⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 130.

Defence's arguments raised previously in litigation,³⁹ and which were dismissed by the Pre-Trial Chamber⁴⁰ and subsequently, the Trial Chamber.⁴¹ To illustrate the impact of these purported violations, the Defence relies on the same alleged instances of evidence interference and insecurity of witnesses.⁴² It is unlikely that the two purported violations resulted in the same impact. The Defence otherwise fails to substantiate any discernible link between how these alleged violations, which largely relate to Court's administrative policies and cooperation frameworks, directly undermines the inherent reliability and probative value of the entire body of evidence before the Trial Chamber, to the detriment of the rights of the Appellant. The Chamber did the only right thing by dismissing these arguments, considering that a violation, if any, had no procedural effect on the evidence. Effectively, the Chamber relied upon relevant evidence to make its factual findings and enter its conviction.

22. The Defence further raises issues which it considers to have impacted on its ability to investigate and/or present its case.⁴³ The Defence indicates that: it was "prevented from calling witnesses that it otherwise would have been able to call";⁴⁴ it was left with "no solution to protect its witnesses" in light of Sudan's criminalisation of cooperation with the Court;⁴⁵ it was not able to carry out adequate investigations in Sudan due to the absence of "the timely issuance of visas";⁴⁶ and that it suffered an "inequality of arms" to deploy and investigate in Sudan whilst "the Prosecution enjoyed the means, capacity, support and cooperation to proceed."⁴⁷ It is insufficient to simply state the existence of a potential fair trial violation, in broad terms, without specifying and without demonstrating any actual or potential materiality on the preparation of the accused's defence, i.e. what witnesses the Defence would have in fact called, what evidence it would have provided, and how this evidence would have directly undermined the final conclusions made by the Chamber. Such information is what is required to illustrate that the Judgment, as a whole, is unreliable. The Defence has consistently been incapable of concretely addressing these matters. This notwithstanding, the Trial Chamber provided the Defence copious extensions and facilities to assist it in presenting its case, which was - also in the CLRV's view - the appropriate remedy in the circumstances. The Defence failed to

³⁹See respectively [ICC-02/05-01/20-349-Red](#), paras 32-34; [ICC-02/05-01/20-481-Conf](#), paras 12-13; [ICC-02/05-01/20-485-Red](#), paras 8-9, 12-13; [ICC-02/05-01/20-623-Conf](#), paras 16-18 (all relating to violation of Article 4(2) of the Statute); and [ICC-02/05-01/20-322](#), paras 22-26, 38-46; [ICC-02/05-01/20-336](#), paras 6-8; [ICC-02/05-01/20-349-Red](#), paras 5-7 (all relating to the violation of the Confidentiality Policy).

⁴⁰Trial Judgment, [ICC-02/05-01/20-1240](#), paras 38-43.

⁴¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 70 and fn. 131.

⁴²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 59, 130.

⁴³See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 8, 10, 12, 13, 16, 17, and 21.

⁴⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 66.

⁴⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 88.

⁴⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 105.

⁴⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 119.

adequately take up those opportunities despite it being incumbent on them to do so. Although the CLRV sincerely appreciates, and experiences herself, the difficulties faced by external teams to ensure access to Darfur, including with communication with victims and witnesses alike and access to solid evidence, the arguments raised by the Defence must be dismissed *in limine*.

23. Finally, the Defence alleges that it did not receive certain documents, as mandated from the Government of Sudan (“GoS”),⁴⁸ due to a breach of the Prosecution’s disclosure obligations.⁴⁹ The Defence states that the requested documents from the GoS represented “crucial”⁵⁰ evidence and that “the non-transmission of the requested documents was [not] compatible with the fairness of the proceedings”.⁵¹ The Defence also asserts that the Prosecution’s “inexplicable absence of a record of the June 2006 introductory meeting [with a person identified as *Ali Kushayb* or another person] prevented it from meeting its burden.”⁵² It submits that the absence of documents from the GoS and the Prosecution each raise reasonable doubt as to whether the Appellant was *Ali Kushayb*, which should have led to an acquittal.⁵³ Without any specificity as to their contents, or even any surety of the existence of certain documents, the ability that a handful of documents could undermine the reliability of the entire body of evidence relied upon by the Trial Chamber to convict, is wholly unpersuasive. In particular, the Defence fails to explain how official documents would have confirmed whether or not the Appellant was known as *Ali Kushayb*, given that they accept this was a nickname,⁵⁴ and have themselves queried why a nickname would have been used in any official document.⁵⁵ The Defence otherwise mischaracterises the Chamber’s findings with respect to the composition of the *Janjaweed*,⁵⁶ which simply found that “some” or “many” *Janjaweed* were integrated in to GoS forces.⁵⁷ The provision of the Appellant’s military records thus would not have necessarily assisted in determining his (non)involvement in the *Janjaweed*. The Trial Chamber otherwise found that the purported meeting note did not exist.⁵⁸ The Defence therefore

⁴⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 9 and 11.

⁴⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 14.

⁵⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 71.

⁵¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 72.

⁵²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 111.

⁵³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 76, 112.

⁵⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 31.

⁵⁵See e.g. Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), para. 703 (“Nor has any explanation for why a nickname would be written on an official bank document.”).

⁵⁶The Defence states that as the Judgment found that the Appellant was a *Janjaweed*, “he must have been incorporated in the PDF, SAF, CRF, NISS or PPF at the time of the events”. See Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 76.

⁵⁷Trial Judgment, [ICC-02/05-01/20-1240](#), paras 280, 333.

⁵⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 132.

fails to demonstrate how the absence of these documents has a material impact on the conviction and render the Judgment completely unreliable.

24. During the trial proceedings, the participating victims understood and respected the fact that the Appellant was entitled to a fair trial, which necessitated certain delays. The Trial Chamber was right in balancing the need for a fair and expeditious trial with full respect for the rights of the Appellant. The Defence simply disagrees with the Trial Chamber not finding that these matters occasioned any unfairness due to these alleged violations and these arguments should be dismissed. Even if the Appeals Chamber entertains the Defence's arguments, no unfairness has been caused which warrants its intervention, and the Judgment can be relied upon.

2. *The Appellant's alias as Ali Kushayb was properly established by the Chamber*

i. The Chamber undertook a holistic assessment of the evidence concerning the nickname

25. The Defence incorrectly suggests that the Trial Chamber did not holistically assess the evidence relating to the nickname. It claims that the Chamber had already made up its mind regarding the Prosecution's evidence, assessed the Prosecution's evidence, and on the back of this analysis, rejected the Defence evidence. Such a claim would amount to a reversal of the burden of proof, which is clearly not what occurred.⁵⁹

26. The Trial Chamber undertook a full credibility assessment of the evidence on the record, including both Defence and Prosecution evidence, as set out in Annex B of the Trial Judgment, which "forms an integral part of the Judgement".⁶⁰ Subsequently, the Chamber found that sufficient evidence existed on the record to convince the Chamber beyond a reasonable doubt that Mr Abd-Al-Rahman was also known as *Ali Kushayb*. In its conclusions on the *alias*, the Chamber explained that it was persuaded by the credible and reliable evidence before it, and that it remained unpersuaded by the Defence's arguments in light of the holistic evidence presented on this issue.⁶¹

27. The CLRV has thoroughly reviewed the Chamber's findings on the credibility assessment of D-0001, D-0002, D-0008 and D-0035 and wasn't able to identify any factual or legal error that would warrant a different finding by the Appeals Chamber. The conclusion relating to the nickname is grounded in the strong, cogent, and persuasive evidence adduced throughout the trial, leaving no reasonable doubt in the minds of the judges. The Chamber rendered a unanimous and fully reasoned decision to that effect.

⁵⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 31.

⁶⁰Trial Judgment, [ICC-02/05-01/20-1240](#), para. 6.

⁶¹Trial Judgment, [ICC-02/05-01/20-1240](#), paras 270-271.

- ii. The Chamber did not err in its assessment of misrepresentations in witnesses asylum claims to establish the *alias*

28. The Defence argues that the Chamber erred in assessing the credibility of [REDACTED] in light of allegedly lying in their asylum claims.⁶² There was no such error committed by the Chamber.

29. The Defence cited to the *Bemba et al.* Appeals Chamber Judgment itself, which clearly established that the fact a witness is known to have previously given false testimony before a court does not automatically make the witness's evidence unreliable *per se* - the Chamber is required to carry out a case-by-case assessment of their evidence.⁶³ This has been the practice of other Chambers of the Court.⁶⁴ Asylum claims are normally considered within domestic administrative or quasi-judicial forums, which does not normally apply the same law or procedure as required by this Court. While lying to domestic immigration authorities may have consequences for an application for refugee status, this can be distinguished from the obligation to tell the truth within a court of law. As such, the credibility assessment to be applied to a witness by a court is also distinct.

30. With regard to [REDACTED], the Chamber correctly considered the Defence's argument regarding his "appropriated stories" and concluded that it was insufficient to undermine the general credibility of the witness, considering his evidence as a whole.⁶⁵ The Chamber otherwise noted the difference between [REDACTED] direct and indirect evidence given.⁶⁶ [REDACTED] misstated asylum claim does not go to the core matters discussed in his testimony. The witness clearly stated his reasons for having lied in his asylum claim.⁶⁷ The Defence is unconvincing when it asserts that this misrepresentation impacted his entire credibility.⁶⁸ In any event, the Defence did not cross-examine the witness on this matter.⁶⁹

31. Regarding [REDACTED], the Chamber clearly considered the Defence's challenge to the credibility of this witness and rejected this argument.⁷⁰ The fact that this witness did not mention the charged event in his asylum claim is not, in and of itself, a misrepresentation or lie,

⁶²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 22.

⁶³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), footnote 417 referring to *Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1019.

⁶⁴ See *Lubanga* Trial Judgment, [ICC-01/04-01/06-2842](#), paras 263-268 (the Chamber did not find P-0010 to be credible, taking in to account *inter alia*, unexplained inconsistencies in her personal information after allegedly falsifying official documents); *Ntaganda* Trial Judgment, [ICC-01/04-02/06-2359](#), paras. 105, 480 (the Chamber relied upon P-0010, the same witness in *Lubanga*, to convict Mr Ntaganda).

⁶⁵[ICC-02/05-01/20-1240-Conf-AnxB](#), paras [REDACTED].

⁶⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED].

⁶⁷ [REDACTED], p. 56, lines 3-23 (Conf).

⁶⁸*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 146.

⁶⁹See [REDACTED], pp. 57-100.

⁷⁰[ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED]; *contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 147.

and should not impact on his credibility. With regard to the impossibility of the Defence to cross-examine this witness on his asylum file,⁷¹ the Defence could have requested that the witness be recalled to be cross-examined on this issue, but did not do so. The Chamber also noted that a “host State do not find asylum claims unsubstantiated on the basis that the applicant has lied or acted in bad faith.”⁷²

32. Similar arguments are made by the Defence in relation to [REDACTED], that is, that he did not mention the charged events in his asylum claim, therefore casting doubts on the veracity of his testimony.⁷³ The Defence also raised the fact that the witness did not sufficiently justify his fear not to tell his entire story in his asylum claim.⁷⁴ The Chamber considered this argument and rejected it on the basis that it was satisfied with the witness’ explanation for this omission.⁷⁵

33. Regarding [REDACTED], the Chamber correctly applied the Court’s established jurisprudence, contrary to the Defence’s argument,⁷⁶ which provides that a Chamber may reject the testimony of a witness in part, but still find the same witness to be credible and reliable on different subjects.⁷⁷ This was especially in light of the fact that part of [REDACTED] evidence was corroborated by other credible and reliable witnesses.⁷⁸ On this basis, the Chamber reasonably rejected the witness’ testimony on the *alias* evidence because he was not found credible on this point.⁷⁹ However, the misrepresentation of *Ali Kushayb* and the death of his father and brother in his asylum claim clearly does not defeat the reliability of the balance of his evidence.

34. As a result of the above, the Chamber correctly set out the applicable law and equally correctly applied it to the assessment of the credibility of those witnesses. It did not commit any factual or legal errors. This Defence argument must therefore be rejected.

iii. The Chamber correctly assessed the credibility of certain defence witnesses

a. *D-0002 and D-0029*

35. The Defence alleges that the Trial Chamber erred in law in its treatment of the evidence of D-0002 and D-0029 and that this error impacted its assessment of the *alias*.⁸⁰

⁷¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 147.

⁷²Trial Judgment, [ICC-02/05-01/20-1240](#), para. 222.

⁷³Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), para. 638; [ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED].

⁷⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 148.

⁷⁵[ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED].

⁷⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 149.

⁷⁷*Ngudjolo* Appeal Judgment, [ICC-01/04-02/12-271-Corr](#), paras 152, 168. *See also Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 524.

⁷⁸[ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED].

⁷⁹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. [REDACTED].

⁸⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 25, paras 162, 166.

36. The Appeals Chamber has previously indicated that “[i]t is within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the “fundamental features” of the evidence.”⁸¹ In this context, the Appeals Chamber has repeatedly indicated that “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’”.⁸² If established that the discretion was erroneously exercised, the Appeals Chamber “must be satisfied that the improper exercise of discretion materially affected the impugned decision.”⁸³ The ICTY Appeals Chamber otherwise found that Trial Chambers were “not required to set out in detail why it accepted or rejected a particular testimony, and an accused’s right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses.”⁸⁴

37. The Trial Chamber appropriately exercised its discretion in assessing D-0002’s evidence. Contrary to the Defence’s argument that the Chamber issued “no finding” on D-0002’s credibility and reliability, paragraphs 581-588 of Annex B demonstrate that the Chamber concluded that the witness’ evidence relating to the *alias* was not only contradictory, but also unpersuasive. The Chamber otherwise outlined the evidentiary principles it applied in relation to assessing credibility and reliability.⁸⁵ This included assessing each statement individually, whilst also taking a holistic approach to the body of evidence before it.⁸⁶ As such, it was not unreasonable for the Chamber to have come to its conclusion relating to D-0002. The Trial Chambers have the advantage of observing the witnesses during their testimony, and therefore are better placed than Appeals Chamber to assess the credibility and the reliability of a witness. The Appeals Chamber will also “will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”⁸⁷

38. The Chamber did not otherwise err in providing a lack of reasoning with respect to its assessment of D-0002’s evidence.⁸⁸ The Chamber’s obligation to provide reasons, as above,⁸⁹

⁸¹Ongwen Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 524 referring to Ntaganda Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 806; Bemba et al. Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 95; Lubanga Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 23.

⁸²Bemba et al. Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 101; Ntaganda Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 46.

⁸³Ntaganda Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 45.

⁸⁴Popović et al Judgment, [IT-05-88-A](#), para. 133 (citations omitted).

⁸⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 194 et seq.

⁸⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 197.

⁸⁷Lubanga Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 24; Ngudjolo Appeal Judgment, [ICC-01/04-02/12-271-Corr](#), para. 22; Popović et al Judgment, [IT-05-88-A](#).

⁸⁸Contra Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 160.

⁸⁹Supra para. 15.

does not necessarily require the provision of detailed reasons for disregarding certain evidence, particularly in circumstances where the Chamber reasoned its approach to assessing the credibility and reliability of evidence as a whole.⁹⁰

39. In any event, the Defence fails to substantiate the material impact of the purported error on the Judgment. The Prosecution's case against the Appellant was that he was known as *Ali Kushayb* during the charged period.⁹¹ As D-0002 was not present in Wadi Salih during the time of the events and did not participate in the counter-insurgency in 2003-2004,⁹² his knowledge of a nickname used outside of the relevant time period has limited probative value, if any. D-0029's evidence suffers from the same issue.⁹³ As such, the Defence fails to indicate how either D-0002 or D-0029's evidence was critical to proving an element of a charged crime or mode of liability, which may in turn have required the Chamber to articulate further reasons in disregarding it. Even if D-0002 and D-0029's evidence was accepted by the Chamber, it is entirely plausible that persons [REDACTED] knew the Appellant by another nickname, namely Abu Nasser. As the Chamber's findings of whether the Appellant was *Ali Kushayb* relied on six different categories of evidence,⁹⁴ it is unpersuasive that either D-0002 and/or D-0029's evidence on the *alias* could have, alone, materially impacted the factual findings on this issue. Accordingly, the Defence fails to articulate the material impact of this error and how it would have rendered the Judgment substantially different. Thus, it should be rejected.

b. D-0016

40. The Defence contends that D-0016's evidence was sufficiently compelling to undermine the Prosecution's case that the Appellant is *Ali Kushayb*,⁹⁵ and that the Chamber's dismissal of his evidence was a legal and factual error. Equally, this argument must be rejected by the Appeals Chamber.

41. A close reading of the D-0016's in-court testimony is very enlightening. When examined by the Defence – the calling party – who asked if D-0016 could confirm whether the person he met, and known as *Ali Kushayb*, was the man in the picture shown to him, his answer was that it was “very difficult to recognise a person by the picture after you have met him briefly, but the person that I know - I see - that I see being prosecuted, I cannot confirm whether it was the person called *Ali Kushayb* or not -- or a different person, because I met him only briefly -- very briefly”.⁹⁶

⁹⁰Trial Judgment, [ICC-02/05-01/20-1240](#), paras 166-188.

⁹¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 239.

⁹²D-0002: T-156, p. 56, lines 15-25 (Conf).

⁹³D-0029: T-157, p. 34, lines 2-21 (Conf).

⁹⁴Trial Judgment [ICC-02/05-01/20-1240](#), para. 241 *et seq.*

⁹⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), Ground 32.

⁹⁶D-0016: T-132, p. 38, lines 21-24.

42. This question was subsequently asked again by the Single Judge, which only reaffirmed his first answer provided under oath. Indeed, the witness confirmed that it was “difficult to tell if it is him or another person, but the features of this person look like the person that the media talk about who is being identified as *Ali Kushayb* and who is being prosecuted by this Court”.⁹⁷

43. There is no sensible conclusion other than that D-0016 “could not confirm whether [the person in the picture] was the person called ‘*Ali Kushayb*’ or not because he met him only briefly”.⁹⁸ As such, D-0016 could not be reasonably relied upon to undermine that *Ali Kushayb* was Mr Abd-Al-Rahman.⁹⁹ Given his clearly very thin evidence, it was not necessary for the Chamber to then “explain why a contemporaneous account pointing to a different, younger, PDF-affiliated *Ali Kushayb* did not weaken, at the very least, the confidence with which the *alias* finding, which is a central issue in this case, was reached.”¹⁰⁰

44. D-0016’s evidence was unchallenged by the Prosecution on this point. The Defence asserts that this lack of challenge enhances its probative value,¹⁰¹ which is entirely misconceived. The mere fact that evidence is unchallenged does not, in of itself, render it more reliable or persuasive. It may well be the opposite. Where evidence is inherently weak, imprecise, or of limited probative value, there is no need to challenge it. The lack of cross-examination or contradiction by the Prosecution does not strengthen the relevance or weight of D-0016’s evidence, to the contrary. His evidence was simply too vague to cast doubt on the “overwhelming”¹⁰² credible and reliable evidence on record, which was relied upon to determine the *alias* issue.

45. Consequently, the Chamber’s assessment of D-0016’s evidence was reasonable. The Defence has neither demonstrated that the Chamber relied on irrelevant evidence, nor has it failed to consider any relevant facts in its evaluation and at no point has the Chamber applied a double-standard between Prosecution and Defence’s evidence.

46. The Chamber also provided sufficient reasoning. As above,¹⁰³ the obligation on the Trial Chamber under Article 74(5) is to provide clear and reasoned findings of fact as to each of the elements of the crimes as charged. At all times, the Chamber followed this legal standard.¹⁰⁴

⁹⁷D-0016: T-132, p. 39, lines 11-16.

⁹⁸[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 637.

⁹⁹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 637.

¹⁰⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 205.

¹⁰¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 206.

¹⁰²[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 637.

¹⁰³*Supra* para. 15.

¹⁰⁴*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), Ground 32, para. 206.

47. Again, the Defence merely disagrees with the Chamber's assessment. A reasonable trier of fact would not have reached a materially different conclusion; accordingly, there is no material impact on the Judgment.

iv. The Chamber correctly relied upon the 2020 pre-surrender video

48. The Defence asserts that the Chamber did not comply with the Appeals Chamber Judgment OA12 on the admissibility of the 2020 pre-surrender video and incorrectly used it,¹⁰⁵ which must be wholly rejected.

49. *First*, the Chamber did not prove a central element of the Prosecution's case – the *alias* – primarily on the basis on the 2020 pre-surrender video, and did not rely upon it to establish guilt of the Appellant.¹⁰⁶ In reaching a conclusion regarding the *alias*, the Chamber relied on an holistic assessment of evidence provided by witnesses, agreed facts, circumstantial evidence and the pre-surrender video recording.¹⁰⁷ The Defence therefore misrepresents the Judgment when stating that the Chamber based its conviction “[b]y relying **primarily** on the 2020 pre-surrender video in its determination as to whether the Appellant is *Ali Kushayb*.”¹⁰⁸

50. The Defence further mischaracterises the weight ascribed to the video by the Chamber, on the basis that the Chamber analysed it as the “first category of evidence”.¹⁰⁹ A plain reading of the Judgment illustrates that although the Chamber ultimately grounded its determination of the *alias* on numerous pieces of evidence on the record,¹¹⁰ there was no attribution of differing weight attached to each category of evidence. In doing so, the Defence does nothing but misinterpret the Chamber's findings.

51. In a case where identity is a primary issue, an accused person's confirmation that he bears the name of the person sought in the arrest warrant, would be reasonably relied upon as evidence of identity. On this basis, the Appeals Chamber held that the pre-surrender video was admissible into evidence and could be used as an administrative identification of the Appellant.¹¹¹ The Prosecution nevertheless bore the burden of establishing that the Appellant is the individual criminally responsible for the crimes charged. Determining the *alias* and establishing the identity of Mr Abd-Al-Rahman are, in essence, one and the same. However, this is obviously wholly separate to establishing the guilt of Mr Abd-Al-Rahman.

¹⁰⁵ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 30; [ICC-02/05-01/20-982](#),

¹⁰⁶ *Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 182.

¹⁰⁷ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 271.

¹⁰⁸ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 182. (Emphasis added)

¹⁰⁹ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 184.

¹¹⁰ Article 74(2) of the Statute; *Bemba et al* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1540.

¹¹¹ [ICC-02/05-01/20-982](#), paras 91-96.

52. *Second*, the Defence’s assertion that the Appellant referred to himself by the *alias* as a result of the Prosecution’s repeated use of it in communications with the intermediary who facilitated his surrender is completely speculative.¹¹² While the Chamber acknowledged that the Prosecution had made errors in logging their interactions with the intermediary, it nonetheless found that no pressure or incentive was applied to the Accused to make the admission in the video – in fact, quite the opposite.¹¹³ If the Defence sought to exclude the video on the basis that the Accused was coerced into making a confession or admission, it was incumbent upon the Defence to produce supporting evidence of such.¹¹⁴ Moreover, although the Defence could have called the intermediary, P-0869, it chose not to do so, and instead hired him as a Defence intermediary.¹¹⁵

53. In *Ntaganda*, the Appeals Chamber was unequivocal that “if the Prosecutor presents evidence meeting the ‘beyond reasonable doubt’ standard of proof, the accused may be convicted if **he or she does not present evidence capable of raising reasonable doubt regarding the Prosecutor’s case**”.¹¹⁶ The Defence had ample opportunity to present reliable or credible evidence to support its suggestion that the Appellant was under pressure to identify himself as *Ali Kushayb*. It failed to do so. The appeal is not the appropriate forum for a second chance in the absence of new and compelling evidence. There was no shifting or reversal of the burden of proof here.

54. *Third*, and final nail in the coffin of the Defence’s argument is that the Appeals Chamber has already concluded that “the Prosecution did not influence the content of the Video by questioning the suspect while it was being made, whether by means of asking follow-up questions to anything that was being said or otherwise.”¹¹⁷ As a result, these Defence arguments have been properly adjudicated and should be entirely dismissed.

55. In any event, the purported error had no material impact on the verdict, as the Chamber relied on other evidence to establish that the Appellant was *Ali Kushayb* and that he is indeed the individual who committed the offenses as charged.

- v. The Chamber correctly considered the inconsistencies between *Ali Kushayb* and the Appellant’s features

¹¹²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 183.

¹¹³Trial Judgment, [ICC-02/05-01/20-1240](#), paras 247-278.

¹¹⁴*Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 75; *Ntaganda* Appeal Judgment Against Conviction, [ICC-01/04-02/06-2666-Red](#), para. 12.

¹¹⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 183; Trial Judgment, [ICC-02/05-01/20-1240](#), para. 243.

¹¹⁶*Ntaganda* Appeal Judgment Against Conviction, [ICC-01/04-02/06-2666-Red](#), para. 12 (emphasis added).

¹¹⁷[ICC-02/05-01/20-982](#), para. 87.

56. The Chamber considered a number of factors when assessing the reliability of identification evidence relating to the Appellant.¹¹⁸ The Chamber was clear that this included “any discrepancy between the description of the accused given by the specific witness and that given by other witnesses and/or the physical appearance of the accused in court (taking into account that more than 20 years have elapsed since the events).¹¹⁹

57. Trial chambers have been consistently warned about the need to provide a reasoned opinion regarding witness credibility and reliability, especially in light of inconsistencies.¹²⁰ However, the ICTY Appeals Chamber recalled that a “Trial Chamber is not obliged to address every minor inconsistency in a witness’s statement; however, neither can a Trial Chamber fail to address alleged inconsistencies in cases such as the instant one, when the evidence of the witness at issue is the principal evidence relied upon to convict an accused.”¹²¹ The Chamber properly adopted a holistic assessment of the evidence regarding physical descriptions of the Appellant.¹²² Minor differences on details can in fact enhance, rather than detract from, the credibility of a witness, as too much similarity will suggest collusion.¹²³

58. The Defence refers to reports that the Appellant had an ear piercing.¹²⁴ The Chamber scrutinised the inconsistencies in witness testimony concerning this feature.¹²⁵ P-0029 described the Accused as he was before 2003, and there was no evidence put before the Chamber concerning the length of time that scarring from ear piercings remain obvious before becoming less apparent, if remaining visible at all.¹²⁶ P-0581’s evidence regarding identification was not relied upon by the Chamber, considering that his evidence was essentially based on indirect evidence.¹²⁷ P-0916 described “‘*Ali Kushayb*’ as tall, dark skinned, having a hole in his ear lobe”,¹²⁸ with the Chamber finding that the “physical description of ‘*Ali Kushayb*’ [was] generally consistent with other credible and reliable witnesses who gave evidence that *Ali Kushayb* was present in Mukjar in August 2003”.¹²⁹

59. Moreover, P-0877’s evidence was found to be credible and reliable on the identification of *Ali Kushayb* given he had “personally observed ‘*Ali Kushayb*’ on several occasions in

¹¹⁸Contra Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 33, para. 209; Trial Judgment, [ICC-02/05-01/20-1240](#), para. 210.

¹¹⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 210.

¹²⁰Ntaganda Appeals Judgment, [ICC-01/04-02/06-2666-Red](#), para. 672; Ongwen Appeals Judgment, [ICC-02/04-01/15-2022-Red](#), para. 524.

¹²¹Haradinaj et al. Appeal Judgement, [IT-04-84-A](#), para. 134.

¹²²Trial Judgment, [ICC-02/05-01/20-1240](#), para. 210.

¹²³R v McGrath (2014) NLCA 40; R. P. Fisher et al., “Inconsistency in Witness Testimony” (2009).

¹²⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 213.

¹²⁵Contra Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), fn 571.

¹²⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 59.

¹²⁷[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 123.

¹²⁸[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 371.

¹²⁹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 373.

varying conditions, lighting, times and distances in Mukjar”.¹³⁰ P-0903 was also found to be credible and reliable, and that the identification of ‘*Ali Kushayb*’ at Mukjar police station was detailed and consistent with other evidence.”¹³¹

60. However, given the lapse in time since the events (more than 20 years), the absence of any expert evidence concerning the scarring, and inconsistent testimony on this minor matter, that the Chamber summarily considered the Appellant’s purported ear piercing as part of its broader evidential analysis regarding the Appellant’s identity was not unreasonable.

61. The Defence also refers to the Appellant having had a hunched or bent posture.¹³² The Chamber referred to P-0129’s evidence regarding the Appellant’s physical description,¹³³ and found his knowledge of the Appellant credible and reliable,¹³⁴ despite the Defence suggesting his recognition of the Appellant was “unreliable”.¹³⁵ With respect to both P-0905 and P-0012’s evidence, while the Chamber did not address this specific matter, it sufficiently reasoned the basis for finding both witness’ ability to identify the Appellant as credible and reliable.¹³⁶ The Chamber otherwise reasonably did not rely upon P-0994 to establish a link between the name Abd-Al-Rahman and the *alias*, given the limited foundation for his purported knowledge.¹³⁷

62. The Chamber acknowledged that P-0932 provided evidence about *Ali Kushayb* being tall with a “pointed head”, “a hump”, and pierced ears.¹³⁸ However, considering his extremely detailed account of encountering the Appellant at the [REDACTED], the Chamber explicitly specified that it was not persuaded that “variations in the physical description of the man, that the witness named as *Ali Kushayb*, is conclusive evidence that this was not the Accused, as physical descriptions may often vary and/or be inaccurate.”¹³⁹

63. The Defence also refers to the Appellant’s facial scars.¹⁴⁰ The Chamber found that P-1073’s evidence on identification of *Ali Kushayb* was indirect, including his physical description.¹⁴¹

64. The Chamber reasonably considered the credibility and reliability of each witness on a case-by-case basis, as was legally required. This included each witness’ ability to have effectively identified the physical attributes of the Appellant. As such, the Defence’s assertion

¹³⁰[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 243.

¹³¹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 314.

¹³²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 213, fn. 573.

¹³³[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 83.

¹³⁴[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 88, 98-99.

¹³⁵[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 98.

¹³⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 326-329 (P-0905); [ICC-02/05-01/20-1240-Conf-AnxB](#), paras 24-29 (P-0012).

¹³⁷[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 518.

¹³⁸[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 429.

¹³⁹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 431.

¹⁴⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 213.

¹⁴¹[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 560.

that the Chamber “did not address such physical descriptors in a consistent manner when evaluating reliability and identification” is simply wrong.¹⁴² In light of the significant lapse of time, the Chamber could not have reasonably entered findings regarding the Appellant’s physical attributes during the charged period on the evidence before it. Indeed, it considered that the forensic evidence relied upon by the Defence to demonstrate that the Appellant did not have any visible signs of holes to his earlobes, scars to his forehead, or a hunched back, was not relevant to the Appellant’s condition prior to, or during, the period of 2003-2004.¹⁴³ The Defence didn’t present any relevant testimony (including expert evidence) to this effect.

65. The Defence has not been able to show any error of law or of fact that has been committed by the Chamber in its determination of the alias *Ali Kushayb*, especially in light of its reasoned opinion relating to evidence on the Appellant’s alleged physical features during the relevant period.

vi. There was no impact from public court documents on the evidence

66. The Chamber did not err by disregarding the Defence’s argument that witness accounts were impacted or contaminated by media exposure when assessing the *alias*.¹⁴⁴ Such arguments are completely specious and should be rejected outright.

67. The Defence’s general argument appears to be that the public attribution of the *alias* of the Appellant post-2007 “created a structural risk that witness accounts would converge, be reinforced, or be reshaped through social transmission, confirmatory cues, and repetition.”¹⁴⁵ This argument is entirely hypothetical — the Defence does not cite to any evidence, either witness testimony or documentary evidence, that identifies any plausible link between the public dissemination of the arrest warrant and witness accounts actually having converged or otherwise. Indeed, the Defence admits it did not consider that the collection of such evidence was required of them,¹⁴⁶ and utilises language which highlights the mere possibility of this speculative contamination having occurred.¹⁴⁷

68. There were a number of witnesses who knew the Appellant prior to 2007 and who identified him as *Ali Kushayb*,¹⁴⁸ suggesting that any purported contamination could not have

¹⁴²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 214 (citations omitted).

¹⁴³Trial Judgment, [ICC-02/05-01/20-1240](#), paras 557-558.

¹⁴⁴*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 35, paras 221-223.

¹⁴⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 222.

¹⁴⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 224, 227.

¹⁴⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 225 (“[...] that public attribution of the alias could operate not only by creating false accounts, but also by reinforcing and standardising aspects of recall [...]”) para. 226 (“[...] the possibility that the same public availability could have influenced or shaped the evidence”); para. 228 (“[...] the Trial Chamber was required to treat that dissemination as a structural reliability risk [...]”; para. 230 (“[...] assessed how public attribution since 2007 could have influenced the reliability and probative value of alias [...]”) (emphasis added).

¹⁴⁸See P-0643, P-0874, P-0905, P-1021, P-0883.

had the effect of requiring the Chamber to treat all *alias* evidence cautiously.¹⁴⁹ There was no obligation on the Chamber to consider matters which do not arise from any evidence at all — to do so would have been antithetical to its obligation to make findings grounded in fact and to base its decision on evidence put before it at trial.¹⁵⁰

69. It was for the Defence to present evidence to substantiate their argument that the “contamination operate[d] diffusely, over time, and through community circulation”,¹⁵¹ if this was their response to the Prosecution’s case that the Appellant was *Ali Kushayb*. The Appeals Chamber has reiterated that an accused has the “the right to adduce evidence in support of claims and factual propositions that he made in response to the Prosecutor’s allegations.”¹⁵² As such, the Defence was “required to establish direct proof of media influence on each witness”¹⁵³ to prove this argument. It clearly failed to do so. It was not for the Trial Chamber to make the Defence’s case for them.

70. Articles 74(2) and 74(5) of the Statute do not entitle the Defence to a reasoned opinion on every argument that the Chamber dismisses.¹⁵⁴ As above,¹⁵⁵ Article 74(5) only obliges a trial chamber to provide sufficient clarity on its findings of fact and law. The Appeals Chamber has found that a trial chamber is not required to address all the arguments raised by the parties if it indicates with sufficient clarity the basis for its decision.¹⁵⁶ It is clear from the above that the Appellant’s right to a reasoned opinion was not violated in these circumstances, and the Chamber did not err in failing to engage in the merits of this argument. As such, the Chamber did not err in failing to take this purported overall contamination into consideration in its analysis of the evidence.

vii. The Chamber did not solely rely on the 2013 media reports

71. The Chamber did not err by finding that certain media reports “add some support” to the Prosecution’s *alias* case and “undermines” the Defence position,¹⁵⁷ and no material impact on the Judgment has been established.

¹⁴⁹*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 228.

¹⁵⁰See Article 74(2) of the Rome Statute.

¹⁵¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 227.

¹⁵²*Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 75.

¹⁵³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 224.

¹⁵⁴*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 227.

¹⁵⁵*Supra* para. 15.

¹⁵⁶*Bemba et al. Appeal Judgment*, [ICC-01/05-01/13-2275-Red](#), para. 105; *Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 53.

¹⁵⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 232.

72. The Court has consistently found that factual findings cannot rely solely on unverified or anonymous sources, such as press articles,¹⁵⁸ as a chamber is “unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information.”¹⁵⁹ However, this does not preclude the ability for anonymous material to be corroborated with evidence that is verified and that the chamber considers to be credible and reliable.

73. Contrary to the Defence’s implication that the Chamber relied on many media reports,¹⁶⁰ there was only one report which was said to include both the name of the Appellant and the nickname *Ali Kushayb*.¹⁶¹ This was within the context of the Chamber considering numerous other pieces of circumstantial evidence as to whether the Appellant was *Ali Kushayb*,¹⁶² and within the wider context of considering six different categories of evidence relating to this issue.¹⁶³ The Chamber explicitly indicated that each piece of circumstantial evidence, on its own, was not enough to enter an adverse inference against the Appellant.¹⁶⁴ However, taken together, the totality of all circumstantial evidence was sufficient to lend support to the finding that the Appellant was *Ali Kushayb* for the relevant period.¹⁶⁵ Additionally, the Chamber qualified that reliance on this particular media report only lent “some” support to such a finding,¹⁶⁶ indicating even less weight placed on this report. As such, there was no legal or procedural error, as the media report was corroborated by other credible and reliable evidence.

74. In any event, the Defence fails to substantiate any material impact on the Judgment arising from this purported error. As the Chamber notes, the media report is dated 2013 and thus provides “limited probative value vis-à-vis the Identification Issue”,¹⁶⁷ due to being outside the temporal scope of the charges. Additionally, that the Chamber partially relied on a single document, in light of the total weight of evidence considered to enter the finding that the Appellant was *Ali Kushayb*,¹⁶⁸ could not reasonably be capable of substantially altering the outcome of the Judgment. In the absence of any substantive evidence presented by the Defence

¹⁵⁸*Gbagbo* Decision Adjourning Confirmation of Charges Hearing, [ICC-02/11-01/11-432](#), paras 29-32; *Katanga* Decision on Prosecutor’s Bar Table Motions, [ICC-01/04-01/07-2635](#), para. 31; *Gbagbo* Separate reasons of Judge Henderson [ICC-02/11-01/15-1263-AnxB-Red](#), paras 42-45; *Al Hassan* dissenting opinion of Judge Akane [ICC-01/12-01/18-2594-OPI](#), para. 7

¹⁵⁹*Gbagbo* decision adjourning hearing [ICC-02/11-01/11-432](#), para. 29.

¹⁶⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), fn. 597.

¹⁶¹Trial Judgment, [ICC-02/05-01/20-1240](#), footnote 500.

¹⁶²Trial Judgment, [ICC-02/05-01/20-1240](#), section 5.I.(A)(e).

¹⁶³Trial Judgment, [ICC-02/05-01/20-1240](#), section 5.I.(A).

¹⁶⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 265.

¹⁶⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 265.

¹⁶⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 268.

¹⁶⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 268.

¹⁶⁸Trial Judgment, [ICC-02/05-01/20-1240](#), section 5.I.(A).

that lends support to its contention that the public release of the arrest warrant in 2007 impacted the public's attribution to the *alias*,¹⁶⁹ this argument must be dismissed.

viii. The Chamber did not impermissibly rely on videos and photographs as identification evidence

75. The Chamber did not err by failing to conduct “a sufficient assessment of the reliability and probative value of that recognition evidence in light of the manner in which it was obtained and used”,¹⁷⁰ or by failing to articulate “what weight”¹⁷¹ certain identification evidence attracted, in light of all the evidence regarding the *alias*.

76. The Appeals Chamber has indicated that “when determining whether the proof beyond reasonable doubt standard has been met, the Trial Chamber is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.”¹⁷² As such, individual items of evidence must be analysed in light of the entire body of evidence adduced.¹⁷³ Indeed, trial chambers have often relied upon the “cumulative effect of the relevant evidence as a whole” to ensure the reliability of single pieces of identification evidence.¹⁷⁴ In light of this, the Trial Chamber was not legally required to specifically explain what weight one piece of evidence attracted. An appellant must otherwise still substantiate how a trial chamber's assessment of a specific item of evidence impacts its factual findings or overall conclusions in light of the totality of the evidence.¹⁷⁵

77. The Chamber complied with this framework. The Chamber stated that it “disparage[d]” the Prosecution's use of a single photograph for identification purposes,¹⁷⁶ and cited its concerns that this methodology could impact the credibility and reliability of such evidence.¹⁷⁷ The Chamber explicitly qualified its use of any identification using these methods, stating that it sought to be satisfied that the witness in question knew of the Appellant prior to being shown the photograph.¹⁷⁸ As such, the Chamber did not rely upon visual identification in isolation, which has repeatedly been considered insufficient by the jurisprudence.¹⁷⁹ The Chamber

¹⁶⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 235.

¹⁷⁰Contra Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 236.

¹⁷¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 237.

¹⁷²Lubanga Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para.22. See also Bemba et al. Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 598.

¹⁷³ Halilović Appeal Judgment [IT-01-48-A](#), para. 125 referring to Ntagerura et al. Appeal Judgement, [99-46-A](#), para. 174. See further Ambos, ‘Article 74’, in K. Ambos (ed.), [Commentary on the Rome Statute of the International Criminal Court](#) (2022), p. 2213.

¹⁷⁴Ntaganda Trial Judgment, [ICC-01/04-02/06-2359](#), para. 74; Bemba Trial Judgment, [ICC-01/05-01/08-3343](#), para. 244 (holding that a Chamber may be satisfied beyond a reasonable doubt in respect of identification evidence where it is relying on the “cumulative effect of the relevant evidence as a whole”).

¹⁷⁵Bemba et al. Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 878.

¹⁷⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 217.

¹⁷⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 218.

¹⁷⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 218.

¹⁷⁹ Ntaganda Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 74; Bemba Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 244; Limaj Appeal Judgment, [IT-03-66-A](#), paras 153-154.

explicitly considered other relevant evidence when determining the probative value of any identification evidence, such as the witness' prior knowledge or acquaintance of the Appellant,¹⁸⁰ in compliance with legal principles. The Defence does not further establish what material impact this purported error had on the Judgment.

78. The Defence does not otherwise substantiate what procedural error was committed by the Chamber in this ground, or what fairness or reliability issue it raises. Thus these should be dismissed entirely.

ix. The Chamber did not impermissibly rely upon in-court identification

79. The Chamber did not err in its treatment of the spontaneous in-court identifications by P-0585, P-0878 and P-0986,¹⁸¹ and such arguments must be rejected.

80. Contrary to the Defence's assertion, P-0585 was not relied upon at all by the Trial Chamber in its discussion and findings regarding the *alias*.¹⁸² The only two witnesses who provided in-court identification, and whose evidence was relied upon by the Trial Chamber concerning the *alias*, were P-0878¹⁸³ and P-0986.¹⁸⁴

81. The in-court identification of both P-0878 and P-0986's evidence was considered as part of other evidence relating to their identification of the Appellant as *Ali Kushayb*. With respect to P-0878 this included *inter alia* the fact that P-0878 had known the Appellant [REDACTED]; "got to know" the Appellant after he retired from the SAF and opened a medical stall in the market; and [REDACTED].¹⁸⁵ The Chamber considered that P-0878's evidence was "credible and consistent" with other witnesses.¹⁸⁶ P-0986 otherwise had various encounters with the Appellant between 2001-2003, not least having been physically assaulted and questioned under his supervision.¹⁸⁷ The fullness of each witness's evidence regarding their knowledge of the Appellant lent credible support to the reliability of their in-court identifications.

82. The Appeals Chamber in *Kamuhanda* found that, notwithstanding the Trial Chamber's consideration of in-court identifications, this was considered as "one element in a larger "process"". ¹⁸⁸ The Appeals Chamber had pointed to the fact that the Trial Chamber had mentioned "the courtroom identification among other factors without emphasizing this

¹⁸⁰Trial Judgment, [ICC-02/05-01/20-1240](#), paras 218, 254.

¹⁸¹*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 243.

¹⁸²See Trial Judgment, [ICC-02/05-01/20-1240](#), Section 5(I).

¹⁸³Trial Judgment, [ICC-02/05-01/20-1240](#), paras 250, 262, 266; footnotes 442, 492.

¹⁸⁴Trial Judgment, [ICC-02/05-01/20-1240](#), footnotes 486, 494.

¹⁸⁵[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 258.

¹⁸⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 260.

¹⁸⁷[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 485-488.

¹⁸⁸*Kamuhanda* Appeal Judgment, [ICTR-99-54A-A](#), para. 244.

particular factor”.¹⁸⁹ In those circumstances, the Appeals Chamber found “a reasonable trier of fact could have arrived at the conclusion that this identification was reliable even when disregarding the courtroom identification.”¹⁹⁰

83. The in-court identifications by P-0878 and P-0986’s were by far not the sole pieces of evidence relied upon by the Chamber to establish a positive identification. The Chamber distinguished P-0878’s evidence to others who did have a close personal relationship to the Appellant, and whom gave evidence that they knew the Appellant as *Ali Kushayb*¹⁹¹ and for which the Chamber relied upon heavily.¹⁹² To the contrary, and very cautiously, P-0878’s identification evidence was relied upon on an extremely limited basis, namely to substantiate that witnesses “drew both direct and indirect links between Abd-al-Rahman and *Ali Kushayb*,”¹⁹³ as well as certain agreed facts,¹⁹⁴ and as circumstantial evidence.¹⁹⁵ P-0986 was otherwise solely relied upon as circumstantial evidence.¹⁹⁶ These witnesses’ evidence was thus analysed as part of a larger pool of evidence all relating to the *alias*.¹⁹⁷ Accordingly, despite the fact that in-court identifications hold no probative value, any impact of having taking this in to consideration was negligible in light of numerous other pieces of evidence establishing that the Appellant was *Ali Kushayb*. As such, the Defence fails to establish any convincing material impact of this purported error.

3. *The Chamber correctly established the Appellant’s authority, including over the Janjaweed*

84. The Chamber did not err in fact and/or law in finding that the Appellant was a *Janjaweed*,¹⁹⁸ an *Agid-al-Ogada*,¹⁹⁹ or that the Appellant had a direct relationship with GoS authorities and forces at a locality level.²⁰⁰ The Defence submits that these errors affect all Counts.²⁰¹ Such arguments should be dismissed *in limine*.

85. The Defence entirely misconstrues certain factual findings relating to the authority of the Appellant. This includes constructing a two prong “test” that, “according to the Chamber’s factual findings, the *Janjaweed* were thus composed in 2003-2004 of an aggregate number of

¹⁸⁹Kamuhanda Appeal Judgment, [ICTR-99-54A-A](#), para. 244.

¹⁹⁰Kamuhanda Appeal Judgment, [ICTR-99-54A-A](#), para. 244.

¹⁹¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 250.

¹⁹²Trial Judgment, [ICC-02/05-01/20-1240](#), paras 250-252.

¹⁹³Trial Judgment, [ICC-02/05-01/20-1240](#), footnote 442.

¹⁹⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 262(b), (d).

¹⁹⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 266(e), footnote 492.

¹⁹⁶Trial Judgment, [ICC-02/05-01/20-1240](#), footnotes 486, 494.

¹⁹⁷Trial Judgment, [ICC-02/05-01/20-1240](#), Section 5(I).

¹⁹⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 40.

¹⁹⁹Contra Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 45 to 47.

²⁰⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 44.

²⁰¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 257, 267, 275.

PDF, SAF, CRF, NISS, and PPF members recruited from Arab militias.”²⁰² This not only overlooks the broader historical context which the Chamber found relating to the *Janjaweed* and its formation,²⁰³ but also misreads the finding that the GoS incorporated many of the *Janjaweed* into its forces including into the PDF, CRF, PPF, SAF and the Border Guards.²⁰⁴ This is opposed to the Defence’s assertion that the *Janjaweed* itself were composed of persons from these forces,²⁰⁵ which is plainly wrong. Alternatively, the Chamber’s finding that “many” *Janjaweed* were gradually incorporated into these forces,²⁰⁶ does not necessarily equate to all. As such, this factual formula serves absolutely no basis to establish the Appellant’s *Janjaweed* membership or authority.

86. The Defence otherwise misrepresents the Chamber’s findings which did not find that the Appellant, in fact, was an *Agid-al-Ogada*.²⁰⁷ Rather, the Chamber found that numerous persons had “formed the view” that the Appellant held this title, which supported its overall finding of the Appellant’s *de facto* authority as a leader during the charged period.²⁰⁸

87. The Defence further fails to grapple with the evidence given by its own witnesses which supported a (peripheral) finding that the Appellant held a “supervisor role in the CRF” not long after the time relevant to the charges.²⁰⁹ Those Defence witnesses stated that the Appellant was [REDACTED],²¹⁰ [REDACTED],²¹¹ at that time. It was therefore consequent and logical for the Chamber to consider that a person carrying out these supervisory functions may have held a previous position of authority.²¹² The Defence simply repeats the statement that the Appellant, as a *musa'id*, had a “modest” or “minimal” position²¹³ during this time.²¹⁴ This does not make it true.

88. To the extent that the Defence incorporates arguments put forward in its Final Trial Brief to illustrate that the Appellant “could not have occupied any position” within the

²⁰²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 251.

²⁰³ Trial Judgment, [ICC-02/05-01/20-1240](#), paras 323-333. *See also* the fact that the *Janjaweed* was a term that pre-dated the conflict in 2003-2004 (para. 323), and that in the early stages of the conflict, there was no finding relating to the source of the members of the *Janjaweed* (para. 330).

²⁰⁴Trial Judgment, [ICC-02/05-01/20-1240](#), paras 333, 342 (emphasis added).

²⁰⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 251.

²⁰⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 333.

²⁰⁷*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 272.

²⁰⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 675.

²⁰⁹Trial Judgment, [ICC-02/05-01/20-1240](#), footnote 2277.

²¹⁰D-0011: T-138, p. 51, line 15 – p. 52, line 1.

²¹¹D-0029: T-157, p. 25, lines 17-19.

²¹²Trial Judgment, [ICC-02/05-01/20-1240](#), footnote 2277.

²¹³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 296-297.

²¹⁴*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 53.

Janjaweed militia,²¹⁵ as well as being an *Agid-al-Ogada*,²¹⁶ these arguments have been unconvincing from the very beginning and must be dismissed *in limine*.²¹⁷

89. However, at the heart of the Defence’s submissions relating to these errors is a failure to appreciate how the *in dubio pro reo* principle applies in the circumstances. The standard of proof applies to “elements of the crime or modes of liability charged”.²¹⁸ This principle does not apply to individual pieces of evidence and findings of fact on which the judgment does not rely.²¹⁹ As already explained, the Chamber assessed, as it had to, the totality of evidence before it,²²⁰ to conclude that there was “overwhelming evidence” that the Appellant exercised *de facto* authority as a *Janjaweed* leader during the relevant period of the charges.²²¹

90. In contrast, the Defence wrongly asserts that it was necessary to establish, beyond reasonable doubt,²²² “that the Appellant was indeed one of [the *Janjaweed*]”,²²³ including “when and how the Appellant had joined [the *Janjaweed*] and [became] one of their leaders”,²²⁴ and that without this finding, all factual findings related to the Appellant’s contact with GoS representatives and/or GoS forces cannot be supported.²²⁵

91. Contrary to the Defence’s submission that “[p]roving the Appellant’s membership in the *Janjaweed* was ‘indispensable for entering a conviction’”,²²⁶ there was no legal obligation on the Chamber to make any positive factual findings that the Appellant was, definitively, a member of the *Janjaweed* in order to establish criminal responsibility under Articles 25(3)(a) or (b).²²⁷ There is a factual distinction between being a member of a group, and appearing to exercise authority on behalf of a group. The Chamber correctly set out the relevant legal elements which were required to be established in order to charge under Articles 25(3)(a)²²⁸ and (b).²²⁹ Nowhere within this legal framework does it provide that the perpetrator is required to have been a verified member of a particular group, or to have attained a formalised senior position therein, in order to attract an appropriate mode of liability under Article 25(3)(a) or

²¹⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 247.

²¹⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 269.

²¹⁷*Supra* Part A2).

²¹⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 167.

²¹⁹*Limaj* Appeal Judgment, [IT-03-66-A](#), para. 21.

²²⁰Trial Judgment, [ICC-02/05-01/20-1240](#), Section 5(I) and (IV).

²²¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 679, 983, 1002.

²²²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 248.

²²³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 249.

²²⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 250.

²²⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 261-263.

²²⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 256.

²²⁷*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 248, 258.

²²⁸Trial Judgment, [ICC-02/05-01/20-1240](#), Section 6(III)(A).

²²⁹Trial Judgment, [ICC-02/05-01/20-1240](#), Section 6(III)(B).

(b).²³⁰ It was appropriate that the Chamber entered findings on the basis of finding that the Appellant exercised *de facto* authority as a *Janjaweed* leader.

92. Otherwise, the Appellant's relationship with the GoS was not solely premised on the basis that he was a *Janjaweed*.²³¹ It was the result of a holistic consideration of an extensive body of evidence illustrating his conduct and actions vis-à-vis the GoS leadership and forces.²³² Thus, the Defence's argument on this issue must fail.

93. The Chamber did not err in law or fact in relation to its conclusions relating to the Appellant's authority. The Defence otherwise fails again to substantiate how these purported errors, especially minor findings of fact, had a material impact on the Chamber's overarching conclusion of the Appellant's authority during the charged period. Such arguments must be dismissed.

4. *The Chamber respected the principle of nullum crimen sine lege*

94. The Chamber did not err in law in assessing whether the Criminal Laws of Sudan that were applicable to the Appellant in 2003-2004 criminalised conduct corresponding to the charged crimes; and appropriately applied the relevant foreseeability and accessibility test as set out by the Appeals Chamber in this case.

95. The Chamber reasonably exercised its jurisdiction over the Appellant pursuant to the UN Security Council's referral of the Darfur situation under Article 13(b) of the Statute. The Chamber also applied the correct legal standard in concluding that the acts for which the Appellant was convicted of were foreseeable, and that the applicable law was accessible to him, based on the relevant evidence on the record. Neither the principle of legality (*nullum crimen sine lege*) under Article 22 of the Statute, nor the principle of non-retroactivity under Article 24 of the Statute were breached.

96. The Defence has previously raised the same arguments before the Appeals Chamber in its appeal of a decision by the Pre-Trial Chamber ("Appeals Decision on the Defence's 'Exception d'incompétence'").²³³ The Defence's request was ultimately rejected by the Appeals Chamber, which rightly pointed out that:

As regards the Defence's challenge to the legality of the charges, the Appeals Chamber finds that, as further developed below, the principle of *nullum crimen sine lege* is not violated. The situation referred to the Court by virtue of Resolution 1593 captures serious violations of internationally recognised human rights and humanitarian law. **The charges subsequently brought by the Prosecutor against Mr Abd-Al-Rahman draw upon norms that were**

²³⁰See further Ambos, 'Article 25' in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2022), pp.1199, 1216; J. Block, *Reconciling Responsibility with Reality*, (2023), section 6.2.2.3.

²³¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 263.

²³²Trial Judgment, [ICC-02/05-01/20-1240](#), Section 5(IV)(A) and (B).

²³³[ICC-02/05-01/20-503](#).

recognised globally, including in Sudan, and were fully ascertainable at the time of the conflict in Darfur.²³⁴

97. As a result, the Appeals Chamber found that:

[...] the charges against Mr Abd-Al-Rahman relate directly to crimes that were within the jurisdiction *ratione materiae* of the Court when the conduct took place, the Appeals Chamber considers that there is no violation of article 22(1) of the Statute.²³⁵

98. As a result, the Appeals Chamber found that there was no violation of Article 22(1) of the Statute.²³⁶ Despite this Appeals Chamber judgment being against a decision issued by Pre-Trial Chamber II, the occurrence of the trial does not change anything to the conclusions regarding the legality of the charges against the Appellant. The Defence simply repeats the same unconvincing claims it previously litigated before the Appeals Chamber and as such, have been duly considered and rejected by this Court. The Appeals Chamber should reject the Defence's arguments made under grounds 1-5 on this basis alone.

99. However, if the Appeals Chamber wishes to entertain these arguments, the Defence fails to establish any errors committed by the Chamber that warrant departure from the Appeals Chamber's interpretation of the application of *nullum crimen sine lege* in this case, and such arguments can be rejected on the merits for the following reasons.

100. First, the Defence argues that the Chamber committed an error of law by expanding the definition of the crimes as analogous or comparable to the crimes charged, in contravention of the prohibition against extending criminal definitions by analogy under the Statute.²³⁷

101. The drafters' intent underlying Article 22(2) of the Statute is clear: new crimes may fall within the Court's jurisdiction only by way of legislative adoption by the Assembly of States Parties, and not through judicial creation.²³⁸ Article 22(2) thus prohibits the introduction of new crimes within the ICC's jurisdiction by analogy as applied by the judiciary. At the same time, a limited and careful use of analogy remains both permissible and necessary as an interpretative tool "with which to construe the definition of crimes within the Statute."²³⁹ This is precisely the approach adopted by the Trial Chamber in *Bemba*, where it was held that the prohibition on analogy does not prevent "the Chamber from resorting to other sources of law whenever necessary to determine the precise content of the definition of a specific criminal conduct."²⁴⁰

²³⁴ICC-02/05-01/20-503, para. 77 (emphasis added).

²³⁵ICC-02/05-01/20-503, para. 82.

²³⁶ICC-02/05-01/20-503, para. 82.

²³⁷Defence Appeal Brief, ICC-02/05-01/20-1303-Conf, ground 1.

²³⁸Broomhall, 'Article 22' in K. Ambos (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2022), p. 1153.

²³⁹Broomhall, 'Article 22' in K. Ambos (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2022), p. 1155.

²⁴⁰*Bemba* Trial Judgment, ICC-01/05-01/08-3343, paras 83-84.

102. In the case of a UN Security Council referral under Article 13(b) of the Statute, some scholars argue that “the only legitimate basis for establishing the criminal responsibility of individuals would presumably – in the absence of relevant national criminal prohibitions at the time of the alleged conduct – be that of customary law.”²⁴¹

103. As a result, the Chamber did not create any new crimes within the Court’s jurisdiction or extend the definition of the crimes under the Statute, but instead relied upon the Appeals Decision on the Defence’s ‘*Exception d’incompétence*’ and the existing criminal law in Sudan. No error of law arose from the Chamber’s – albeit unfortunate – use of the term “analogous”. The Defence simply misconstrued the meaning of the use of this term by the Trial Chamber.

104. *Second*, contrary to the Defence’s argument, Article 22 of the Statute does not require that conduct be defined as “criminal” under the national law of any given State, in order to give rise to criminal responsibility before the Court. Rather, it requires, as a first step, that the law applicable to the accused at the relevant time - whether domestic or international in origin - criminalised and sanctioned, in principle, the conduct underlying the charges.²⁴² If this is answered in the affirmative, the second step requires to assess: (a) whether the law was accessible to an individual in the accused’s circumstances; and (b) whether it would have been foreseeable to such person that they may face domestic or international prosecution and sanction.²⁴³ The Chamber applied this specific test established by the Appeals Chamber Decision following the Defence Request on the ‘*Exception d’incompétence*’.²⁴⁴

105. The first step of accessibility was already answered by the Appeals Chamber, which found that when looking at the existing law applicable at the time of the Appellant’s conduct, customary law was already prohibiting this conduct with no exception.²⁴⁵ Additionally, the CLRV recalls that in her separate opinion, Judge Ibáñez considered that it was unnecessary to assess the foreseeability or accessibility of the legal norms, given that Sudan signed the Rome Statute on 8 September 2000 resulting in the laws being public and known to the Appellant, as well as the fact that “the prohibition to commit international crimes which violate the core human rights is also a *ius cogens* norm,” thus existing as customary international law.²⁴⁶

106. The Chamber nevertheless carried out its evaluation of the first step and considered relevant criminal law applicable in Sudan at the time of the events. This included, notably, the

²⁴¹Broomhall, ‘Article 22’ in K. Ambos (ed.) [Commentary on the Rome Statute of the International Criminal Court](#) (2022), p. 1157.

²⁴²[ICC-02/05-01/20-503](#), para. 38.

²⁴³Broomhall, ‘Article 22’ in K. Ambos (ed.) [Commentary on the Rome Statute of the International Criminal Court](#) (2022), para. 19; [ICC-02/05-01/20-503](#), para. 85 (emphasis added).

²⁴⁴Trial Judgment, [ICC-02/05-01/20-1240](#), paras 29-60.

²⁴⁵[ICC-02/05-01/20-503](#), paras 88-90.

²⁴⁶[ICC-02/05-01/20-503](#), para. 95 (citations omitted).

1998 Sudanese Constitution providing for fundamental human rights and freedoms;²⁴⁷ the 1991 Criminal Act of Sudan, which described prohibited conduct and defining crimes very clearly;²⁴⁸ as well as the testimony of D-0016 regarding the 1986 People's Armed Forces Act and his explanation of the criminalisation of violation of international humanitarian law by military personnel.²⁴⁹

107. The Defence's reliance on evidence that war crimes and crimes against humanity were not included in Sudanese law at the relevant time does not, in any event, impede the exercise of the Court's jurisdiction on a national from a non-State party. This is simply a misinterpretation of the law. The Defence relied on the testimony of P-0120 to assert that Sudanese law did not include international crimes,²⁵⁰ however, the Chamber considered that P-0120, when questioned by the Presiding Judge, confessed that he was not aware of any amnesty for crimes committed by members of the GoS during the 2003-2004 conflict.²⁵¹

108. As a result of the above discussion, the arguments that Counts 10, 11, 21 and 31 had no equivalence in Sudanese law have no merit, and simply reflect a misunderstanding of the applicable law and a failure to demonstrate any error of law by the Chamber. Consequently, these arguments should be rejected.²⁵²

109. Concerning the second step of foreseeability, a "reasonableness" standard applies, taking into account, *inter alia*, the "'flagrantly unlawful nature' of the crimes charged and the circumstances of the accused",²⁵³ in order to determine whether a person in the accused's situation "was reasonably capable of taking steps to comprehend and comply with" their "obligations under international law, and [...] capable of appreciating the attendant penal consequences".²⁵⁴

110. The Appeals Chamber applied that test and found that Mr Abd-Al-Rahman "was reasonably capable of taking steps to comprehend and comply with his obligations under international law, and he was capable of appreciating the attendant penal consequences".²⁵⁵ Further, in considering "the framework of laws applicable to the conflict in Darfur, the undertakings of the parties to the conflict, and the appreciation for those laws and undertakings that would reasonably belong to a commander in the militia, the Appeals Chamber is satisfied

²⁴⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 33.

²⁴⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 34.

²⁴⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 35.

²⁵⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf.](#), para. 13.

²⁵¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 47.

²⁵²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf.](#), grounds 2 and 3.

²⁵³[ICC-02/05-01/20-503](#), para. 85.

²⁵⁴[ICC-02/05-01/20-503](#), para. 88.

²⁵⁵[ICC-02/05-01/20-503](#), para. 88.

that the risk of international criminal liability was acute to such a degree that it was foreseeable to an officer of Mr Abd-Al-Rahman's rank."²⁵⁶

111. The Appeals Chamber held that the relevant laws must have been "sufficiently clear and accessible" to a person in the circumstances of the accused.²⁵⁷ The Appeals Chamber also assessed the profile of the Appellant – albeit on preliminary evidence – and concluded that:

According to the Confirmation Decision, Mr Abd-Al-Rahman spent a considerable part of his career as a non-commissioned officer in the military. During the relevant period Mr Abd-Al Rahman was the head of the *Janjaweed* militia in the Wadi Salih and Mukjar localities. He had command over other deputies of the militia as well as members of the Sudanese Armed Forces. In March of 2002, before the period covered by the charges, the Sudanese Government and the Sudan People's Liberation Movement formally undertook to comply with their obligations under international law, including common article 3 of the 1949 Geneva Conventions, to "take constant care to protect civilians and civilian objects [against attack]". Part of this undertaking was to create a body to investigate and report on incidents involving "serious violations" of the parties' obligations including, but not limited to, grave breaches of the 1949 Geneva Conventions.

Moreover, the Appeals Chamber recalls its finding above that the referral of the Situation in Darfur, Sudan took place in the wake of serious violations of human rights and humanitarian law that were criminalised under international law at the time. As to the crimes with which Mr Abd-Al-Rahman is charged in this case, the Appeals Chamber notes, generally, that the statutory crimes are a product of a concerted effort to codify the developing state of international law so as to provide the clarity that was lacking in the preceding international tribunals.²⁵⁸

112. The Chamber also conducted its own assessment of the accessibility and foreseeability test and found that the absence of international humanitarian law training was immaterial to the Chamber's finding, considering that the Appellant was sufficiently educated and, his position and experience in the armed forces was enough for the Appellant to understand and comply with the applicable law in force at the time of the charged event.²⁵⁹

113. The Chamber also correctly assessed the level of education of the Appellant as a relevant factor in assessing the capacity of the Appellant to have access to the applicable law.²⁶⁰ The Defence assertion that there is no evidence of Mr Abd-Al-Rahman's level of education is irrelevant and goes against the obvious.²⁶¹ The Appellant was able to read out in open court "statements" prepared by him.²⁶² He was also the owner of a pharmacy in Rahad-El-Berdi, which presupposes a certain level of intellectual capacity.²⁶³

²⁵⁶[ICC-02/05-01/20-503](#), para. 90.

²⁵⁷[ICC-02/05-01/20-503](#), para. 88.

²⁵⁸[ICC-02/05-01/20-503](#), para. 88.

²⁵⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 57-59.

²⁶⁰Trial Judgment, [ICC-02/05-01/20-1240](#), para. 52-54.

²⁶¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 37.

²⁶²T-027, p. 28, line 12 – p. 29, line 18 (Conf); T-162, p. 57, line 10 – p. 64, line 10 (Conf).

²⁶³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 35; Trial Judgment, [ICC-02/05-01/20-1240](#), para. 266(d).

114. Moreover, the Defence's argument regarding the concept of *Ghamina* is not only wrong, but irrelevant in determining if the applicable law was accessible to the Appellant.²⁶⁴ The Chamber noted that Defence witness D-0016's confirmation that '*ghanima* does not apply unless the armed forces attack an enemy camp', that it is a crime for someone to take this property for himself or herself, and that taking away properties from a locality that was attacked would amount to the crime of *hiraba* or 'stealing'."²⁶⁵ The Chamber provided a reasonable interpretation of the evidence on the record and a reasoned opinion to reject Defence's argument.

115. In essence, the Defence failed to establish that the Chamber made an error of law and/or facts in its assessment of the accessibility test and foreseeability as defined by the Appeals Chamber.²⁶⁶

116. *Third*, the Defence has failed to establish any error – of any type – committed by the Trial Chamber in relation to the absence of a definition of lawful order in Sudanese law. The Chamber correctly assessed the testimony of D-0016 to this effect. The Defence misinterprets the evidence provided by P-0883, whom actually supports D-0016 in the sense that P-0883 testified that a soldier facing unlawful order is obliged to obey unless its refusal would cause peril to the headquarters, unit, position or military property.²⁶⁷ The witness explained that when an unlawful order is given it is possible to complain against this unlawful order, but that if the order is given and there is no time to criticise the order, then the order must be executed.²⁶⁸ The witness was also very clear that to shoot at someone, this person had to be a 'criminal', and that "you cannot give orders to kill someone in such random way".²⁶⁹ As a result, the argument made by the Defence that the Appellant did not have a choice but to obey the unlawful orders given by Harun is not supported by P-0883's testimony. Further, the Defence reference to P-0954 is unhelpful to the extent that P-0954's witness statement does not specify if the witness was referring to a lawful or unlawful order.²⁷⁰

117. The Defence merely disagrees with the analysis of the Chamber,²⁷¹ and the conclusions established both by the Appeals Chamber and Trial Chamber as to the application of *nullum*

²⁶⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 36.

²⁶⁵ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 40, referring to D-0016: T-131, p. 67; D-0016: T-131, pp. 66-67, 69. According to D-0016, *ghanima* is 'collected in a legal manner' only when 'the armed forces takes all that it can take, including money or weapons' following 'an attack on the enemy camp and entering such camp', and if 'this is used for the armed forces'; D-0016: T-131, p. 67.

²⁶⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 5.

²⁶⁷ P-0883: T-73, p. 16, line 15 to p. 17 line 15 (Conf).

²⁶⁸ P-0883: T-73, p. 19, lines 7-11 (Conf).

²⁶⁹ P-0883: T-73, p. 16, line 15 to p. 17 line 15 (Conf).

²⁷⁰ P-0954: DAR-OTP-0221-0571-R01 at 0580, para. 43 (Conf).

²⁷¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 4.

crimen sine lege. It has simply not been able to demonstrate any concrete error of law or fact having been committed.

5. *The Chamber correctly dismissed the Defence's mistake of law arguments*

i. The right standard of law under Article 32(2) of the Statute was applied

118. The Chamber did not commit an error of law or procedure by summarily dismissing the Defence's arguments under its "Defence Line 3."²⁷² The participating victims through the CLRV have otherwise consistently maintained that no one in Darfur could believe that the Appellant's actions were lawful or immune from prosecution.²⁷³

119. The Chamber found that the Appellant voluntarily engaged in conduct that were crimes under international law at the time and did so with full intent and knowledge - there was no mistake of law.²⁷⁴ The Chamber did not need to engage with every argument put forward by the Defence. Rather, it was required to clearly show how the evidence evaluated by the Chamber supported its findings.²⁷⁵ This was more than satisfied.

120. Mistake of law can exclude criminal responsibility when knowledge of a legal element to a crime is required and there is an absence of such.²⁷⁶ Triffterer and Ohlin helpfully specify that: [a]ll legal elements have their basis in facts, which have to be known if the perception of the element is to reach the awareness of the perpetrator. Someone who is not aware of the purpose for which 'a flag of truce' may be used, cannot comprehend an 'improper use' of it under Article 8(2)(b)(vii). This serves as an additional example of the close relationship between normative (material) and legal elements. If the word improper is defined as 'forbidden by law', it is a legal element; if it refers to mere customs socially respected, it would be a normative element."

121. This aligns with the *Al Hassan* Trial Judgment, whereby Trial Chamber X expressly clarified that, "Article 32(2) of the Statute provides that a mistake of law may be a ground for excluding criminal responsibility only if it negates the mental element required by such a crime or as provided for in Article 33, which relates to superior orders."²⁷⁷ Applying this standard, the *Al Hassan* Trial Chamber concluded that the Defence had failed to demonstrate how Mr Al Hassan's personal experiences and circumstances negated the requisite mental element, and

²⁷²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 54 to 57.

²⁷³CLRV Final Brief, [ICC-02/05-01/20-1208-Conf](#), paras 69-75.

²⁷⁴Trial Judgment, [ICC-02/05-01/20-1240](#), paras 948, 956, 990-997.

²⁷⁵O. Triffterer and A. Kiss, 'Article 74' in K. Ambos (ed.), [Commentary on the Rome Statute of the International Criminal Court](#) (2022), p. 2233.

²⁷⁶O. Triffterer and J.D. Ohlin, 'Article 32' in K. Ambos (ed.), [Commentary on the Rome Statute of the International Criminal Court](#) (2022), p.1388, para. 12; [ICC-02/05-01/20-503](#). See also A. Coco, [The Defense of Mistake of Law in International Criminal Law: A Study on Ignorance and Blame](#) (2022), p. 135.

²⁷⁷*Al Hassan* Trial Judgment, [ICC-01/12-01/18-2594-Red](#), para. 1769.

therefore failed to establish the existence of a specific mistake of law.²⁷⁸ The Defence in the present case likewise fails to do so.

122. If the Appeals Chamber were to alternatively adopt the criteria articulated by the *Lubanga* Pre-Trial Chamber, the Defence has not explained how the Appellant “was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)”.²⁷⁹ The Chamber plainly considered the legal framework governing the exclusion of criminal responsibility under Article 32(2) of the Statute, and the Defence has thus failed to demonstrate any error on the part of the Chamber.

- ii. Attacking members of the Fur communities could not have been construed as legal nor mandatory

123. A reasonable person in the Appellant’s position, considering his personal profile, level of education, and the broader circumstances in which he operated, could not have honestly and reasonably believed that the orders delivered by Harun in his speech in Mukjar in August 2003 were lawful and binding. However, the Defence submits that, given Harun’s position of authority and influence, a reasonable individual in the Appellant’s situation might have understood the instructions contained in that speech - namely to attack, kill, rape, and pillage members of Fur communities - as orders that had acquired a form of legal legitimacy by virtue of their source and were therefore mandatory to execute.²⁸⁰ These arguments are entirely misconceived.

124. International criminal law has reiterated that the authority of the person issuing an order does not transform a manifestly unlawful conduct into lawful conduct, nor does it automatically excuse the individual who carries out such acts. The Defence has not established what mental requirement from each of the crimes of murder, pillaging, rape, torture, ill-treatment that the Appellant did not have knowledge of. Mistake of law pursuant to Article 32(2) is not a simple justification to believe that certain behaviour is legal, even though it was blatantly unlawful. What the Defence is asking the Appeals Chamber to do is to relitigate the facts, on the basis that the Appellant “genuinely thought” that Harun’s speech legalised criminal conduct. This is despite the fact that ignorance of the law is not an excuse and cannot negate the requisite *means rea*, even less when speaking about such brutal crimes as those reflected in the Document Containing the Charges. The Chamber was satisfied that “a reasonable person in the position of the Accused would not have been ‘deceived’ into believing that his acts and conduct during the charged events were legal or justified”.²⁸¹ Any other finding would be erroneous, naive and

²⁷⁸*Al Hassan* Trial Judgment, [ICC-01/12-01/18-2594-Red](#), para 1772.

²⁷⁹*Lubanga* Confirmation Decision, [ICC-01/04-01/06-803-tEN](#), para. 316.

²⁸⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 314, 317.

²⁸¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 59.

disrespectful of the victims community, considering the undisputed factual circumstances at hand.

125. As for the obligation to obey the order, the Trial Chamber set out, at length, the evidence it relied on to reject the Defence's argument, highlighting that even in Sudan in 2003, armed forces personnel were only bound to execute lawful orders.²⁸² The Chamber further relied on D-0016's testimony as well as the 1986 People's Armed Forces Act. The evidence was clear that disobeying a lawful order could result in a sanction, but this was not necessarily the case for disobeying unlawful orders.²⁸³ Contrary to the Defence arguments, the Trial Chamber clearly provided sufficient and sound reasoning on this issue.

126. The Appellant was sufficiently educated to foresee domestic or international prosecution, as considered by the Appeals Chamber.²⁸⁴ The Trial Chamber reiterated this finding. On the basis of international jurisprudence, "the Accused was able to appreciate that his conduct was criminal, in the sense generally understood", without reference to any specific [legal] provision".²⁸⁵ The Appellant did not need to know the text of the law to understand that targeting the Fur civilian population, killing, raping, looting and torturing, was criminal in of itself. The ignorance of international law cannot constitute an excuse under Article 32(2) of the Statute.²⁸⁶ The Defence's argument that the Appellant did not have training in international humanitarian law and received only basic training, as provided to SAF members, on the necessity to obey orders,²⁸⁷ is therefore nothing but erroneous.

127. The Defence raises the fact that extrajudicial arrests, detention, torture and execution was common practice in Sudan; that human rights were disregarded; and that international humanitarian law was not implemented in its domestic system in 2003-2004.²⁸⁸ The Chamber addressed those arguments at length, based on the underlying evidence. D-0016 explained that violations of the Geneva Conventions constituted crimes under the 1991 Criminal Act, which was relied upon by the Chamber to hold that "non-compliance does not, in and of itself, vitiate the applicability of the law".²⁸⁹ To accept the Defence's position would be to permit individuals to evade criminal responsibility on the basis that widespread violations rendered the criminal nature of the conduct immune from prosecution, which is an absurd suggestion which would result in unacceptable outcomes.

²⁸²Trial Judgment, [ICC-02/05-01/20-1240](#), paras. 42-45.

²⁸³Trial Judgment, [ICC-02/05-01/20-1240](#), paras 43-44.

²⁸⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 57.

²⁸⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 54, footnote 96 referring to *inter alia* Hadžihasanović et al. Jurisdiction Decision, [IT-01-47-AR2](#), para. 34.

²⁸⁶A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, (2008)), p. 294.

²⁸⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf.](#), para. 304

²⁸⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf.](#), para. 304.

²⁸⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 49.

128. The Chamber otherwise addressed the Defence’s submissions in relation to the fact that: (i) the crimes took place in the context of counterinsurgency as ordered by the National Security Council and State policy involving high profile people;²⁹⁰ (ii) the targeted population was globally identified as rebels;²⁹¹ and (iii) the criminal nature of the “*Amsah Aksah*” motto.²⁹² The Chamber also established that the declaration of the State of emergency could not be construed as a suspension of human rights justifying the commissions of violations of *jus cogen* norms, such as attacking civilian population, killing and raping civilians ‘hors de combat’.²⁹³ None of these matters could exonerate the Appellant of criminal liability in light of his position.²⁹⁴

129. Contrary to Defence arguments, the definition of *Ghamina*²⁹⁵ was explicitly addressed by the Chamber. The Chamber found that, on the basis of D-0016’s testimony, *Ghamina* concerns enemy camp.²⁹⁶ “Enemy” is defined in the 1986 People’s Armed Forces Act as ‘includ[ing] external enemies, outlaw rebels and armed gangs in a state of readiness for combat operations’²⁹⁷ and that otherwise “it is a crime for someone to take this property for himself or herself, and that taking away properties from a locality that was attacked would amount to the crime of *hiraba* or ‘stealing’”.²⁹⁸ Notably, the Chamber found that Harun did not have the legal authority to give orders relating to *ghanima*.²⁹⁹ The Defence states that the Chamber also did not take into consideration relevant evidence, notably evidence from D-0016 and P-0757.³⁰⁰ This is clearly contradicted by footnotes 55-61 of the Judgment.

130. The Defence’s interpretation of the Chamber’s findings relating to Harun’s speech is otherwise manifestly erroneous.³⁰¹ Contrary to the Defence’s argument, the Chamber delivered a reasoned finding that, after attending Minister Harun’s speech, persons in attendance, including *Janjaweed* were “well aware of the meaning and significance of the phrases” given by the Appellant, which were understood as a license to commit crimes as sanctioned by the State.³⁰² This finding is no way a demonstration that Minister Harun forced the people who attended the speech to commit the crimes or that consequences would apply if they did not.

²⁹⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 304; Trial Judgment, [ICC-02/05-01/20-1240](#), paras 367, 667-668.

²⁹¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 304; Trial Judgment, [ICC-02/05-01/20-1240](#), paras 286-287, 289, 818-825.

²⁹²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 304; Trial Judgment, [ICC-02/05-01/20-1240](#), paras 826-827.

²⁹³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 316-322.

²⁹⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 49-50.

²⁹⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 305.

²⁹⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 40.

²⁹⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 39.

²⁹⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 40.

²⁹⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 41.

³⁰⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), fn 771.

³⁰¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 320-321.

³⁰²Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1005.

131. Unsurprisingly, the Defence was not able to present evidence to prove that other individuals genuinely believed that the orders given by Harun were lawful, and that by not obeying those orders would result in a severe punishment. Moreover, as D-0016 explained, the military legal structure under the 1986 Military Act distinguished between lawful and unlawful orders and would entail criminal responsibility for both the issuer of the unlawful order and the individual who executed such order.³⁰³ Indeed, the Chamber even cited the relevant part of D-0016's testimony that:

‘[i]n all cases, there [was] no crime if a person disobey[ed] an unlawful order, it ha[d] to be a lawful order’, and that when ‘an officer [...] issue[d] an unlawful order’, ‘the person who’s receiving the order [could] refuse to obey this order because it’s unlawful’.³⁰⁴

132. The Defence cannot use the testimony of D-0016 when they see fit (including recalling him in the context of the sentencing hearing) but ignore it when it does not suit its argument. The Defence uses D-0016 to support their argument regarding the *alias* and nothing else.

133. There was nothing ambiguous, culturally or socially, about the criminal nature of an order instructing someone to kill, loot, and rape. The Appellant could not reasonably have thought that such orders were not a crime. A mistake of law can only be a valid defence if the accused is unaware of a normative objective element of the crime if he doesn't realise the social significance.³⁰⁵ This argument failed at trial, and it must fail again.

134. Every combatant otherwise has the duty to disobey a manifestly unlawful order.³⁰⁶ In *Bralo*, the ICTY Appeals Chamber confirmed that “[i]t is the duty of any person involved in an armed conflict to comply fully with the relevant norms of international humanitarian law and, while Bralo may have been pressured to participate in combat activities, he remained legally and morally obliged to conduct himself in accordance with those norms”.³⁰⁷ The Appeals Chamber also rightly pointed to the fact that while Bralo may have been under some pressure, he did not seek to present any defence of duress or superior orders, and it was established that at no point the Bralo had tried to resist these unlawful orders, to the contrary.³⁰⁸ In *Nsengiyumva and Ntabakuze*, the ICTR Trial Chamber found that:

Nsengiyumva and Ntabakuze were at times following superior orders in executing their crimes, which is a mitigating factor under Article 6 (4) of the Statute. However, given their own senior status and stature in the Rwandan army, the Chamber is convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to

³⁰³D-0016: T-130, p. 80, lines 15-20; T-131, p. 6, lines 14-17.

³⁰⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 44, D-0016: T-130, p. 82.; see also D-0016: T-131, p. 4, line 18-p. 8, line 4.

³⁰⁵*Lubanga* Confirmation Decision, [ICC-01/04-01/06-803-tEN](#), para. 316.

³⁰⁶J.-M. Henckaerts and L. Doswald-Beck, *Commentary on the Rome Statute of the International Criminal Court*, Vol. I: Rules (Cambridge: ICRC/Cambridge University Press, 2005), Rule 154.

³⁰⁷*Bralo* Appeals Judgment, [IT-95-17-A](#), para. 24.

³⁰⁸*Bralo* Appeals Judgment, [IT-95-17-A](#), paras 23-24. See also *Popovic et al.* Appeals Judgment, [IT-05-88-A](#), para. 1898.

perpetrate them reflects their acquiescence in committing them. No mitigation is therefore warranted on this ground.³⁰⁹

135. There can be no doubt that the orders were so manifestly unlawful in this case that the Appellant should have refused to implement them. The Defence has not submitted any evidence, and no argument has been made, that the Appellant made any attempt to resist carrying out the crimes he committed.³¹⁰ The Defence also fails to point to any evidence that people were actually punished for not following an order. Indeed, it failed to present any evidence on these matters during the lengthy trial phase, and equally fails to submit any new evidence on appeal which would warrant reconsideration.

136. The core of the Defence's arguments under 'Defence line 3 – Mistake of law' is based on a misunderstanding of the jurisprudence regarding a Chamber's duty to provide a reasoned opinion.³¹¹ As established above,³¹² a Chamber must provide a reasoning for the parties to understand on what basis the decision was taken. Contrary to this argument, it must not provide *why* it did not follow the Defence's line of argumentation. The Chamber did not have to go through every argument made by the Defence to reject them, it simply had to provide a substantive basis of reasoning to understand the basis of its findings. The Chamber did not commit any error of fact or law in reaching its conclusions dismissing the 'Defence line 3'.

6. *Mr Abd-Al-Rahman had the requisite mens rea for the crimes committed during the attack on Bindisi and Kodoom and the commission of the crimes was foreseeable*

i. The Chamber correctly assessed witness credibility relevant to these crimes³¹³

137. The Chamber did not err in its findings that witnesses P-0012, P-0878, and P-0877 were credible and reliable, despite their contemporaneous notes not having been produced or admitted into evidence.³¹⁴ Notably, the Defence had the opportunity to challenge the witnesses regarding those notes, but either failed to do so or chose not to for strategic reasons. The Defence must now accept the consequences of its examination or lack thereof.

138. The Chamber did not find the witnesses credible and reliable because their testimony was consistent with their contemporaneous notes - which would, of course, have required their disclosure. Rather, the Chamber observed that the witnesses' contemporaneous notetaking

³⁰⁹*Bagosora et al.* Judgment, [ICTR-98-41-T](#), para. 2274.

³¹⁰*Bagosora* Judgment, [ICTR-98-41-T](#), para. 2274.

³¹¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para 303.

³¹²*Supra* para. 15.

³¹³For completeness, this evidence relates to all four incidents, not solely Bindisi and Kodoom. See P-0012: T-045, p. 39, lines 3-5; P-0878: T-078 *referring to* DAR-OTP-0224-0071, paras 45-50; P-0877: T-054.

³¹⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 29.

enabled them to provide highly detailed accounts of the events.³¹⁵ As a result, the jurisprudence relied upon by the Defence is inapposite. There is no obligation to produce evidence that was not relied upon for the truth of its contents. Again, the Defence had the opportunity to question the witnesses on the production and archiving of the notes, as well as on the substance of their testimonies, but did not do so.

139. There was also no obligation on the Prosecution to produce the notes, as the witness were testifying *viva voce* and were producing the “best evidence” possible. The Chamber had the benefit of observing them firsthand and assessing their credibility directly in the courtroom.

140. The Chamber provided a detailed and flawless assessment explaining why it considered the witnesses to be credible and reliable, including its consideration of the absent notes.³¹⁶ The Defence has not substantiated any legal or factual error, or that the lack of the notes had a material impact on the Chamber’s findings or the outcome of the proceedings.

- ii. The Chamber correctly established that the crimes in Bindisi and Kodoom were foreseeable, and correctly established the Appellant’s *mens rea*

141. The Chamber clearly reasoned that the Appellant possessed the requisite mental element to commit all the crimes he was found guilty of.³¹⁷ The Chamber concluded, pursuant Article 30 of the Statute, that the Appellant meant to issue orders, and that he was aware that those orders would, as a consequence, cause the crimes carried out pursuant to the order or, alternatively, was aware that the crimes would occur in the ordinary course of events. The Defence’s arguments are otherwise based on a misreading of the Trial Judgment and must be rejected.

142. The Appellant was found guilty of those crimes committed during the attack on Bindisi and Kodoom pursuant to the mode of liability of ordering under Article 25(3)(b) of the Statute. The Chamber clarified that the *mens rea* required to support a conviction for ordering is that “[...] the accused intended or meant to order the commission of the crime, or must have been aware that the crime would be committed (or attempted) in the ordinary course of events in the realisation or implementation of the order.”³¹⁸ In *Ntaganda*, the Appeals Chamber found that, under this mode of liability, the person ordering “ [...] is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation

³¹⁵[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 22-23, 255-257.

³¹⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 21-23 (P-0012); 254-257 (P-0878); 248-249 (P-0877).

³¹⁷*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 54.

³¹⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 806.

of the order.”³¹⁹ The Accused must have sufficient and fair notice that their conduct would be criminal.³²⁰

143. The Chamber did not err in law by having convicted the Appellant for ordering the crimes committed in Bindisi and Kodoom, “in the absence of proof of his intention or awareness that these would be committed in the ordinary course of events.”³²¹ Indeed, the Chamber did not convict the Appellant on the basis of an abstract risk of the commission of the crimes. Rather, it conducted a holistic assessment of the evidence available on the record to conclude that the looting, killings, destruction of civilian property were foreseeable to the Appellant during the attacks against Bindisi and Kodoom.³²²

144. The Chamber established that the Appellant “was **aware** and **could foresee** that the crimes charged under Counts 1 to 11 would be committed in the ordinary course of the attacks on Kodoom and Bindisi during the implementation of his orders”, considering that the Appellant:

- “was aware of the meaning and significance of the phrases ‘*amsah aksah*’ and ‘wipe out and sweep away’ and the *Janjaweed*’s understanding of this phrase in his instructions to them’;
- “was present on the ground during the *Janjaweed*’s attacks on Kodoom and on Bindisi, which means that he saw and was aware of the manner in which his orders were being implemented by the *Janjaweed*”; and
- was present “on the ground for the entirety of the operation”, which “means that, prior to the charged attacks, he saw and became aware of the manner in which the *Janjaweed* were implementing his orders during the course of the attacks on the villages of Nyerli and Tiro (prior to the attack on Kodoom) and also Kodoom, Merly, Seder and Drangal (prior to the attack on Bindisi)”.³²³

145. The Chamber also found that, within the broader context of the Kodoom and Bindisi Operations occurring, the Accused was aware that crimes were being committed during the implementation of his orders, on the basis that:

- after the *Janjaweed*’s attack on Nyerli, during which they fired at and chased people away, raped women, looted properties and burned down houses, P-1021 asked the Accused why he did it, the Accused told him that it was none of his business;

³¹⁹*Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 145.

³²⁰Broomhall, ‘Article 22’ in K. Ambos (ed.) *Commentary on the Rome Statute of the International Criminal Court* (2022), p. 1158.

³²¹*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 339.

³²²Trial Judgment, [ICC-02/05-01/20-1240](#), para 1008, *contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 343.

³²³Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1008 (citations omitted) (emphasis added).

- after the *Janjaweed* fired at and chased away the inhabitants of Tiro, who were predominantly Fur, and burned down their houses, the Accused dismissed the exhortations of a *Janjaweed agid* that what he was doing was wrong;
- during the attack on Kodoom, the Accused saw members of the *Janjaweed* beat P-0986, and he instructed them to question, torture and then kill P-0986, and also to chase after livestock and fleeing inhabitants of Kodoom;
- after the *Janjaweed*'s attack on North Bindisi, P-0874 expressed his revulsion about the way in which the attacks were carried out, which the Accused dismissively waved off; and
- on the night of 15 August 2003, the Accused indicated that the attacks were carried out as he intended when he thanked and commended the *Janjaweed*, and told them that they 'taught the enemy a lesson' and 'the Fur will never forget this lesson'".³²⁴

a. *Patterns of crimes*

146. The Defence argues that the Chamber relied on a pattern of crimes committed in other villages leading to the crimes committed in Bindisi and Kodoom, without providing any evidence that the Appellant was made aware of the occurrence of such crimes.³²⁵

147. The Defence blatantly misreads the Judgement - the Chamber did not rely solely on P-1021 to find that the Appellant was leading his troops to attack Nyerli.³²⁶ The Chamber relied on P-0878 to find that the Appellant "instructed the *Janjaweed* to start attacking with rallying calls, instructing them to 'wipe out and sweep away'. Throughout the operation, the [Appellant] chanted '*Allahu Akbar*', '*Amsah aksah*' and '[w]ipe out, sweep away, *amsah aksah*' to instruct the *Janjaweed* to start attacking. P-0878 heard the [Appellant] say that, 'I will kill whoever I want and leave who ever I want to live', and saw the [Appellant] issuing instructions to Hassaballah throughout the operation".³²⁷ The Appellant did more than simply receive information that the crimes were committed.³²⁸ It was the Appellant himself ordering the commission of the crimes.

148. Concerning the crimes committed in Tiro, the Chamber also found that, on the basis of P-0878's evidence, the Appellant "instructed Abd-Al-Jabbar to point out a route that the *Janjaweed* could take into Tiro where the vehicles would not get stuck in the mud."³²⁹ Again, contrary to the Defence's argument, the evidence relied upon by the Chamber to establish the

³²⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1009 (citations omitted).

³²⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 344.

³²⁶*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 344.

³²⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 397.

³²⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 344.

³²⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 399.

knowledge of the Appellant regarding the crimes committed in other villages was based on more than a generic discussion with *Umdah Dawd*.³³⁰

149. Knowledge can be inferred by a pattern of crimes committed in surrounding villages. For instance, in *Yekatom & Ngaïssona*, Mr Ngaïssona was found to have “had ‘virtual certainty’ that killings, injuries, dislocation, and destruction of property would occur in the ordinary course of events during the attack on Bossangoa”,³³¹ because “[d]uring th[e] period of at least September to December 2013 and prior to the Bossangoa Attack, Mr Ngaïssona provided financial contributions and engaged in activities pertaining to the organisation and coordination of groups for the purpose of facilitating the commission of criminal acts targeting the Muslim population. [...] Mr Ngaïssona knew and was informed of the advance of the groups towards Bangui as well as of the hostilities during this advance, including the killings and dislocation of Muslim civilians from these locations.”³³² The Chamber considered that the dislocation of Muslim civilians from Boeing and Cattin, as well as the harm and consequences caused, were all objectively foreseeable to Mr Ngaïssona. In this regard, it recalls that Mr Ngaïssona was fully aware that the Anti-Balaka would violently target the Muslim population, noting in particular his knowledge and awareness of their prior dislocating of Muslim civilians.³³³

150. In *Ongwen*, the Trial Chamber found that that in respect of the Padjule Camp attack, Mr Ongwen was aware that “the execution of the attack on Pajule IDP camp as planned and with the instructions that were given to LRA fighters, would lead [...] in the ordinary course of events’ to ‘(i) the killings of civilians; and (ii) forcing abducted civilians to carry heavy loads for long distances, beatings of civilians, and threats of beatings or death.”³³⁴, citing notably to the fact that by the time of the Padjule Camp attack, Mr Ongwen was aware that the LRA had already killed, injured or enslaved civilians in numerous prior attacks including on civilian locations like IDP camps.³³⁵ This was confirmed on Appeal.³³⁶

151. The Chamber thus made no error in finding that the commission of the crime was foreseeable and the launch of the attack would lead to the commission of the crimes in the ordinary course of events in lights, notably, of the pattern of crimes committed in other villages on the way to the attacks on Bindisi and Kodoom.

b. *Form of the orders*

³³⁰Trial Judgment, [ICC-02/05-01/20-1240](#), para. 399, *contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 65, para. 344.

³³¹*Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4129.

³³²*Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4113 (citation omitted) (emphasis added).

³³³*Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4720.

³³⁴*Ongwen* Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2869.

³³⁵*Ongwen* Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2869.

³³⁶*Ongwen* Appeals Judgment, [ICC-02/04-01/15-2022-Red](#), paras 791-797.

152. The Defence asserts that the Chamber erred in fact and in law in finding that the Appellant issued orders pursuant to Article 25(3)(b) of the Statute, on the basis of a “hand gesture” and “blowing a whistle”.³³⁷

153. The Chamber did not err in considering the evidence of the Appellant making a “hand gesture” and “whistling,” when viewed in conjunction with the evidence of the August meeting in Mukjar, as well as the instructions he issued in Nyerli, Tiro, and Kodoom to the *Janjaweed* to “wipe out,” “sweep away,” and “*Amsah Aksah*.” Altogether, this evidence clearly supported the overall finding that the Appellant instructed his forces to attack the village of Bindisi.³³⁸ In addition, the Appellant employed the same pattern and subterfuge as in Kodoom, namely by reassuring the inhabitants that no harm would befall them, immediately before entering the village and attacking the civilian population.³³⁹

154. The “hand gesture” and the blowing of a whistle, combined with the words he used as reported by P-0878,³⁴⁰ show that the Appellant’s actions had a direct effect on the commission of the crimes.³⁴¹ As a result, the Chamber correctly assessed in a holistic matter the evidence on the record to establish that the Appellant issued orders in Bindisi to attack the village. The Defence’s arguments should be dismissed.

155. Moreover, the Defence misinterprets the law on ordering by asserting that the only “positive order” identified during the attack on Kodoom is attributable to P-0986.³⁴² ICC jurisprudence does not require the existence of a “positive order” in order to incur liability for ordering a crime. Indeed, in *Yekatom & Ngaissona*, the Trial Chamber held that the accused’s act of firing an automatic pistol in the air, which subsequently launched the attack, was sufficient to constitute an ‘order’.³⁴³ Moreover, the Chamber cited in support of this finding various decisions establishing that an order can take any form.³⁴⁴ The Appeals Chamber of the ICTY found that “[t]here is no requirement that the order be given in any particular form, and the existence of the order may be proven through circumstantial evidence.”³⁴⁵ The Appeals Chamber of the ICTR also held the same in the *Kamuhanda* case where it was confirmed that a gesture from the Accused combined with the sentence “get to work” was sufficient to be found liable for ordering.³⁴⁶ This is exactly what the Chamber did here.

³³⁷ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 66-67, para. 351.

³³⁸ Trial Judgment, [ICC-02/05-01/20-1240](#), paras 397, 399. See further Part III(A)(g)(viii).

³³⁹ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 420.

³⁴⁰ Trial Judgment, [ICC-02/05-01/20-1240](#), paras 437-440.

³⁴¹ Trial Judgment, [ICC-02/05-01/20-1240](#), paras 436-437, 1003.

³⁴² Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 350.

³⁴³ *Yekatom & Ngaissona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 3986.

³⁴⁴ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 804, footnote 2531.

³⁴⁵ *Boškoski & Tarčulovski* Appeal Judgement, [IT-04-82-A](#), paras 160-161.

³⁴⁶ *Kamuhanda* Appeals Judgment, [ICTR-99-54A-A](#), paras, 76, 278-282.

156. The Defence’s argument is also factually incorrect in that the Appellant did not issue an order. The Chamber expressly found that “P-0878 then heard the Accused instruct Hassaballah to ‘move on’.”³⁴⁷ This order was followed by the attack on Kodoom by the *Janjaweed* and the commission of the crimes.³⁴⁸ The Chamber clearly made no error in fact or law in finding that the Appellant issued an order that was connected to the commission of the crimes in Bindisi and Kodoom.

- iii. The Chamber correctly convicted Mr Abd-Al-Rahman of having ordered the commission of rapes in Bindi and Kodoom

157. The Chamber did not commit an error of law and/or fact by convicting the Appellant of Counts 8 and 9, on the basis that he issued an order to his troops to rape and finding that he “knew rapes would be committed in the ordinary course of events with “virtual certainty”, pursuant to Article 30 of the Statute”. In the Defence’s view, Minister Harun’s speech in Mujkar where he ordered the rapes cannot be attributed as an order coming from the Appellant.³⁴⁹ The Defence also contends that the “*amsah aksah*” motto cannot be construed as an order to rape.³⁵⁰

158. *First*, the CLRV notes that the Defence made similar arguments in support of its Motion for acquittal, which was submitted at the end of the presentation of the Prosecution and CLRV case. In this Motion, the Defence asserted that no evidence was adduced that Mr Abd-al-Rahman was responsible for the commission of rapes and other inhuman acts in Bindisi, as contained in Counts 6-7 and 8-9.³⁵¹

159. The standard applied in deciding this Motion was that the Chamber was convinced that the evidence “has satisfied the standard of proof beyond reasonable doubt that it can be said to have been ‘sufficient to sustain a conviction’.”³⁵² This standard is comparable the one applied at the end of the trial, but can only be assessed on the evidence presented at the time. The Chamber found that, taking the evidence at its highest, the Appellant was present during Harun’s speech inviting the participants to commit crimes against the Fur population including rapes.³⁵³ Alongside the evidence of earlier uncharged attacks on other villages, before Bindisi, where the same type of crimes had been committed, and that the Appellant was in charge of the attack against Bindisi, left no doubt that he bore criminal responsibility for the crimes of rape and other inhuman acts.³⁵⁴

³⁴⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 405.

³⁴⁸Trial Judgment, [ICC-02/05-01/20-1240](#), Part III(A)(e)(i)-(vi).

³⁴⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 357.

³⁵⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 358.

³⁵¹[ICC-02/05-01/20-891](#), paras 6-7.

³⁵²T-116, p. 9, lines 20-23.

³⁵³T-116, p. 9, lines 20-23.

³⁵⁴T-116, p. 9, line 24 to p. 11, line 6.

160. The Defence wholly failed to present evidence in its own case that materially contradicted or impeded on the Prosecution case with respect to the acts of sexual violence. It is thus unsurprising that the Chamber arrived at the same conclusion of the Appellant's responsibility with respect to Counts 8 and 9 in the Judgment.

161. *Second*, in its Appeal Brief, the Defence incorrectly relied on the *Al Hassan* Judgment to support its interpretation of the required *mens rea* for rape. The Defence fails to take into consideration the Separate Opinion of Judge Akane, who found that the mistreatment of women and acts of sexual violence were carried out under the sole authority of Mohammed Moussa, chief of *Hesbah*.³⁵⁵ According to Judge Akane, the rapes were not part of the ideology or the rule imposed on Timbuktu by the Ansar Dine nor could be seen as part of a pattern.³⁵⁶ As a result, Mr Al Hassan could not have foreseen the commission of those crimes, also considering that the *Hesbah* was a separate entity to the Islamic Police, where Mr Al Hassan was working.³⁵⁷ Mr Al Hassan was acquitted of those crimes on the basis of Judge Akane's Separate Opinion.

162. The Defence also cites to the *Yekatom & Ngaïssona* Judgment, and more specifically to the acquittal of Mr Ngaïssona of the rape charge. In this specific case, the Trial Chamber found that it was not possible to conclude beyond a reasonable doubt "that on the basis of the evidence before it, Mr Ngaïssona had 'virtual certainty' that rape would occur in the ordinary course of the Anti-Balaka attack in Bossangoa." The Chamber "found a clear pattern of criminal conduct relating to the targeting of Muslim civilians" by the Anti-Balaka for all crimes but for rape.³⁵⁸ Then it found that "Mr Ngaïssona was aware that such criminal conduct would occur in the ordinary course of events and, indeed, that he performed his own conduct for purposes of facilitating the commission of such crimes."³⁵⁹

163. The *Ngaïssona* case is not analogous to the case at hand and therefore not helpful for the Defense's argument. Indeed, there was no evidence that the Anti-Balaka elements were widely involved in sexual violence, either from witness evidence, or from UN or NGO reports.³⁶⁰ This was simply not part of the evidence on the record, which led the Chamber to conclude that Mr Ngaïssona could not have been aware that such conduct would happen in the ordinary course of events, nor that his knowledge could be inferred on the basis of 'virtual certainty'.³⁶¹ This is especially in light of the fact that Mr Ngaïssona was located approximately

³⁵⁵ *Al Hassan* Dissenting Opinion of Judge Akane [ICC-01/12-01/18-2594-OPI](#), paras. 14-24.

³⁵⁶ *Al Hassan* Dissenting Opinion of Judge Akane [ICC-01/12-01/18-2594-OPI](#), paras. 8-56.

³⁵⁷ *Al Hassan* Dissenting Opinion of Judge Akane [ICC-01/12-01/18-2594-OPI](#), para 41.

³⁵⁸ *Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4131.

³⁵⁹ *Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4131.

³⁶⁰ *Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), paras 4126-4131.

³⁶¹ *Yekatom & Ngaïssona* Trial Judgment, [ICC-01/14-01/18-2784-Red](#), para. 4127, citing to the *Yekatom & Ngaïssona* Defence Closing Brief, [ICC-01/14-01/18-2736-Conf-AnxA-Corr](#), paras 270-276: "The Ngaïssona

1000km away from the crimes.³⁶² Without direct evidence of his knowledge or sufficient evidence that the occurrence of rape was widely known in such way that Mr Ngaïssona could have foreseen the occurrence of such crimes, the Chamber had no choice but to acquit Mr Ngaïssona of having facilitated or contributed ‘in any way’ to the commission of this specific crime.

164. The present case did not suffer from the same lack of evidence. The Chamber was presented with clear and convincing evidence which indicated that an obvious pattern of criminal conduct existed, and which was directed against the non-Arab population of Bindisi and Koodom, including the commission of rape against women.³⁶³

165. Rape and sexual violence was widespread during the entire period of the charges, and in many different localities across Darfur.³⁶⁴ The Chamber relied upon P-0878 and P-0932 to support the fact that people knew that women were raped in Koodom,³⁶⁵ contrary to the Defence arguments.³⁶⁶ P-0011 testified that she saw a woman being raped by a *Janjaweed* in Bindisi while being questioned because she was carrying a suitcase.³⁶⁷ P-0011 also testified about her own rape,³⁶⁸ and P-1073 and P-1074 were victims of rape.³⁶⁹ The Defence’s argument that the Appellant could not have been aware of the rapes because villagers reported the rapes after the fact is flawed.³⁷⁰ The testimonies were crystal clear: sexual violence was happening out in the open and in front of others, including children.³⁷¹ The Chamber even concluded that the *Janjaweed* “worked in unison during the rapes and the women were raped multiple times”.³⁷² It was not a secret that was disclosed only later on. There is a wealth of evidence that sexual violence did indeed happen and was known.³⁷³

Defence argues in the context of Article 25(3)(d) of the Statute that (i) ‘alleged SGBV in the present case were random acts committed by individuals’; (ii) the Prosecution ‘failed to demonstrate any pattern of SGBV amongst the alleged crimes imputed to the Anti-Balaka’; (iii) ‘there is no evidence that the alleged perpetrators of the charged rape, or other alleged acts of SGBV in the uncharged locations, committed such acts because they saw the victims as complicit of the Seleka’; and (iv) ‘there is no evidence suggesting that rape or other forms of SGBV were committed to further the common purpose’.”

³⁶²Yekatom & Ngaïssona Trial Judgment, [ICC-01/14-01/18-2784-Red](#), paras 34-38.

³⁶³Trial Judgment, [ICC-02/05-01/20-1240](#), Part, III(A)(g)(vi) (Bindisi); para. 407 (Koodom).

³⁶⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para 281.

³⁶⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 407

³⁶⁶Trial Judgment, [ICC-02/05-01/20-1240](#), fn 1064, Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), para. 436-438.

³⁶⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 423, 429.

³⁶⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 431.

³⁶⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para 431.

³⁷⁰Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 360.

³⁷¹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 433. Relying on P-0015’s Statement, DAR-OTP-0088-0187-R04, at 0196, paras 41-43, referring to P-0015’s Sketches, DAR-OTP-0088-0211-R01, DAR-OTP-0088-0216-R01; P-0015’s Statement Corrections, DAR-OTP-00000427, at 000002-000003, paras 16-17; P-0015: T-093, pp. 44-45; P-0007’s Statement, DAR-OTP-0088-0060-R02, at 0071, para. 43; P-0007: T-089, pp. 6-12, 36-41, 51-52, referring to P-0007’s Annotated Map, DAR-OTP-00000312; P-0007’s List, DAR-OTP-00000311, at 000001. See also P-0007: T-089, pp. 47-48; P-0011’s Interview, DAR-OTP-00000367, at 000001.

³⁷²Trial Judgment, [ICC-02/05-01/20-1240](#), para. 433.

³⁷³CLRVR Final Brief, [ICC-02/05-01/20-1208-Conf](#), paras.188-197.

166. *Third*, the Chamber established that the expressions “*amsah aksah*” and “cut a straw and eat it raw” were construed as orders to engage in violent conducts.³⁷⁴

167. The *Ntaganda* trial judgment considered the significance of an expression commonly used by commanders to convey orders to soldiers. It found that, in the context of the charged conduct, the way in which the operations unfolded demonstrated that acts of sexual violence were not incidental or opportunistic. Rather, they formed an integral component of a coordinated plan - just as the killings did - aimed at the destruction of the Lendu community during the course of the attacks.³⁷⁵

168. Similarly, in the present case, the expressions used by the Appellant must be understood within their operational and contextual framework. As in *Ntaganda*, such language functioned not merely as rhetorical flourish, but as a trigger for the commission of crimes. These expressions activated and directed conduct that was embedded within a broader apparatus of attack against the Fur community, thereby evidencing the Appellant’s contribution to and participation in that coordinated campaign.³⁷⁶ The Appellant’s intent is apparent from the repeated pattern and modus operandi of these attacks, which included rape. He meant, while issuing his orders, to attack everyone within Fur communities - attacks that he knew would be violent and would include the commission of many violent crimes, including rapes against women.

169. *Fourth*, although the Chamber noted that the mental element was satisfied on the basis of the conduct of the *Janjaweed*,³⁷⁷ the Defence is incorrect in asserting that the Chamber made no findings regarding the Appellant’s specific *mens rea*. On the contrary, the Chamber found that:

‘the Accused was aware and could foresee that the crimes charged under Counts 1 to 11 would be committed in the ordinary course of the attacks on Kodoom and Bindisi during the implementation of his orders.’³⁷⁸

170. The Chamber found that, during another attack that occurred after the Bindisi and Kodoom attack, the Appellant instructed the *Janjaweed* to spare the women and not to kill them, which according to witness P-0905 “meant that the *Janjaweed* ‘never killed women’ instead they would ‘torture’ and ‘rape’”.³⁷⁹ The Appellant had also used the “*amsah aksah*” motto in

³⁷⁴Trial Judgment, [ICC-02/05-01/20-1240](#), paras 364-366; P-0547 (in charge of Border and Tribal affairs Section within NISS during period relevant to case): T-051, p. 2, line 17 - p. 3, line 9; T-052, p. 63, line 7-p. 64, line 3 (in context of combat operations, effectively means “kill relentlessly”, indicates to soldiers “there are no restrictions or limits that govern military and combat operations, and there is no regard for any other consideration”, and a phrase that would terrorise civilians in this context); P-0878: T-078, p. 21, lines 8-10.

³⁷⁵*Ntaganda* Trial Judgment, [ICC-01/04-02/06-2359](#), para. 415.

³⁷⁶*Ntaganda* Trial Judgment, [ICC-01/04-02/06-2359](#), para. 1186.

³⁷⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 868.

³⁷⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1008.

³⁷⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1011, footnote 3031.

this context. Considering the evidence on the record, the Chamber was satisfied that the Appellant's "order not to kill women was not intended to be understood that women should be 'spared' from the commission of other crimes, during the Kodoom and Bindisi Operation."³⁸⁰

171. The Chamber further established that the Appellant was aware that such criminal conduct would occur in the ordinary course of events. The Chamber established the knowledge of the Appellant on the basis of "virtual certainty" and did indeed apply the correct standard of *mens rea* pursuant to Article 25(3)(b) of the Statute, basing its determination on a holistic assessment of the relevant evidence on the record. The CLRV contends that it is utterly improbable that the Appellant was aware that the attack in Bindisi was carried out so violently, including murder, destruction of property, looting, the forcible transfer of population and persecution, but he could not have possibly been aware that rape was committed in the ordinary course of the events.³⁸¹ Considering the *modus operandi* and the pattern of conduct of the *Janjaweed* in villages on their way to Bindisi and Kodoom, rape was as much of a certainty as every other crime the Appellant was convicted of.

172. As a result, the Defence fails to establish an error of law or fact committed by the Chamber regarding the Appellant's foreseeability of the commission of rape during the attacks launched against the villages of Bindisi and Kodoom.

7. *The Chamber correctly established the Appellant's role in the Mukjar and Deleig operations*

- i. Insider evidence relevant to the Mukjar and Deleig operations was properly evaluated

173. The Chamber did not err in law and/or fairness when it assessed and relied upon evidence from insider witnesses and as such, these arguments should be rejected.³⁸²

174. The Defence asserts that the Chamber failed to exercise caution "when evaluating P-0905's unreliability concerning his entire testimony."³⁸³ The Defence submits, with no citation or examples provided, that "P-0905's testimony was too often contradictory and inconsistent."³⁸⁴ As the Defence states, a Chamber "cannot merely state that they exercised caution when assessing the evidence of an accomplice witness, but must establish that they in fact did so."³⁸⁵ Caution was clearly exercised by the Chamber in refusing to consider certain evidence when it considered it to be unreliable. The Chamber explicitly did not rely on P-0905

³⁸⁰Trial Judgment, [ICC-02/05-01/20-1240](#), para. 1011.

³⁸¹T-115, p. 3, lines 3-19.

³⁸²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 28, para. 170.

³⁸³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 176.

³⁸⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 176.

³⁸⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 176 referring to *Nchamihigo* Judgement [ICTR-01-63-A](#), paras 43-48.

in circumstances where he [REDACTED],³⁸⁶ and when his evidence was uncorroborated.³⁸⁷ This notwithstanding, Chamber may rely on certain aspects of a witness' evidence despite finding other aspects unreliable.³⁸⁸ The fact that the Chamber found particular parts of P-0905's testimony unreliable does not necessarily render the entirety of his evidence uncredible or unreliable. There was otherwise no evidence to suggest that his credibility was impugned to such extent to be considered wholly unreliable. The Chamber has broad discretion in assessing the appropriate credibility and weight to be accorded to the testimony of a witness,³⁸⁹ including the discretion to rely upon the evidence of accomplice witnesses.³⁹⁰ Accordingly, the Chamber was correct in finding P-0905 credible and reliable and relied upon his evidence in support of its other factual findings.

175. The Defence otherwise appears to assert that due to inconsistencies between P-0905, P-0012, and P-0883, the Chamber erred in failing to consider the impact on their overall credibility and reliability.³⁹¹ This should be rejected. The Appeals Chamber has been clear that, as a matter of law, corroboration is not required when evaluating the reliability or credibility of any witness' testimony.³⁹² The fact that such inconsistencies existed between witnesses does not, by itself, negatively impact either P-0012 or P-0905's overall credibility and reliability. Corroboration is one of many potential factors relevant to a trial chamber's assessment of credibility.³⁹³ Indeed, trial chambers have treated the corroborated testimony between witnesses who had maintained a personal relationship over a number of years, with a great deal of circumspection.³⁹⁴ The effect of trauma and the time that has elapsed since the events can be considered by the Chamber in its credibility assessment, and the mere fact that there is inconsistencies does not mean that the witness is not credible.³⁹⁵ In addition, perfect consistency in witness statement does not necessarily bolster credibility or establish the truth, to the contrary.³⁹⁶ As such, the Defence fails to substantiate any error committed by the Chamber in its assessment of the credibility of insider witnesses, and thus must be dismissed.

ii. Children and boys were affected by the Mukjar and Deleig operations

³⁸⁶[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 333.

³⁸⁷[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 341-342.

³⁸⁸*Ngudjolo* Appeal Judgment, [ICC-01/04-02/12-271-Corr](#), paras. 152, 168.

³⁸⁹*Popović et al* Judgment, [IT-05-88-A](#), para. 131.

³⁹⁰*Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), paras 655, 73; *Popović et al* Judgment, [IT-05-88-A](#), para. 134; *Setako* Judgment [ICTR-04-81-A](#), para. 143.

³⁹¹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 173-174.

³⁹²*Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1084.

³⁹³*Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1084.

³⁹⁴*Katanga* Trial Judgment, [ICC-01/04-01/07-3436-tENG](#), para. 393. See further *Ntawukulilyayo* Appeal Judgment, [ICTR-05-82-A](#), paras 16-26; *Karera* Appeal Judgment, [ICTR-01-74-A](#), paras 231-235; *Muhimana* Appeal Judgment, [ICTR-95-1B-A](#), paras 88-93.

³⁹⁵*Muvunyi* Trial Judgment, [ICTR-2000-55A-T](#), para. 14.

³⁹⁶*Ntakirutimana* Trial Judgment, [ICTR-96-10-A](#), para. 147.

176. The Chamber did not err in its factual findings relating to the detention of children and the Mukjar Police Station³⁹⁷ or that “boys” were targeted, including being arrested, detained, mistreated and killed as part of the Deleig Operation.³⁹⁸

177. With respect to Mukjar police station, the Defence blatantly misstates and misrepresents the evidence and the Chamber’s findings.³⁹⁹ P-0905 stated in his testimony that he saw the young boys [REDACTED] within the police station.⁴⁰⁰ This was a direct response to Defence Counsel’s question [REDACTED].⁴⁰¹ This can be distinguished to P-0905’s evidence regarding the [REDACTED] which the Chamber conceded was uncorroborated and therefore not relied upon,⁴⁰² and which is the finding the Defence refers to concerning a lack of evidence.⁴⁰³ There was no ambiguity or incoherency in P-0905’s evidence regarding the young boys at the police station. The Chamber correctly relied upon this evidence, which was also corroborated by P-0129.⁴⁰⁴ The Chamber otherwise clearly provides a justification for not relying on P-0919’s evidence that there were no children at the police station, stating that given “he witnessed the events from a different vantage point” it was “plausible that P-0919 did not see any children.”⁴⁰⁵ Finally, the absence of certain evidence does not provide a positive inference that children were not detained at the Mukjar police station⁴⁰⁶ or that boys were not targeted within the Deleig operation.⁴⁰⁷

178. Regarding the Deleig operation, the Defence asserts that there were witnesses who “all assure that younger males were spared and that male adults only were the targets of the operation.”⁴⁰⁸ There is no evidence that children or boys were purposefully spared from arrest as a matter of policy. This is consistent with the Chamber’s findings concerning persecution, which found that the *Janjaweed* targeted predominantly Fur men of fighting age **based on the perception that they were affiliated with the rebels.**⁴⁰⁹ Alongside P-0736 who reiterated that boys were arrested,⁴¹⁰ P-0607 stated that the others who were arrested in his group [REDACTED].⁴¹¹ P-0584, who was arrested himself, had only just turned 18 years old

³⁹⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 72.

³⁹⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 76.

³⁹⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 388.

⁴⁰⁰P-0905: T-088, p. 69, lines 14-21 (Conf).

⁴⁰¹P-0905: T-088, p. 69, lines 14-15 (Conf) (emphasis added).

⁴⁰²[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 341-342.

⁴⁰³Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 388.

⁴⁰⁴Trial Judgment, [ICC-02/05-01/20-1240](#), fn. 1600. *See specifically* P-0129: DAR-OTP-0128-0128-R04, at 0142, para. 48; T-076, pp. 58-59, lines 14-3 (Conf).

⁴⁰⁵Trial Judgment, [ICC-02/05-01/20-1240](#), fn. 1600.

⁴⁰⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 387.

⁴⁰⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 438.

⁴⁰⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 436.

⁴⁰⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 936 (emphasis added).

⁴¹⁰DAR-OTP-0210-0248-R02, at 0265-0268, paras 64-65, 70, 72, 74.

⁴¹¹DAR-OTP-0203-0164-R01, at 0177, para. 46.

[REDACTED].⁴¹² P-0726 specified that “young males” were being arrested.⁴¹³ P-0994 also stated that mainly “young males” were detained at the Deleig police station.⁴¹⁴ This evidence is then consistent with the fact that Fur boys, under 18 years old, were found to be detained⁴¹⁵ and then killed.⁴¹⁶ There is nothing contradictory in this evidence when viewed holistically. Rather, the Defence seeks to focus on individual pieces of evidence to support their argument,⁴¹⁷ to distract from a proper holistic evaluation.

179. The Defence’s assertion that “too few examples” were provided by the Chamber, to illustrate a targeted campaign,⁴¹⁸ is also misconceived. There was otherwise no legal requirement to distinguish between men or children (either civilian or *hors de combat*) to substantiate any of the crimes the Appellant was convicted of. The facts of the arrest, detention and killing of Fur boys are borne out of the evidence itself. The Defence otherwise makes speculative statements regarding the evidence which should not be given any weight,⁴¹⁹ especially as the Defence had an opportunity to cross-examine certain witnesses on these matters.⁴²⁰

180. There was no error in fact committed by the Trial Chamber. In any event, the Defence fails to establish what material impact these purported errors had on the Judgment which would have resulted in a substantially different outcome – being the applicable appellate standard.⁴²¹

iii. The Appellant’s role in the Mukjar and Deleig Common Plans was established beyond reasonable doubt

181. The Chamber did not err in fact or law in establishing, beyond a reasonable doubt, that the Appellant played a role in either the Mukjar or Deleig Common Plans,⁴²² and that the elements of co-perpetration were fulfilled,⁴²³ thus entering the Appellant’s convictions under Counts 12-21⁴²⁴ and 22-31.⁴²⁵

182. The Defence argues that the Chamber did not provide any clear findings on how the key co-perpetrators “coordinated” and “acted” with the Appellant,⁴²⁶ and that the “role allegedly

⁴¹²DAR-OTP-0200-1540-R02, at 1540 ([REDACTED]).

⁴¹³DAR-OTP-0210-0346-R04, at 0364, para. 63.

⁴¹⁴DAR-OTP-0222-0055-R01, at 0064, para. 40.

⁴¹⁵Trial Judgment, [ICC-02/05-01/20-1240](#), paras 604, 618.

⁴¹⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 634.

⁴¹⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 436, 439.

⁴¹⁸Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 437.

⁴¹⁹Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 437 ([REDACTED]); para. 440 ([REDACTED]).

⁴²⁰E.g. P-0712: T-036.

⁴²¹*Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para 19; *Ngudjolo* Appeal Judgment, [ICC-01/04-02/12-271-Corr](#), para. 20.

⁴²²*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), grounds 70, 74.

⁴²³*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 367.

⁴²⁴*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 374.

⁴²⁵*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 383.

⁴²⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 369, 376.

entrusted to the Appellant” in the implementation of both the Mukjar and Deleig Common Plans “was not sufficiently defined.”⁴²⁷ The Defence fails to provide a legal basis as to why individual roles and responsibilities within a common plan are required to be formalised or defined in order to enter a finding of co-perpetration under Article 25(3)(a).

183. Outside of establishing the existence of an agreement or common plan between two or more persons,⁴²⁸ the jurisprudence reflects a fluid approach as to how a common plan may eventualise. The Appeals Chamber has held that this agreement may be “express or implied, previously arranged or materialising extemporaneously”,⁴²⁹ and as such, at the time the common plan is conceived, “the exact contours of all the crimes or offences that will be committed as part of the plan’s implementation [may] not yet [be] known.”⁴³⁰ A chamber may infer the existence of a common plan,⁴³¹ including an accused’s involvement in such a common plan, either backwards or forward in time.⁴³²

184. Accordingly, that the Appellant’s role in either the Mukjar and Deleig Common Plan may not have been “defined” is not a material element of an agreement or common plan. Indeed, a common plan can be unsettled and open to change, and by extension, the roles of co-perpetrators therein. Further, an accused does not require to have an official role or position, or any other position of authority, within a formalised hierarchy to bring about the common plan.⁴³³ Indeed, the Trial Chamber rejected the Defence’s submissions which reiterated this argument.⁴³⁴

185. Rather, what is required is a “normative assessment of the role and activities of the accused person, with a view to determining ‘whether the accused had control over the crime, by virtue of his or her essential contribution to it’”.⁴³⁵ The Trial Chamber clearly undertook this analysis with respect to both the Mukjar and Deleig Common Plans, establishing his essential contribution in both.⁴³⁶

186. Contrary to the Defence’s submission that the Chamber did not explain how, without the Appellant’s contribution, the crimes could not have been committed,⁴³⁷ this is clearly spelled out by the Chamber.⁴³⁸ It is not necessary, or sometimes possible, to provide “evidence”

⁴²⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 370, 376.

⁴²⁸*Lubanga* Confirmation Decision, [ICC-01/04-01/06-803-tEN](#), para. 343.

⁴²⁹*Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 445.

⁴³⁰*Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 821.

⁴³¹*Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 918.

⁴³²*Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1306.

⁴³³*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 370, 376, 409-410.

⁴³⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 989.

⁴³⁵*Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 820; *Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 473.

⁴³⁶Trial Judgment, [ICC-02/05-01/20-1240](#), paras 982-988.

⁴³⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 382.

⁴³⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 987.

that any of these crimes would have been frustrated in the absence of the Appellant's role,⁴³⁹ given this introduces hypothetical fact scenario. What is required is a consideration or determination by the trial chamber that an accused's normative role resulted in providing an essential contribution in all the circumstances.

187. It is this agreement or common plan between co-perpetrators, which leads to the commission of one or more crimes, that "ties the co-perpetrators together and [...] justifies the reciprocal imputation of their respective acts."⁴⁴⁰ As such, the Appellant is capable of being held accountable for crimes committed by others on the basis of this mode of individual criminal responsibility.⁴⁴¹ His presence at the scene of the crime is not necessary to be held liable for such crimes committed.⁴⁴² The Chamber did not err in law in finding otherwise.

188. The Chamber otherwise entered a reasoned opinion to establish that the Appellant had the required *means rea* for the crimes underlying Counts 12-13, Counts 16-23, Counts 26-31, and only explicitly dismissed the Defence's argument for the crime of torture.⁴⁴³

189. Not only did the Chamber establish the mental element for the crimes of torture and for outrage upon personal dignity at paragraphs 990-994, but it also did so for the crimes of murder, and persecution at paragraphs 995-996. The Chamber found that "the only reasonable conclusion is that the Accused's acts and conduct were deliberate and undertaken with a discriminatory intent on a combination of ethnic, political and gender grounds. As such, the requisite discriminatory intent for the crime against humanity of persecution is met."⁴⁴⁴

190. To the extent that the Defence alleges that the Chamber erred in fact, the Defence largely relitigates its submissions in its final trial brief without establishing any error on the part of the Trial Chamber and otherwise misrepresents the Chamber's findings. With respect to P-0955's indirect evidence regarding the arrest of *Umdah* Kindiri by the Appellant,⁴⁴⁵ the Chamber clearly reasoned why it relied on this evidence in establishing this fact.⁴⁴⁶ With respect to P-0905's uncorroborated and unreliable evidence relating to the Deleig Operation,⁴⁴⁷ the Chamber also addressed the Defence's arguments on this point.⁴⁴⁸ On the death of *Jenif*, it was logical

⁴³⁹ *Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 380.

⁴⁴⁰ *Lubanga* Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 445; *Bemba et al.* Appeal Judgment, [ICC-01/05-01/13-2275-Red](#), para. 1305.

⁴⁴¹ *Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 368, 375, 407.

⁴⁴² *Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 382, 405, 408. *See Lubanga* TJ, *Lubanga* Judgment, [ICC-01/04-01/06-2842](#), paras 1003-1005.

⁴⁴³ *Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 300.

⁴⁴⁴ Trial Judgment, [ICC-02/05-01/20-1240](#), para. 996.

⁴⁴⁵ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 405. *See also* Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), para. 585.

⁴⁴⁶ [ICC-02/05-01/20-1240-Conf-AnxB](#), para. 460.

⁴⁴⁷ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 406. *See also* Defence Final Trial Brief, [ICC-02/05-01/20-1210-Conf](#), paras 560, 591, 593, 597, 599, 601, 603, 608, 612-615, 621.

⁴⁴⁸ [ICC-02/05-01/20-1240-Conf-AnxB](#), para. 346.

for the Chamber to rely upon the evidence of P-0905 who personally saw the Appellant hit *Jenif*,⁴⁴⁹ rather than other witnesses, including P-0931, who explicitly stated that “[he did not] know how he got killed”.⁴⁵⁰ P-0931’s evidence could hardly be considered exculpatory.⁴⁵¹ The Defence otherwise fails to establish how the unexplained absence of evidence from P-0905, P-0994, P-0973, P-0607, P-0712 and P-0651 relating to *Sheikh* Motor’s mistreatment, supports a positive inference that the Appellant did not strike him,⁴⁵² in light of the fact that P-0907 was a direct witness to his mistreatment and [REDACTED].⁴⁵³

191. With respect to the loading of detainees, the Defence misreads the Judgment which found that the Appellant arrived at the Deleig Police Station “some time before 13:00”,⁴⁵⁴ not “around”, which would have placed the Appellant at the Deleig Police Station prior to the detainees being transported.⁴⁵⁵ It is otherwise not unreasonable for the Chamber to prefer to rely upon the corroborated evidence of two witnesses, over a singular witness, concerning the number and frequency of detainees being transported.⁴⁵⁶ Otherwise, with respect to the Chamber relying upon P-0905’s evidence to establish the Appellant’s instructions to kill near Fere,⁴⁵⁷ the Chamber explicitly outlined the cautionary basis it relied upon P-0905’s evidence on this matter.⁴⁵⁸

192. The Defence does not establish any error of fact and/or material defect with these reasons, and how these discrete factual matters would result in a substantially different outcome in the Judgment had they been decided differently. The Defence simply disagrees with the Chamber’s analysis and must be dismissed.

8. The Chamber did not add an additional ground for discrimination for the crime of persecution

193. The Chamber did not impermissibly add a ground for discrimination on the basis of age, in utilising the sentence “*of fighting age*”.⁴⁵⁹

194. The Chamber convicted the Appellant of the crime against humanity of persecution on political and ethnic grounds, committed during the Bindisi and Kodoom operation.⁴⁶⁰ It also convicted the Appellant of persecution on political, gender and ethnic grounds, committed

⁴⁴⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 611, fn. 2014.

⁴⁵⁰P-0931: T-062, p. 51, line 12 (Conf).

⁴⁵¹*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 413.

⁴⁵²Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 414.

⁴⁵³[ICC-02/05-01/20-1240-Conf-AnxB](#), para. 355.

⁴⁵⁴Trial Judgment, [ICC-02/05-01/20-1240](#), para. 606 (emphasis added).

⁴⁵⁵*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 416.

⁴⁵⁶*Contra* Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 417. *See* P-0651’s Statement: DAR-OTP-0205-0015-R02, at 0028-0029, paras 46, 50; P-0973’s Statement: DAR-OTP-0220-0736-R01, at 0743, para. 34.

⁴⁵⁷Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 419.

⁴⁵⁸[ICC-02/05-01/20-1240-Conf-AnxB](#), paras 346-347.

⁴⁵⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 936.

⁴⁶⁰Trial Judgment, [ICC-02/05-01/20-1240](#), Dispositif on Count 11.

during the Mukjar and Deleig operation, against predominantly Fur population of these villages and surrounding areas perceived as belonging to, or being associated with, or supporting the rebel armed groups.⁴⁶¹ The Chamber stated that in Mukjar and Deleig, the *Janjaweed* and GoS Forces targeted predominantly Fur men of fighting age **based on the perception that they were affiliated with the rebels**, and the fact that they were Fur, thus discriminated them based on their political affiliation, ethnic identity and perceived gender role.⁴⁶²

195. In *Ongwen*, the Trial Chamber stated that:

The second and third elements of the crime of persecution are that the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such, and that such targeting was based on political, racial, national, ethnic, cultural religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law.⁴⁶³

196. However, “[i]n evaluating the alleged status as a protected group, the political, social, and cultural context is relevant, as are, in addition to the objective factors relevant to the discriminatory ground alleged, the subjective perception of belonging of both the perpetrator and the victim.”⁴⁶⁴

197. The fact that certain victims might have been “of fighting age” could constitute a subjective element informing the perception of the perpetrator as to the contours of the targeted group, rather than an additional ground of discrimination, *i.e.* age. The Defence itself argued that “the perpetrators had not targeted individuals because of their group identity, but rather because they were perceived to be rebels or supportive of the rebellion and thus fell into the category of adversaries of the GoS forces in their armed counter-insurgency”.⁴⁶⁵ Being of “fighting age” is clearly an element that triggers this “perception” of being affiliated to the rebellion. This transpires from a plain reading of paragraph 936 of the Trial Judgment.

198. Moreover, the Defence is incorrect in asserting that the Chamber was required to give the parties a notification pursuant to Regulation 55 of the Regulations, as it did not vary the legal qualification.⁴⁶⁶ In *Al Hassan*, the Appeals Chamber stated the following:

[...] In principle, a trial chamber may view the confirmation decision holistically in its interpretation of how the pre-trial chamber set out to delimit the scope of the ‘facts and circumstances’ at issue for trial. Relevant to this consideration is whether the pre-trial chamber performed a thorough analysis of all of the factual allegations underpinning a charge, or whether it analysed only a sample of those allegations before concluding that the charge in question, as a whole, had been established to the requisite degree. Moreover, where the confirmation decision does not directly address certain factual allegations advanced by the Prosecutor, **a trial chamber may find it necessary to read the confirmation decision together with the**

⁴⁶¹Trial Judgment, [ICC-02/05-01/20-1240](#), Dispositif on Counts 21, 31.

⁴⁶²Trial Judgment, [ICC-02/05-01/20-1240](#), para. 936 (emphasis added).

⁴⁶³*Ongwen* Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2734.

⁴⁶⁴*Ongwen* Trial Judgment, [ICC-02/04-01/15-1762-Red](#), para. 2736.

⁴⁶⁵Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), para. 443.

⁴⁶⁶Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 445-446.

document containing the charges and subsequent amendments to see whether those allegations are within the scope of the case.⁴⁶⁷

199. The Prosecution, as early as in its Pre-Confirmation Brief, had described the targeted group from Mukjar and Deleig in those terms:

Furthermore, the targeting of males during the Mukjar and Deleig incidents because of their presumed role in society as current or potential future rebel fighters was on the ground of gender. At Mukjar and Deleig, the victims' Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators' perception of them as rebels or rebel sympathisers.⁴⁶⁸

200. More specifically and of significance, the Prosecution noted in its footnote 430 of the same document that: the killing of **military age men** within a group as one example of gender persecution.⁴⁶⁹

201. Furthermore, the Prosecution in its Trial Brief, used the following language:

Indeed, P-0726 was given a woman's dress by a local resident and told to put it on for his protection to prevent him from being arrested. The Militia/*Janjaweed* and GoS Forces primarily targeted adult males, **but also arrested some boys under the age of 18 years and some elderly men.**⁴⁷⁰

202. As such, the Defence has been on notice, since the pre-trial stage of the proceedings, of the contours of the targeted group. The fact that victims were perceived as affiliated with the rebels in part because they were of fighting age does not create an additional charge, or modify the legal characterisation of facts, which would have necessitated a notice under Regulation 55.

203. The Trial Chamber correctly assessed the Confirmation of the Charges Decision, and the evidence on the record, to inform itself as to the scope of the facts at issue at trial. As a result, the Chamber did not commit any mistake of law or fact by varying the grounds of discrimination underlying the crime of persecution.

204. The Defence further asserts that the Pre-Trial Chamber erred in its definition of the discriminatory basis under Article 7(1)(h) of the Statute.⁴⁷¹ At the time of the issuing of the Decision on the confirmation of charges against the Appellant, the Defence requested reconsideration and leave to appeal the said decision.⁴⁷² However, the Defence did not raise within this leave to appeal or request for reconsideration, any arguments on this alleged flawed definition made by the Pre-Trial Chamber. It must now accept the consequences of failing to do so.

⁴⁶⁷ *Al Hasan* Appeal Judgment, [ICC-01/12-01/18-1562-Red](#), para. 94 (citations omitted) (emphasis added).

⁴⁶⁸ [ICC-02/05-01/20-346-Conf-AnxA](#), para 129.

⁴⁶⁹ [ICC-02/05-01/20-346-Conf-AnxA](#), para 129, fn 430.

⁴⁷⁰ [ICC-02/05-01/20-550-Conf-Corr](#), para. 200 (citation omitted) (emphasis added).

⁴⁷¹ Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), paras 447-448.

⁴⁷² [ICC-02/05-01/20-438-Red](#); [ICC-02/05-01/20-448](#); [ICC-02/05-01/20-465](#).

205. The Defence further raises an error concerning “gender” discrimination. The Judgment is very clear on this issue. The charges of persecution concern mistreatment and torture committed against Fur male in the villages of Mukjar and Deleig.⁴⁷³ The fact that the Chamber found that women and children were arrested and brought to the locality building does not contradict the Chamber’s finding of guilt for the torture and massacre of hundreds of Fur male detained in Mukjar and Deleig. The fact that women and children were also arrested does not change the legal characterisation for the persecution against Fur male that occurred in those villages. The Defence simply confuses the general factual findings made by the Chamber, and those relied upon to enter findings on a particular charge.

206. The Defence is also mistaken in arguing that the Chamber committed a fatal error in referring to paragraphs 497-501 in footnote 2810 at paragraph 934 – which is part of the Chamber’s broader legal finding of guilt regarding persecution.⁴⁷⁴ The Chamber’s finding of guilt for Count 21 does not solely rely on paragraphs 497-501, but also on the Chamber’s findings that the Appellant, *Janjaweed* and GoS forces: (i) arrested and detained four Fur policemen at Mukjar police station;⁴⁷⁵ (ii) arrested and detained a number of predominantly Fur persons at the Mukjar locality building;⁴⁷⁶ (iii) arrested and detained at least 100 predominantly Fur men at Mukjar police station;⁴⁷⁷ (iv) tortured, mistreated and killed predominantly Fur men at Mukjar police station;⁴⁷⁸ (v) summarily executed predominantly Fur male detainees, including community leaders;⁴⁷⁹ and (vi) separated men from women and children, and did not arrest women, children and elderly men.⁴⁸⁰ Altogether, the discriminatory intent is clear – Fur men were predominantly targeted. The fact that largely, with some exceptions, women, children and elderly were not arrested does not contradict or undermine this finding.

207. The Defence does not demonstrate any error committed by the Chamber, either on the law or the facts, and this argument should simply be dismissed. The Chamber did not make contradictory or ambiguous findings on Counts 11, 21, and 31, given the overwhelming evidence on the trial record regarding the operation conducted against Fur men in Mukjar and Deleig, and which fully substantiates the Chamber’s findings. The Defence argument does not also establish any materiality that would change the outcome of the verdict.

IV. CONCLUSION

⁴⁷³Trial Judgment, [ICC-02/05-01/20-1240](#), paras 929-930, 934.

⁴⁷⁴Defence Appeal Brief, [ICC-02/05-01/20-1303-Conf](#), ground 79, para. 455.

⁴⁷⁵Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2809 *referring to* para. 496.

⁴⁷⁶Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2810 *referring to* paras 497-501.

⁴⁷⁷Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2811 *referring to* paras 495-496, 502, 506.

⁴⁷⁸Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2812 *referring to* paras 873, 875, 878-879, 902, 903-904, 909, 920, 927.

⁴⁷⁹Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2813 *referring to* paras 920, 923-926.

⁴⁸⁰Trial Judgment, [ICC-02/05-01/20-1240](#), para. 934, footnote 2814 *referring to* paras 484, 491, 494.

208. The CLRV submits that the Appeal Brief ought to be dismissed in its entirety and the Trial Judgment be confirmed. The Defence fails to comply with the basic procedural requirements for the Appeal Brief to be considered properly constituted, but more significantly, fails to establish the errors they purport to exist in the Trial Judgment. In the alternative, none of the slew of errors they refer to would have materially affected the Judgment to the extent that it would have rendered a judgment that is substantially different from that which they received. The Appellant committed the crimes he was charged and convicted of. The Defence has not been successful in undermining this fact, either at trial or on appeal. The participating victims place their trust in the Appeals Chamber to consider their observations herein. They have long awaited, with grace and dignity, for justice to be done by this Court – nothing in this Appeal warrants delaying it any further.

Respectfully submitted,



Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 26th day of June 2026

At Berlin, Germany