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Criminal
Court

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No.**: ICC-02/05-01/20**
Date: **29 June 2026**

**THE APPEALS CHAMBER**

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

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**

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

**Public with public redacted annexes A-B**

**Public redacted version of "Prosecution Response Brief (Conviction)", 17 April 2026, ICC-02/05-01/20-1320-Conf**

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## INTRODUCTION

1. Abd-Al-Rahman was unanimously convicted by the Trial Chamber of numerous, serious, violent crimes committed in three different operations in Darfur in 2003 and 2004, victimising hundreds if not thousands of people. Abd-Al-Rahman not only perpetrated crimes jointly with others, and ordered their commission, but directly perpetrated such crimes himself. His appeal against conviction shows no error in the Chamber's carefully reasoned judgment. Rather, he frequently rehearses the same unsuccessful arguments from trial, disagrees with the Chamber's trial management, and at times apparently misunderstands the applicable legal and factual findings. His appeal should be dismissed in its entirety and his convictions affirmed.[*]

## CONFIDENTIALITY

2. The Prosecution files this brief confidentially since it refers to information with the same classification. The Prosecution will file a public redacted version as soon as possible.

## SUBMISSIONS

### I. The Chamber correctly applied the principle of legality (Part A)

3. Abd-Al-Rahman shows no error in the Chamber's finding that "the requirement of *nullum crimen sine lege*, found in [a]rticle 22(1) of the Statute, is met in this case".[1] As explained below, Abd-Al-Rahman shows no error materially affecting his convictions in his five grounds of appeal challenging the Chamber's approach to: (i) the application of article 22;[2] (ii) the crime of forcible transfer;[3] (iii) the crime of persecution;[4] (iv) the concept of a "lawful order",[5] and; (v) Abd-Al-Rahman's personal circumstances.[6] Abd-Al-Rahman misapprehends or misstates the Chamber's reasoning and/or the applicable legal framework.

4. When analysing the charges for the purpose of article 22(1),[7] the Chamber correctly emphasised four considerations. First, it recalled the procedural history of Abd-Al-Rahman's claims on this issue—notably including the Appeals Chamber's prior affirmation of the correct legal framework and its general finding that criminal liability for the charged crimes was both foreseeable and accessible to a person in Abd-Al-Rahman's position.[8] Second, in light of the

[*] For table of contents, *see* Annex A. For long-form citations, *see* Annex B.
[1] *See* Judgment, para. 60. *Contra* Appeal, paras. 8-45.
[2] *See* Appeal, paras. 8-20 (Ground 1). *See below* paras. 8-27.
[3] *See* Appeal, paras. 21-22 (Ground 2). *See below* paras. 28-33.
[4] *See* Appeal, paras. 23-24 (Ground 3). *See below* paras. 34-41.
[5] *See* Appeal, paras. 25-34 (Ground 4). *See below* paras. 42-50.
[6] *See* Appeal, paras. 35-45 (Ground 5). *See below* paras. 51-60.
[7] Unlike other cases, the necessity of this arose because Sudan was not party to the Statute at the material times. Rather, the *Situation in Darfur* was referred to the Court by a chapter VII resolution of the UN Security Council.
[8] *See* Judgment, paras. 22-27; Jurisdiction AJ, paras. 77-78, 89-92; Appeal, para. 8.

Appeals Chamber's judgment, the Chamber properly directed itself that: "the foreseeability and accessibility test is satisfied if": (i) criminal law applicable at the material times "described the prohibited conduct clearly" and (ii) "a reasonable person in the Accused's position could have expected, at that moment in time, to find himself faced with the crimes charged".[9]

5. Third, the Chamber assessed "the relevant Sudanese laws […] in force at the time of the charged events".[10] It correctly rejected Abd-Al-Rahman's claims that: (i) he was legally obliged to violate aspects of international humanitarian law (IHL) under the Sudanese legal doctrine of "*ghanima*" (capture of equipment)[11] or to follow unlawful orders;[12] (ii) the doctrine of military necessity could materially have been understood as meaning that "everything was permissible" in military operations,[13] or that the prospect of prosecution was subject to any immunity, amnesty, or other relevant official act,[14] and; (iii) the authority and applicability of the relevant national law *vis-à-vis* the conduct relevant to the charged crimes was either "impact[ed] or undermine[d]" by the alleged non-compliance of Sudan with relevant international law.[15]

6. Fourth, and finally, the Chamber assessed Abd-Al-Rahman's personal circumstances, and was satisfied that "a reasonable person in the Accused's position could have expected, at the time of his conduct, to find himself faced with the crimes charged."[16] It correctly considered it immaterial whether Abd-Al-Rahman himself had received any training in IHL.[17] Further, it rejected the claim that a reasonable person could "have been 'deceived'" to the extent that they could no longer reasonably have expected to face prosecution for the charged conduct.[18]

7. Abd-Al-Rahman's claims, both at trial and on appeal, elide two separate concepts which—despite the similarity of some terms—the Chamber correctly kept distinct. The principle of legality requires that the criminal law is sufficiently foreseeable and accessible, *objectively*, at the time(s) material to the charges.[19] Additionally, for those limited crimes

[9] Judgment, paras. 30-31 (emphasising that: "a chamber's assessment of the second limb of the test is objective, on the basis of a reasonable person in the Accused's position, and not the Accused's subjective understanding of the law, or his belief in the lawfulness of his conduct"). *See also* paras. 28-29 (quoting Statute, art. 22(1); Jurisdiction AJ, paras. 85-86), 50 (recalling that "the test under [a]rticle 22(1) of the Statute does not require that the rules of international humanitarian law were implemented in the domestic legal system or that the definition of 'international crimes' was adopted in domestic law with respect to the acts constituting the crimes charged").
[10] *See* Judgment, paras. 32-51 (considering the 1998 Sudanese Constitution, the 1991 Criminal Act, and the 1986 People's Armed Forces Act, as well as the evidence of witnesses such as D-0016). *See also* Appeal, paras. 8-9.
[11] Judgment, paras. 38-41.
[12] Judgment, paras. 42-45.
[13] Judgment, para. 46.
[14] Judgment, para. 47.
[15] Judgment, paras. 48-50.
[16] *See* Judgment, paras. 52-59. *See also* Appeal, para. 35.
[17] Judgment, para. 57.
[18] Judgment, paras. 58-59.
[19] *See e.g.* Statute, art. 22(1).

requiring a legal appreciation, it may also be relevant to assess whether the accused, *subjectively*, understood the legal framework relevant to their conduct.[20] Thus, while Abd-Al-Rahman raised both points, his subjective state of mind concerning the legal framework was not only formally irrelevant under article 22(1),[21] but also no defence because no charged crime required a legal appreciation.[22] His claims therefore fail on this basis alone, irrespective of the fundamental implausibility that he truly was ignorant of the criminal nature of his conduct.

### I.A. The Chamber did not violate article 22(2) (Ground 1)

8. In its principle of legality analysis,[23] the Chamber noted that the 1991 Criminal Act of Sudan "unambiguously described the prohibited conduct" inherent in crimes which "are analogous to the crimes charged in the present case", including but not limited to: "provoking hatred against or among sects by reason of ethnic, colour or language differences; murder; […] causing serious bodily injury; […] intimidation; rape; gross indecency (acts contrary to another person's modesty and sexual acts with another person not amounting to adultery or sodomy); insult, abuse and humiliation; […] unlawful confinement or detention; […] theft; robbery; armed robbery (*hiraba*); […]; destruction of property; […]".[24]

9. Abd-Al-Rahman shows no error in his claim that the Chamber's analysis violated article 22(2).[25] This provides materially that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy."[26] Abd-Al-Rahman's arguments rest on two critical misconceptions. First, he appears to assume, incorrectly, that the principle of legality requires that international crimes are implemented in national law. Second, he confuses the different requirements of article 22. Put simply, while article 22(1) entails considering the *objective foreseeability of prosecution for particular conduct*, article 22(2) governs the manner in which crimes under the Statute are *interpreted by the Court*. Article 22(2) therefore does not limit the evidence (such as the scope of national or international legal provisions relevant to the charges) which may establish the objective foreseeability required by article 22(1).

10. Furthermore, Abd-Al-Rahman shows no error in the finding that relevant crimes under

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[20] *See e.g.* Statute, arts. 32-33.
[21] *See e.g.* Judgment, para. 30. *See further e.g.* *Case 002/01* AJ, para. 761; Gallant, p. 366 ("the person involved need not *actually* have foreseen the applicability of the law to his or her actions", emphasis added); Grover, p. 138 ("objective knowability […] stop[ping] short of asking whether the individual charged did in fact know the law"). This does not mean, however, that a chamber is not entitled to consider the specific situation of the accused person in the course of making this objective assessment: *see e.g.* *Case 002/01* AJ, para. 761. *See also* *Vasiliauskas v. Lithuania*, para. 157; *Kononov v. Latvia*, para. 235.
[22] *See below* paras. 323, 326-344.
[23] *See above* paras. 4-6.
[24] Judgment, para. 34. *See also* paras. 33, 35-36, 49.
[25] *Contra* Appeal, paras. 10-11, 14, 19-20.
[26] Statute, art. 22(2).

Sudanese law were analogous to the charges in this case. By failing to particularise his arguments under Ground 1 sufficiently—that is, to demonstrate that any *specific charge* failed to meet the requirements of article 22—Abd-Al-Rahman also fails to show any error which materially affected any of his convictions. For these reasons, Ground 1 should be dismissed.

### *I.A.1. Article 22(1) does not require domestic implementation of international law*

11. Abd-Al-Rahman states that "[t]he absence of domestic implementation of [IHL] and, even more crucially, of the definition of international crimes in Sudanese law in 2003-2004 was a fatal blow to the passing of the legality test".[27] While it is not clear whether this is intended as a legal assertion, or his view of the facts of this particular case, this proposition is fundamental in nature and therefore addressed first in response.

12. As the Chamber correctly held, "[a]rticle 22(1) of the Statute does not require that the rules of [IHL] were implemented in the domestic legal system or that the definition of 'international crimes' was adopted in domestic law with respect to the acts constituting the crimes charged." Rather, it suffices that applicable criminal laws "described the prohibited conduct clearly […] such that a reasonable person in the Accused's position" could have anticipated the risk of criminal prosecution.[28] This is consistent with the Appeals Chamber's guidance that "the principle of *nullum crimen sine lege* generally requires that […] an individual […] could have reasonably expected to face prosecution under national or international law."[29]

13. The Chamber's correct statement of the law was consistent with aspects of the prior reasoning of the Pre-Trial Chamber, not disturbed by the Appeals Chamber. Specifically, the Pre-Trial Chamber recalled that a reading of the principle of legality which required domestic incorporation of international crimes would potentially "call into question the very *raison d'être*" of the careful balance struck by the drafters in establishing the jurisdictional framework of the Court.[30] In particular, and self-evidently under articles 12(3) and 13 of the Statute, the Court may exercise jurisdiction—including with retroactive effect, subject to articles 11(1) and 24(1)—where the territorial State or State of nationality has *not* ratified the Statute. This may occur either on the basis of the *ad hoc* acceptance of the Court's jurisdiction by the relevant

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[27] Appeal, para. 14.
[28] Judgment, para. 50.
[29] Jurisdiction AJ, para. 85. *See also* Gallant, p. 359 ("international law require[s] […] that the act have at least been foreseeably criminal—reasonably likely to be held criminal—under existing law applicable to the actor when the crime is done"); Boot, pp. 176, 616-617. *See further above* para. 4; *below* para. 17.
[30] *See* Jurisdiction Decision, para. 41. *Compare* Jurisdiction AJ, paras. 60 (noting this reasoning of the Pre-Trial Chamber), 87, 92 (finding that the Pre-Trial Chamber erred in its ultimate conclusion that it was unnecessary to consider whether the charged conduct was "criminalised by either Sudan's national law or as a matter of international customary law", but not disapproving the Pre-Trial Chamber's reasoning concerning the absence of any need specifically for domestic incorporation of international law).

State, or a resolution of the UN Security Council under chapter VII of the UN Charter. In such circumstances, as the Pre-Trial Chamber noted, it is likely that the relevant State may *not* have adopted any domestic legislation incorporating international crimes into its own law.[31] Thus, any interpretation of the principle of legality requiring such incorporation would significantly undermine the jurisdiction expressly established by the Statute.

14. Furthermore, States Parties are not obliged to adopt legislation directly implementing Rome Statute crimes, even if it may be desirable that they do so. There is no support in the Statute for Abd-Al-Rahman's assumption that domestic implementation is required. Any such requirement would run counter to, and undermine, the long-established principle that international law is addressed not only to States but also to individuals, and that State inaction does not shield individuals from responsibility for crimes under international law.[32]

15. It follows that the Chamber was not *required* to identify "evidence of the applicability of international instruments" or "domestic implementation" of international law in Sudan's legal system before the commission of the charged crimes.[33] Rather, as it did, the Chamber could properly ascertain that the charged crimes met the requirements of the principle of legality by other means, including the content of analogous crimes under national law.[34]

### *I.A.2. Article 22(2) does not limit the evidence which may establish the objective foreseeability required by article 22(1)*

16. As the Appeals Chamber has previously recalled, on its face, article 22(1) of the Statute requires only that a person's criminal responsibility under the Statute must be "based upon statutory crimes and no others".[35] However, article 22(1) is also to be read and applied "consistent with internationally recognised human rights as set out in article 21(3)".[36] This "generally requires that a court may exercise jurisdiction only over an individual who could reasonably have expected to face prosecution" for the material conduct at the material time.[37]

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[31] *See* Jurisdiction Decision, para. 41.
[32] *See further* Broomhall, pp. 1155 (mn. 16: "the *nullum crimen* principle permits the prosecution of the acts of individuals regardless of whether national law required, permitted, or was silent as to the relevant conduct. Any objection based on prior legality or on the fact that national law did not prohibit the international crime in question at the time it was committed can only be the result of misunderstanding the principle's proper scope. The international criminal law that has pertained to the 'core crimes' from the Charter and Judgment of the Nuremberg Tribunal through the Rome Statute and up to the present is based on the principle that individual responsibility arises directly under international law […] To allow otherwise would allow States to legislate their own agents out of their international responsibilities"), 1156 (mn. 19).
[33] *Contra* Appeal, paras. 13-14.
[34] *See Milutinović* Jurisdiction AJ, paras. 40-41 ("domestic law […] may provide some notice […] that a given act is regarded as criminal under international law"). *See also below* fns. 44, 73.
[35] Jurisdiction AJ, para. 82.
[36] Jurisdiction AJ, para. 83.
[37] Jurisdiction AJ, para. 85.

17. Consistent with the Chamber's approach,[38] article 22(1) entails assessing the objective "foreseeability" that the relevant conduct could lead to prosecution (looking at the nature of the conduct, and the broad context in which the accused is situated),[39] including the "accessibility" of relevant laws.[40] Furthermore, since article 22(1) does not require that the crimes under the Statute were directly incorporated into national law,[41] as established above,[42] this "foreseeability and accessibility" assessment under article 22(1) must *necessarily* permit consideration of relevant analogies.[43] This is also consistent with its residual nature, since the inclusion of a crime within the Statute "weighs heavily in favour of the foreseeability of facing prosecution […] even in relation to conduct occurring in a State not party to the Statute."[44]

18. By contrast, article 22(2) of the Statute addresses a different facet of the principle of legality. It requires that, in *"constru[ing]"*—that is, *interpreting*[45]—the crimes in the Statute, the Court does not impermissibly extend their scope beyond the applicable legal texts.[46] The authorities presented by Abd-Al-Rahman support the same understanding.[47] In other words, article 22(2) prohibits analogy in *judicial reasoning* on the required elements of crimes *for the purpose of improperly expanding* the Court's jurisdiction *ratione materiae*.[48] Yet this says

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[38] *See above* paras. 46.
[39] *See* Jurisdiction AJ, para. 85 ("taking into account factors such as the 'flagrantly unlawful nature' of the crimes charged and the circumstances of the accused"). The Appeals Chamber's reference to the "circumstances of the accused" meant the broader context, not the subjective appreciation of the accused: *see* para. 86 ("a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that *a reasonable person* could have expected, at that moment in time, to find him or herself faced with the crimes charged", emphasis added), 89 ("Mr Abd-Al-Rahman was *in a position* to understand and comply with his obligations […] under international law", emphasis added). *See also above* fn. 21.
[40] *See* Jurisdiction AJ, para. 85 (and references in footnote 152). The "accessibility" criterion may be one means of establishing objective "foreseeability": *see e.g.* Gallant, pp. 363-364. *See also Kononov v. Latvia*, para. 235.
[41] Judgment, para. 50.
[42] *See above* paras. 11-15.
[43] This is implicit in the very notion that the Court must assess in this context whether prosecution is "foreseeable and accessible". Such a test would be unnecessary if the principle of legality required that article 5 crimes were directly incorporated in national law, since this could be discerned on the basis of a much simpler assessment. Conversely, if there is no requirement for incorporation, as the Prosecution maintains, then any assessment of foreseeability and accessibility will often require looking at *similar* or *analogous* crimes under applicable law.
[44] Jurisdiction AJ, para. 89 ("[i]n principle […] the crimes under the Statute were intended to be generally representative of the state of customary international law"). *See also* para. 95. *See further* Gallant, p. 406 ("Most […] war crimes in the ICC Statute are clearly crimes under customary international law already […]. The same can be said of genocide and crimes against humanity. There will be fewer and fewer situations in which one needs to determine whether a crime under the ICC Statute is also a crime under customary international law or a crime under national law"). *See also below* fn. 73.
[45] *See* Schabas (2016), p. 547; Broomhall, p. 1161 (mn. 35).
[46] *See e.g. Ntaganda* Jurisdiction AJ, para. 54.
[47] *See* Appeal Brief, para. 12 (quoting *Lubanga* CD, para. 303; *Bemba* TJ, paras. 83-84; *Bemba et al.* AJ, para. 675).
[48] *See* Grover, pp. 214 ("the prohibition against analogy can perhaps be understood as prohibiting judges from creating crimes by interpreting a criminal prohibition beyond its express wording. This prohibition is very different from logical reasoning by analogy, which is permissible"), 219; Broomhall, p. 1163 (mns. 41-42: "The prohibition on analogy bars its use as a basis for imposing criminal responsibility in what amount to substantially new crimes.

nothing about how a reasonable person may have *adequate notice* that conduct is unlawful, which is addressed separately in article 22(1). Thus, articles 22(1) and 22(2) are correctly interpreted harmoniously, as different facets of the principle of legality—without article 22(2) limiting evidence showing the objective foreseeability of prosecution for charged conduct.

19. Within this framework, Abd-Al-Rahman does not show that the Chamber "erred in law by extending the definition of crimes by analogy pursuant to Article 22(2)".[49] Nowhere does he claim that the Chamber expanded the crimes in order to convict him, and as such does not raise a claim within the scope of article 22(2) at all.[50] Instead, by conflating articles 22(1) and (2), Abd-Al-Rahman wrongly suggests that it was a "condition[]" to show either that there was "a domestic definition of war crimes and crimes against humanity" or "the direct applicability of international definitions in the Sudanese legal system."[51] He states that "the entire exercise of drawing an analogy between Sudanese crimes and the charged crimes amounted to an error of law by failing to comply with the prohibition of analogy under Article 22(2)".[52] Yet Abd-Al-Rahman fails to substantiate this claim with any authority, or any logical argument.

20. To the contrary, the Chamber was fully entitled to do as it did—which was to consider whether there was an objectively foreseeable risk of prosecution for the charged conduct. It was immaterial whether the applicable national or international law was identical to the crimes charged at this Court, with precisely the same elements, provided it was "sufficiently" clear that

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[…] The rule does not, however, bar *all* use of analogy in the process of interpretation", emphasis supplied); Boot, pp. 388-389 ("Article 22(2) […] implies that […] the Court is not allowed to 'create' offenses").

[49] *Contra* Appeal, para. 11. *See also* para. 10.

[50] *See generally* Judgment, paras. 681-789 (setting out "the relevant applicable law regarding the contextual elements of the war crimes and crimes against humanity" and "the elements of the individual crimes"). Furthermore, even if it were correct—but which significantly the Appeals Chamber neither affirmed nor even suggested (*see generally* Jurisdiction AJ)—that the Court should apply customary international law when exercising jurisdiction on the territory of a non-State Party on the basis of a UN Security Council referral (*see e.g.* Dias, pp. 208, 229-230, 235, 237-238, 240, 245-247), the Chamber's interpretation of the applicable law was in any event generally consistent with or more advantageous to Abd-Al-Rahman than applicable customary international law. The only charged crime whose elements are clearly more expansive than customary international law as it has been interpreted by institutions such as the ICTY and IRMCT is count 1 (directing attacks against the civilian population), insofar as article 8(2)(e)(i) does *not* require proof of harm while this *may* be required under customary international law: *compare e.g.* *Karadžić* TJ, para. 455, *with* Judgment, para. 709; *Ongwen* TJ, para. 2758; *Ntaganda* TJ, para. 904; *Katanga* TJ, para. 799. On the facts of this case, however, it is clear that harm was actually caused, and so any hypothetical omission by the Chamber in stating such a requirement would in any event be harmless: *see e.g.* Judgment, paras. 396, 404-408, 844.

[51] *Contra* Appeal, para. 11.

[52] *See* Appeal, paras. 13, 15. *See also* para. 19. Abd-Al-Rahman is not understood to claim any so-called 'retroactive reclassification' or 'recharacterisation' (*i.e.*, the retroactive application of a novel international crime, satisfying the principle of legality based on pre-existing analogous national law: *see e.g.* Grover, p. 162; Gallant, p. 130), nor did this occur—the Chamber relied on national law as an *evidentiary* means of showing that the article 22(1) test was met, but the (international) criminal law *actually applied* to Abd-Al-Rahman *pre-existed his conduct*, both under the Statute (in force in 2002) and, if necessary, under customary international law.

the relevant conduct could lead to prosecution,[53] "without reference to any specific provision".[54] In other words, "what is required is not an analysis of the technical terms of the definition of the crimes, but whether it was generally foreseeable that the *conduct in question* could entail criminal responsibility."[55] This is what the Chamber found.[56]

### *I.A.3. The Chamber properly concluded that the charged conduct was also prohibited under Sudanese law, for the purpose of article 22(1)*

21. Abd-Al-Rahman shows no error in further claiming that the Chamber was incorrect in finding a relevant analogy between crimes in the national law of Sudan and the charged crimes.[57] To the contrary, the Chamber properly found that there was a sufficient overlap for the purpose of article 22(1) if (among other means) the applicable national law "clearly described the prohibited conduct and defined crimes comparable to the crimes charged."[58]

22. First, Abd-Al-Rahman wrongly suggests that the absence of *chapeau* requirements in national crimes precludes any relevant analogy to the charged crimes (*i.e.* crimes against humanity and war crimes).[59] This logic is faulty. The absence of *chapeau* requirements in the national crimes means that they are somewhat *broader* in scope than the charged crimes (because they contain no additional elements beyond those defining the prohibited conduct of the perpetrator). As such, there is no possibility that the *absence* of *chapeau* requirements would prevent a reasonable person from recognising the risk of prosecution if they carry out conduct which is prohibited by applicable national crimes.[60] Abd-Al-Rahman's concern that the Court exists to try international crimes, and not "offences against Sudanese domestic public order",

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[53] *See e.g.* *Case 002/01* AJ, para. 761; *Case 001* AJ, para. 96; *Milutinović* Jurisdiction AJ, paras. 37-38 (referring to "sufficient[]" foreseeability and accessibility). *See also* *Vasiljević* TJ, para. 201 (stating that the *nullum crimen sine lege* principle requires that the "general nature, […] criminal character and […] approximate gravity" of an offence must "have been sufficiently foreseeable and accessible"). Relatedly, in the context of evolving judicial clarification of the law, the ECtHR has consistently affirmed that the *nullum crimen sine lege* principle is satisfied provided resultant developments are "consistent with the essence of the offence and could reasonably be foreseen": *see* *Vasiliauskas v. Lithuania*, para. 155; *Korbely v. Hungary*, para. 71; *Jorgić v. Germany*, paras. 100-101, 109, 114; *Streletz, Kessler, and Krenz v. Germany*, paras. 50, 82; *S.W. v. UK*, paras. 34-36, 43; *C.R. v. UK*, para. 34. *See also* Jurisdiction Appeal Judgment, para. 85 (referring to "the standard of 'reasonableness' in assessing the foreseeability of prosecution"). *See further* *Vasiliauskas v. Lithuania*, para. 157; *Kononov v. Latvia*, para. 235 (considering that "the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed").

[54] *Case 002/01* AJ, para. 762; *Case 001* AJ, para. 96; *Hadžihasanović* Jurisdiction AJ, para. 34.

[55] *Case 002/01* AJ, para. 765 (emphasis added).

[56] Judgment, paras. 34, 51.

[57] *Contra* Appeal, para. 19 ("the relevant Sudanese offences [were] not analogous to the charged crimes").

[58] Judgment, para. 51. *See also* paras. 30, 50.

[59] *Contra* Appeal, para. 16. *See also* para. 18. It is understood that Abd-Al-Rahman's reference to "footnote 45" is a typographic error (since it refers to the 1998 Sudanese Constitution), and that the intended reference is to footnote 46 (referring to provisions of the 1991 Criminal Act): *see* Judgment, para. 34 (fn. 46). *See also* Appeal, paras. 21, 23 (referring to "footnote 46").

[60] The Chamber recalled D-0016's evidence that the 1991 Criminal Act applied to relevant conduct committed even by military personnel in the context of military operations, and that the 1986 People's Armed Forces Act provided no exclusion of criminal responsibility under the 1991 Act: *see* Judgment, para. 35.

misses the point of article 22(1)—which is to ensure that there is *adequate notice* of the risk that criminal liability attaches to particular conduct, without prejudice to the precise legal characterisation that may eventually be applied or the venue in which it may be prosecuted.[61]

23. Second, Abd-Al-Rahman shows no error by stating that the national crimes identified by the Chamber are "irreconcilable" with the charged crimes, based on his own undeveloped view that the national crimes contain elements which have "no equivalent" in the Statute.[62] But he fails to engage with the contrary evidence of his own witness, D-0016, who testified that "'the acts described in the [Four] Geneva Conventions and the Rome Statute are crimes prohibited by the [1991 Criminal Act], even if [the 1991 Criminal Act used] different names for these acts and crimes'".[63] Likewise, Abd-Al-Rahman fails to consider the crimes in the 1991 Criminal Act in the context of the fundamental rights guaranteed by the 1998 Sudanese Constitution, as the Chamber did,[64] or in the context of Sudan's own views expressed to the CERD Committee and the African Commission on Human and People's Rights.[65]

24. Overall, Abd-Al-Rahman shows nothing to disturb the Chamber's view that the national law crimes ensured that a reasonable person could have anticipated the risk of prosecution for the charged conduct—specifically, that the national law crimes were "comparable" to charged crimes.[66] It sufficed if a reasonable person could have "reasonably construed" their conduct as falling "within the ambit of [the] definition of [a] crime existing at the time".[67]

### *I.A.4. Abd-Al-Rahman shows no error materially affecting the Judgment*

25. Finally, and in any event, Ground 1 must be dismissed because Abd-Al-Rahman mistakes the impact of the claimed error(s), and fails to develop his argument sufficiently. Critically, he fails to show that any particular charge—and thus any particular conviction—was materially affected by the error(s) that he claims. Rather, he seems to assume that the Chamber's assessment of article 22(1) affected whether "the Court could exercise its jurisdiction *in the*

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[61] *See above* para. 12, 20; *below* para. 24.
[62] *Contra* Appeal, para. 17. *See also* para. 18.
[63] Judgment, para. 49 (quoting T-130-Conf, p. 70:5-7). *See also* para. 35.
[64] Judgment, para. 33.
[65] Judgment, para. 36 (citing DAR-OTP-00006618, DAR-OTP-00005133).
[66] In particular, for national law crimes such as murder (article 130), semi-intentional homicide (article 131), hurt (article 142), insult and abuse (article 160), and criminal mischief (article 182), Abd-Al-Rahman appears to suggest that the applicable elements are *broader* than charged crimes such as directing an attack on the civilian population, murder, attempted murder, other inhumane acts, torture, outrages upon personal dignity, and destruction of property under counts 1-3, 5-7, 12-13, 16-20, 22-23, 26-30: *see* Appeal, para. 17. As previously noted, this does not prevent a reasonable person from anticipating the risk of prosecution for such conduct: *see above* para. 22. For other national law crimes, Abd-Al-Rahman asserts that their elements use concepts which are not mirrored in the Statute, but nonetheless fails to show that they were not sufficiently "comparable" for the purpose of article 22(1).
[67] *See* Gallant, pp. 360-361 ("all definitions of crimes […] will have some degree of indeterminacy"), 366 ("could the law as then existing have been reasonably understood to proscribe the conduct involved"); Grover, p. 139 ("fair warning does not require absolute legal certainty"). *See further above* fns. 53-54.

*case*", such that any success in his argument under Ground 1 "would have irresistibly led a reasonable Trial Chamber to conclude that it could not exercise its jurisdiction, and to acquit the Appellant of *all* charges".[68] He asserts that Ground 1 "impacted the entirety of the Judgment" and "must lead to the quashing of the entire Trial Judgment".[69] Yet Abd-Al-Rahman's underlying assumption is incorrect. As the Appeals Chamber has previously found, article 22(1) must be considered at the level of *individual charges*.[70] It is insufficient simply to claim *ipso facto* that jurisdiction over the entire case is materially affected—especially when the Appeals Chamber has expressly cautioned against this approach.

26. Furthermore, to the extent that Grounds 2-3 rely expressly on the same arguments in Ground 1, but applied specifically to the charges of forcible transfer and persecution,[71] Ground 1 might be construed to have residual application to all the other charges—that is, to: directing an attack on the civilian population (count 1), murder (counts 2-3, 17-18, 27-28), attempted murder (counts 19-20, 29-30), pillaging (count 4), destroying enemy property (count 5), other inhumane acts (count 6), outrages upon personal dignity (counts 7, 16, 26), rape (counts 8-9), torture (counts 12-13, 22-23).

27. Yet even if this is so, Abd-Al-Rahman makes no concrete attempt in Ground 1 to show that any technical error by the Chamber would preclude the finding that a reasonable person in his position could have anticipated the risk of prosecution for the conduct relevant to these crimes. This is unsurprising, since it verges on the impossible. To the contrary, this conduct—which boils down to the intentional commission of serious violent crimes, and crimes against property—is not only unequivocally prohibited under customary international law,[72] but prohibited under the criminal laws of many if not all States. It might fairly be said to epitomise conduct which is *mala in se*.[73] As such, even if the Chamber had erred in any aspect of its

[68] Appeal, para. 20 (emphasis added).
[69] Appeal, para. 20.
[70] *See e.g.* Jurisdiction AJ, paras. 91-92 (reasoning that "only once a link is drawn *with the charges* in this case can the question of the legality *of the charges* be definitively answered", noting that Abd-Al-Rahman had not "indicated that the Pre-Trial Chamber erred in confirming jurisdiction *in respect of any of the specific charges*", and concluding that the Pre-Trial Chamber's technical error did "not itself have any effect *on the charges* in this case" such that "there is currently no basis to question the legality *of the charges*", emphasis added). *See also* paras. 93-95 (describing the separate reasoning of Judge Ibáñez distinguishing between jurisdiction over the case, and the possibility of violating the principle of legality in the exercise of that jurisdiction).
[71] *See below* paras. 28 (fn. 74), 34 (fn. 94).
[72] *See* Judgment, para. 30 (referring to applicable laws, "national *or international*", emphasis added).
[73] *See e.g.* Gallant, p. 364 ("the heart of the core international crimes of genocide, crimes against humanity, and war crimes (*i.e.*, the forbidding of killing, maiming, torturing, and other inhumane mistreatment) is well known to be criminal everywhere, whether or not all individuals understand the substance, of even the existence, of international criminal law"); Boot, pp. 492 ("[m]urder is considered a crime in virtually all national criminal law systems"), 617-618 ("[a]t first sight, it appears that the criminality of conduct included in the Statute is clear").

technical reasoning concerning article 22(1), such an error was harmless. Abd-Al-Rahman shows nothing to the contrary, and Ground 1 must be dismissed.

## I.B. The Chamber properly determined that the charge of forcible transfer (count 10) met the requirements of article 22(1) (Ground 2)

28. Ground 2, challenging the Chamber's determination that the charge of forcible transfer (count 10) met the requirements of article 22, is expressly linked to the success of Ground 1 of the appeal.[74] For the same reasons, it must fail.[75] Moreover, Abd-Al-Rahman's additional arguments show no error.[76] Ground 2 should be dismissed.

### *I.B.1. The Chamber properly concluded that it could convict Abd-Al-Rahman of forcible transfer*

29. Abd-Al-Rahman fails to show that the Chamber erred in concluding that count 10 (forcible transfer) satisfied the requirements of article 22(1). First, importantly, the facet of the principle of legality in issue concerns only the objective foreseeability of the risk of prosecution arising from the charged conduct, and not retroactivity due to the non-applicability of the law at the relevant time. There is no doubt that the substantive law under which Abd-Al-Rahman is convicted, including for count 10, was applicable since 2002.[77]

30. Second, the Chamber was not required to identify a crime under Sudanese national law which *directly* mirrored or corresponded to the charged crime of forcible transfer.[78] Rather, the Chamber was required to determine that it was *sufficiently clear to a reasonable person* that the *conduct* charged as forcible transfer *could result in a criminal prosecution*, without reference to any specific provision.[79] The critical conduct in forcible transfer is the use of force, or the threat of force or other coercive acts, to expel or otherwise to remove persons from an area in which they were lawfully present.[80] It was clear that the conduct amounting to the use or threat

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*See also above* fn. 44. *See further* *Kononov v. Latvia*, para. 238; *Šimšić v. Bosnia and Herzegovina*, para. 24 (taking account of the "flagrantly unlawful nature" of acts such as murder, torture, and other ill treatment in concluding that "even the most cursory reflection" would have indicated that such acts "risked" constituting war crimes or crimes against humanity for which there could be criminal accountability). *See also* Jurisdiction Appeal Judgment, para. 85 (fn. 151: quoting *Milutinović* Jurisdiction AJ, para. 42 ("the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under international law, [but] it may in fact play a role […] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts")).

[74] *See* Appeal, para. 21 ("The second error […] is a direct consequence of the error […] under [Ground 1]").

[75] *See above* paras. 827.

[76] *Contra* Appeal, paras. 21-22.

[77] *See e.g.* Statute, arts. 5-8, 11(1), 13(b). *See also above* fns. 50, 52.

[78] *Contra* Appeal, paras. 21-22.

[79] *See above* para. 20 (fns. 53-55).

[80] *See e.g.* Elements of Crimes, art. 7(1)(d), elements 1-2 (noting that "coercion" includes conduct causing "fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment").

of force and/or coercion in this case[81] could result in prosecution under the 1991 Criminal Act, including as "murder; […]; causing serious bodily injury; causing pain or disease; use of force on another person without their consent; intimidation; rape; gross indecency […]; insult, abuse and humiliation; […] theft; robbery; […]; destruction of property".[82]

31. While these crimes neither require nor exclude the instrumentalisation of such conduct to remove persons from an area in which they were lawfully present, many if not all of these crimes are *already* serious in themselves. As such, a reasonable person would still anticipate the risk of severe punishment for such conduct, even in the context of forcible transfer. Furthermore, article 23 of the 1998 Sudanese Constitution specifically guaranteed to all citizens "the right to freedom of movement and residence which cannot be restricted except in accordance with law."[83] This would have made it obvious to a reasonable person that the law sought to protect the right of persons to remain in their homes. These considerations, individually and jointly, more than sufficed for the purpose of article 22(1).

32. Third, even if the Chamber had erred in relying on Sudanese national law to establish that count 10 (forcible transfer) satisfied article 22(1), such an error would not have materially affected the Judgment.[84] This is because applicable national law is not the only means by which article 22(1) could be satisfied. The Chamber could equally consider customary international law, whose content is in principle both sufficiently foreseeable and accessible,[85] and which was no less applicable to Abd-Al-Rahman at the time of the crimes.[86] In that regard, forcible transfer as a crime against humanity not only satisfied the requirements of article 22(1) at the time of the charged conduct in 2003-2004, but did so (in the form of the crime of other inhumane acts) since at least 1975,[87] and in its own right from at least 1998.[88]

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[81] *See e.g.* Judgment, para. 861 (noting that "[m]embers of the *Janjaweed* pillaged, destroyed property, mistreated and murdered civilians and raped women" in the course of "forc[ing] numerous inhabitants, including children, to flee", in the absence of "any grounds under international law permitting such displacement").
[82] *See* Judgment, para. 34.
[83] Judgment, para. 33.
[84] *Contra* Appeal, para. 22.
[85] *See e.g.* *Case 002/01* AJ, paras. 762-763; *Case 001* AJ, paras. 91-96; *Milutinović* Jurisdiction AJ, para. 41.
[86] *See* Jurisdiction AJ, para. 86 (referring to "the criminal laws applicable to the suspect or accused at the time the conduct took place", but making no limitation that this assessment could relate only to national law). *Compare* Judgment, paras. 29, 30 ("national or international"), 32 (referring to "laws […] which were in force at the time of the charged events between August 2003 and March 2004, and thus, were applicable to the Accused").
[87] *See e.g.* *Case 002/01* AJ, paras. 576-590, 657, 660. For subsequent reasoning on and convictions for other inhumane acts (forcible transfer) as a crime against humanity, *see e.g.* *Stakić* AJ, paras. 277, 302, 313-317; *Blagojević and Jokić* TJ, para. 629; *Brđanin* TJ, para. 544; *Krstić* TJ, paras. 520-523; *Kupreškić et al.* TJ, para. 566.
[88] *See e.g.* Ambos (2022), p. 148 (mn. 5: "Article 7 [crimes] […] largely accord" with customary international law). *See further above* fn. 44. *See also* Ambos (2014), p. 87 (forcible transfer in the ILC 1996 Draft Code); Stahn, pp. 187-188 (mn. 59: forcible transfer in the 1919 Peace Conference Report, the 1973 Apartheid Convention, and 2000 UNTAET Regulation 2000/15).

### *I.B.2. The Chamber reasonably assessed the evidence of D-0016*

33. Abd-Al-Rahman fails to show that the Chamber erred in assessing D-0016's evidence.[89] D-0016 had testified that "'the acts described in the [Four] Geneva Conventions and the Rome Statute are crimes prohibited by the [1991 Criminal Act], even if [the 1991 Criminal Act used] different names for these acts and crimes'".[90] Abd-Al-Rahman cannot rely on a further statement from D-0016 which he had not even made when the Judgment was issued, and which was subsequently received in evidence for sentencing only.[91] D-0016's view—on which he could not properly be examined[92]—that there was "no offence equivalent to forcible transfer" in Sudanese law merely reflected his own understanding of national law.[93] It did not (and could not) dispose of the legal question before the Chamber under article 22(1), concerning the objective *sufficiency* of information available to a reasonable person. Notwithstanding D-0016's evidence, the Chamber could still properly conclude that it was sufficiently clear that the conduct charged as forcible transfer could result in a criminal prosecution, as it did.

## I.C. The Chamber properly determined that the persecution charges (counts 11, 21, and 31) met the requirements of article 22(1) (Ground 3)

34. Like Ground 2, Ground 3—challenging the Chamber's determination that the persecution charges (counts 11, 21, and 31) met the requirements of article 22—is expressly linked to the success of Ground 1.[94] For the same reasons, it must fail.[95] Moreover, Abd-Al-Rahman's additional arguments show no error.[96] Ground 3 should be dismissed.

### *I.C.1. The Chamber properly concluded that it could convict Abd-Al-Rahman of persecution*

35. Abd-Al-Rahman fails to show that the Chamber erred in concluding that counts 11, 21,

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[89] *Contra* Appeal, paras. 21-22.
[90] Judgment, para. 49 (quoting T-130-Conf, p. 70:5-7). *See also* para. 35.
[91] *See* Appeal, paras. 21-22 (citing DAR-D31-0000363). DAR-D31-0000363 was signed by D-0016 on 18 October 2025. The Judgment was handed down on 6 October 2025. For the purpose of sentencing, on 18 November 2025, the Chamber heard the testimony of D-0016 under rule 68(3) and received DAR-D31-0000363 into evidence: *see* Sentencing Judgment, para. 10; T-165, p. 12:2-16. The Prosecution objected to the use of the sentencing hearing "to re-litigate issues decided at trial, decided in your judgment", with which the Presiding Judge agreed: T-165, pp. 14:5-23, 15:2-7, 17:5-18:12. *See also* *Ntaganda* Sentencing Evidence Decision, para. 44; *Bemba* Sentencing Evidence Decision, paras. 21, 45.
[92] *Contra* Appeal Brief, para. 22 ("The Prosecution did not challenge D-0016 on this issue"). Notably, when examined by the Prosecution at trial, D-0016 had not yet given the statement upon which Abd-Al-Rahman now relies, and therefore there was no basis to question the witness specifically with regard to forcible transfer. When D-0016 testified again for the purpose of sentencing, he did not testify on this issue at all, and the Prosecution had been explicit in its view that his statement and further testimony was only relevant to sentencing issues and was not an opportunity to re-litigate issues decided in the Judgment: *see above* fn. 91. In this context, given the limited scope of D-0016's actual testimony, the Prosecution did not cross-examine the witness: T-165, p. 18:20-21.
[93] *See* DAR-D31-0000363, para. 60. *See also* paras. 61-62.
[94] *See* Appeal, para. 23 ("The third error […] is a direct consequence of the error […] under [Ground 1]").
[95] *See above* paras. 8-27.
[96] *Contra* Appeal, paras. 23-24.

and 31 (persecution) satisfied the requirements of article 22(1). This ground of appeal addresses only "persecution on political and/or gender grounds", and not persecution on ethnic grounds.[97] Again, this ground of appeal concerns only the objective foreseeability of the risk of prosecution arising from the charged conduct, and raises no question as to the timely existence of the substantive law applied to Abd-Al-Rahman.[98]

36. As previously stated, the Chamber was not required to identify a crime under Sudanese national law which *directly* mirrored or corresponded to the charged crime of persecution, as Abd-Al-Rahman implies.[99] Rather, the Chamber was required to determine that it was *sufficiently clear to a reasonable person* that the *conduct* charged as persecution *could result in a criminal prosecution*, without reference to any specific provision.[100] Even if it were necessary also to establish the objective foreseeability of the relevance of discriminatory intent, this did not necessarily extend further to *particular* legal characterisations of the facts (for example, where discriminatory grounds intersect, parsing them out individually[101]). Accordingly, the critical conduct in persecution is the severe deprivation, contrary to international law, of fundamental rights of one or more persons targeted by reason of the identity of a group or collectivity, or of the group or collectivity as such, on any discriminatory basis.[102] In this regard:

- It was clear that the conduct charged as amounting to the severe deprivation of fundamental rights, contrary to international law,[103] not only violated rights guaranteed in the 1998 Sudanese Constitution[104] but could also result in prosecution under the 1991 Criminal Act, for example as: "murder; semi-intentional homicide; causing serious bodily injury; causing pain or disease; use of force on another person without their consent; intimidation; rape; gross indecency […]; insult, abuse and humiliation; […] theft; robbery; […]; destruction of property".[105]
- As Abd-Al-Rahman seems to concede—by not challenging the conclusion that persecution on ethnic grounds satisfied the requirements of article 22(1)—it was equally clear that the 1998 Sudanese Constitution prohibited discrimination on grounds of "race", and

[97] *See* Appeal, para. 23.
[98] *See above* para. 29.
[99] *Contra* Appeal, paras. 23-24. *See above* para. 30.
[100] *See above* paras. 20 (fns. 53-55), 28. In this case, Abd-Al-Rahman was charged with three counts of persecution on intersecting grounds: *see e.g.* Judgment, paras. 928 (politics, ethnicity), 929 (politics, ethnicity, gender).
[101] Rather, if objective foreseeability of the relevance of discriminatory intent is required, it may suffice that this attaches to at least any one of the charged discriminatory grounds factually characterising the intent.
[102] *See e.g.* Elements of Crimes, art. 7(1)(h), elements 1-3.
[103] *See e.g.* Judgment, paras. 931-932.
[104] *See e.g.* Judgment, para. 33.
[105] Judgment, para. 34.

criminalised conduct which "provoke[eds] hatred against or among sects by reason of ethnic, colour or language differences".[106] Since the 1998 Sudanese Constitution equally and expressly prohibits discrimination based on grounds of "sex" and "religion",[107] it would have been no less clear to a reasonable person at least that gender discrimination was likewise prohibited (as well as religious discrimination).

37. Taken together, these more than sufficed for the purpose of article 22(1). It would have been sufficiently clear to a reasonable person not only that the conduct amounting to the severe deprivation of rights risked prosecution, but also that discrimination was prohibited on various grounds expressly including race and sex, and other grounds which sought to exploit "differences" between Sudanese citizens such as ethnicity and language.

38. In any event, even if the Chamber had erred in relying on Sudanese national law to establish that counts 11, 21, and 31 (persecution) satisfied the requirements of article 22(1), such an error would have been harmless and would not have materially affected the Judgment.[108] This is because persecution as a crime against humanity under customary international law applicable to Abd-Al-Rahman was a further means to satisfy the requirements of article 22(1) at the time of the charged conduct in 2003-2004[109]—indeed, contemporary tribunals have entered convictions for such conduct since at least 1975.[110] Likewise, persecution on gender grounds has been prosecuted by national courts (as a crime against humanity) for conduct dating back to the 1990s.[111]

39. Read with the clear and long-standing prohibition of all forms of discrimination in international law, the objective foreseeability of prosecution for persecution on *any* impermissible ground is sufficiently established by this practice. This is consistent with the (non-exhaustive) list of impermissible grounds of persecution included in article 7(1)(h) of the Statute—which was significant in illustrating States' views of customary international law in

[106] *See* Judgment, paras. 33-34.
[107] Judgment, para. 33.
[108] *Contra* Appeal, para. 24.
[109] *See above* fn. 86.
[110] *Case 002/01* AJ, paras. 758-765; *Case 001* AJ, paras. 225, 280. These cases addressed persecution on, *inter alia*, political grounds, building on post-WWII practice. For further reasoning on the elements of persecution under customary international law, applied to conduct in the 1990s, *see e.g.* *Stakić* AJ, para. 327; *Kvočka et al.* AJ, para. 320; *Kordić and Čerkez* AJ, para. 101; *Blaškić* AJ, para. 131; *Vasiljević* AJ, para. 113; *Krnojelac* AJ, para. 185.
[111] Powderly and Hayes, p. 232 (mn. 167: recalling that the War Crimes Chamber in Bosnia and Herzegovina convicted several persons of persecution on gender grounds for conduct in the 1990s); OSCE Report, pp. 60-62. *See e.g.* *Kujundžić* TJ, p. 4, and para. 591 (in translation, referring to "sexual" grounds to mean "*spolnoj osnovi*").

1998.[112] The broad approach taken to article 7(1)(h)—including gender discrimination—precisely reflected the progressive development of international human rights law since the 1940s,[113] including notably the UDHR, ICCPR, CEDAW, and other instruments.[114]

40. Finally, Abd-Al-Rahman's reference in this context to the "intersectionality theory" as "an aggravating factor of persecution" is unclear.[115] To the extent it relates to sentencing, as it appears, this argument should be summarily dismissed since the Appeal Brief and this response are confined to the merits of Abd-Al-Rahman's convictions only. It is in any event incorrect.[116]

### *I.C.2. The Chamber reasonably assessed the evidence of D-0016*

41. For similar reasons to those set out above under Ground 2, Abd-Al-Rahman fails to show that the Chamber was unreasonable in assessing D-0016's evidence.[117] D-0016's statement on which Abd-Al-Rahman now relies was not in evidence at trial.[118] Nor could D-0016's evidence dispose of the legal question before the Chamber under article 22(1), concerning the objective foreseeability of the risk of prosecution for the conduct charged as persecution under counts 11, 21, and 31.[119]

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[112] *See e.g.* Ambos (2022), p. 148 (mn. 5: "The […] crimes contained in Article 7 and their definitions largely accord with the traditional conception of [crimes against humanity] under [customary international law]"). *See further above* fn. 44. *See also* Powderly and Hayes, pp. 224 (mn. 144: noting that the adoption of the Rome Statute definition of persecution by the ILC for the purpose of its draft articles on crimes against humanity, forming the basis for the subsequent treaty negotiations, "lends weight to the assertion that it is reflective of [customary international law]"), 227-228 (mn. 154).

[113] *See* Brady and Liss, p. 499 (recalling that, in its 1996 report on its Draft Code, the ILC had noted that the scope of persecution as a crime against humanity was "broad, and deeply informed by the human rights protections codified in, *inter alia*, the UN Charter and the ICCPR's provision on non-discrimination").

[114] *See e.g.* UDHR, art. 2 (prohibiting "distinction of any kind," including "race, colour, sex, language, religion, political or other opinion"); ICCPR, arts. 3 (guaranteeing the "equal right of men and women" to all civil and political rights), 24 (guaranteeing the right of children to such measures of protection as required by their status, "without any discrimination" including "as to race, colour, sex, language, religion, […]"), 26 (requiring that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, […]"); CEDAW, art. 2 (condemning discrimination against women in all forms); CRC, art. 2(1) (prohibiting "discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, […]"). *See further* Brady and Liss, pp. 551-552 (including fn. 499); Oosterveld, pp. 50-51, 60-62; Steains, pp. 357-361, 370-371 (including fn. 41); Widney Brown and Grenfell (text accompanying fns. 65-72); Martín. *See also* HRC General Comment 28, paras. 8-9 (noting the particular vulnerability of women in times of conflict, but also emphasising the "equal right of men and women to the enjoyment of all civil and political rights" and that "nothing in the Covenant may be interpreted as implying […] any limitation[] not covered by the Covenant"), 30 (noting that "[d]iscrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, […]"); GCIV, arts. 3(1) (prohibiting "any adverse distinction founded on race, colour, religion or faith, sex, […]"), 13, 27(3); 2025 Commentary to GCIV, Introduction, paras. 44-50; 2025 Commentary to GCIV, Article 3, paras. 635-637, 639-644, 651-655.

[115] *Contra* Appeal, para. 24.

[116] *See* Sentencing Judgment, paras. 213-214, 271, 276 (considering the intersection of discriminatory grounds in the gravity of the three persecution convictions under counts 11, 21, and 31).

[117] *Contra* Appeal, paras. 23-24 (citing DAR-D31-0000363, paras. 63-65).

[118] *See above* para. 33 (fn. 91).

[119] *See above* para. 33.

## I.D. The Chamber did not err in rejecting Abd-Al-Rahman's claim of a national law duty to follow unlawful orders (Ground 4)

42. The Chamber correctly and reasonably rejected Abd-Al-Rahman's claim that "disobedience to orders during operations, be they lawful or not, could result in summary execution without trial" due to the "absence of a definition of 'lawful order' in the law applicable in Sudan in 2003-2004".[120] In particular, with the assistance of the evidence of D-0016, the Chamber found that the 1986 People's Armed Forces Act required obedience to lawful orders, and that disobedience to a lawful order was punishable by a term of imprisonment of ten years or less. It found no relevant inconsistency in D-0016's evidence of the practical application of these rules. Abd-Al-Rahman shows no error in the Chamber's approach.[121] Notably, the Chamber did not "disregard" evidence occasioning any error of law or procedure, nor was it unreasonable in assessing the evidence presented to it. In any event, Abd-Al-Rahman fails to show that his claimed error, even if established, would materially affect the Judgment. Ground 4 should be dismissed.

### *I.D.1. The Chamber did not err in law or procedure by "disregarding" evidence*

43. Under article 74(5) of the Statute, a Chamber need not mention every item of evidence or argument of the parties, but need only identify with "sufficient clarity" the basis of its decision.[122] It is generally entitled to the presumption that it has considered and evaluated all the evidence before it.[123] The Chamber specifically acknowledged that—while it had carried out a "holistic assessment of all evidence"—it did "not refer to its assessment of each and every submitted item of evidence in the present judgment".[124]

44. Abd-Al-Rahman fails to show that the Chamber breached its article 74(5) duty by "disregarding" evidence which it should have addressed.[125] He refers to four passages of the testimony of D-0016,[126] three passages of the testimony of two other witnesses (P-0954 and P-0883),[127] and two documents: the 2007 Armed Forces Act, and the 1986 People's Armed Forces

[120] *See* Judgment, paras. 42-45. *See also* Appeal, paras. 25-26.
[121] *Contra* Appeal, paras. 25-34.
[122] *See e.g. Bemba* AJ, para. 53. *See also* para. 54 ("a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning […] when determining whether there was a breach of article 74(5) of the Statute, the Appeals Chamber will assess whether there was reasoning in support of a given factual finding; if particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed").
[123] *See e.g. Bemba et al.* AJ, para. 105.
[124] *See* Judgment, paras. 162-164.
[125] *Contra* Appeal, paras. 28-33.
[126] *See* Appeal, paras. 29 (fns. 63-64: referring to T-130-Conf, pp. 79, 82; T-131-Conf, pp. 20-21), 32 (fn. 72: referring to T-131-Conf, p. 5).
[127] *See* Appeal, para. 32 (fns. 68, 70: referring to DAR-OTP-0221-0571-R01, para. 43; T-073, pp. 15-16, 19).

Act.[128] He also refers to four paragraphs of his closing brief at trial.[129] Yet of these materials, the Chamber specifically cited all the identified paragraphs of Abd-Al-Rahman's closing brief, referred extensively to one of the documents, and cited some of the same transcript pages of D-0016's evidence.[130] Abd-Al-Rahman's claim should therefore be summarily dismissed.

45. For the material which was not expressly cited in paragraphs 42 to 45 of the Judgment, Abd-Al-Rahman fails to show that this evidence was of such importance that the Chamber could not reasonably have omitted reference to it within the context of its reasoning, and bearing in mind the limited relevance of these issues.[131] Rather, Abd-Al-Rahman merely disagrees with the Chamber's assessment of this evidence, and fails to show that the Chamber "abused its discretion by disregarding the entire body of relevant, credible and reliable evidence relied upon by the Defence in its submissions".[132]

### *I.D.2. The Chamber was not unreasonable in appreciating the evidence*

46. Abd-Al-Rahman fails to show that the Chamber was unreasonable in assessing the evidence concerning the alleged absence of any distinction in Sudanese national law between a "lawful" and "unlawful" order.[133] While Abd-Al-Rahman expresses his own preferred interpretation of the evidence, the Chamber reasonably relied on the evidence of D-0016 to help interpret the Sudanese national legislation before it, both as it existed in principle and as it applied in practice.[134] In this regard, considered as a whole, the thrust of D-0016's testimony was clearly not as Abd-Al-Rahman contends.[135] His attempts to cherry pick D-0016's evidence to support his preferred outcome show nothing unreasonable in the Chamber's approach.

47. Likewise, Abd-Al-Rahman shows nothing unreasonable in the Chamber's reliance on article 60 of the 1986 People's Armed Forces Act, which only permits punishment for "failure

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[128] *See* Appeal, paras. 29 (fns. 63-64: referring to DAR-D31-0003-0074 at 0077; DAR-OTP-00005984 (ENG DAR-OTP-00006136, arts. 4, 28), 31 (fn. 67: referring to DAR-OTP-00005984 (ENG DAR-OTP-00006136, art. 48((c)).
[129] *See* Appeal, para. 29 (fns. 63-64, 67: referring to Defence Final Brief, para. 261), 31 (fn. 67: referring to Defence Final Brief, para. 261), 32 (fns. 70, 73: referring to Defence Final Brief, paras. 258-259, 261, 808).
[130] *See e.g.* Judgment, paras. 42-44 (fns. 64, 65-72: referring *inter alia* to Defence Final Brief, paras. 258-259, 261, 808; T-130-Conf, pp. 79, 82; T-131-Conf, p. 5; DAR-D31-0003-0074 at 0077; DAR-OTP-00005984 (ENG DAR-OTP-00006136, art. 28).
[131] *See further below* paras. 48-50.
[132] *Contra* Appeal, para. 33.
[133] *Contra* Appeal, paras. 29-33.
[134] *See* Judgment, paras. 42-44.
[135] *Contra* Appeal, para. 29 (referring to the question "whether a legal determination of 'lawful order' was in force in 2003-2004", and stating, "[i]n light of the evidence, the only possible answer to this question was 'no'"). *Compare e.g.* Judgment, para. 42 (relying on D-0016 for the view that "Article 28 and 60 of the 1986 People's Armed Forces Act 'stipulated indirectly the definition of lawful order'" and "clearly indicated that 'the order coming from any leadership has to be lawful' and 'no unlawful order shall be executed'", citing T-130-Conf, pp. 79, 81-83, 86; T-131-Conf, pp. 4-8)

to obey orders" of imprisonment "for not more than ten years", rather than article 48(c).[136] While this latter provision does appear to allow for the imposition of "death or some other penalty", Abd-Al-Rahman's interpretation of the *actus reus* is not plainly correct.[137] Counsel for Abd-Al-Rahman requested D-0016 *not* to explain "[REDACTED]" when [REDACTED].[138] In any event, the Chamber reasonably relied not only on D-0016's evidence that, in practice, disobeying an order was usually punished by lesser means, but also on the Sudanese constitutional provision restricting application of the death penalty to the "most serious crimes".[139] In this context, Abd-Al-Rahman shows no error in the Chamber's decision not to refer to the passing observations of P-0954 or P-0883.[140]

### *I.D.3. Abd-Al-Rahman shows no error materially affecting the Judgment*

48. In any event, Abd-Al-Rahman fails to show that any error in the Chamber's assessment of the existence of a concept of "lawful order" materially affected the Judgment.[141] First, while the Chamber addressed this Defence submission out of an abundance of caution, it did not need to do so to determine that the charges satisfied the requirements of article 22(1). As explained above, the key question was whether the risk of prosecution for the conduct relevant to the charges was objectively foreseeable to a reasonable person.[142] The Chamber found that it was, based on Sudanese national law. It could equally have reached this conclusion based on applicable customary international law.[143]

49. In this context, even if Sudanese law recognised no distinction between a "lawful" and "unlawful" order, this could not have impacted the Chamber's article 22(1) assessment because "even a private soldier [cannot] show total, blind obedience to orders which flagrantly infringed internationally recognised human rights, in particular the right to life". As such, international human rights courts have refused to accept that even a "State practice of tolerating or encouraging certain acts that have been deemed criminal under national or international [law] and the sense of impunity which such a practice instils in the perpetrators of such acts" may

[136] *Contra* Appeal, paras. 31, 33. *See* Judgment, paras. 43-44.
[137] *See* DAR-OTP-00005984 (ENG DAR-OTP-00006136, art. 48(c)): "[a]ny refusal to obey orders or any behaviour deliberately intended to imperil any headquarters, unit, position or military property"). It is unclear whether the "refusal to obey orders" must *likewise* be "deliberately intended to imperil any headquarters, unit, position or military property", especially given that article 60—addressed in the Judgment—provides a general offence of "failure to obey orders". Furthermore, "enemy" is defined (p. 6) as including "external enemies, outlaw rebels and armed gangs in a state of readiness for combat operations"—whereas the alleged orders in this case concerned the commission of crimes against civilians and fighters *hors de combat*. *See also* Judgment, para. 39.
[138] *See* T-131-Conf, p. 5:3-21 ([REDACTED]).
[139] Judgment, para. 44
[140] *Contra* Appeal, para. 32.
[141] *Contra* Appeal, para. 34.
[142] *See above e.g.* paras. 7, 9, 12.
[143] *See above e.g.* paras. 9, 12, 20.

"prevent their being brought to justice and punished", on the basis of the principle of legality.[144]

50. Second, Abd-Al-Rahman shows no impact on his claimed defence of mistake of law under article 32. For the reasons addressed below, this defence was inapposite since none of the charged crimes called for a legal appreciation.[145] Likewise, Abd-Al-Rahman expressly and repeatedly disclaimed at trial that he relied on the defence of superior orders under article 33.[146] In any event, nothing in his arguments under Ground 4 or any other ground of appeal shows that he would satisfy all of the applicable conditions in that respect.

## I.E. The Chamber adequately considered Abd-Al-Rahman's personal circumstances (Ground 5)

51. The Chamber adequately considered Abd-Al-Rahman's personal circumstances when finding that "a reasonable person in the Accused's position could have expected, at the time of his conduct, to find himself faced with the crimes charged."[147] Abd-Al-Rahman shows no error in the Chamber's approach.[148] The Chamber did not "disregard" evidence occasioning an error of law or procedure, and properly considered that it was immaterial whether Abd-Al-Rahman had received IHL training. Likewise, it did not err in its approach to the "*Allahu Akbar*" and "*amsah aksah*" mottos, the "*ghanima*" doctrine, or the significance of the speech by Minister Harun. In any event, Abd-Al-Rahman fails to show that any of these claimed errors, even if established, would materially affect the Judgment. Ground 5 should be dismissed.

### *I.E.1. The Chamber did not err in law or procedure by "disregarding" evidence*

52. Despite claiming that the Chamber breached its duty under article 74(5), Abd-Al-Rahman fails to identify with sufficient particularity any evidence which he claims was disregarded.[149] Rather, he merely refers to his unsuccessful trial submissions,[150] and disagrees with the Chamber's view, for example, that it was immaterial whether Abd-Al-Rahman had received any IHL training.[151] His undeveloped argument cannot properly be addressed in response, and should be summarily dismissed.

### *I.E.2. The Chamber properly considered that it was immaterial whether Abd-Al-Rahman had received IHL training*

53. The Chamber addressed Abd-Al-Rahman's submission that he "never received any

[144] *Vasiliauskas v. Lithuania*, para. 158 (citing *K-H.W. v. Germany*, para. 75; *Streletz, Kessler, and Krenz v. Germany*, paras. 74, 77-79).
[145] *See below* paras. 323, 326-344.
[146] *See e.g.* Defence Closing Statement, p. 94:5-98:4.
[147] *See* Judgment, paras. 52-59. *See also* Appeal, para. 35.
[148] *Contra* Appeal, paras. 35-45.
[149] *Contra* Appeal, para. 38. Concerning this issue generally, and the high threshold, *see above* para. 43.
[150] *See e.g.* Appeal, paras. 36-37.
[151] *See e.g.* Appeal, para. 38.

training in [IHL]", but correctly recalled that article 22(1) is not concerned with the subjective knowledge of the accused person. It therefore considered that "it is immaterial to the Chamber's assessment whether [Abd-Al-Rahman] received any training in [IHL]."[152] Abd-Al-Rahman incorrectly claims that "[t]his finding amounts to an error of law and of fact", based on the Chamber's own reliance "on principles of [IHL]" throughout the Judgment which he considers to be "proof of the relevance of the Appellant's awareness of these […] principles".[153] This faulty logic confuses two different issues, and shows no error.

54. First, the Chamber correctly stated that article 22(1) requires only an objective, and not a subjective assessment.[154] As such, the Chamber properly concluded that whether or not Abd-Al-Rahman received any IHL training was "*immaterial*". It formed no view whether or not he had received such training, or was familiar with IHL principles, and was not required to do so.

55. Second, the Chamber's article 22(1) analysis was entirely distinct from its substantive analysis—addressed in the remainder of the Judgment—whether the charges against Abd-Al-Rahman had been proved. This is where the Chamber's own analysis was (correctly) informed by IHL principles. Yet even so, none of the charged crimes necessarily required Abd-Al-Rahman to have an understanding of IHL as such, provided that he had the required knowledge of the relevant factual circumstances.[155] There was no inconsistency between the Chamber's findings on these matters and its approach to article 22(1), nor could there be.

### *I.E.3. The Chamber did not err in its consideration of the "Allahu Akbar" and "amsah aksah" mottos, the "ghanima" doctrine, or Harun's speech*

56. In its article 22(1) assessment, the Chamber noted the Defence submission on the use of the phrase "*Allahu Akbar*", and the submission that "Minister Harun 'invited'" GoS Forces and the *Janjaweed* "to resort to the concept of *hiraba* against the Fur people in Darfur". Yet it concluded 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."[156] While Abd-Al-Rahman argues that the Chamber erred by not reaching more specific conclusions on these issues, he shows no error.[157] A Chamber need not mention every item of evidence or argument, provided the basis of its decision is sufficiently clear.[158]

57. In particular, Abd-Al-Rahman shows no inconsistency and nothing unreasonable in the

[152] Judgment, para. 57.
[153] *Contra* Appeal, para. 38.
[154] *See above e.g.* para. 7.
[155] *See below e.g.* paras. 342-343.
[156] *See* Judgment, paras. 58-59.
[157] *Contra* Appeal, paras. 39-44.
[158] *See above* para. 43.

Chamber's analysis for the purpose of article 22(1), based on its wider understanding of the meaning of the phrases "*Allahu Akbar*" and "*amsah aksah*".[159] While these phrases may suggest that criminal perpetrators—GoS Forces and the *Janjaweed*—had the intent to carry out violent acts amounting to crimes, this is not inconsistent with the conclusion that a reasonable person would nonetheless have anticipated the risk of criminal prosecution for such conduct.

58. Likewise, Abd-Al-Rahman fails to show that the Chamber was unreasonable in finding that Harun had no authority to declare Fur property as "*ghanima*" (that is, property which could be seized as war booty), or that any such declaration would have created a positive legal obligation or provided a justification for the commission of the acts constituting the crimes charged."[160] While Abd-Al-Rahman asserts that "the private appropriation of *Ghanima* only became a crime as of 2007", he does not address or show anything unreasonable in the Chamber's reliance on D-0016's evidence that "'*ghanima* does not apply unless the armed forces attack an enemy camp'", or the fact that it was already a crime under article 52(b) of the 1986 People's Armed Forces Act to "'attack[] any house or other place in order to plunder, damage or destroy any crops, gardens or any other such property', and that such acts would also have constituted 'armed robbery (*Hiraba*)' under the 1991 Criminal Act."[161]

59. Abd-Al-Rahman's assertion that no "person with the Appellant's level of education and military background could have questioned the authority" of Harun "to transmit instructions on the conduct of the counterinsurgency" merely disagrees with the Chamber's overall view of the objective foreseeability test required by article 22(1).[162] Such a mere disagreement can show no error. Nor is this undermined by the Chamber's view expressed elsewhere in the Judgment that Harun's speech called for the commission of crimes.[163]

### *I.E.4. Abd-Al-Rahman shows no error materially affecting the Judgment*

60. In any event, Abd-Al-Rahman fails to show that any error in the Chamber's assessment of his personal circumstances materially affected the findings in the Judgment concerning the compatibility of the charges with article 22(1).[164] It cannot do so, since article 22(1) is an *objective* assessment.[165] While the personal circumstances of the accused person may have some relevance on occasion in identifying the perspective of the "reasonable person",[166] Abd-

[159] *See* Appeal, paras. 39-40.
[160] Judgment, para. 41. *See also* paras. 39-40. *Contra* Appeal, para. 41.
[161] Judgment, para. 40. *Contra* Appeal, para. 41.
[162] *Contra* Appeal, para. 41.
[163] *Contra* Appeal, paras. 42-44. Concerning Abd-Al-Rahman's further argument that he would have taken Harun's speech as an order with which he had to comply on pain of death, *see above* paras. 42-50.
[164] *Contra* Appeal, para. 45.
[165] *See e.g. above* para. 7.
[166] *See e.g. above* fn. 21.

Al-Rahman's own actual state of mind—and, equally, that of other persons participating in the crimes around him—remains immaterial.[167]

## II. Abd-Al-Rahman had a fair trial (Part B)

61. The Appeals Chamber should dismiss all grounds in Part B. Abd-Al-Rahman fails to show that the Chamber erred, or that he was occasioned any prejudice or unfairness affecting the reliability of the Judgment.[168] Rather, he repeats submissions that were extensively litigated and properly addressed by the Pre-Trial Chamber and/or Trial Chamber. His claim that issues were not properly resolved merely reflects his own disagreement with the determinations, which he often mischaracterises, apparently seeking to maintain "an illusion of unfairness."[169]

### II.A. The Court's investigations in Sudan and [REDACTED] conformed with the Statute, including article 4(2) (Grounds 6-7)

62. In responding to Grounds 6 and 7,[170] the Prosecution departs from the structure of Abd-Al-Rahman's appeal in two respects. First, it addresses separately Abd-Al-Rahman's allegations concerning the purported deficiencies in the investigations in Sudan and [REDACTED], rather than treating them together. Different legal bases govern the cooperation regimes with each State, making separate analysis more appropriate.[171] The investigative record also differs, with more measures undertaken in Sudan than in [REDACTED], which makes any potential impact of the alleged errors different. Second, instead of following Abd-Al-Rahman's sequence of nine alleged errors of law, the Prosecution groups them into three categories.[172]

63. In these grounds, Abd-Al-Rahman repeats submissions that were extensively litigated, and correctly rejected by, the Pre-Trial and Trial Chambers ("the Chambers").[173] He essentially argues that the Court's cooperation regime does not conform with the Statute because the cooperation agreements with Sudan and [REDACTED] lacked an explicit reference to article

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[167] *See e.g. above* para. 49.
[168] *Contra* Appeal, paras. 46-141.
[169] Judgment, para. 64.
[170] Appeal, paras. 46-59.
[171] Sudan is subject to the cooperation regime applicable to States Parties by virtue of the UNSC referral under Resolution 1593, whereas [REDACTED]: *see below* paras. 64, 66-70, 89-90.
[172] (i) The Chambers did not err in finding that an agreement pursuant to article 4(2) was not required for the Court to operate on in Sudan and that no specific reference to article 4(2) was required in the cooperation agreement with [REDACTED] (*see below* paras. 66-80, 90-91); (ii) the Chambers did not err in finding that, in any event, agreements pursuant to article 4(2) existed (*see below* paras. 81-85, 90-91); and (iii) even if the Chambers erred, any error did not affect the fairness or reliability of the proceedings or materially impacted the Judgment (*see below* paras. 86-88, 90-91).
[173] Procedural Challenges Decision, *especially* paras. 38-40, 45; Confirmation Decision, paras. 17-18 (rejecting the request for leave to appeal the Procedural Challenges Decision); Sudan Cooperation Decision, *especially* paras. 16-18, 19-27, 38-40; T-020, pp. 83:25-86:25 (rejecting the request for leave to appeal the Sudan Cooperation Decision); Sudan Cooperation Reconsideration Decision , *especially* paras. 15-17, 18, 22-23); Rule 68(3) Decision, *especially* paras. 9-17; Rule 68(3) ALA Decision, *especially* paras. 11-13. *See* Judgment, paras. 68-71.

4(2). He claims that the entire proceedings were unreliable and exposed witnesses to significant risk. These claims, speculative at trial, are now unsubstantiated on appeal. They warrant summary dismissal. The investigations are complete, evidence has been collected, and witnesses have appeared before the Court. Abd-Al-Rahman has not shown that any evidence was affected by the alleged deficiencies, let alone that the proceedings as a whole were compromised.

### *II.A.1. The Court's investigations in Sudan conformed with the Statute*

64. Grounds 6-7, concerning the alleged deficiencies in the cooperation regime with Sudan, should be dismissed *in limine* because they concern an issue already conclusively determined by the Appeals Chamber.[174] The Appeals Chamber found that Resolution 1593 obliges Sudan *to fully cooperate* with the Court, and that the cooperation regime for States Parties applies to Sudan's cooperation with the Court.[175] This finding, made in the *Al-Bashir* case, applies equally to this case, as both arise from the situation in Darfur, Sudan, referred to the Court by Resolution 1593.[176] In the absence of "convincing reasons" to depart from this settled interpretation, the Appeals Chamber should not revisit the issue.[177] Given that the cooperation regime for States Parties applied to Sudan, article 4(2), which governs special agreements with non-States Parties, is inapplicable. Accordingly, the Chamber could not have erred in law by not requiring an agreement under that provision.[178]

65. Abd-Al-Rahman does not engage with the Appeals Chamber's interpretation of the cooperation regime applicable to Sudan. Rather, he completely disregards it. He: (i) repeats that the Chambers erred in law in finding that a special agreement under article 4(2) was not a pre-condition for the Court to operate in Sudan;[179] and (ii) alleges errors of law in the Chambers' findings that, in any event, a special agreement pursuant to article 4(2) existed in this case.[180] In both respects, Abd-Al-Rahman shows no error.[181] Even if the Chambers had erred—which they did not—any such error would have no material impact on the Judgment, or on the fairness and/or reliability of the proceedings.[182]

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[174] *Contra* Appeal, paras. 46-59.
[175] *Al-Bashir* Jordan Referral AD, paras. 140-142. The Appeals Chamber further explained that "this does not make Sudan a State Party to the Rome Statute, with all the attendant obligations and powers", but "simply means that the applicable cooperation regime is that for States Parties, as the one for States not parties to the Rome Statute is clearly inappropriate and a 'third regime' does not exist."
[176] *See* Jurisdiction AJ, paras. 78-80.
[177] *See Gbagbo* Victims Participation Decision, para. 14, *Said* Interim Release AD, para. 45.
[178] *Contra* Appeal, paras. 48-54, 57.
[179] Appeal, paras. 48 (issues (i)-(iv)), 49, 50-54, 57.
[180] Appeal, paras. 48 (issues (v)-(vii), 49, 55, 57.
[181] *See below* para. 71.
[182] *Contra* Appeal, paras. 48 (issues (viii)-(ix)), 56-59.

*II.A.1.a. The Chambers correctly found that a special agreement under article 4(2) was not required for the Court to operate in Sudan*

66. The Chambers correctly rejected Abd-Al-Rahman's claim—repeated again on appeal—that a special agreement under article 4(2) was required to conduct investigations in Sudan and to collect and preserve evidence.[183] As the Appeals Chamber held, pursuant to Resolution 1593, Sudan: (i) is obliged to fully cooperate with the Court, and (ii) the cooperation regime for States Parties under Part 9 of the Statute applies to Sudan's cooperation with the Court.[184] Since Abd-Al-Rahman disregards the Appeals Chamber's determination, conclusively settling the matter, his arguments should be summarily dismissed.

67. Even if the Chambers were not bound by the Appeal's Chamber's determination, their reliance on the Appeals Chamber's reasoning to dismiss Abd-Al-Rahman's claim were correct. Resolution 1593 triggered the Court's exercise of jurisdiction in this case.[185] Paragraph 2 decides that "Sudan and all other parties to the conflict in Darfur, *shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor* pursuant to this resolution".[186]

68. The Appeals Chamber observed that the wording of the Resolution imposes on Sudan a legally binding obligation to "fully cooperate", which is a stronger obligation than that addressed to States not party to the Statute, who are only "urged" to cooperate fully. It further observed that the language of Resolution 1593 reflects article 86, which provides that States Parties shall cooperate fully with the Court.[187] The Appeals Chamber concluded that the cooperation regime for States Parties applies to Sudan, rather than article 87(5) which governs situations where a non-binding duty to cooperate exists.[188]

69. The Defence argued before both Chambers that there was no legal basis for the Court's activities in Sudan because the Court allegedly never concluded a special agreement pursuant to article 4(2). The Pre-Trial Chamber correctly held that the Court's jurisprudence, including the above ruling by the Appeals Chamber, establishes that a UNSC referral renders Part 9 of the Statute applicable to the concerned non-State Party. Accordingly, it held that a special agreement under article 4(2) is not a precondition for the Court to operate on the territory of a non-State Party following such a referral.[189] The Trial Chamber correctly made a similar finding

[183] *Contra* Appeal, para. 51.
[184] *Al-Bashir* Jordan Referral AD, paras. 137-149. *See* Sudan Cooperation Decision, paras. 17-18.
[185] Jurisdiction AJ, paras. 45, 78-80.
[186] UNSC Resolution 1593, para. (2) (emphasis added).
[187] *Al-Bashir* Jordan Referral AD, paras. 140-141.
[188] *Al-Bashir* Jordan Referral AD, paras. 140-141.
[189] Procedural Challenges Decision, para. 38.

based on the Appeals Chamber's decision and found no reason to depart from it.[190]

70. Abd-Al-Rahman disregards this interpretation and advances no reasons—because none exist—to justify departing from it. Grounds 6 and 7 should therefore be dismissed *in limine*. In any event, Abd-Al-Rahman's arguments, addressed in the following section, fail to demonstrate that the Chambers erred in law in finding that a special agreement pursuant to article 4(2) was not required for the Court to operate in Sudan.

*II.A.1.b. Abd-Al-Rahman's arguments do not establish an error of law*

71. Abd-Al-Rahman does not identify an error of law in the Chambers' reasoning. Instead, he disagrees with the Chambers' decisions, and mischaracterises the Prosecution's and the Registry's submissions, the academic commentaries upon which he relies, and the Chambers' findings.[191] His arguments should be rejected for the following reasons.

72. First, Abd-Al-Rahman mischaracterises the Prosecution's submission by claiming that it "conceded the legal impossibility of conducting investigative acts" on a territory of a non-State Party with which the Court has not entered into a special agreement.[192] He cites the Prosecution's submissions relating to a witness [REDACTED], where the impossibility of interviewing them was not due to an absence of a special agreement but because "[REDACTED]".[193]

73. Abd-Al-Rahman also mischaracterises the Prosecution's submissions with respect to the 14 February 2021 Memorandum of Understanding ("MoU").[194] The Prosecution stated only that the MoU allowed it to access the territory of Sudan to conduct investigative activities. It never accepted, explicitly or implicitly, that "the absence of a special agreement" was "a legal bar to its investigation in Sudan".[195] Nor did the Prosecution ever accept that the MoU was a special agreement under article 4(2). Moreover, Abd-Al-Rahman's repeated argument, rejected by the Pre-Trial Chamber, regarding an alleged breach of equality of arms and fairness as a result of this MoU shows no error.[196] The Pre-Trial Chamber correctly found that: (i) the principle of equality of arms "does not require the creation of a situation of absolute equality" but only that "each party has a reasonable opportunity to adequately prepare for and present its case, without being placed at a substantial disadvantage vis-à-vis the opposing party"; (ii)

[190] Sudan Cooperation Decision, paras. 17-18; Rule 68(3) Decision, para. 14.
[191] *Contra* Appeal, paras. 46-59.
[192] *Contra* Appeal, para. 49 (citing Prosecution Charges Amendment Request, para. 44(a)).
[193] Prosecution Charges Amendment Request, para. 44(a).
[194] *Contra* Appeal, para. 50 (citing Prosecution Charges Amendment Request, para. 38). *See* [REDACTED] ("MoU").
[195] Prosecution Charges Amendment Request, para. 38. *Contra* Appeal, para. 50.
[196] *Contra* Appeal, para. 50. *See below* paras. 110, 169-170.

"[t]here is no indication that the MoU permitted the Prosecutor to engage in investigatory activities that the Defence was barred from"; and (iii) the difference "in the formal legal basis" for conducting investigatory activities between the Prosecution and the Defence is "inconsequential".[197]

74. Second, Abd-Al-Rahman is inaccurate in claiming that the Registry "said nothing" to contradict his submissions that a special agreement under article 4(2) was required before conducting activities and investigations in Sudan.[198] The Registry, however, said the contrary, observing that the Court has a "legal mandate to operate in Sudan based on UNSC Resolution 1593",[199] and that even if Sudan has not signed the APIC "or any cooperation agreement with the Court, the observance of States' cooperation obligations, authorisation to its missions, provisions concerning privileges and immunities or any other subjects in their respective territories are secured by the ICC *via* an exchange of *notes verbales*."[200]

75. Third, Abd-Al-Rahman mischaracterises the academic commentaries he cites, which do state that a special agreement under article 4(2) is required. At most, they suggest that a State's consent is required before the Court is authorised to operate on the State's territory.[201]

76. Fourth, Abd-Al-Rahman shows no error simply by repeating his claim that proceeding without a special agreement violates the principle *pacta tertiis nec nocent nec prosunt*.[202] Sudan is a Member State of the UN and, under article 25 of the UN Charter, is obliged to accept and carry out decisions of the UNSC. As noted, Resolution 1593, adopted under Chapter VII, created a legally binding obligation on Sudan to 'fully cooperate' with the Court.[203]

77. Fifth, Abd-Al-Rahman mischaracterises the ILOAT decision, which is not binding, by arguing that it condemned the Court for deploying staff to Libyan territory without a special

[197] Procedural Challenges Decision, para. 45.
[198] Appeal, para. 51.
[199] Procedural Challenges Decision, para. 34 (citing Registry Article 4(2) Observation, paras. 6-12).
[200] Procedural Challenges Decision, para. 34 (citing Registry Article 4(2) Observation, para. 14).
[201] *Contra* Appeal, para. 51 (citing Schabas (2010), pp. 97-98; Rückert (2008), pp. 125-126; Cahin, pp. 506, 512). Concerning UNSC Resolution 1593, Schabas merely considered that it did not authorise the Court to operate in Sudan without Sudan's consent, but did not limit such consent to a special agreement under article 4(2). The other cited commentators did not address the cooperation regime following a UNSC referral. *But see also* Rückert (2022) (mn. 12: "[UNSC] decisions referring situations to the ICC contained an obligation of the territorial State concerned to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. Since cooperation includes allowing for the exercise of functions and powers of the Court on one's own territory, the binding [UNSC] decisions in these cases legally also replaced the consent requirement with regard to cooperation"); Rastan, p. 442 ("In the case of a [UNSC] referral, the Chapter VII resolution directing a state to co-operate with the ICC would form the relevant 'appropriate basis' for the Court to issue its requests—that is, the conclusion of an ad hoc agreement or arrangement with the non-party state would not be a prerequisite").
[202] *Contra* Appeal, para. 51.
[203] *See* *Al-Bashir* Jordan Referral AD , para. 140.

agreement under article 4(2).[204] In fact, the ILOAT found that the complainant's experience in Libya "was a result of the Court's failure to properly prepare for the mission, specifically, its failure to: (a) establish a diplomatic basis by ensuring that a Memorandum of Understanding was established and/or *Notes Verbales* were exchanged with the Libyan authorities prior to the mission's initiation […]".[205] In the present case, the Prosecution signed an MoU and exchanged *Notes Verbales* with the competent authorities.[206] These measures would have been sufficient according to the ILOAT decision, even without an article 4(2) agreement.

78. Sixth, Abd-Al-Rahman mischaracterises the Pre-Trial Chamber's decision, suggesting that it erroneously treated the Juba Peace Agreement as substituting for a special agreement under article 4(2).[207] But the Pre-Trial Chamber did not suggest this. Rather, it referred to it solely to address and reject the Defence concerns about the impact on the safety of the Defence team and witnesses of the alleged Sudanese criminalisation of cooperation with the Court.[208] The Juba Peace Agreement, a legal document referred to in the cooperation agreement signed with Sudan,[209] need not have been formally introduced into evidence for the Pre-Trial Chamber to rely on it. In any event, it was only one factor relied upon to address the Defence concern.[210]

79. Seventh, Abd-Al-Rahman mischaracterises the Trial Chamber's decision by claiming that it did not consider the merits of the Defence's arguments regarding the need for a special agreement "on the ground that the matter was within the purview of the Registry, which had confirmed that arrangements were in place."[211] The Trial Chamber, however, rejected the Defence's argument not because the matter fell within the purview of the Registry, but because the situation in Darfur had been referred to the Court by UNSC Resolution 1593, which obliged Sudan to cooperate with the Court without the need for any special agreement. The Trial Chamber correctly considered the Registry's observations. Nothing in the Chamber's decision suggests that the Chamber considered itself bound by the Registry's input.[212]

80. Finally, Abd-Al-Rahman's argument alleging an error based on the Trial Chamber's

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[204] *Contra* Appeal, para. 51.
[205] Judgment No. 4003, para. 16 (page 2 cited by Abd-Al-Rahman relates to the IOM findings).
[206] *See above* paras. 73-74. *See also below* fn. 231.
[207] *Contra* Appeal, para. 52.
[208] Procedural Challenges Decision, para. 40 (the legal basis for the Court's actions in Darfur, as provided by the UNSC referral, "makes it *per se* unnecessary for the Chamber to address the Defence's concern"). Nevertheless, the Pre-Trial Chamber observed that the Defence's concern overlooks article 24 of the Juba Peace Agreement.
[209] Cooperation Agreement, p. 2. *See further below* paras. 81-85.
[210] *See e.g.* *Bikindi* Additional Evidence AD, para. 19. *See* Statute, art. 69(3)-(4). The Juba Peace Agreement is not "evidence necessary for the determination of the truth". It may however be considered a fact of common knowledge of which the Chamber could have taken judicial notice. *Cf.* *Bemba et al*. Judicial Notice AD, para. 8
[211] Appeal, para. 53.
[212] Rule 68(3) Decision, paras. 13-14.

reliance on article 87(5) is unclear.[213] In any event, the Chamber correctly noted that article 87(5) allows the Court to enter into *ad-hoc* arrangements or agreements with non-State Parties and therefore to act on their territory on that basis.[214] Nothing in the Chamber's observation supports Abd-Al-Rahman's claim that a special agreement under article 4(2) was a precondition for the Court to operate in Sudan, or that Sudan was not required to comply with the Court's orders in the absence of an agreement under article 87(5).[215]

*II.A.1.c. The Chambers correctly found that, in any event, a special agreement under article 4(2) was signed*

81. On 10 May 2021, Sudan and the Court signed an "Agreement on Cooperation between the International Criminal Court and Sudan."[216] The Chambers did not find that this agreement "resolved the problem of the absence of a special agreement" since they never accepted that the lack of an agreement was a problem.[217] The Chambers did not accept that such an agreement was required for the Court to operate in Sudan.[218] They merely found that the Cooperation Agreement was, in any event, a special agreement pursuant to article 4(2).[219]

82. In the Judgment, the Trial Chamber reaffirmed that the Cooperation Agreement was a special agreement under article 4(2), finding that its "purpose, scope and contents" clearly qualify it as a "special agreement" regardless whether article 4(2) is mentioned. [220] The Chamber noted, for example, that article 1 of the Cooperation Agreement defined its purpose as establishing "mechanisms to operationalise and enhance cooperation between the Court and Sudan", to further the Court's mandate in the territory of Sudan for "the instant case".[221]

83. Abd-Al-Rahman shows no error in the Trial Chamber's finding, but merely repeats submissions rejected at trial and mischaracterises the Chamber's findings. His claims regarding issues of (i) "internal legality" and (ii) "external legality" should therefore be dismissed.[222]

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[213] Appeal, para. 53. The Prosecution notes, in passing, that Abd-Al-Rahman's argument equating agreements under article 87(5) with agreements under article 4(2) undermines his submission that agreements under article 87(5) cannot be considered agreements under article 4(2) unless they include an express reference to the latter article. *See below* paras. 89-90.
[214] Rule 68(3) Decision, para. 13.
[215] UNSC Resolution 1593 may form the "appropriate basis" under article 87(5) on which the Court may seek Sudan's cooperation and with which Sudan is required to comply. Whether on this view, or the view that Sudan's obligations are to be equated to that of a State Party as the Appeals Chamber held, the outcome is the same: Sudan must comply with the Court even in the absence of an agreement.
[216] Cooperation Agreement.
[217] *Contra* Appeal, para. 49.
[218] *E.g.* Rule 68(3) Decision, paras. 13-15
[219] *Contra* Appeal, para. 49.
[220] Judgment, paras. 68-70 (citing Sudan Cooperation Decision, paras. 22-23; Sudan Cooperation Reconsideration Decision, para. 23).
[221] Judgment, para. 69.
[222] *Contra* Appeal, para. 55.

84. As to the issues of "internal legality", Abd-Al-Rahman reiterates his unsuccessful trial arguments.[223] He asserts, without any supporting authority, that a specific reference to article 4(2) was required for the Cooperation Agreement to qualify as a special agreement.[224] He also repeats his claim, based on regulation 107(1) of the RoC, that only the Presidency could conclude special agreements within the meaning of article 4(2), [REDACTED].[225] In doing so, he ignores the Chamber's explicit finding that the Cooperation Agreement was "[REDACTED]."[226]

85. As to the issues of "external legality", Abd-Al-Rahman also repeats his unsuccessful trial arguments and mischaracterises the Trial Chamber's reasoning. His claim—that the Chamber relied on article 14 of the Relationship Agreement to reject the need for publication or registration under article 102(1) of the UN Charter—mischaracterises the Chamber's decision.[227] While the Chamber did reject his assertion that the Cooperation Agreement was invalid because it was confidential and not-registered, it did so on the basis that article 1(a) of the VCLT limits "international agreements" to those concluded between States, and was therefore inapplicable to agreements concluded by the Court. It further noted that, under article 14 of the Relationship Agreement between the Court and the UN, there is no obligation to register such agreements with the UN Secretariat.[228]

#### *II.A.1.d. Even if the Chambers had erred, any such error would not have affected the reliability and fairness of the proceedings and would not have materially impacted the Judgment*

86. Even if an agreement under article 4(2) had been required, and the Cooperation Agreement was not a special agreement under article 4(2), any such error would have no material impact on the Judgment.[229] This is because, even if the legal framework in place for cooperation with Sudan was considered "insufficient", and the evidence collected was based on arrangements not fully in accordance with the Statute, Abd-Al-Rahman's arguments on the impact of these errors fail to meet the appellate standard.[230] Abd-Al-Rahman does not show that the reliability of any witness statements or other material collected by the Prosecution in

[223] Appeal, para. 55.
[224] Sudan Cooperation Decision, para. 22
[225] Appeal, para. 55
[226] [REDACTED].
[227] Appeal, para. 55 (citing Sudan Cooperation Decision, paras. 24-27.)
[228] Sudan Cooperation Decision, paras. 24-27.
[229] *Contra* Appeal, paras. 56-59.
[230] *See* Statute, art. 81(1). The Appeals Chamber will intervene only if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or that the Judgment was materially affected by the procedural error. *See Ntaganda* AJ, para. 49. *See also Bemba* AJ, para. 60; *Lubanga* AJ, para. 28.

Sudan—whether during the 2006 or 2007 missions,[231] or after the Cooperation Agreement was signed—and introduced at trial, was affected, or that his right to a fair trial was prejudiced.[232]

87. Not every non-conformity with the Statute, particularly if formalistic in nature, constitutes a violation of a fundamental right or automatically renders a fair trial impossible. Abd-Al-Rahman broadly submits that the Court's investigation, collection and preservation of evidence in Sudan violated article 4(2), and this "cast substantial doubt on its reliability and/or made its admission antithetical to and seriously damaged the integrity of the proceedings under Article 69(7)(a) and/or (b) of the Statute."[233] However, he fails to identify a single concrete example of evidence which was compromised as a result of an alleged violation of article 4(2). The instances of interference reported by the Prosecution [REDACTED], and relied upon by the Defence, did not result from any such alleged violation.[234]

88. In addition, although article 69(7) excludes evidence only where a violation casts substantial doubt on the reliability of the evidence or where it damages the integrity of the proceedings, Abd-Al-Rahman appears to argue that these requirements need not be met.[235] He mischaracterises decisions in the *Al Hassan* case,[236] and argues that the central issue is not whether the Defence has shown that the absence of a special agreement affected the reliability of the evidence. To the contrary, on appeal, this is a central issue. Rather than addressing it, Abd-Al-Rahman focuses on irrelevant matters, namely the measures allegedly taken by the Prosecution to remedy the absence of a special agreement under article 4(2).[237]

### *II.A.2. The Court's investigations in [REDACTED] conformed with the Statute*

89. The Trial Chamber correctly found that the evidence collected by the Prosecution in [REDACTED] (a non-State Party at the time), in the absence of an agreement explicitly referring to article 4(2), was admissible.[238]Abd-Al-Rahman shows no error of law, but rather

[231] These missions were carried out with the cooperation of the Sudanese authorities. *See* Prosecution Article 4(2) Response, paras. 6-7.
[232] Abd-Al-Rahman's argument that the Cooperation Agreement could not have cured pre-existing anomalies should be dismissed, as it does not arise from the Chamber's findings: *contra* Appeal, para. 49. Nevertheless. this argument may be taken into account as an implicit acceptance by Abd-Al-Rahman that, if his challenge to the Cooperation Agreement fails, at the very least evidence collected in Sudan after this agreement would have been obtained in accordance with the Statute. The impact of any alleged error would therefore be far more limited than Abd-Al-Rahman presents.
[233] Appeal, para. 59.
[234] Appeal, para. 59 (fns. 198-199). The Prosecution notes that, in footnote 198, Abd-Al-Rahman refers to some of his own submissions that have already been rejected by the Chambers, as well as to two documents classified as confidential and *ex parte*, to which the Prosecution is unable to respond. *See also below* para. 174.
[235] Appeal, para. 58.
[236] *Al Hassan* Rule 68(2)(c) Decision, para. 17; *Al Hassan* Statements Decision, para. 45.
[237] Appeal, para. 58.
[238] *Contra* Appeal, para. 48-49, 56, 58-59. *See* Rule 68(3) Decision, paras. 13-14; Rule 68(3) ALA Decision, paras. 4-5, 11-13.

merely disagrees with the Chamber's finding. His arguments should be rejected.

90. The Trial Chamber based its finding on three conclusions: (i) a cooperation agreement may qualify as an agreement under article 4(2) even without explicit reference to that provision; (ii) the statutory framework permits the Court to enter into *ad hoc* arrangements with non-State Parties under article 87(5); and (iii) [REDACTED].[239] The Chamber further noted that even if, *arguendo*, the legal framework in place for interviews [REDACTED] was deemed 'insufficient', the Defence did not explain how "this could affect the reliability or probative value of [the impugned witnesses' statements] or associated material or how the introduction of [their testimonies] would in any way affect the accused's right to a fair trial."[240]

91. Abd-Al-Rahman repeats his disagreement with the Trial Chamber's conclusions without showing any error in the Chamber's reasoning. His incorrect arguments have already been addressed above.[241] He does not explain why the *ad hoc* arrangements with [REDACTED] are insufficient, nor does he substantiate any alleged impact arising from the alleged non-conformity with the Statute. Abd-Al-Rahman also fails to demonstrate that the reliability or probative value of any evidence collected in [REDACTED] was affected, or that its admission prejudiced his right to a fair trial. Notably, the decision to admit the evidence concerns prior recorded testimony from three witnesses—P-0008, P-0044 and P-0105[242]—collected in [REDACTED]. Accordingly, any alleged deficiency in the cooperation framework would at most affect only those statements, and not the entirety of the evidence as Abd-Al-Rahman seems to suggest.[243]

### II.B. The Chamber correctly rejected the request for a non-disclosure order (Ground 8)

92. Abd-Al-Rahman fails to show that his fair trial rights were violated by the Chamber's rejection of his request for a non-disclosure order. He argues that the Chamber erred legally by rejecting the Defence's request for an order prohibiting the disclosure of the identities of 17 Defence witnesses (who were residing in Sudan or of Sudanese nationality) to [REDACTED].[244] He submits that the alleged errors violated his right to a fair trial.[245]

93. This ground should be dismissed *in limine*. Abd-Al-Rahman shows no legal error in the

[239] Rule 68(3) Decision, paras. 13-14. *See* Rule 68(3) ALA Decision, paras. 4-5, 11-13.
[240] Rule 68(3) Decision, paras. 16-17. *See* Rule 68(3) ALA Decision, paras. 11-12.
[241] *See above* paras. 79-85.
[242] Rule 68(3) Decision, para. 12.
[243] *Contra* Appeal, paras. 56-59.
[244] Defence Non-Disclosure Request, paras. 1-2; Non-Disclosure Decision, paras. 2, 18. The 17 witnesses were [REDACTED].
[245] Appeal, para. 66.

Chamber's findings. Nor does he show that they were so unfair or unreasonable as to amount to an abuse of discretion. He merely disagrees with the findings and repeats his same arguments from trial.[246] He does not submit that the Chamber applied the incorrect law, and fails to articulate how the Chamber purportedly misinterpreted or misapplied the law. Moreover, Abd-Al-Rahman fails to show that the alleged errors had any material impact on his convictions.

#### *II.B.1. The Chamber correctly found that the requested measures were neither necessary nor appropriate*

94. The Chamber correctly found that the requested measures were neither necessary nor appropriate.[247] It appropriately weighed a range of relevant factors, including the broad scope of the requested order, the effectiveness of the protective measures already available to Defence witnesses, the comparable situation between Defence and Prosecution witnesses, and the infeasibility of alternative (less restrictive) protective measures or of alternative investigation means into Defence witnesses.[248] As a matter of fairness, it also considered that no such non-disclosure order was issued in respect of the Prosecution's witnesses.[249]

#### *II.B.2. The Chamber properly found that the requested measures would unduly restrict the Prosecution's exercise of its statutory obligations*

95. Abd-Al-Rahman submits that the Chamber erred in law by finding that the requested non-disclosure order would amount to a blanket prohibition for the Prosecution to conduct investigations of Defence witnesses, render the Prosecution unable to test the Defence's evidence during cross-examination and thereby meet its obligations under article 54(1)(a) to arrive at the truth, and unduly restrict the Prosecution's investigative activities.[250] He asserts that the Chamber made these findings without balancing the investigative needs of the Prosecution against the need to protect Defence witnesses in Sudan.[251]

96. First, the Chamber correctly and reasonably found that the requested measures would unduly restrict the Prosecution's investigative activities in relation to Defence witnesses and therefore its ability to meet its obligation to establish the truth.[252] It noted that the Prosecution's potential enquiries into Defence witnesses "would occasionally require […] the revealing of their identity (but not of their status) to [REDACTED]".[253] In finding that "[n]ot allowing the

[246] *See* Appeal, paras. 62, 64-65; Defence Non-Disclosure Request, paras. 1-2, 9-15, 17; Defence Non-Disclosure Reconsideration Request, paras. 5-8, 12-13.
[247] Non-Disclosure Decision, para. 16.
[248] Non-Disclosure Reconsideration Decision, para. 14; Non-Disclosure Decision, paras. 12-15.
[249] Non-Disclosure Reconsideration Decision, para. 14; Non-Disclosure Decision, para. 14.
[250] Appeal, para. 64. *See* Non-Disclosure Decision, paras. 12, 14.
[251] Appeal, para. 64.
[252] *See* Non-Disclosure Decision, paras. 12, 14. *Contra* Appeal, para. 64.
[253] Non-Disclosure Decision, para. 12.

Prosecution to do so in all instances would unduly restrict its investigative activities", the Chamber considered the broad scope of the requested order, which concerned 17 of the 21 witnesses on the Defence's provisional witness list.[254]

97. Second, the Chamber *did* consider the need to protect Defence witnesses in Sudan.[255] It correctly and reasonably found that the protective measures already in place—the same as those available to Prosecution witnesses—were sufficient to protect Defence witnesses.[256] These included the measures foreseen in the protocol on handling confidential information and contact with witnesses, in-court protective measures, and [REDACTED].[257] The Chamber noted that there was no evidence that these measures had been or would be ineffective for Defence witnesses.[258] As an extra safeguard, the Chamber also gave the Defence the opportunity to request additional measures for individual witnesses on a case-by-case basis, after consultation with VWU, where the Defence could provide good reasons to deviate from the established procedure.[259]

98. Third, the Chamber's decision was fair. As it noted, no such non-disclosure order was issued in respect of the Prosecution's witnesses, and there was no evidence to suggest that all Defence witnesses were at greater risk than Prosecution ones.[260] The Chamber was correct that, in the circumstances, imposing a blanket prohibition on the Prosecution would "unduly impinge[] on the fairness of the proceedings."[261] The Chamber's established procedure allowing the Defence still to make requests for individual witnesses on a case-by-case basis further demonstrates that its decision was fair and that it properly considered its obligation to protect Defence witnesses.[262] Abd-Al-Rahman fails to show any error.

#### *II.B.3. Abd-Al-Rahman speculates about potential inquiries into Defence witnesses*

99. Abd-Al-Rahman submits that the Chamber erred in dismissing his contention that "any investigative activity by the Prosecution in which a witness's identity is disclosed to [REDACTED] could reveal the witness's relationship to the Court."[263] He asserts that [REDACTED], would have been able to conclude that any person about whom the Prosecution

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[254] Non-Disclosure Decision, para. 12. [REDACTED]. *See also below* fn. 274.
[255] *Contra* Appeal, para. 64.
[256] Non-Disclosure Decision, paras. 13-16; Non-Disclosure Reconsideration Decision, paras. 14, 16.
[257] Non-Disclosure Decision, paras. 13-16; Non-Disclosure Reconsideration Decision, paras. 14, 16. *See also* Protocol, paras. 11, 14.
[258] Non-Disclosure Decision, para. 15.
[259] Non-Disclosure Decision, para. 16; Non-Disclosure Reconsideration Decision, para. 22.
[260] Non-Disclosure Decision, para. 14.
[261] Non-Disclosure Decision, para. 14.
[262] Non-Disclosure Decision, para. 16; Non-Disclosure Reconsideration Decision, para. 22.
[263] Appeal, para. 65. *See* Non-Disclosure Decision, para. 13.

made enquiries was a current or potential Defence witness.[264] Further, he submits that this "should have militated against the conclusions in the Non-Disclosure Decision."[265]

100. The Chamber properly dismissed this speculation.[266] It took into account that the parties and participants were duty-bound to consult with VWU before disclosing a protected witness's identity to a third party, to seek VWU's advice in case of doubt, and to exercise particular caution with regard to investigative activities involving witnesses falling under the scope of the protocol.[267] Further, as the Chamber noted, the Prosecution gave assurances that it would ensure its communications would not endanger any witness,[268] and that it would maintain its consistent trial practice of not disclosing the identities of Defence witnesses to [REDACTED].[269] Again, Abd-Al-Rahman fails to show any error.

### *II.B.4. Abd-Al-Rahman fails to show any impact*

101. Abd-Al-Rahman argues that the Chamber's alleged errors prevented him from calling witnesses he would otherwise have been able to call because potential witnesses were unwilling to cooperate after being informed by the Defence that the Prosecution may make enquiries about them with [REDACTED].[270] He argues this violated his right to a fair trial.[271]

102. Abd-Al-Rahman shows no impact on his convictions, the fairness of the proceedings, or the reliability of the Judgment. His submissions are merely speculative, without reference to any evidence that any (potential) Defence witness refused to cooperate after being so informed. To the contrary, the record shows that Defence witnesses *were not* dissuaded from cooperating due to the absence of any non-disclosure order. The Defence duly presented evidence from witnesses residing in or coming from Sudan—of the 17 witnesses for whom the Defence sought the order, the evidence of 13 witnesses *was* adduced at trial.[272] The Defence did not call the remaining four witnesses for unrelated reasons.[273] The Defence later called two additional witnesses who were residing in or came from Sudan—further demonstrating that its ability to present evidence from this category of witnesses was not impacted.[274]

103. Further, despite having the opportunity to request non-disclosure for individual

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[264] Appeal, para. 65.
[265] Appeal, para. 65.
[266] Non-Disclosure Decision, para. 13.
[267] Non-Disclosure Decision, para. 13; Protocol, paras. 11, 14.
[268] Non-Disclosure Decision, para. 7.
[269] Non-Disclosure Decision, para. 7; Non-Disclosure Reconsideration Decision, para. 12.
[270] Appeal, para. 66.
[271] Appeal, para. 66.
[272] [REDACTED]. *See above* fn. 244.
[273] [REDACTED].
[274] [REDACTED].

witnesses on a case-by-case basis, the Defence never did so.[275] If a potential witness had refused to cooperate based on this concern, the Defence could have seised the Chamber. Having not done so, Abd-Al-Rahman cannot now complain that the lack of a non-disclosure order prevented him from calling any such witness.

#### *II.B.5. Abd-Al-Rahman misrepresents the record*

104. Finally, the Prosecution corrects certain misrepresentations made by Abd-Al-Rahman. Contrary to his assertion,[276] and as found repeatedly by the Chamber (including in the Judgment), Sudan did not declare the Defence's investigations a threat to its national security (Ground 11).[277] Additionally, the Chamber has repeatedly rejected his submission that cooperation with the Court was criminalised in Sudan.[278]

### II.C. The Chamber correctly found that Sudan's failure to provide certain documents requested by the Defence did not render the trial unfair (Grounds 9, 11)

105. Abd-Al-Rahman fails to show that the trial was rendered unfair by Sudan's failure to provide certain documents requested by the Defence. He argues that the Chamber erred legally, and breached the fairness of the proceedings, by finding that Sudan's failure to provide these documents did not render the trial unfair.[279] Abd-Al-Rahman fails to demonstrate any error of law and merely repeats arguments already dismissed at trial. Moreover, he fails to show that the alleged errors materially impacted his convictions.

#### *II.C.1. Sudan partially responded to the request for cooperation*

106. Sudan partially responded to the Defence's request for cooperation. On 11 February 2022, the Chamber granted a Defence request for cooperation from the GoS in relation to the following documents: [REDACTED].[280]

107. While these documents were never delivered by the GoS,[281] a GoS communication transmitted by the Registry on 9 December 2024 (which the Chamber authorised for submission into the record at the Defence's request)[282] did partially respond [REDACTED]. The GoS

[275] Non-Disclosure Decision, para. 16; Non-Disclosure Reconsideration Decision, para. 22.
[276] Appeal, para. 62.
[277] Judgment, paras. 106-108. *See below* para. 117 (Ground 11).
[278] Appeal, para. 62. *See below* paras. 119-122 (Ground 10).
[279] Appeal, paras. 72-73.
[280] Decision on Defence's Article 57(3)(b) Request, paras. 7-9 and p. 5 (the list of documents in paragraph 9 is reproduced in Decision on Defence's Second Article 87(5)(b) Request, para. 19). The Prosecution notes that the Chamber also granted a Defence request for cooperation in relation to a separate list of documents, however Abd-Al-Rahman does not explicitly refer to these documents in this ground of appeal. *See* Addendum to Decision on Defence's Second Article 87(5)(b) Request, para. 5.
[281] Appeal, para. 69.
[282] Second Additional Evidence Decision, paras. 6-7, 11; GoS Communication.

reported that [REDACTED].[283] The GoS also reported that [REDACTED].[284]

### *II.C.2. The Chamber properly assessed whether the fairness of the trial was impacted by Sudan's failure to provide certain documents*

108. The Chamber assessed the impact of the GoS' failure to provide certain requested documents and correctly found that it did not render the trial unfair.[285] Abd-Al-Rahman submits that, when assessing any impact on the fairness of the trial arising from the absence of the documents, the Chamber erred in law by distinguishing between whether they were "necessary" versus "indispensable" (i.e. "essential") to the case.[286] He asserts that, since the documents were not provided, the only reasonable conclusion based on the Chamber's previous findings that Sudan should provide the documents to the Defence, is that the trial was unfair.[287] Abd-Al-Rahman shows no error in this respect, but merely disagrees with the Chamber's conclusion and repeats his unsuccessful trial arguments.

109. In concluding that the absence of the requested documents did not render the trial unfair,[288] the Chamber found that, while considered *necessary* by the Defence for the preparation of its case, the documents were not "so *essential* as to [have] prevent[ed] the [D]efence from putting forward any kind of a case".[289] It found that the "suggested possibility that these documents *may* have included exculpatory information [was] too hypothetical, without more, to lay a basis for a finding of unfairness."[290]

110. The Chamber's approach was correct and reasonable. Its findings that the Defence should be provided with the documents it considered necessary for the preparation of its case were made in the context of the Defence's request for cooperation under article 57(3)(b).[291] These do not amount to a finding that the documents were so "essential" (or "indispensable") as to automatically render the trial unfair should they not be received. The Chamber was correct to assess (at the conclusion of the trial, with the benefit of the entire evidentiary record) whether the absence of the documents had any *actual* impact—rather than hypothetical or speculative—on the fairness of the proceedings.[292] As it correctly and reasonably found, they did not. Nor

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[283] GoS Communication, p. 3.
[284] GoS Communication, p. 3.
[285] Judgment, paras. 91-96.
[286] Appeal, para. 72 (citing Judgment, paras. 91-96). The Chamber used the word "essential", not "indispensable".
[287] Appeal, paras. 68, 72-73.
[288] Judgment, paras. 91-96.
[289] Judgment, para. 91 (emphasis added).
[290] Judgment, para. 91 (emphasis supplied).
[291] Appeal, para. 68. *See* Decision on Defence's Article 57(3)(b) Request, paras. 1, 6, 8; Decision on Defence's First Article 87(5)(b) Request, paras. 1, 13; Decision on Defence's Second Article 87(5)(b) Request, paras. 1, 18; First Additional Evidence Decision, para. 6, fn. 7.
[292] Judgment, paras. 91-96.

does Abd-Al-Rahman show that any alleged unfairness was aggravated by the Prosecution's receipt of documents from the GoS.[293] He submits that "[k]ey documents in the record of the case were received by the Prosecution from the GoS",[294] yet cites only one Prosecution filing, referring to one document received from the GoS (an interview with Abd-Al-Rahman conducted by the GoS)[295]—which the Chamber did not rely on in the Judgment.[296]

### *II.C.3. Abd-Al-Rahman fails to show that the measures undertaken by the Chamber to obtain cooperation from Sudan impacted the fairness of the trial*

111. Abd-Al-Rahman submits that the Chamber erred in law by finding that the measures it undertook to obtain cooperation from Sudan did not raise an issue of fairness in the proceedings.[297] He submits that the Chamber "failed to use every possible power available to it under the Statute in a timely manner to restore and preserve the fairness of the trial proceedings".[298] Further, he submits that the judicial proceedings should have been stopped.[299] Again, Abd-Al-Rahman demonstrates no error, but merely rehashes his trial arguments and asks the Appeals Chamber to reach a different conclusion. His arguments should be rejected.

112. After granting the Defence's request for cooperation, the Chamber took necessary steps in a timely manner to obtain cooperation from Sudan and granted measures to ameliorate the impact of Sudan's failure to comply on the Defence's ability to prepare "in accordance with its *chosen* line of investigation",[300] including granting multiple postponements of the Defence case and authorising evidence disclosure on a rolling basis (a facility not given to the Prosecution).[301] The Chamber granted the Defence "a remarkable degree of latitude and flexibility in the preparation and presentation of its evidence".[302]

113. The Chamber's approach was correct and reasonable. As found by the Chamber, "the Defence's disagreement with the Chamber's exercise of its trial management powers does not automatically make the trial unfair, and […] the alternative measures sought by the Defence would have neither contributed to the reception of the documents the Defence requested nor expedited the proceedings."[303] Abd-Al-Rahman fails to show anything more than disagreement with the Chamber's exercise of its trial management function.

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[293] Appeal, para. 72.
[294] Appeal, fn. 229.
[295] *See* Prosecution Charges Amendment Request, para. 38, fn. 51.
[296] Judgment, paras. 95, 269.
[297] Appeal, para. 74.
[298] Appeal, paras. 74-75.
[299] Appeal, paras. 75-76.
[300] Judgment, paras. 85-86, 96 (emphasis supplied).
[301] Judgment, para. 86.
[302] Judgment, para. 86.
[303] Judgment, para. 90.

114. Abd-Al-Rahman's further submission that the Chamber erred by deciding not to refer Sudan's non-cooperation to the UNSC should be summarily dismissed.[304] Abd-Al-Rahman fails to properly substantiate his argument and refers to previous submissions without developing them in his appeal brief.[305] His argument (that referral is a mechanical consequence of a finding of non-compliance) is contained in a single sentence, citing to submissions in the Defence Final Brief.[306] In any case, contrary to his argument, the Appeals Chamber has held that "a referral is *not* an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87(7) application."[307] Since he fails to show that the Chamber abused its discretion by not referring the matter to the UNSC, his argument should be rejected.

### *II.C.4. Abd-Al-Rahman fails to show any impact*

115. Abd-Al-Rahman fails to demonstrate that any of the alleged errors materially impacted his convictions. He merely speculates about a purported impact the requested documents may have had on the Chamber's findings that Abd-Al-Rahman was also known as Ali Kushayb and that he was a member of the *Janjaweed* in 2003-2004.[308] He asserts that, in the absence of the requested documents, "any reasonable trier of fact would have found that there was a reasonable doubt" on these two points, leading to his full acquittal.[309]

116. Again, Abd-Al-Rahman merely speculates and disagrees with the Chamber's findings in the Judgment, which show that the absence of the requested documents *did not* materially impact his convictions.[310] The Chamber's findings were correct and reasonable. As noted above,[311] based on the entire evidentiary record, the Chamber assessed the alleged relevance of the documents to the Defence case and concluded that they were not so essential. The possibility that they *may* have contained exculpatory information was too speculative to conclude that the trial was unfair.[312] Abd-Al-Rahman grossly overstates the potential value of the requested documents in light of the Chamber's findings.

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[304] Appeal, para. 74. *See also* Decision on Defence's Request for Finding of Non-Compliance, paras. 27-29.
[305] *See* *Ntaganda* AJ, para. 901.
[306] Appeal, para. 74. *See also* fn. 233 (citing Defence Final Brief, paras. 41-42).
[307] *Kenyatta* Non-Compliance AJ, paras. 49, 53 (emphasis added).
[308] Appeal, para. 76. Most egregiously, at footnote 238, he speculates that Abd-Al-Rahman's criminal records "would have been proof of the fabrication of that highly incriminating evidence provided by the Sudanese Attorney General's Office to the Prosecution and of the Sudanese authorities' fabrication of the entire case against [Abd-Al-Rahman]." The reference to "highly incriminating evidence" is to the interview of Abd-Al-Rahman conducted by the GoS, which the Chamber did not rely on: *see* Judgment, paras. 95, 269.
[309] Appeal, para. 76.
[310] Judgment, paras. 91-96.
[311] *See above* paras. 108-110.
[312] Judgment, para. 91.

### *II.C.5. Abd-Al-Rahman misrepresents the record*

117. Finally, the Prosecution again corrects certain misrepresentations made by Abd-Al-Rahman. While not appearing to allege that the Chamber made any error in this respect,[313] Abd-Al-Rahman continues to wrongly assert that Sudan declared the Defence's investigations a threat to its national security.[314] The Chamber has repeatedly rejected the Defence's claim that Sudan made such a declaration.[315] [REDACTED].[316] This does not amount to a declaration by Sudan that it considered the Defence's investigations, as a whole, a threat to its national security. As the Chamber noted, given that the requested documents were "straightforward and of an administrative nature", the "basis of Sudan's recent assertion that [REDACTED] is therefore not readily apparent."[317] Abd-Al-Rahman mischaracterises the Chamber's most recent rejection of this submission as merely "downplay[ing]" the impact of the supposed declaration on the Defence's investigations.[318] This submission is misleading. The question of an alleged impact on the Defence's investigations did not arise given that the Chamber rejected the Defence's submission that Sudan made such a declaration.

## II.D. The Chamber properly rejected the submission that cooperation with the Court was criminalised under Sudanese law (Ground 10)

118. Abd-Al-Rahman fails to show that the Chamber erred legally, factually, or breached the fairness of the proceedings, by rejecting the Defence's submission that cooperation with the Court was criminalised under Sudanese law.[319] He argues that the Chamber placed "undue weight on the bald assertions of the Sudanese authorities, which had an appalling history of hostility towards the ICC and of failing to cooperate with the ICC."[320] He asserts that, if the Chamber were to have assessed the issue as invited to by the Defence, it would have reached a different conclusion.[321] He submits, further, that the alleged error impacted the fairness and integrity of the trial proceedings.[322] This ground of appeal should be rejected. Abd-Al-Rahman merely disagrees with the Chamber's finding and repeats arguments already repeatedly

[313] Abd-Al-Rahman merely states that the Chamber rejected the Defence's submissions that this supposed declaration negatively impacted its investigations in Sudan, without arguing how this amounted to an error.
[314] Appeal, paras. 70-71.
[315] Judgment, paras. 106-108.
[316] *See* Decision on Documents Requested on 11 February 2022, para. 12; [REDACTED].
[317] Decision on Documents Requested on 11 February 2022, para. 23.
[318] Appeal, para. 70.
[319] Appeal, paras. 78-79, 87-88.
[320] Appeal, para. 87.
[321] Appeal, para. 87.
[322] Appeal, para. 88.

dismissed at trial,[323] without identifying a legal error. He fails to show that the Chamber's finding was unreasonable or unfair, or that it impacted the fairness of the proceedings or his convictions.

### *II.D.1. The Chamber correctly and reasonably found that cooperation with the Court was not criminalised under Sudanese law*

119. The Chamber was correct to reject the Defence's submission that Sudan criminalised cooperation with the Court under Sudanese law.[324] It reasonably relied on detailed information provided by the Registry, based on information received from Sudan—which [REDACTED] confirmed that cooperation with the Court was not criminalised in Sudan.[325]

120. While the GoS confirmed that cooperation with the Court was not criminalised in Sudan, contrary to Abd-Al-Rahman's assertion,[326] the information it provided *did not* confirm that cooperation had been criminalised until the entry into force of the Miscellaneous Amendments Act (Fundamental Freedoms and Rights) of 2020 ("Miscellaneous Amendments Act"). [REDACTED],[327] [REDACTED]. [REDACTED].[328] This does not detract from Sudan's clear confirmation that cooperation with the Court was not criminalised.

121. As the Chamber noted, it received no evidence on which to doubt the information provided by Sudan or to support the Defence's claim that cooperation was criminalised.[329] Contrary to Abd-Al-Rahman's (unsupported) assertion,[330] the history of non-cooperation by the *former* GoS authorities was not a reason to question the validity of the information provided by the *current* authorities.[331] Notably, the former GoS authorities, led by Omar Al-Bashir, had been replaced two years earlier following a military takeover in 2019.[332]

122. The cooperation provided by the GoS in this case further demonstrates that there is no reason to doubt that cooperation with the Court was not criminalised in Sudan. Notably, on 10

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[323] *See* Defence Final Brief, paras. 54-55; Defence Response to Registry Report, para. 15; Defence Request for Urgent Measures, paras. 5-6; Defence Observations on Security in Sudan, paras. 4, 6. *See also* T-020, p. 86:4-14 (when refusing leave to appeal, the Chamber noted that the Defence merely disagreed with its factual finding); Judgment, para. 104 (noting that the Defence had provided no new arguments in the Defence Final Brief beyond its prior submissions).
[324] Judgment, paras. 102-104. *See also* Sudan Cooperation Decision, para. 40; Decision on Defence's Article 67(1)(e) Motion, para. 16.
[325] Judgment, para. 102; [REDACTED]; Second Registry Report on Sudan Cooperation, para. 23 (11 October 2021). *See also* [REDACTED].
[326] Appeal, para. 81.
[327] [REDACTED].
[328] [REDACTED].
[329] Judgment, paras. 102-104.
[330] Appeal, para. 87.
[331] Since Abd-Al-Rahman cites no evidence for this submission, it is unclear to which period he refers, but the Prosecution assumes he refers to the period of non-cooperation during the regime of Omar Al-Bashir.
[332] Second Registry Report on Sudan Cooperation, paras. 19-20.

May 2021, a Cooperation Agreement concluded by the Court with the GoS entered into force.[333] The GoS also signed Memoranda of Understanding with the OTP on 14 February 2021 and 12 August 2021.[334] The GoS provided cooperation pursuant to these agreements, including by issuing visas to the Prosecution, the Defence and the Registry to undertake missions in Sudan.[335] It is not logical that the GoS authorities would themselves cooperate with the Court and the OTP if such cooperation was criminalised under its domestic law. Indeed, in 2022, the Chamber found that the "fact that Sudanese authorities facilitated, met with and assured the Registry delegation of their continued cooperation with the Court, demonstrates the opposite to any alleged criminalisation of such acts under Sudanese law."[336] His argument about criminalisation therefore fails.

### *II.D.2. Abd-Al-Rahman fails to show any impact*

123. Abd-Al-Rahman fails to show that any alleged error affected the reliability of the Judgment or materially affected his convictions. While submitting that the Chamber's finding "left the Defence with no solution to protect its witnesses against that risk", he fails to explain how this had any consequence on the trial.[337] To the contrary, the record shows that Abd-Al-Rahman *was* able to present evidence from witnesses in Sudan. During the trial, the Defence presented evidence from 11 such witnesses.[338] Abd-Al-Rahman also submits that the Chamber's finding "substantiated concerns regarding Sudan's interference with the entirety of the evidence in the case".[339] Although the precise meaning of this (undeveloped) argument is unclear, there is no logical connection between the Chamber's finding and his apparent allegation—unsupported by any evidence—that Sudan somehow interfered with *all of the evidence in the case*. This unsupported allegation must be rejected.

124. Finally, Abd-Al-Rahman submits (without further explanation) that the Chamber's alleged error "aggravated" the impact of the issues addressed in Grounds 6-8, 11-12, 16-17 and 19.[340] This submission is not adequately developed. Nevertheless, none of the errors alleged in these grounds, either individually or cumulatively, compromised the integrity of the trial proceedings or materially impacted Abd-Al-Rahman's convictions.[341] As such, the alleged error

[333] [REDACTED]; Second Registry Report on Sudan Cooperation, paras. 18, 21.
[334] Second Registry Report on Sudan Cooperation, para. 21.
[335] *See e.g.* Second Registry Report on Sudan Cooperation, paras. 23-25; Judgment, paras. 117-118.
[336] Sudan Cooperation Reconsideration Decision, para. 16.
[337] Appeal, para. 88.
[338] *See* Appeal, para. 91 (listing D-0001, D-0002, D-0003, D-0005, D-0008, D-0011, D-0016, D-0029, D-0032 and D-0039). [REDACTED].
[339] Appeal, para. 88.
[340] Appeal, para. 88.
[341] *See above* paras. 86-88, 91 (Ground 6-7), 101-103 (Ground 8), 115-116 (Ground 11); *below* paras. 134-137 (Ground 12), 171 (Grounds 16-17), 174 (Ground 19).

concerning Sudan's alleged criminalisation of cooperation with the Court cannot be said to have "aggravated" the impact of the other referenced alleged errors.

### II.E. The Chamber correctly dismissed Defence arguments about the impossibility of protecting witnesses in Sudan (Ground 12)

125. Abd-Al-Rahman fails to show that the Chamber breached the fairness of the proceedings in dismissing his arguments about the impossibility to protect Defence witnesses in Sudan.[342] He argues that the impossibility of protecting such witnesses "was irreconcilable with the requirements of fair trial."[343] He further submits that the Chamber, by "focusing on irrelevant considerations and failing to address relevant ones, […] failed to restore the fairness of the proceedings."[344] He alleges a "serious breach" of the principle of equality of arms.[345] Yet Abd-Al-Rahman fails to demonstrate that the Chamber was unreasonable or abused its discretion in dismissing the Defence's arguments. Nor does he show that these alleged issues rendered the trial unfair or the Judgment or his convictions unreliable. He merely repeats the same arguments already addressed by the Chamber at trial, without identifying any error in its approach.

126. The Chamber correctly and reasonably "took into consideration the difficulties encountered by the Defence arising from the circumstances in Darfur and in Sudan in general, when weighing the entirety of the evidence and information before it on this issue, in order to prevent any unfairness or undue prejudice towards the Accused."[346] It considered a range of relevant factors, including that the strategy adopted by the Defence caused delays in the case, and that it had granted several adjournments to allow the Defence "adequate time to obtain evidence and continue with the presentation of its case."[347]

127. The Chamber also recalled that it had dismissed the Defence's repeated submissions on "the impossibility of protecting witnesses" in Sudan, when rejecting the Defence's request that the Chamber "order a halt on all field activities in Sudan", and when deciding on its first request for postponement of the Defence case.[348] In attempting to show that difficulties in obtaining protection services for his witnesses in Sudan caused him prejudice, Abd-Al-Rahman merely

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[342] Appeal, para. 96.
[343] Appeal, paras. 93-96.
[344] Appeal, para. 95. *See further* paras. 94-95 (arguing further that, instead of addressing the alleged unfairness to the Defence, the Chamber focused on "blaming the Defence for a strategy it had adopted which, it was found, caused delays in the case").
[345] Appeal, para. 93.
[346] Judgment, para. 115.
[347] Judgment, paras. 112-113. *Contra* Appeal, paras. 94-95.
[348] Judgment, para. 110-111 (referring to Sudan Cooperation Decision, para. 51: finding that it did not have the power to prohibit "parties and participants in the case from undertaking investigative measures and missions in Sudan"; First Postponement Decision, para. 38). *See also* T-020, p. 86:15-23; Sudan Cooperation Reconsideration Decision, para. 27.

repeats arguments already dismissed by the Chamber, and disagrees with the Chamber's fair and reasonable assessment that any such difficulties did not render the trial unfair.[349]

128. Further, Abd-Al-Rahman fails to identify the appropriate remedy the Chamber should have adopted for the alleged unfairness. To any extent he attempts to argue that the only appropriate remedy would have been a permanent or temporary stay of proceedings,[350] this drastic remedy was not justified in this case, as found by the Chamber.[351] [REDACTED][352]

### *II.E.1. Abd-Al-Rahman fails to show that the principle of equality of arms was breached*

129. Abd-Al-Rahman argues that the situation *vis-à-vis* the security of Prosecution and Defence witnesses amounted to a "serious breach" of the principle of equality of arms.[353] None of the arguments he advances has any merit. As correctly noted by the Chamber, the principle of equality of arms requires that "each party has a reasonable opportunity to adequately prepare for and present its case to the Court, without being placed at a substantial disadvantage *vis-à-vis* the opposing party".[354] This principle was not breached in this case.

130. Abd-Al-Rahman submits that none of the Prosecution's Sudanese witnesses "were submitted to the level of hardship imposed on Defence witnesses".[355] He does not explain how he presumes to know the "level of hardship" experienced by Prosecution witnesses. Even if this assertion were correct (which the Prosecution does not accept), it would not demonstrate an inequality of arms in this case since any alleged potential differences in the hardships imposed on witnesses had no impact on the Defence's ability to call its witnesses at trial,[356] nor, as Abd-Al-Rahman concedes,[357] on the reliability of their evidence.

131. Abd-Al-Rahman further submits that "the majority of Prosecution Sudanese witnesses resided outside Sudan".[358] But a substantial number of Prosecution witnesses who testified at trial (at least 21 of 56) did reside in Sudan.[359] The Prosecution was therefore not in a favourable position compared to the Defence on this issue. In any event, even if they did reside outside Sudan, it would not demonstrate that there was an inequality of arms in the case.

132. Abd-Al-Rahman also submits, without evidence, that "the OTP relied on its own witness

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[349] *Contra* Appeal, paras. 91-93 (referring to Defence Final Brief, para. 64-65; [REDACTED]).
[350] *See e.g.* Appeal, paras. 93, 96, and fn. 272 (referring to a portion of his opening statement quoted at para. 88).
[351] First Postponement Decision, para. 31.
[352] [REDACTED].
[353] Appeal, para. 93.
[354] *See* Judgment, para. 150. *See also* *Uganda* Article 58 ALA Decision, para. 30; *Gbagbo* Postponement ALA Decision, para. 40.
[355] Appeal, para. 93.
[356] *See below* paras. 134-136.
[357] Appeal, para. 96.
[358] Appeal, para. 93.
[359] *See* First Postponement Decision, para. 38.

protection services [REDACTED]".[360] At trial, the Prosecution already refuted the claim that it enjoyed an advantage over the Defence in relation to witness protection.[361] The Prosecution does not have its own witness protection system but rather abides by the [REDACTED] Protocol [REDACTED]. This protocol—which applies *mutatis mutandis* to the Defence[362]—[REDACTED].[363] The protocol makes clear that [REDACTED][364] It is therefore only in exceptional cases, on a temporary basis, that the Prosecution [REDACTED]—and even then it would only do so in consultation with the VWU.[365] Abd-Al-Rahman fails to show that there is any disparity in the Court's witness protection framework. Accordingly, his argument should be dismissed.

133. Lastly, Abd-Al-Rahman submits that a number of Prosecution witnesses [REDACTED], whereas only one Defence witness [REDACTED].[366] He provides no evidentiary support for this assertion, nor does he explain how he claims to know [REDACTED]. [REDACTED]. [REDACTED].[367] There is no evidence of unequal treatment of Prosecution and Defence witnesses by the VWU, nor any suggestion that VWU decisions prevented the Defence from adducing the evidence of witnesses at trial.[368] As such, his submissions lack merit and should be dismissed.

### *II.E.2. Abd-Al-Rahman fails to show any impact*

134. Abd-Al-Rahman argues that the alleged errors had a "significant" impact, and that, individually and together with Grounds 6-7, 8, 11, 12, 16-17 and 19, "these breaches of fairness fatally compromised the integrity of the trial proceedings".[369] He fails to show any impact. None of the alleged errors, individually or together, compromised the fairness of the trial.

135. Abd-Al-Rahman submits that the Defence was obliged to inform potential witnesses "that there was nothing that could be offered to them by way of meaningful protection in Sudan", and that thereafter "many witnesses unsurprisingly declined to cooperate with the Defence."[370] But he fails to substantiate that any potential Defence witness declined to cooperate. While pointing to his inability to maintain contact with [REDACTED], he does not

[360] Appeal, para. 93.
[361] Prosecution Response to Defence Request on Witness Protection, paras. 14-18; T-117-Conf, pp. 14:20-18:9.
[362] [REDACTED].
[363] [REDACTED].
[364] [REDACTED].
[365] Prosecution Response to Defence Request on Witness Protection, para. 15.
[366] Appeal, para. 93.
[367] *See* Appeal, para. 93, fn. 269.
[368] [REDACTED].
[369] Appeal, para. 96.
[370] Appeal, paras. 91, 96.

explain how this was linked to witness protection, nor does he cite to any supporting evidence.[371] The assertion that [REDACTED] "would not agree to appear at trial" is similarly unsupported and apparently speculative.[372] There is no indication that [REDACTED] even possessed relevant evidence,[373] and the Defence [REDACTED].[374]

136. As noted above, the Defence *was* able to call evidence at trial from a substantial number of witnesses (11) residing in Sudan.[375] Abd-Al-Rahman does not suggest that these witnesses were "dissuaded from testifying, or otherwise gave unreliable evidence."[376] Accordingly, he shows no impact on the fairness of the trial or the reliability of the Judgment.

137. The Prosecution addresses Abd-Al-Rahman's specific arguments relevant to Grounds 6-7, 8 and 10 in the respective sections responding to those grounds.[377] Abd-Al-Rahman's submission—that he was obliged to warn potential witnesses they risked prosecution for espionage—should be rejected since this was based on his own incorrect view that cooperation with the Court was criminalised in Sudan.[378]

### II.F. The Chamber did not err in its findings concerning the alleged non-delivery of visas to the Defence to enter Sudan (Ground 13)

138. Abd-Al-Rahman fails to show that the Trial Chamber erred or breached the fairness of the proceedings, regarding certain findings it made concerning the alleged non-delivery of visas to the Defence to enter Sudan.[379] This ground of appeal should be rejected *in limine*. Abd-Al-Rahman fails to substantiate any impact on the Judgment from any of the alleged errors, and fails to show that the Chamber's approach was unreasonable or unfair. The Prosecution further notes that Abd-Al-Rahman refers to 35 documents which are classified as confidential, *ex parte* (Defence only),[380] and which he has not sought to reclassify. His arguments based on these documents should be summarily dismissed. Other parties and participants cannot meaningfully respond to arguments if unable to access the underlying material.[381]

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[371] Appeal, para. 91.
[372] Appeal, para. 91.
[373] [REDACTED].
[374] [REDACTED].
[375] *See above* para. fn. 338.
[376] Appeal, para. 96.
[377] Appeal, paras. 91-92. *See above* paras. 62-91 (Grounds 6-7), 92-104 (Ground 8), 118-124 (Ground 10).
[378] *Contra* Appeal, para. 91. *See above* para. 119-122 (Ground 10). In addition to Ground 10, Abd-Al-Rahman refers to article 53 (relating to espionage against the country) of the Criminal Act 1991 of Sudan, however this provision alone does not establish that Defence witnesses would be at risk of prosecution for espionage.
[379] Appeal, paras. 97, 100, 103, 105.
[380] Appeal, fns. 275-280, 282-313. The Prosecution notes that, while Abd-Al-Rahman refers to the confidential, *ex parte* version of Registry Observations on Sudan Cooperation, the cited paragraph (para. 27) is not redacted in the confidential, redacted version available to the Prosecution. *See* Appeal, fn. 278.
[381] The majority of these documents were filed by the Defence, however the Prosecution is unable to ascertain the source of the second document cited at Appeal, fn. 312, since it cannot access any part of this submission.

### *II.F.1. Abd-Al-Rahman fails to show that the alleged non-delivery of visas caused him unfairness or prejudice*

139. Abd-Al-Rahman argues that the Chamber erred by failing to acknowledge that the multi-entry visas the Defence received were the only visas issued to the Defence during the course of the proceedings.[382] Further, he submits that the "impact on Defence's investigations of Sudan's failure to issue visas on more than one occasion was radical", and that the Defence "could never visit Darfur or collect evidence in Kodoom, Bindisi, Mukjar, Deleig or Garsila, where the core of its potential witnesses lived."[383] In his view, the Chamber erred by "blaming the Defence and failing to address the real issue: […] the systematic refusal of Sudan to issue more than one set of [multi-entry visas] […] caused unfairness and prejudice to the Accused"[384] and that, "[h]ad the Trial Chamber fairly assessed the situation, it would have concluded that the conditions for a fair trial were not met, at least so long as this situation persisted."[385]

140. The Chamber holistically assessed all of the information concerning the Defence's visa applications to Sudan. It found that the Sudanese authorities had "complied with their obligation under Article 28 of the Cooperation Agreement in relation to the granting of visas to the Defence team."[386] It recalled that the Defence "carried out one investigative mission to Sudan in June 2022 and unilaterally cancelled other missions, refusing to accept the GoS' visa requirements and engaging in interminable arguments with the Registry."[387] It found that "it was the Defence's own decision to go on only one mission during the period 2021-2023, instead of making use of its six-month multi-entry visa".[388] Overall, it concluded that "the Accused did not suffer prejudice as a result of Sudan's non-cooperation with the Defence to the extent that would justify the exceptional remedy of a permanent stay of proceedings."[389]

141. Abd-Al-Rahman fails to show any error in the Chamber's approach. The Chamber was correct and reasonable, when assessing whether the Defence suffered prejudice, to consider not only whether Sudan had granted visas, but also whether the Defence had properly utilised its opportunities to conduct missions to Sudan, including by making use of the multi-entry visas it was granted. Abd-Al-Rahman also fails to show that the Chamber erred in finding that a stay

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[382] Appeal, para. 97.
[383] Appeal, para. 99.
[384] Appeal, para. 100.
[385] Appeal, para. 100.
[386] Judgment, para. 117 (referring to Decision on Defence's First Article 87(5)(b) Request, para. 19).
[387] Judgment, para. 118 (noting "the Prosecution's submission that, contrary to the Defence's argument that the month of Ramadan presented 'an insurmountable obstacle to carrying out investigative missions', the Prosecution interviewed many witnesses during its investigation, including during Ramadan").
[388] Judgment, para. 119.
[389] Judgment, para. 120.

of proceedings was not warranted in the circumstances. As addressed below, Abd-Al-Rahman fails to substantiate any material impact on the Defence's investigations resulting from this issue.[390] As held by the Appeals Chamber, a trial chamber "enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached" and that "where a Trial Chamber has already addressed and disposed of the substance of allegations that a trial should have been stayed owing to violations of fair trial rights, the Appeals Chamber's role is not to address these allegations *de novo*."[391] In sum, he fails to show the Trial Chamber erred.

### *II.F.2. Abd-Al-Rahman fails to show any breach of the principle of equality of arms*

142. Abd-Al-Rahman argues that the Chamber's "comparison with the Prosecution's and Registry's situations, whose members received visas and conducted multiple missions during the trial only highlights the unequal treatment reserved by Sudan to the Defence, whose requests for assistance were considered a threat to its national security […], in breach of the principle of equality of arms".[392] Abd-Al-Rahman does not substantiate this claim.

143. Abd-Al-Rahman's suggestion that unequal treatment is shown by Sudan's refusal to respond to requests for assistance (for certain documents requested by the Defence) based on national security considerations is speculative and baseless.[393] While the Prosecution and Registry were able to conduct multiple missions to Sudan during the trial, this did not show unequal treatment but merely reflected that the Prosecution and the Registry utilised the opportunities available to carry out such missions. By contrast, the Defence decided to go on only one mission and "unilaterally cancelled other investigative missions, refusing to accept the GoS' visa requirements and engaging in interminable arguments with the Registry."[394] The fact that the Defence did not make the most of the reasonable opportunity it had to conduct missions to Sudan does not amount to a breach of equality of arms.[395]

### *II.F.3. The Chamber correctly found that multi-entry visas were granted in 2022*

144. Abd-Al-Rahman shows no error in the Chamber's finding that "multi-entry visas had been issued on 3 February 2022."[396] His submissions relying on confidential, *ex parte* (Defence only) documents should be summarily dismissed, since the Prosecution has no access to these

[390] *See below* paras. 149-150.
[391] *Lubanga* AJ, para. 155.
[392] Appeal, para. 103.
[393] Appeal, para. 103. *See above* para. 117.
[394] Judgment, paras. 118-119.
[395] *See* Judgment, para. 150. *See also Uganda* Article 58 ALA Decision, para. 30; *Gbagbo* Postponement ALA Decision, para. 40.
[396] Appeal, para. 101 (referring to Judgment, para. 117).

documents and thus cannot meaningfully respond.[397] In any case, the Chamber did not find that the visas were "issued" on that date, but that they were "granted".[398] This correct finding was based on reliable information provided by the Registry.[399] The fact that the delivery of the visas was delayed—partly due to the Defence's own inaction, as found by the Chamber[400]—does not impact the date that they were granted.[401] In any case, the precise date that the visas were granted was of limited significance. The core finding made by the Chamber was that the Defence failed to utilise these multi-entry visas to carry out more than one mission to Sudan.[402]

### *II.F.4. The Chamber correctly found that the Defence attempted to mislead it*

145. The Chamber correctly noted that the Defence attempted to mislead it in claiming "it was granted visas for only one mission, in June 2022, and to Khartoum only" and that "[a]ll its other visa applications were ignored".[403] The Defence did not receive visas "for only one mission", but rather multi-entry visas with six months validity.[404] As correctly found by the Chamber, the Defence could have used those multi-entry visas to conduct multiple missions, but chose to conduct only one.[405] Further, as found by the Chamber, the Defence "unilaterally cancelled other investigative missions, refusing to accept the GoS' visa requirements and engaging in interminable arguments with the Registry."[406]

146. Abd-Al-Rahman argues that, when finding that the Defence could have utilised the multi-entry visas it received to conduct additional missions, the Chamber erred in fact by failing to consider that "this was a period of high-intensity in-court activity for the Defence during the opening weeks and months of the trial", and [REDACTED].[407] This argument is incongruent with the Defence's previous position that its team "has always been large enough and agile enough to multi-task", that it had sufficient resources, and that failure to progress its investigations in Sudan was not due to a lack of resources but a lack of visas.[408] A Defence team is expected to manage its courtroom activities alongside other aspects of its preparation, and to raise any resource issues as soon as they arise. Further, it cannot make its ability to progress its

[397] Appeal, para. 101 (fns. 276-277).
[398] Judgment, para. 117.
[399] *See* Decision on Defence's First Article 87(5)(b) Request, para. 18 (citing Registry Observations on Sudan Cooperation, para. 22).
[400] Judgment, para. 117 (referring to Decision on Defence's First Article 87(5)(b) Request, para. 18).
[401] *Contra* Appeal, para. 101. *See* Registry Observations on Sudan Cooperation, paras. 22, 27.
[402] Judgment, paras. 117-118.
[403] Judgment, para. 116. *Contra* Appeal, para. 98.
[404] Judgment, para. 117; Appeal, paras. 97, 102.
[405] Judgment, para. 119.
[406] Judgment, para. 118.
[407] Appeal, paras. 102-103.
[408] Defence Note for the Record, para. 13.

investigations contingent on the availability of [REDACTED]—it must make reasonable efforts to overcome ordinary challenges that arise in any investigation.

147. Abd-Al-Rahman shows no error in the Chamber's finding that the Defence had sought to mislead it, based on his view that the Defence had "engaged in an unprecedented effort of transparency" by submitting detailed chronologies and voluminous supporting documents.[409] Submitting such documents, for whatever purpose, does not absolve the Defence of its duty to ensure its submissions are not misleading.

148. With respect to Abd-Al-Rahman's submissions on various mission requests submitted by the Defence during the proceedings, these refer to confidential, *ex parte* (Defence only) documents.[410] Again, these submissions should be summarily dismissed given the Prosecution is not in a position to meaningfully respond. In any case, it is not clear how these submissions are relevant to the alleged errors.

### *II.F.4. Abd-Al-Rahman fails to show any impact*

149. Abd-Al-Rahman argues that the impact of the Chamber's alleged errors was "significant".[411] He submits that "in the absence of timely issuance of visas, the Defence was not able to carry out adequate investigations in Sudan, and certainly not in Darfur" and that it was "unable to meet with and interview as many potential Defence witnesses as were required by the exigencies of the case."[412] He submits that this violated his right to a fair trial and, individually and together with Grounds 6-7, 8, 11, 13, 16-17 and 19, "fatally compromised the integrity of the trial proceedings".[413]

150. Abd-Al-Rahman fails to substantiate his assertions on impact. He makes no submission regarding how the alleged errors are said to have materially impacted the Judgment. In addition, he fails to show that the alleged unfairness impacted the reliability of the Judgment.[414] His submissions on this point are vague and speculative.[415] He does not concretely identify any witness, or even any category of witness, that he claims to have been unable to access because

[409] *See* Appeal, para. 98 (fn. 275). The Prosecution cannot access these documents, which are classified as confidential, *ex parte* (Defence only).
[410] Appeal, para. 104 (fns. 282-313).
[411] Appeal, para. 105.
[412] Appeal, para. 105.
[413] Appeal, para. 105.
[414] *See* *Ntaganda* AJ, para. 49. *See also* *Bemba* AJ, para. 60; *Lubanga* AJ, para. 28.
[415] *See* *Banda* Stay Decision, paras. 90 (the facts supporting a request for a stay of proceedings should be "properly substantiated"), 93, 102 (where the Defence claims it cannot secure evidence necessary for the presentation of its case, it should identify this evidence with "sufficient specificity"), 95 (the Defence cannot rely on "speculative or vague claims of impeded Defence investigations" and must show that the unavailable evidence possesses "an *apparent* exculpatory value and be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

the Defence could not travel to Darfur. The Defence adduced evidence from 11 witnesses who were residing in Darfur during the trial, all of whom provided evidence on the core issue before the Chamber (whether Abd-Al-Rahman was also known as Ali Kushayb).[416] The Prosecution was also unable to conduct investigative missions to Darfur, yet it effectively pursued other investigative avenues, such as interviews in third countries, to collect evidence and present its case.[417] Abd-Al-Rahman fails to show any impact of the alleged error, individually or in combination with the other grounds. This ground should be dismissed.

### II.G. The Chamber correctly found that the Prosecution did not breach its disclosure obligations (Ground 14)

151. Abd-Al-Rahman fails to show that the Prosecution breached its disclosure obligations. He argues that the Chamber erred factually and legally, and breached the fairness of the proceedings, in dismissing the Defence's submission that the Prosecution had breached its disclosure obligations with respect to an "introductory meeting" mentioned in a "Road-Map" document, which the Defence suggests may have been with "a man named Ali Kushayb".[418] Specifically, he argues that the Chamber erred in accepting "the Prosecution's submission that the 'introductory meeting' […] had not taken place and that there was thus no record thereof."[419] He submits that "[n]o reasonable trier of fact would have concluded that no meeting had taken place."[420] He also argues that the Chamber erred in law by not finding that the "Prosecution's assertion that no such record existed is proof of the violation of its disclosure obligation."[421]

152. Ground 14 should be dismissed. The claimed meeting with the Prosecution never took place. Abd-Al-Rahman identifies no error in the Chamber's findings but merely repeats his unsuccessful trial arguments. He likewise fails to show that the alleged errors had any impact on the fairness of the trial, the reliability of the Judgment, or on his convictions.

#### *II.G.1. Abd-Al-Rahman fails to show that the Chamber was unreasonable in accepting the Prosecution's submission that the purported meeting did not take place*

153. Abd-Al-Rahman fails to show that the Chamber was unreasonable in accepting the Prosecution's submission that the purported meeting did not take place. Given the absence of evidence that the meeting did take place, this was the only reasonable conclusion. The Chamber was correct and reasonable not to rely on mere speculation from the Defence.

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[416] *See* Witness Annex, paras. [REDACTED]. *See also* Judgment, para. 238; *above* fn. 338.
[417] *See also* Second Postponement Decision, para. 12 ("Given the nature of this court, neither an ongoing conflict nor a lack of State cooperation are exceptional in nature and should not be insurmountable, nor lead to impunity, nor prevent achieving justice for victims").
[418] Appeal, paras. 106, 109-110 (referring to DAR-OTP-00005798 at 1); Judgment, paras. 130-134.
[419] Appeal, para. 109.
[420] Appeal, para. 109.
[421] Appeal, paras. 109-110.

154. The Chamber correctly noted that the Defence's allegation of non-disclosure was "premised on mere speculation that a meeting with a person named 'Ali Kushayb' '*probably* took place with the Prosecution delegation in Khartoum in June 2006'."[422] It also correctly noted that "[n]o evidence was presented at trial which supports the Defence's claim that 'the "introductory meeting" mentioned in the Road-Map *must have been* the meeting with Ali Kushayb mentioned by D-0016'."[423] Abd-Al-Rahman advances no new arguments, but rather confirms again that this purported meeting was a mere "possibility".[424]

### *II.G.2. Abd-Al-Rahman fails to show that the Chamber erred in finding that the Prosecution had not violated its disclosure obligations*

155. Abd-Al-Rahman shows no error in the Chamber's finding that the Prosecution had not violated its disclosure obligations. The Chamber correctly stated that the Prosecution's article 67(2) disclosure obligation only related to material in its possession or control.[425] The same principle applies to disclosure under rule 77.[426] Abd-Al-Rahman's argument—that the Prosecution's assertion that it does not possess a record (of a meeting that never took place) proves that it violated its obligation to disclose such a record—is circular and illogical.[427] The Prosecution need not disclose a record that does not exist of a meeting that never took place.[428]

### *II.G.3. Abd-Al-Rahman fails to show any impact*

156. Abd-Al-Rahman incorrectly argues that the "consequences on the fairness of the proceedings and reliability of the Judgment are considerable."[429] He submits that, as a result of the non-disclosure of the supposed meeting record, there was reasonable doubt that Abd-Al-Rahman was also known as Ali Kushayb and that he should therefore have been acquitted.[430]

157. Yet to the contrary, the absence of any meeting record merely supports that there *was no such meeting*. Abd-Al-Rahman's suggestion that such a meeting took place is purely speculative—there is no evidence to support this assertion.[431] D-0016's evidence *did not* establish that the Prosecution met a man in June 2006, who the Sudanese authorities presented as "Ali Kushayb", and who was not Abd-Al-Rahman.[432] His evidence is of such limited

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[422] Judgment, para. 132 (emphasis supplied, citing Defence Final Brief, para. 72).
[423] Judgment, para. 132 (emphasis supplied, citing Defence Final Brief, para. 70). *See also below* para. 210.
[424] Appeal, paras. 107-108.
[425] Judgment, para. 132.
[426] *See* Appeal, paras. 107-110 (arguing that disclosure should have been made under article 67(2) or rule 77).
[427] Appeal, paras. 109-110.
[428] *Contra* Appeal, para. 110.
[429] Appeal, para. 111.
[430] Appeal, paras. 107, 111.
[431] *See above* paras. 153-154.
[432] *Contra* Appeal, para. 111. *See above* 153-154. *See also below* paras. 208-212 (Ground 26), 237-241 (Ground 32).

probative value that it cannot reasonably be said to put into question the Chamber's finding—based on "abundant", "compelling and coherent" evidence—that Abd-Al-Rahman was "Ali Kushayb".[433] Further, the Prosecution has the onus to prove guilt beyond reasonable doubt, not to disprove any Defence assertion based on mere speculation.[434]

158. Finally, Abd-Al-Rahman merely speculates that, had this meeting taken place, this would "mean that the Sudanese authorities fabricated evidence in this case".[435] He shows no impact on the reliability of the Judgment.

## II.H. The Chambers' findings relating to Defence field missions in Sudan were correct (Grounds 16-17)

159. Abd-Al-Rahman's arguments that the Pre-Trial Chamber and the Trial Chamber erred legally, and breached the fairness of the proceedings, in making certain findings relating to the Defence's field missions in Sudan should be rejected.[436]

160. This ground should be dismissed *in limine*. Abd-Al-Rahman fails to substantiate any impact on the reliability of the Judgment from the alleged errors. He also fails to identify any legal error, or to show that the principle of equality of arms was breached. Further, the Prosecution notes that the Defence quotes an extract from a document classified as confidential, *ex parte*, to which the Prosecution has no access and which appears to emanate from the Registry.[437] As already noted, the Prosecution is unable to meaningfully respond to arguments based on documents it cannot access. Such arguments should therefore be dismissed *in limine*. Further, Abd-Al-Rahman fails to respect the confidentiality classification of this document.[438]

### *II.H.1. Abd-Al-Rahman fails to show that the Pre-Trial Chamber erred in making a certain finding*

161. Abd-Al-Rahman appears to argue that the Pre-Trial Chamber erred legally in finding that "the Defence's right to investigate, including conducting missions *in situ*, must be properly framed to the stage of the proceedings and that, should the case proceed to trial, it would be the Registry's responsibility to assess and support the Defence's missions."[439] He submits that there was "simply no legal basis for preventing the Defence from conducting investigations at the pre-trial stage or [to] consider that such investigations only matter once the case proceeds to

[433] Judgment, paras. 269-271. *See also below* paras. 209, 241, 238.
[434] *Contra* Appeal, para. 111. *See* Statute, art. 66(2); Judgment, paras. 168-168.
[435] Appeal, paras. 107-108, 112.
[436] Appeal, paras. 116, 118, 119 (referring to Procedural Challenges Decision, para. 44; Sudan Cooperation Reconsideration Decision, paras. 26-27; First Postponement Decision, paras. 36, 37).
[437] Appeal, para. 115 (fn. 329). *See also* fn. 332.
[438] *See above* para. 138, 144, 148.
[439] Appeal, para. 116 (referring to Procedural Challenges Decision, para. 44).

trial."[440]

162. Abd-Al-Rahman mischaracterises the Pre-Trial Chamber's finding. It did not find that there was a legal basis preventing Defence investigations at the pre-trial stage, or that such investigations only matter once the case proceeds to trial. The Pre-Trial Chamber merely noted that the Defence's right to investigate must be understood in light of the function of confirmation proceedings (which have a limited and specific purpose).[441] The Defence was then asserting that the case should be stopped because, *inter alia*, it had been unable to conduct necessary investigations in Sudan.[442] The Pre-Trial Chamber observed that "even though the Defence has the right to present evidence at the confirmation hearing, there is no corresponding right to have finalised all investigative steps the Defence might want to undertake."[443] It noted that, if the case were to proceed to trial, the Defence would still have ample opportunity to undertake missions to Sudan (which the Registry would be responsible to assess and support).[444] It determined that the start of the confirmation hearing could not be made contingent on the progress of the Defence's (or Prosecution's) investigations.[445] Abd-Al-Rahman fails to identify any legal error in the Pre-Trial Chamber's reasoning.

### *II.H.2. Abd-Al-Rahman fails to show that the Trial Chamber erred in making certain findings*

163. Abd-Al-Rahman appears to argue that the Trial Chamber erred in law by failing to intervene to restore the fairness of the proceedings pursuant to article 64(2).[446] He submits that the Registry's responsibilities with respect to security and safety were no bar to the Chamber's authority to so intervene.[447] Further, the Chamber should have ordered the Registry to provide support or otherwise stayed the proceedings.[448] These arguments should be rejected.

164. Abd-Al-Rahman refers to findings made by the Chamber in two decisions.[449] In the first decision, the Chamber recalled its earlier finding that it did "not have the power to prohibit 'parties and participants in the case from undertaking investigative measures and missions in Sudan'."[450] It noted that "the assessment of the security situation, the issuance of JTAG [Joint

[440] Appeal, para. 118 (referring to Procedural Challenges Decision, para. 44).
[441] Procedural Challenges Decision, paras. 37, 44, 47.
[442] Procedural Challenges Decision, paras. 31(viii), 36.
[443] Procedural Challenges Decision, para. 47.
[444] Procedural Challenges Decision, paras. 44, 47.
[445] Procedural Challenges Decision, paras. 37, 47.
[446] Appeal, para. 118 (referring to Sudan Cooperation Reconsideration Decision, paras. 26-27; First Postponement Decision, para. 36). *See also* Appeal, para. 116.
[447] Appeal, para. 118.
[448] Appeal, para. 118.
[449] Appeal, paras. 116-118 (referring to Sudan Cooperation Reconsideration Decision, paras. 26-27; First Postponement Decision, para. 36).
[450] Sudan Cooperation Reconsideration Decision, para. 26 (referring to Sudan Cooperation Decision, para. 51).

Threat Assessment Group] recommendations for a State, the timing and procedure of conducting such assessments, and determining the logistical and operational conditions for missions, is the prerogative of the Registry and is fully within its mandate."[451] It further found that "[a]lthough the Chamber has powers under Article 64(2) of the Statute to regulate matters that impact the conduct of the trial, these, however, do not extend to interfering with the Registry's security assessments, the timing and procedure of conducting such assessments, actions taken in respect of security matters, nor their responsibilities in respect of defence missions."[452] It found that this "non-interference extends to the witness protection measures and related activities undertaken by the VWU outside of the Court."[453]

165. On this basis, the Chamber rejected the Defence's requests to instruct the Registry to submit a new report (on the current status of cooperation with Sudan) and recommendations,[454] [REDACTED], and to make a declaration that the Registry owed a "duty of care" to members of the Defence team when they are on mission.[455] The Chamber also relied on similar reasoning to reject the Defence's submission that the non-transmission of Registry internal documents amounted to an obstacle to the preparation of its case.[456]

166. Abd-Al-Rahman fails to show any error in these decisions. The Chamber was correct to refuse to interfere in the Registry's exercise of its mandate regarding security matters in the ways requested by the Defence. As for a stay of proceedings, the Defence did not request this remedy in relation to the first decision.[457] In relation to the second decision, the Defence expressly argued (including when seeking leave to appeal) that it was *not* requesting a stay of the proceedings, even though the Chamber correctly found that the substance of its request amounted to one.[458] The Chamber properly found that this "drastic remedy" was not warranted in the circumstances.[459] Abd-Al-Rahman fails to show otherwise.

167. With respect to the second decision, Abd-Al-Rahman also argues that the Chamber "erroneously failed to draw any consequences from the delayed clearance of the deployment of the Defence's resource person to Sudan".[460] He does not explain what "consequences" the Chamber should have drawn. The Chamber noted that the Registry had by then agreed to

[451] Sudan Cooperation Reconsideration Decision, para. 26.
[452] Sudan Cooperation Reconsideration Decision, para. 27.
[453] Sudan Cooperation Reconsideration Decision, para. 27.
[454] Sudan Cooperation Reconsideration Decision, para. 3.
[455] Sudan Cooperation Reconsideration Decision, para. 27.
[456] First Postponement Decision, para. 36 (referring to Sudan Cooperation Reconsideration Decision, para. 26).
[457] Sudan Cooperation Reconsideration Decision, paras. 1, 5.
[458] First Postponement ALA Decision, paras. 23-25; First Postponement Decision, para. 29.
[459] First Postponement Decision, paras. 30-31.
[460] Appeal, para. 116 (referring to First Postponement Decision, para. 37).

authorise the deployment of the Defence's resource person, as the resource person had signed a waiver.[461] It also noted that the resource person was recruited by the Defence 14 months after the charges were confirmed, and that it was unclear to the Chamber "why his recruitment took place at such a late stage and, why given the problems [relating to his deployment], no attempt was made to seek a replacement."[462] Nonetheless, while finding that the overall situation did not mandate an adjournment *sine die*, as requested by the Defence, the Chamber amended the deadlines concerning the presentation of the Defence's case.[463] Despite finding that "many of the delays in the preparation of, and investigations relating to, the Defence's case are attributable to the Defence", it allowed the Defence additional time to "remedy any prejudice that the present state of affairs may have caused to the Accused."[464] The Chamber's approach was correct and reasonable. Abd-Al-Rahman fails to show any error.

### *II.H.3. Abd-Al-Rahman fails to show any breach of the equality of arms*

168. Abd-Al-Rahman submits that "[a]ll requests for Chambers' intervention to restore equality with the Prosecution and fairness by instructing the Registry to provide an appropriate level of assistance and support for the Defence's field missions were denied."[465] Further, he submits that these denials "compelled the Defence to conduct investigations from third countries [REDACTED]", and that these same issues "impacted on the possibility to protect, support and assist Defence witnesses in Sudan".[466] In his view, "the Registry's bureaucratic barriers",[467] the refusals of the Chambers to "intervene", and Sudan's non-cooperation (referring to Grounds 9, 11) placed the Defence at a substantial disadvantage *vis-à-vis* the Prosecution with respect to its capacity to deploy and investigate in Sudan.[468]

169. Abd-Al-Rahman fails to demonstrate any breach of equality of arms in this case. First, he advances no evidence that the Registry did not provide appropriate support and assistance to Defence field missions, in accordance with its responsibilities in particular under rules 20 and 14(2), and regulation 119 of the Regulations of the Registry.[469] Second, he fails to show that the specific measures requested by the Defence would have made any difference to this level of

[461] First Postponement Decision, paras. 9, 37.
[462] First Postponement Decision, para. 37.
[463] First Postponement Decision, paras. 43-44.
[464] First Postponement Decision, paras. 40, 42.
[465] Appeal, para. 116.
[466] Appeal, para. 117 (referring to Ground 12).
[467] This appears to relate to the Registry's request that the Defence's resource person sign a waiver before deploying to the field. *See* Appeal, para. 119 (fn. 345: referring to First Postponement Decision, para. 37). *See also above* para. 167.
[468] Appeal, para. 119.
[469] *See* Registrar Letter of 22 March 2022.

support and assistance.[470] Third, he fails to explain how the alleged lack of support compelled the Defence to conduct investigations in third countries. In any case, this was an investigative avenue that the Defence should have pursued regardless—in fact, the Chamber found that the Defence failed to explore this avenue diligently and in a timely manner.[471] Fourth, the Prosecution was also required to interview witnesses in third countries, given it had limited opportunity to conduct investigative missions in Sudan (and never in Darfur).[472]

170. Fifth, the Prosecution did not have any material advantage over the Defence in relation to [REDACTED].[473] Abd-Al-Rahman does not point to any evidence that the Defence was prevented from going on any mission due to [REDACTED]. Sixth, Abd-Al-Rahman does not explain how the Chamber's refusal to interfere in the security mandate of the Registry in the ways requested by the Defence is said to have had any impact on the possibility to protect, support and assist Defence witnesses in Sudan.[474] There is no apparent link between these two things. Seventh, Abd-Al-Rahman does not point to any evidence that the Registry's requirement that the Defence's resource person sign a waiver before being deployed to Sudan had any material impact on its ability to investigate.[475] Further, as found by the Chamber, the Defence's own actions contributed to the delay in deploying a resource person.[476] Finally, Abd-Al-Rahman fails to explain how Sudan's failure to provide certain documents requested by the Defence (as addressed in Grounds 9, 11) placed it at a disadvantage to the Prosecution in being able to deploy and investigate in Sudan.[477] Again, there is no apparent link between these things.

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[470] In relation to the Pre-Trial Chamber, *see* Procedural Challenges Decision, para. 31 (the Defence requested, *inter alia*, the immediate suspension of all activities in Sudan and an indefinite stay of the proceedings). *See also* Defence UNAMID Request, para. 18 and p. 9 (the Defence requested that the Pre-Trial Chamber order the Registry and Prosecution to submit observations on the consequences of the withdrawal of UNAMID). In relation to the Trial Chamber, *see* Sudan Cooperation Reconsideration Decision, paras. 1, 5, 27 (the Defence requested, *inter alia*, an immediate suspension of all activities in Sudan, and, relatedly, requested the Chamber to instruct the registry submit a new report and recommendations, [REDACTED], and to make a declaration that the Registry owed a "duty of care" to members of the Defence team when they are on mission); First Postponement Decision, para. 2 (the Defence requested postponement of the presentation of its case *sine die*).
[471] First Postponement Decision, para. 39. The Defence did not request assistance for a mission to a third country until February 2023.
[472] The Prosecution was able to conduct its first investigative mission on the territory of Sudan after 14 years only on 24 March 2021: *see* Prosecution Response to Defence Request for Finding of Non-Compliance, para. 15. The Prosecution then had a brief window to carry out further investigative missions until the military takeover on 25 October 2021, following which it was able to conduct only one additional investigative mission (in January/February 2022) before the trial commenced: *see* Decision on Prosecution's Application to Rely on Recently Collected Evidence, para. 26; Prosecution Request to Extend Deadlines para. 13.
[473] *See e.g.* T-147-Conf, pp. 8:6-11:7.
[474] *Contra* Appeal, para. 117.
[475] *Contra* Appeal, para. 119 (fn. 345: referring to First Postponement Decision, para. 37).
[476] First Postponement Decision, para. 37.
[477] *Contra* Appeal, para. 119. *See above* paras. 105-117 (Grounds 9, 11).

### *II.H.4. Abd-Al-Rahman fails to show any impact*

171. Abd-Al-Rahman submits that the alleged inequality of arms created "grave unfairness" in the proceedings, and that the Judgment should accordingly be quashed.[478] Abd-Al-Rahman fails to substantiate any impact of the alleged errors. This ground should be dismissed *in limine*. As found by the Appeals Chamber, "[w]hen raising an appeal on the ground of unfairness under article 81(1)(b)(iv) of the Statute, the appellant is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision."[479] Where an appellant fails to do so, the Appeals Chamber may dismiss the argument *in limine*.[480] Abd-Al-Rahman makes no argument concerning the reliability of the conviction decision, only stating that the alleged errors caused "grave unfairness".[481] This is insufficient to substantiate impact. In any case, as set out above, Abd-Al-Rahman fails to show that the principle of equality of arms was breached.[482]

## II.I. The Prosecution did not elevate the risk to witnesses by not marking statements as confidential (Ground 19)

172. Abd-Al-Rahman shows no error in the decisions by the Chambers concerning the Prosecution's marking of witness statements.[483] The Pre-Trial and Trial Chambers correctly found admissible witness statements that were *classified* confidential and regarded and treated as such by all parties, despite being *marked* as "Restricted" instead of "Confidential".[484] Rather than identifying any legal error, Abd-Al-Rahman merely repeats arguments that were correctly rejected by both Chambers, and mischaracterises their findings. He also fails to substantiate any impact of the alleged errors, whether on the Judgment or on the reliability and fairness of the proceedings. Ground 19 should therefore be dismissed.[485]

173. Neither Chamber found that the Prosecution violated the Court's rules protecting confidentiality.[486] Thus, Abd-Al-Rahman cannot show that the Chambers erred in law by concluding that the "Prosecution had systematically failed to comply with the Court's rules protecting confidentiality […], but found that this had no impact on its admissibility".[487] This does not arise from the Judgment or the Chambers' decisions.[488] Moreover, in his attempt to

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[478] Appeal, para. 119.
[479] *Ntaganda* AJ, para. 49. *See also* *Bemba* AJ, para. 60; *Lubanga* AJ, para. 28.
[480] *Ntaganda* AJ, para. 49.
[481] Appeal, para. 119.
[482] *See above* paras. 168-170.
[483] *Contra* Appeal, paras. 120-131.
[484] Judgment, paras. 65, 142-145; T-017, pp. 47:9-48:21; Procedural Challenges Decision, para. 42.
[485] *Contra* Appeal, paras. 120-131.
[486] *Contra* Appeal, paras. 125-126. The Judgment and the decisions (cited in fn. 484) contain no such finding.
[487] Appeal, para. 126.
[488] *Contra* Appeal, paras. 125-126.

substantiate his claim regarding the Prosecution's alleged wrongdoing, Abd-Al-Rahman incorrectly seeks to expand the scope of article 69(7) to cover non-compliance with administrative policies.[489] Article 69(7) however is limited to violations of the Statute or human rights.[490] Abd-Al-Rahman cites no authority for equating an alleged failure to comply with an administrative instruction on confidentiality marking with a statutory violation.

174. In any event, the Chambers also correctly found that the Defence submissions were speculative, and failed to demonstrate that any witness was actually at risk due to the absence of a "confidential" marking. [491] Abd-Al-Rahman shows nothing to the contrary. While he repeats his unsuccessful trial arguments, Abd-Al-Rahman provides no support for his claim that his concerns materialised in a number of cases.[492] Instances of interference reported by the Prosecution or the Registry were not linked to the marking of evidence and therefore cannot support Abd-Al-Rahman's claim.[493] Accordingly, any alleged error in the Prosecution's practice in marking the statements had no impact on the Judgment, or on the integrity and fairness of the proceedings. This is an additional reason to dismiss Ground 19.

## II.J. The Chamber properly imposed a 300 page limit for the Defence's Final Brief (Ground 21)

175. Abd-Al-Rahman shows no error in the Trial Chamber's imposition of a 300 page limit for the Defence's Final Brief. He argues that the Chamber erred procedurally, factually and legally, and breached the fairness of the proceedings, when imposing this page limit.[494] This ground should be dismissed *in limine*. Abd-Al-Rahman fails to substantiate any impact of the alleged errors. He repeats arguments already dismissed by the Chamber and merely disagrees with its reasonable exercise of its trial management powers.

### *II.J.1. The Chamber properly exercised its trial management powers in setting the page limit*

176. Abd-Al-Rahman argues that the Chamber erred procedurally and legally, and breached the fairness of the trial, by rejecting the Defence's request to reconsider its decision not to extend the page limit for its final brief from 300 to 370 pages.[495] He submits that the Chamber should have accepted the Defence's submission on the number of pages it considered necessary for its brief, based on "trust" in the "professionalism of the Defence", and given that the Lead Counsel

[489] *Contra* Appeal, para. 128.
[490] *See* Statute, art. 69(7).
[491] *See* Judgment, paras. 142-145; T-017, pp. 47:9-48:21. *See further* Decision on Procedural Challenges, para. 42.
[492] Appeal, para. 130.
[493] Appeal, para. 130. *See also above* para. 87.
[494] Appeal, paras. 133, 139, 140-141.
[495] Appeal, para. 139.

had submitted that, unless the page limit was extended, "he may have no choice other than to expose himself to professional sanctions".[496] He submits that no reasonable chamber would have maintained the limit of 300 pages in these circumstances.[497] Abd-Al-Rahman fails to show that the Chamber's decision was unreasonable or unfair, or to identify any legal error.

177. An accused's right to be heard is not unfettered, but subject to the Chamber's trial management powers under article 64(2) to ensure that the trial is fair and expeditious.[498] These powers include the setting of page limits. The Chamber set a reasonable page limit for the Defence's final brief. It twice extended the original page limit of 200 pages, first to 250 and then 300 pages—an overall 50% increase to the original limit.[499] The final figure of 300 pages was, in fact, the number of pages initially jointly requested by the Prosecution and the Defence.[500] When setting the final page limit, the Chamber was well-acquainted with the issues that had been raised during the trial, and knew of specific arguments that the Defence wished to address in its final brief.[501] It was within the Chamber's trial management function to determine the appropriate page limit in the circumstances of the case, and it was not obliged merely to accept the submissions of any party or participant in this regard.[502] The Chamber stressed that it was not "trying to limit Mr Abd-Al-Rahman's right to a fair trial", and stated its view that the page limit was "ample" to set out the issues the Defence had raised over the course of the trial and in its second request to extend the page limit.[503]

178. Moreover, despite rejecting the request for a further extension, the Chamber ensured that the Defence had sufficient opportunity to present its final arguments.[504] The Defence was permitted 4.5 hours to present its closing statements, and did not seek any additional time.[505] Having not done so, Abd-Al-Rahman cannot complain that he did not have the opportunity to

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[496] Appeal, para. 139.
[497] Appeal, para. 139.
[498] *See* *Katanga* Stay AJ (Dissenting Opinion of Judges Kourula and Trendafilova), paras. 57, 81, 83; *Ongwen* Confirmation Decision AJ, para. 137 (citing *Katanga* Stay AJ, para. 53).
[499] Final Briefs Page Limit Reconsideration Decision, paras. 1, 3, 5.
[500] Final Briefs Page Limit Reconsideration Decision, para. 3. In this respect, the Chamber noted that that it was "not until this very late stage of the proceedings that the Defence sought, within a short time span, two largely divergent page-limit extension for its final brief." *See* Final Briefs Page Limit Reconsideration Decision, para. 17.
[501] Final Briefs Page Limit Reconsideration Decision, paras. 12, 15, 16 (to the extent the Defence had apprised the Chamber of these issues). *Contra* Appeal, para. 139.
[502] *Contra* Appeal, para. 139.
[503] Final Briefs Page Limit Reconsideration Decision, para. 17.
[504] Final Briefs Page Limit Reconsideration Decision, para. 20 ("[n]otwithstanding the Chamber's view that 300 pages is more than ample to deal fully with all issues which are relevant to its Article 74 judgment, if either party feels it is incapable of properly dealing with such issues within the page limit, they may request leave from the Chamber to address supplementary arguments during their closing statements"); Final Briefs Non-Compliance Decision, para. 9.
[505] Third Conduct of Proceedings Directions, para. 17.

address the Chamber on any supplementary arguments to his final brief.

179. As for Lead Counsel's assertion regarding possible exposure to professional sanctions, the Chamber properly stated that it "deplores these *in terrorem* submissions",[506] and recalled that its initial decision on the length of the final briefs gave ample time to the Defence "to plan and litigate any related issues".[507] The Chamber's approach to the Defence's submissions was reasonable—it was for the Defence to prepare appropriately to prevent any such alleged conflict from arising. Abd-Al-Rahman fails to show the Chamber erred legally, procedurally or in the exercise of its discretion.

#### *II.J.2. Abd-Al-Rahman fails to show the Chamber erred in fact by finding that Annex II to the Defence's Final Brief contained submissions*

180. Abd-Al-Rahman argues that the Chamber erred in fact by finding that Annex II to the Defence Final Brief contained submissions, in violation of regulation 36(2) of the Regulations.[508] He argues that the purpose of compiling all deleted portions of the Defence Final Brief in Annex II was not to circumvent the page limit, but to provide "the public with the full version of the Defence argument" and to provide "contemporaneous evidence of the prejudice caused to the Defence by the denial of the required number of pages."[509]

181. These arguments should be dismissed. As noted by the Chamber, regardless of the supposed purpose of Annex II, it contained submissions—which contravened regulation 36(2)(b) of the Regulations and the Chamber's explicit order.[510] The Defence's Final Brief was therefore not "fully compliant with the Trial Chamber's instructions", as suggested by Abd-Al-Rahman.[511] The Chamber's decision to strike out Annex II, and to order the Defence to file an amended, self-standing, final brief, was a reasonable exercise of the Chamber's inherent trial management powers.[512] He has not shown otherwise.

#### *II.J.3. Abd-Al-Rahman fails to show any impact*

182. Abd-Al-Rahman does not argue that the outcome of the trial would have been different had the Defence been able to include the identified additional submissions in its final brief.[513]

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[506] Final Briefs Page Limit Reconsideration Decision, para. 18; Final Briefs Non-Compliance Decision, para. 9. This was not the first time the Chamber considered that an *in terrorem* suggestion by the Defence was inappropriate. *See* First Postponement Decision, para. 40.
[507] Final Briefs Page Limit Reconsideration Decision, para. 18.
[508] Appeal, para. 138.
[509] Appeal, para. 134.
[510] Final Briefs Non-Compliance Decision, paras. 11-12; Third Conduct of Proceedings Directions, para. 13.
[511] Appeal, para. 138.
[512] Final Briefs Page Limit Reconsideration Decision, paras. 14-15, 17. *See* Appeal, para. 137. While including arguments on the limits of this inherent power, Abd-Al-Rahman does not explicitly allege that the Chamber erred in exercising it.
[513] Appeal, paras. 140-141.

He merely argues that the simple fact of the alleged breach of his right to a fair hearing should result in the whole Judgment being quashed.[514] This argument is meritless.

183. Abd-Al-Rahman fails to substantiate any impact of the alleged errors. This ground should therefore be dismissed *in limine*. He makes no argument concerning any alleged impact from the distinct factual error alleged.[515] As found by the Appeals Chamber, an appellant alleging unfairness must also identify how this affected the reliability of the conviction decision.[516] Where an appellant fails to do so, the Appeals Chamber may dismiss the argument *in limine*.[517] Abd-Al-Rahman makes no argument concerning the reliability of the conviction decision, only stating that a number of his grounds of appeal may have been avoided if the additional submissions were included.[518] This is insufficient to substantiate any impact.

## III. The Chamber properly assessed the evidence (Part C)

184. In Part C of his appeal, Abd-Al-Rahman challenged the Chamber's assessments of witness credibility and reliability. He alleges the Chamber erroneously relied on the evidence of witnesses who gave inconsistent evidence (Grounds 22, 28); treated Prosecution and Defence witnesses differently (Grounds 24-26); and relied upon material not available to the Defence in positively assessing witnesses' credibility and reliability (Ground 29). In each ground, Abd-Al-Rahman relies on mischaracterisations and selective readings of the Chamber's reasoning and unduly formalistic arguments as to when witnesses and their evidence should be found lacking in credibility or to be unreliable. Moreover, his arguments rest on his fundamental misconception of the Chamber's discretion in its assessment of witness credibility and reliability. He frames the errors primarily as legal ones while failing to identify the legal principles allegedly violated. But even if framed as factual errors, Abd-Al-Rahman fails to demonstrate that no reasonable trial chamber would have made the findings he contests.[519] Critically, he also fails to concretely demonstrate—or in some instances, even allege—the material impact of the alleged errors on the Judgment. Instead he broadly submits that the errors affected overall findings of guilt. His lack of substantiation warrants summary dismissal of his grounds.[520] Grounds 22, 24-26 and 28-29 should be rejected for the reasons developed below.

[514] Appeal, para. 141.
[515] Appeal, para. 139.
[516] *Ntaganda* AJ, para. 49. *See also* *Bemba* AJ, para. 60; *Lubanga* AJ, para. 28. *See above* para. 171.
[517] *Ntaganda* AJ, para. 49.
[518] Appeal, para. 140.
[519] *Ntaganda* AJ, paras. 39-42; *Bemba et al.* AJ, paras. 91-96; *Lubanga* AJ, paras. 21-27; *Ongwen* SAJ, para. 34.
[520] *Ongwen* AJ, paras. 88-89; *Ntaganda* AJ, para. 43; Interim Release AD, para. 16.

### III.A. The Chamber properly assessed inconsistencies in witnesses' asylum applications (Ground 22)

185. Abd-Al-Rahman fails to show any error in the Chamber's cautious approach to assessing the credibility of witnesses [REDACTED], whose testimony was inconsistent in some respects with information they had provided in asylum applications on fleeing Sudan.[521] Abd-Al-Rahman argues that the Chamber erred by failing to give sufficient weight to these inconsistencies, and that irrespective of their cross examination by the Defence, the Chamber should have found them unreliable.[522] Abd-Al-Rahman misconstrues the nature of the Chamber's discretion in assessing the evidence, and merely repeats his trial arguments in disagreement with the Chamber's reasonable assessment. His arguments should be rejected.

186. First, despite alleging legal error, Abd-Al-Rahman fails to identify any rule to support his claim that the trial chamber should have found [REDACTED] lacking in credibility overall due to discrepancies between their evidence before the Court and information they provided in their asylum applications.[523] In any event, there is none. Whether a particular witness is considered credible and reliable requires a case-by-case assessment of their evidence, in light of all relevant circumstances,[524] while taking into account, holistically, the entire system of evidence available to the Chamber.[525] This assessment falls within the significant discretion afforded to a trial chamber to freely assess all evidence in the case.[526] As such, "[n]o witness is *per se* unreliable, including a witness that has previously given false testimony before a court".[527] Where discrepancies arise between in-court testimony and a prior account, a trial chamber must carefully consider the content and all circumstances in which the prior account had been made, including its context, purpose and the (expected) level of details, as well as any explanation for such discrepancy as provided by the witness.[528] As such, a trial chamber may find that although a witness is not reliable in some parts of their testimony, they may be reliable in others, but the chamber must explain why it considers the rest of the testimony to be reliable.[529] The Chamber correctly recognised and applied these principles in this case,[530] observing that "[s]uch assessments are part of the fact-finding function of a Chamber and reflect

[521] *Contra* Appeal, paras. 142-150.
[522] Appeal, paras. 142-143.
[523] *Contra* Appeal, paras. 142-143, 150.
[524] *Bemba et al.* AJ, paras. 1019, 1531; *Gicheru* CD, para. 41.
[525] *Ongwen* TJ, para. 260.
[526] ICC RPE, rule 63(2); Statute, art. 64(9); *Bemba et al.* AJ, para. 1019; *Kenyatta et al.* CD, para. 80.
[527] *Gicheru* CD, para. 41. *See also* *Bemba et al.* AJ, para. 1019; *Ongwen* TJ, para. 260.
[528] *Ongwen* TJ, para. 256.
[529] *Ntaganda* AJ, paras. 736, 774; *Ngudjolo* AJ, para. 168.
[530] Judgment, para. 219 (citing *Ongwen* AJ, para. 524; *Ngudjolo* AJ, para. 168. *See also* *Ntaganda* AJ, paras. 736, 774; *Bemba et al.* AJ, para. 1019.

the reality of human experience".[531]

187. Second, the Chamber correctly applied these principles in assessing the testimony of [REDACTED].[532] The Chamber found that while it considered the witnesses' individual reasons for the lies or inconsistencies on their asylum applications, "the evidence, taken as a whole, demonstrated that in their asylum applications, witnesses provided information that they considered would make the best case for asylum in their respective host States", and as such "lied or withheld information in their asylum applications with an intention to make the best case for asylum".[533] The existence of discrepancies on witnesses' asylum applications was therefore not of itself, without additional factors, material to the Chamber's assessment of their credibility.[534] The Chamber's finding was reasonable in light of [REDACTED].[535]

188. Third, the national sources and *ad hoc* tribunal jurisprudence that Abd-Al-Rahman cites do not assist him.[536] To the contrary, the national sources demonstrate—consistently with the principles described above—that misrepresentations on an asylum application do not automatically lead to the revocation of a person's refugee status. If there are reasonable explanations for the misrepresentation, or where the misrepresentation was not material or decisive to the grant of asylum, refugee status is not revoked.[537] This is consistent with refugee and human rights jurisprudence, correctly noted and applied by the Chamber,[538] where judges have considered factors such as the applicants' acknowledgement they had lied, the effect of those lies, and whether they went to core issues in their applications.[539] Abd-Al-Rahman otherwise fails to explain the relevance of his reference to government guidance warning immigration applicants of the consequences of making misrepresentations in visa and citizenship applications.[540] Moreover, his reference to *ad hoc* tribunal case law only demonstrates that a chamber should assess with caution the testimony of a witness who has

[531] Witness Annex, para. 275.
[532] *Contra* Appeal, para. 142.
[533] Judgment, para. 221.
[534] Judgment, para. 222.
[535] *Contra* Appeal, paras. 142-150. *See* Witness Annex, paras. [REDACTED]. [REDACTED].
[536] *Contra* Appeal, para. 143.
[537] Appeal, para. 143 (fn. 414: citing Guidance – Revocation of protection status (UK); Refugees Act 1998 (South Africa), s. 36(1); Law No. 9,474 of 22 July 1997 (Brazil), article 39(II); Immigration Control and Refugee Recognition Act (Japan), art. 61-2-7(i)).
[538] Judgment, para. 222 (fn. 398: citing *GM (Eritrea), YT (Eritrea) and MY (Eritrea) v. Secretary of State for the Home Department*, paras. 29-31; *J.N.A. v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform*, paras. 13-20).
[539] *J.N.A. v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform*, para. 17; *J.K. and Others v. Sweden*, para. 93. *See e.g. Said v. The Netherlands*, para. 53; *N. v. Finland*, paras. 154-155.
[540] Appeal, para. 143 (fn. 414: citing Consequences of immigration and citizenship fraud (Canada)).

benefited in a material way from their participation as a witness in the criminal proceedings.[541] This concern is irrelevant to [REDACTED].[542]

189. Fourth, Abd-Al-Rahman alleges that the Chamber further erred in two respects, but his undeveloped submissions in this regard should be dismissed.[543] Firstly, he fails to explain why the Chamber erred in considering whether a witness's lie "was deliberate, rather than accidental."[544] This was an appropriate inquiry to ascertain all relevant circumstances of the misrepresentations[545] in line with the holistic assessment required of trial chambers.[546] Secondly, he does not develop his claim that the Chamber attached "excessive virtue" to the Defence's cross-examination of the witnesses in reaching its findings on credibility.[547] A chamber must be satisfied for itself of the credibility and reliability of witnesses, regardless of whether and how effectively cross-examination was conducted.[548] Contrary to Abd-Al-Rahman's claim, [REDACTED].[549] The Chamber implicitly recognised that without the opportunity to elicit explanations from the witnesses as to the nature and reason for the inconsistencies, it could not be satisfied of the witnesses' credibility. This reinforces the correctness of the Chamber's approach to the *viva voce* witnesses [REDACTED].[550]

190. Fifth, Abd-Al-Rahman also fails to establish that the Chamber erred in finding that [REDACTED] had lied on their asylum application to maximise their chances of obtaining asylum and that this did not undermine their credibility or reliability:

- The Chamber accepted [REDACTED].[551] This was reasonable in light of its detailed assessment of each topic of the witness's evidence, finding [REDACTED][552] and, describing his evidence on certain topics [REDACTED],[553] [REDACTED][554] and [REDACTED].[555] Abd-Al-Rahman repeats his trial arguments, disagreeing with the Chamber.[556]

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[541] *Contra* Appeal, para. 143 (fn. 416: citing *Martić* TJ, para. 38; *Bizimungu et al.* TJ, paras. 830-831; *Zigiranyirazo* TJ, paras. 139-140).
[542] [REDACTED].
[543] *Contra* Appeal, paras. 143-144. *See* *Ongwen* AJ, paras. 92, 96 (duty to substantiate grounds of appeal).
[544] Appeal, para. 144 (citing Judgment, para. 220, first bullet point).
[545] *Bemba* TJ, para. 229 (finding that it was necessary to understand the motives behind a misrepresentation).
[546] Judgment, para. 219.
[547] Appeal, para. 143.
[548] *See* *Bemba et al.* AJ, paras. 1019, 1531; *Ongwen* TJ, para. 260; *Gicheru* CD, paras. 41-42.
[549] *Contra* Appeal, para. 145. *See* Witness Annex, paras. [REDACTED].
[550] *See below* para. 190.
[551] Witness Annex, para. [REDACTED].
[552] Witness Annex, paras. [REDACTED].
[553] Witness Annex, paras. [REDACTED].
[554] Witness Annex, para. [REDACTED].
[555] Witness Annex, para. [REDACTED].
[556] Appeal, para. 146. [REDACTED].

- The Chamber accepted that [REDACTED].[557] Its finding that this did not undermine the witness's credibility or reliability was reasonable given its detailed assessment of each topic of the witness's evidence, finding that he was credible and reliable in relation to [REDACTED].[558] Abd-Al-Rahman repeats his trial arguments which simply disagree with the Chamber.[559]
- The Chamber accepted [REDACTED].[560] The Chamber's finding that this did not undermine the witness's credibility and reliability was reasonable in light of its detailed analysis of each topic of the witness's evidence. It found [REDACTED],[561] evidence on other aspects [REDACTED],[562] and [REDACTED].[563] Abd-Al-Rahman merely disagrees with the Chamber's reasonable and nuanced assessment.[564]
- The Chamber accepted [REDACTED].[565] [REDACTED].[566] [REDACTED].[567] [REDACTED].[568] [REDACTED].[569] This was a very cautious approach, given that [REDACTED].[570] The Chamber nevertheless reasonably found the remainder of his evidence to be credible and reliable, noting that it aligned with that given by other witnesses.[571] Abd-Al-Rahman merely repeats his trial arguments in disagreement with the Chamber.[572]

191. Finally, Abd-Al-Rahman fails to substantiate the material impact of the alleged errors on the Judgment. He claims that the errors ultimately impacted the finding of guilt.[573] This is insufficient to meet his burden as the appellant, and ground 23 may be dismissed *in limine* as a result.[574] In any event, none of the alleged errors, even if established, could have materially impacted the Judgment. The Chamber relied on various aspects of the evidence of [REDACTED] on a range of topics that were corroborated by other witnesses. Abd-Al-Rahman

[557] *Contra* Appeal, para. 147. *See* Witness Annex, para. [REDACTED]. [REDACTED].
[558] Witness Annex, paras. [REDACTED].
[559] Appeal, para. 147. *See* Defence Final Brief, para. [REDACTED]; Witness Annex, para. [REDACTED].
[560] *Contra* Appeal, para. 148. [REDACTED]. *See* [REDACTED]; Witness Annex, para. [REDACTED].
[561] Witness Annex, paras. [REDACTED].
[562] Witness Annex, para. [REDACTED].
[563] Witness Annex, paras. [REDACTED].
[564] Appeal, para. 148 (citing Judgment, para. 220, third bullet point).
[565] *Contra* Appeal, para. 149. *See* [REDACTED]; Witness Annex, para. [REDACTED]. [REDACTED].
[566] [REDACTED].
[567] [REDACTED].
[568] [REDACTED].
[569] Witness Annex, para. [REDACTED].
[570] [REDACTED].
[571] Witness Annex, para. [REDACTED].
[572] Appeal, para. 149; Defence Final Brief, para. [REDACTED].
[573] Appeal, para. 150.
[574] Interim Release AD, para. 16.

has not shown that the Chamber's findings on these topics would have differed at all, let alone in any manner altering his convictions, had it not relied on their evidence.

### III.B. The Chamber applied consistent standards in assessing the evidence of Prosecution and Defence witnesses (Ground 24)

192. In Ground 24 of his appeal, Abd-Al-Rahman alleges that the Chamber erred in law by applying a double-standard in assessing the evidence of Prosecution and Defence witnesses. He claims that the Chamber failed to address credibility challenges raised by the Defence in relation to P-0905 and P-0769. Further, that it disregarded the entirety of the evidence of Defence witnesses D-0001, D-0002 and D-0035 even though they were only found to be unreliable on one aspect of their evidence, whereas it had accepted the evidence of Prosecution witnesses on certain aspects while finding that their evidence was unreliable on other aspects.[575] Abd-Al-Rahman's arguments are premised on his selective and incorrect reading of the Judgment and his misappreciation of the Chamber's wide discretion to assess freely all evidence based on the content of the evidence and all circumstances relevant to the witness's credibility and reliability.[576] Abd-Al-Rahman fails to demonstrate any error.

193. First, contrary to Abd-Al-Rahman's claim, the Chamber reasonably rejected his challenge to P-0905's credibility.[577] It considered his arguments on the witness's alleged evasiveness in answering Defence questions and his evidence [REDACTED].[578] This is evidenced by its citation to the Defence's arguments.[579] It implicitly found the Defence's challenge unmerited when it concluded that while P-0905 may have minimised his own role in the events, this did not undermine his credibility in light of his detailed evidence, which was given without any apparent animus and was supported by other witnesses.[580] In any event, the Chamber was not required to provide a detailed answer to every Defence argument, since its reasoning was sufficiently clear to discern the basis for its findings.[581] This is demonstrated by its eight pages of analysis of P-0905's credibility and reliability, in which the Chamber accepted Defence challenges on other aspects of the witness's evidence.[582] Abd-Al-Rahman merely disagrees with the Chamber's conclusions.

194. Second, contrary to Abd-Al-Rahman's claim, the Chamber reasonably rejected the

[575] Appeal, paras. 151-155.
[576] *See above* para. 186.
[577] Appeal, para. 151.
[578] *Contra* Appeal, para. 151 (fn. 435: citing Defence Final Brief, paras. 134-135).
[579] Witness Annex, para. 336 (fn. 1235: citing Defence Final Brief, paras. 134-135).
[580] Witness Annex, para. 336.
[581] *Said* Contact Restrictions AD, paras. 44-45; *Lubanga* First Redactions AD, para. 20. *Contra* Appeal, para. 151.
[582] *See e.g.* Witness Annex, paras. 332-333, 345.

Defence's arguments regarding P-0769's motives to testify given [REDACTED].[583] The Chamber cited the Defence arguments[584] and implicitly rejected them when finding that [REDACTED] and there was no evidence that P-0769 had any reason to shift blame to any other person.[585] This finding was reasonable given the witness's evidence that [REDACTED].[586] In any event, [REDACTED], and, without more, do not undermine a witness's credibility.[587]

195. Third, Abd-Al-Rahman mischaracterises the Chamber's findings in arguing that the Chamber did not rely at all on certain Defence witnesses after finding their evidence on the issue of whether Abd-Al-Rahman was known as 'Ali Kushayb' ("the Identity Issue") to be unreliable, unlike its treatment of Prosecution witnesses:[588]

- The Chamber found that D-0001 was not credible in denying knowledge that Abd-Al-Rahman was alleged to be Ali Kushayb. This was not because his evidence contradicted the Chamber's finding that Abd-Al-Rahman was known as 'Ali Kushayb' throughout the charged events ("the Identity Finding").[589] Rather, it was because it was implausible that D-0001 did not know of this link given [REDACTED], knowledge of certain events involving Abd-Al-Rahman—the reports of which referred to Abd-Al-Rahman as Ali Kushayb—and his keeping up-to-date with the news.[590] The Chamber's finding was reasonable and well-reasoned, setting out the specific factors that led it to make its negative credibility assessment. Moreover, contrary to Abd-Al-Rahman's claim, the Chamber did not rely on D-0001's remaining evidence of the neutrality of the Ta'aisha tribe, Abd-Al-Rahman's relationship with the Fur in Rahad Al-Berdi, the role of the *nazir* and other functionaries in the Ta'aisha tribe, because these issues were not relevant to its assessment of Abd-Al-Rahman's participation in the 2003-2004 events.[591] The Chamber appropriately limited its factual assessment to the charged allegations.[592]
- The Chamber did not rely on D-0002's evidence of the neutrality of the Ta'aisha tribe because this issue did not have any impact on its findings in relation to Abd-Al-Rahman's

[583] Appeal, para. 151 (citing Witness Annex, para. 218). *See* Defence Final Brief, paras. 156-157.
[584] Witness Annex, para. 218 (fn. 804: citing Defence Final Brief, paras. 156-157).
[585] Witness Annex, para. 218.
[586] [REDACTED].
[587] [REDACTED].
[588] Appeal, paras. 152-154.
[589] *Contra* Appeal, para. 153.
[590] [REDACTED]. He had knowledge of events including the conflict between the Ta'aisha and Salamat tribes and the assassination attempt on Abd-Al-Rahman, the reports for both of which referred to Abd-Al-Rahman as Ali Kushayb. He kept up-to-date with the news on television and radio: Witness Annex, paras. 575, 580.
[591] Witness Annex, paras. 576-577, 580. *Contra* Appeal, para. 153.
[592] *See* Judgment, para. 236.

role in 2003-2004 in Wadi Salih, particularly as D-0002 was not present in the area.[593] This was a reasonable finding, and consistent with its approach in relation to Prosecution witnesses where the Chamber did not rely on their indirect evidence of the events.[594] The Chamber did not take into account D-0001 or D-0002's evidence of the neutrality of the Ta'aisha tribe due to its concerns over their credibility and reliability, finding that their evidence lacked "any probative value" on this issue.[595] This was reasonable in light of the factors it outlined in its credibility and reliability assessments for D-0001 and D-0002. Abd-Al-Rahman merely disagrees with the Chamber.[596]

- The Chamber found it was implausible that D-0035 had never heard of a connection between 'Ali Kushayb' and Minister Harun, and knew nothing of the charged events, given [REDACTED].[597] It was unnecessary for the Chamber to make further findings that the witness lied or gave prior inconsistent evidence.[598] The Chamber's negative assessment of the witness's credibility was reasonable and properly based on its holistic assessment. Having found the witness to be generally not credible, the Chamber reasonably did not rely on other aspects of his evidence.[599] Moreover the Chamber was not bound to consider as established those portions of D-0035's testimony that were unchallenged by the Prosecution.[600]

196. Finally, Abd-Al-Rahman fails to demonstrate the material impact of the alleged errors. He argues that the alleged errors rendered the trial unfair and the Judgment "fatally flawed".[601] This sweeping claim is insufficient to meet the appellant's burden to substantiate the legal error and demonstrate how the error materially affected the Judgment. The Chamber convicted Abd-Al-Rahman based on extensive factual findings established through multiple sources of evidence. Abd-Al-Rahman's failure to explain how the Judgment would have differed in a material respect warrants the dismissal *in limine* of Ground 24.

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[593] Witness Annex, para. 589. *Contra* Appeal, para. 153.
[594] *See e.g.* Witness Annex, paras. 3 (finding P-0007's evidence in relation to Ali Kushayb in the Bindisi and Mukjar events to be "indirect, unsubstantiated and general" and therefore unreliable), 73 (finding P-0119's evidence in relation to the 'Ali Kushayb' nickname to be based on indirect evidence and therefore unreliable), 76 (finding P-0119's evidence regarding the Deleig Operation to be indirect and unsupported by other evidence and therefore unreliable), 123 (finding P-0581's evidence of 'Ali Kushayb' in Mukjar to be indirect and therefore deciding not to rely on it), 173 (finding P-0651's identification evidence of Ali Kushayb to be indirect and deciding not to rely on it).
[595] *Contra* Appeal, para. 153. *See* Judgment, para. 324 (fn. 712).
[596] *See also below* paras. 306-313 (Ground 48).
[597] Witness Annex, para. [REDACTED]. *Contra* Appeal, para. 154.
[598] *Contra* Appeal, para. 154.
[599] Witness Annex, para. 691.
[600] *Bemba* TJ, para. 232.
[601] Appeal, para. 155.

## III.C. The Chamber reasonably assessed the evidence of Defence witnesses on the Identity Issue (Ground 25)

197. Abd-Al-Rahman alleges that the Chamber legally and factually erred in its approach to assessing the Defence evidence concerning the Identity Issue.[602] He alleges that the Chamber misinterpreted Defence witnesses and discounted their evidence without finding concrete inconsistencies, and dismissed testimony as implausible or unhelpful without adequate reasoning. Abd-Al-Rahman mischaracterises the Chamber's detailed and careful assessment and takes its findings out of context. He repeats his unsuccessful trial arguments and merely disagrees with the Chamber.

### *III.C.1. The Chamber reasonably assessed Defence witness testimony on the Identity Issue (first alleged error)*

198. Abd-Al-Rahman alleges that the Chamber erred in fact by misinterpreting the evidence of D-0002 and D-0029 on the Identity Issue and thus incorrectly characterised their evidence as inconsistent or contradictory.[603] His arguments should be rejected.

199. First, contrary to Abd-Al-Rahman's claims,[604] the Chamber found in its *overall* assessment of D-0002 that his evidence on the Identity Issue was "contradictory and unpersuasive".[605] It reached this conclusion based on its holistic assessment of all relevant aspects of the witness's testimony—not just the individual factors that Abd-Al-Rahman highlights.[606] This included that: he [REDACTED] the Ta'aisha tribe to which Abd-Al-Rahman also belonged;[607] he had known Abd-Al-Rahman since [REDACTED];[608] he had never heard the nickname 'Ali Kushayb' and did not know what it meant, although he later heard the nickname in the context of the ICC investigations against Abd-Al-Rahman between 2010 and 2014;[609] he discussed the ICC investigations with [REDACTED].[610] The contradictions were thus inherent in his evidence, particularly about [REDACTED].[611] Since the Chamber's findings were reasonably based on the weaknesses inherent in the witness's evidence, it did not need to consider any external factors such as the socio-cultural context in which news is

[602] Appeal, paras. 156-166.
[603] Appeal, para. 157.
[604] Appeal, paras. 158-159.
[605] Witness Annex, para. 589.
[606] Appeal, para. 158 (claiming that the Chamber identified two principal inconsistencies: (i) that D-0002 stated that he had never heard the nickname 'Ali Kushayb', while later acknowledging he heard the name in connection with the ICC investigation; and (ii) that D-0002 stated that the ICC arrest warrants were widely known in Rahad Al-Berdi and that he discussed the investigation with Abd-Al-Rahman, while also stating that he did not know the crimes with which he was charged). *See* Witness Annex, para. 589.
[607] Witness Annex, para. 581; Judgment, para. 7.
[608] Witness Annex, para. 582.
[609] Witness Annex, paras. 584, 588.
[610] Witness Annex, paras. 584-585, 588.
[611] *See e.g.* Witness Annex, para. [REDACTED].

disseminated in Darfur.[612] Moreover, the Chamber correctly noted the different contexts in which the witness gave evidence of his knowledge of the 'Ali Kushayb' nickname;[613] it simply found the witness's evidence to be unpersuasive in light of his testimony as a whole. Abd-Al-Rahman does not engage with these factors but rather repeats unsuccessful trial arguments.[614]

200. Abd-Al-Rahman's claim that the Chamber made no finding on D-0002's credibility and reliability concerning the Identity Issue, such that its rejection of his evidence on the nickname is "left with no reason, in breach of the holistic approach to the evidence",[615] is contradicted by a plain reading of the Judgment. It is self-evident from the Chamber's assessment summarised above and its conclusion that D-0002's evidence was "contradictory and unpersuasive", and "did not have any impact on the Chamber's findings",[616] that it found the witness's evidence to be lacking in credibility, unreliable and irrelevant.

201. Second, Abd-Al-Rahman mischaracterises and selectively reads the Chamber's reasoning in claiming that the Chamber cursorily dismissed D-0029's evidence[617] and failed to explain why his evidence of the manner in which Abd-Al-Rahman was addressed locally, years after the charged period, lacked probative value.[618] D-0029[619] stated that Abd-Al-Rahman also went by the name 'Abu Nasser', and that he heard the name 'Ali Kushayb' on the radio but never in connection with Abd-Al-Rahman.[620] The Chamber did not rely on this evidence, finding it to be "temporally and factually limited in scope, and somewhat inconsistent",[621] providing sufficient reasons for this finding.[622] It noted that D-0029 was only about 10 years of age during the charged period,[623] did not meet Abd-Al-Rahman until 2010, and never had conversations with him.[624] Moreover, the witness stated he only had access to news via the radio.[625] These factors showed that D-0029's evidence on Abd-Al-Rahman's identity was limited in scope, compared to the body of evidence demonstrating the link between Abd-Al-Rahman and Ali Kushayb during 2003-2004.[626] Moreover, the Chamber's finding that D-0029's

[612] *Contra* Appeal, para. 159.
[613] *Contra* Appeal, para. 158.
[614] Appeal, para. 159 (citing Defence Final Brief, para. 796).
[615] Appeal, para. 160.
[616] Witness Annex, para. 589.
[617] Appeal, para. 161.
[618] Appeal, para. 161.
[619] D-0029 was a [REDACTED] member of the Fur tribe from Rahad Al-Berdi: Witness Annex, para. 669.
[620] Witness Annex, paras. 671-672.
[621] Witness Annex, para. 675.
[622] *Contra* Appeal, para. 161. *See* Witness Annex, paras. 670-675.
[623] Witness Annex, para. 675.
[624] Witness Annex, para. 670.
[625] Witness Annex, para. 675.
[626] *See* Judgment, Section 5.I.

evidence was "somewhat inconsistent" was reasonable in light of: (i) the witness's claim to remember hearing the name 'Ali Kushayb' years earlier on the radio, despite not knowing who this was;[627] (ii) his shifting account of the context in which he first heard the name 'Ali Kushayb', first insisting he did not know the context in which it was mentioned and later acknowledging, when confronted with his statement in cross-examination, that the name was mentioned in relation to problems between the Arabs and the Fur—but denying hearing that 'Ali Kushayb' was involved.[628] In determining that it would not rely on D-0029's evidence due to these issues, the Chamber implicitly found it had low probative value.[629]

202. Finally, Abd-Al-Rahman's claim that the Chamber failed to explain why D-0029's evidence on the manner in which Abd-Al-Rahman was addressed locally lacked probative value is unfounded.[630] D-0029's evidence of his knowledge of Abd-Al-Rahman and how he was addressed locally from 2010 onwards was of little evidentiary value when assessed holistically against the overwhelming evidence on the record—including eight witnesses found to be credible and reliable who knew Abd-Al-Rahman was 'Ali Kushayb' based on their personal experiences during the charged period.[631]

203. Abd-Al-Rahman alleges that the Chamber's failure to rely on D-0002 and D-0029 as to the emergence of the link between Abd-Al-Rahman and the name 'Ali Kushayb' impacted the Identity Finding, affecting all counts.[632] This broad assertion is insufficient to discharge his burden to show the material impact of the alleged errors. The Chamber's comprehensive findings on the Identity Issue were based on a range of testimonial, audio-visual, documentary, and circumstantial evidence, supported by the agreed facts,[633] and its detailed assessments of witnesses' credibility and reliability on the topic. Abd-Al-Rahman fails to show that, had the Chamber not erred as alleged in relation to D-0002 and D-0029's evidence, these findings would have altered such that the Chamber would have acquitted him on all counts.

#### *III.C.2. The Chamber did not discount Defence witnesses simply because their evidence contradicted the Identity Finding (second alleged error)*

204. Abd-Al-Rahman alleges that the Chamber dismissed or accorded little weight to the testimony of Defence witnesses without identifying deficiencies that would justify such

[627] T-157, pp. 12:23-13:1.
[628] T-157, pp. 11:22-12:8, 12:21-13:6, 13:12-17.
[629] *Contra* Appeal, para. 161.
[630] *Contra* Appeal, para. 161.
[631] Judgment, paras. 250-253. *See also* Witness Annex, para. 637 (referring to the "overwhelming evidence" that Abd-Al-Rahman was 'Ali Kushayb').
[632] Appeal, para. 162.
[633] Judgment, paras. 238-271.

treatment. Instead, he submits, it treated their absence of knowledge of the name 'Ali Kushayb' or refusal to accept that this was Abd-Al-Rahman as a factor undermining their credibility,[634] thus equating disagreement with the Prosecution case with unreliability.[635] Abd-Al-Rahman mischaracterises the Judgment and takes the Chamber's findings out of context. Moreover, he fails to appreciate the Chamber's broad discretion in determining a witness's credibility. That it considered certain factors in assessing certain Defence witnesses which it did not consider for certain Prosecution witnesses does not demonstrate erroneous differential treatment of Prosecution and Defence witnesses.[636] Rather, it reflected the Chamber's appropriate, individualised assessment of each witness's evidence in light of all relevant circumstances, including individual circumstances of the witness, their relationship to the accused, age, vulnerability, involvement in the events under consideration, the risk of self-incrimination, possible bias towards or against the accused, and/or motives for telling the truth or providing false testimony.[637] Abd-Al-Rahman's allegations regarding the errors in the Chamber's credibility assessments of D-0007 and D-0011 are misplaced.

205. First, contrary to Abd-Al-Rahman's claim, the Chamber did not disregard D-0007's evidence primarily because it was "implausible" that he had not heard of the 'Ali Kushayb' nickname.[638] Instead, the Chamber identified several factors that led it to reasonably conclude that his evidence was "of limited reliability and credibility".[639] This included that: it was "implausible" that D-0007—a [REDACTED] member of the Ta'aisha tribe who first met Abd-Al-Rahman [REDACTED][640]—had never heard of the name 'Ali Kushayb' until he testified despite the plethora of media reports linking Abd-Al-Rahman to the name 'Ali Kushayb', including in reports of the shooting of Abd-Al-Rahman in [REDACTED] Nyala in 2013;[641] D-0007 was [REDACTED];[642] D-0007 was "fiercely loyal" to the Ta'aisha tribe and gave "incongruent" evidence when asserting the pacifist and peaceful nature of the tribe who were "very interested in being soldiers" with "large numbers" in the armed forces and police.[643] D-0007 repeatedly appeared to misunderstand the Prosecution's questions;[644] and his evidence

[634] Appeal, para. 164.
[635] Appeal, para. 164.
[636] *Bikindi* AJ, para. 116.
[637] *See e.g. Bemba* TJ, para. 229.
[638] Appeal, para. 165.
[639] Witness Annex, para. 613.
[640] Witness Annex, paras. 608-609.
[641] Witness Annex, para. 610.
[642] Witness Annex, para. 608.
[643] Witness Annex, para. 612.
[644] Witness Annex, para. 613.

was vague.[645] Abd-Al-Rahman fails to appreciate that these factors revealed the deficiencies in D-0007's evidence; the Chamber did not need to identify any further deficiencies.[646]

206. Second, Abd-Al-Rahman mischaracterises the Chamber's reasoning in alleging that it provided insufficient reasons for finding that D-0011's evidence did not assist it in determining whether Abd-Al-Rahman was known by the 'Ali Kushayb' nickname in 2003-2004.[647] The Chamber noted a number of factors establishing the low credibility and reliability of the witness's account. This included that D-0011—a member of the Ta'aisha tribe [REDACTED];[648] [REDACTED];[649] [REDACTED].[650] In light of these factors, the Chamber did not need to further explain why it considered the witness's evidence to be unhelpful despite [REDACTED].[651] Nor was it required to reconcile the witness's account with Abd-Al-Rahman's submission that the association of the 'Ali Kushayb' nickname emerged through later dissemination in the media given the overwhelming evidence showing the link between Abd-Al-Rahman and that name during the charged period.[652] Abd-Al-Rahman merely disagrees with the Chamber's reasonable assessment.

207. Finally, in broadly submitting that the Chamber's assessments amounted to errors of law impacting the fairness of the proceedings and reliability of the Judgment on all counts,[653] Abd-Al-Rahman again fails to demonstrate the material impact on the Judgment or its reliability. This warrants summary dismissal. In any event, any alleged errors would not have materially impacted the Judgment, much less rendered it unreliable. The Identity Finding was based on a wide range of evidence. Abd-Al-Rahman fails to show that, had the Chamber not erred as alleged in relation to D-0007 and D-0011's evidence, it would have acquitted him on all counts.

### III.D. The Chamber consistently assessed Prosecution and Defence challenges to witness evidence (Ground 26)

208. In Ground 26 of his appeal, Abd-Al-Rahman alleges that the Chamber erred in law or unfairly applied a double-standard to Defence and Prosecution challenges to the evidence, as exemplified in the case of D-0016.[654] Abd-Al-Rahman alleges that while the Chamber required

[645] Witness Annex, para. 613 (fn. 2195).
[646] *Contra* Appeal, para. 165.
[647] *Contra* Appeal, para. 165. *See* Witness Annex, paras. 627-632.
[648] Witness Annex, para. 624.
[649] Witness Annex, para. 625.
[650] Witness Annex, para. 628.
[651] *Contra* Appeal, para. 165.
[652] *Contra* Appeal, para. 165. *See* Judgment, section 5.I; Witness Annex, para. 637 (referring to the "overwhelming evidence" that Abd-Al-Rahman was 'Ali Kushayb'). *See also below* paras. 249-256 (Ground 35).
[653] Appeal, para. 166.
[654] Appeal, paras. 167-169. *See also* paras. 237-241 (Ground 32).

parties to put challenges to witnesses during cross-examination if challenging their account,[655] it did not require this of the Prosecution who did not challenge D-0016's evidence of having once been introduced to a young male member of the PDF named 'Ali Kushayb' [REDACTED].[656] He alleges this evidence went to an issue at the heart of the case, and the Chamber's failure to take into account the Prosecution's lack of challenge led it to erroneously dismiss D-0016's evidence of this event[657]—an argument he further develops in Ground 32 of his appeal.[658] Abd-Al-Rahman's arguments are unsupported by the record and should be rejected.

209. First, the Chamber reasonably found that D-0016's[659] evidence of having once been introduced to a member of the PDF aged in his 30s named 'Ali Kushayb' [REDACTED] did not materially impact the overwhelming evidence showing that the Accused was 'Ali Kushayb'.[660] Abd-Al-Rahman overstates the probative value of D-0016's evidence in this regard, and merely disagrees with the Chamber's finding.[661] The Prosecution was under no obligation to challenge the witness on his one-time encounter with an 'Ali Kushayb', [REDACTED].[662] As the Chamber rightly noted, the non-calling party, was not required to put questions relating to *every* area of disagreement, only those which related to the real issues in the case.[663] In this context, D-0016's evidence primarily concerned legal topics and cooperation between Sudan and the ICC.[664] By contrast, his evidence of having met a man called 'Ali Kushayb' was marginal, vague and thus inherently unreliable.[665] The Prosecution did not seek to impeach D-0016's credibility on this aspect of his evidence as it did not need to.

210. Second, the Chamber was not bound to consider as established the unchallenged portions of D-0016's testimony.[666] While challenges by the non-calling party allowed witnesses to explain their contested evidence, the Chamber could assess for itself whether, in this case,

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[655] *See* Judgment, para. 199.
[656] Appeal, para. 168 (citing Witness Annex, para. 637).
[657] Appeal, para. 168 (citing Judgment, para. 133, Witness Annex, paras. 636-637).
[658] *See also* paras. 237-241 (Ground 32).
[659] D-0016 was a lawyer who coordinated on behalf of the SAF to organise cooperation with the ICC: Witness Annex, para. 633.
[660] Witness Annex, para. 637. *Contra* Appeal, para. 168. *See below* para. 238.
[661] *See below* para. 238.
[662] [REDACTED]. *See also below* para. 239.
[663] Judgment, paras. 133; 201.
[664] Witness Annex, para. 634 (noting that the witness's evidence primarily concerned Sudanese law, the adoption of UNSC Resolution 1593, the applicability of international humanitarian law in Sudan, cooperation between Sudan and the ICC and whether this was prohibited under Sudanese law, military and civilian legislation, and the applicability of customary international law to Sudan).
[665] *See below* para. 238.
[666] *Bemba* TJ, para. 232. *Contra* Appeal, para. 169.

D-0016's version of events on his encounter with 'Ali Kushayb' was reliable or not.[667] This fell squarely within the Chamber's role as the trier of fact and discretion to freely assess the evidence.[668] Abd-Al-Rahman merely disagrees with the Chamber, repeating trial arguments.[669]

211. Third, Abd-Al-Rahman misstates the record in alleging that the Chamber regarded the lack of Defence challenge to evidence to be decisive while applying a "radically different" and "far more relaxed" standard when the Prosecution did not challenge Defence evidence.[670] He overlooks that the Chamber made negative credibility or reliability assessments of Prosecution witnesses even without a Defence challenge, as it did with P-0918, for example.[671] The Chamber's consistent approach to assessing Prosecution and Defence witnesses is further demonstrated in its findings that, like D-0016's "identification" evidence, it would not rely on the "identification" evidence of certain Prosecution witnesses because of their limited interactions with or knowledge of Abd-Al-Rahman or 'Ali Kushayb'.[672] In any event, Abd-Al-Rahman is inconsistent in claiming that D-0016's evidence of his one-time encounter was of such importance to the case—given his trial argument that the Chamber should not rely upon the identification evidence of P-0012, who had only encountered Abd-Al-Rahman in occasional commercial interactions in his pharmacy.[673]

212. Finally, Abd-Abd-Al-Rahman fails to demonstrate the impact of any alleged error.[674] D-0016's inconclusive evidence on his one-time encounter with an 'Ali Kushayb', even if it had been accepted by the Chamber, was incapable of displacing the overwhelming evidence that Abd-Al-Rahman was 'Ali Kushayb'.[675] The Chamber properly reached this conclusion based on its holistic assessment of the evidence it considered on the Identity Issue.[676]

### III.E. The Chamber reasonably assessed insider witness evidence (Ground 28)

213. In Ground 28 of his appeal, Abd-Al-Rahman alleges that the Chamber failed to exercise due caution in assessing the evidence of a number of insider witnesses, including [REDACTED], who he claims had significant inconsistencies in their evidence regarding Abd-Al-Rahman's acts and conduct, and therefore should not have been relied upon at all.[677] Abd-

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[667] *Contra* Appeal, para. 169. *See* Witness Annex, para. 637.
[668] *See above* para. 186.
[669] Defence Final Brief, paras. 68-72, 740, 754-756, 759.
[670] *Contra* Appeal, paras. 167-168.
[671] *See e.g.* Witness Annex, paras. 379-380 (P-0918).
[672] Witness Annex, paras. 50 (P-0020), 73 (P-0119), 103 (P-0131), 183 (P-0697), 518 (P-0994), 566 (P-1074).
[673] Defence Final Brief, para. 745.
[674] Appeal, para. 169.
[675] Witness Annex, para. 637. *See below* paras. 203, 230.
[676] Judgment, paras. 238-271.
[677] Appeal, paras. 170-177.

Al-Rahman's arguments should be rejected. He misunderstands the discretionary nature of witness credibility and reliability assessments, instead arguing for inflexible approaches unsupported in law and unwarranted on the facts of this case.

214. As prior chambers have found, "inconsistencies do not lead to an automatic rejection of the piece of evidence, and do not bar the Chamber from using it. Rather, in order to define its probative value, the Chamber assesses whether the inconsistencies cast doubt on the overall credibility and reliability of the evidence".[678] In the case of so-called "accomplice" witnesses, the Appeals Chamber has confirmed that while this circumstance requires careful consideration when assessing the reliability of the witness's evidence, it does not make the evidence unreliable *per se* or in need of corroboration as a matter of law.[679] A trial chamber may rely on uncorroborated, but otherwise credible, testimony of accomplice witnesses.[680] Consistent with these principles, the Chamber applied the appropriate degree of caution in this case, taking into account all relevant circumstances in assessing the witnesses' credibility and reliability, and explaining the basis for each of its findings. Its assessments were reasonable, grounded in the evidence, and sufficiently explained. Abd-Al-Rahman fails to show error:

- The Chamber comprehensively assessed each topic of [REDACTED] evidence[681] and reasonably found that he was truthful, credible and reliable even though there were discrepancies between his evidence and that of [REDACTED] on aspects of Abd-Al-Rahman's acts and conduct.[682] Abd-Al-Rahman does not explain the "significant discrepancies" he claims arose between the witnesses' evidence, citing only to three findings in a footnote without further explanation.[683] His arguments may be dismissed *in limine* for his failure to substantiate the alleged error.[684] Notwithstanding, the three cited findings do not show error, but rather Abd-Al-Rahman's disagreement with the Chamber. Specifically: (i) the Chamber reasonably found that the differences between [REDACTED] evidence as to whether [REDACTED][685] did not adversely affect [REDACTED] credibility as the differences were [REDACTED][686]—a finding that appropriately contextualised each witness's evidence; (ii) the Chamber found that while [REDACTED] evidence regarding

[678] *Bemba* CD, para. 55; *Gbagbo & Blé Goudé* NCTA Judge Herrera Carbuccia Dis. Op., para. 34. *See also* *Lubanga* AJ, para. 23. *Contra* Appeal, paras. 172-173.
[679] *Bemba et al.* AJ, para. 1531.
[680] *Bemba et al.* AJ, para. 1534.
[681] *See* Witness Annex, paras. [REDACTED].
[682] *Contra* Appeal, para. 173 (citing Witness Annex, paras. [REDACTED]).
[683] *See* Appeal, para. 173 (citing Witness Annex, paras. [REDACTED]).
[684] *Ntaganda* AJ, para. 49 (citing *Bemba* AJ Minority Opinion, para. 386). *See also* *Lubanga* AJ, para. 30.
[685] Appeal, para. 173 ([REDACTED]). *See* Witness Annex, para. [REDACTED].
[686] Witness Annex, para. [REDACTED].

[REDACTED] was more reliable than [REDACTED] evidence of [REDACTED], this did not adversely affect [REDACTED] credibility since [REDACTED][687]—a finding that was reasonable in light of the Chamber's explanation that [REDACTED];[688] (iii) the Chamber rejected the Defence's arguments regarding a discrepancy between [REDACTED] evidence of [REDACTED] and [REDACTED] evidence of same, [REDACTED][689]—a finding that was reasonable given the type of details it applied to. These findings show that the Chamber reasonably rejected the Defence challenges on these discrepancies in [REDACTED] evidence. Given that [REDACTED] was otherwise found to have given [REDACTED] evidence,[690] the Chamber reasonably found that inconsistencies with the evidence of other witnesses did not undermine his evidence.[691]

- The Chamber reasonably found that, to the extent that there were inconsistencies between the evidence of [REDACTED] regarding [REDACTED], it would rely on [REDACTED].[692] It was self-explanatory in the Chamber's findings that [REDACTED].[693] In light of these clear factors, the Chamber was not required to further explain why [REDACTED] rendered his memory of the events more reliable.[694] As a corollary, the Chamber's finding that [REDACTED] did not mean that it could not rely on [REDACTED] for other aspects of his evidence,[695] or that [REDACTED] lacked credibility for his account [REDACTED].[696]
- The Chamber appropriately assessed [REDACTED] credibility and reliability taking into account [REDACTED]. The Chamber exercised the appropriate [REDACTED].[697] This is demonstrated in the Chamber's lengthy and careful analysis of [REDACTED] evidence, setting out all relevant circumstances impacting the witness's credibility and reliability, and providing reasons as to why it did or did not find the witness credible and reliable.[698] [REDACTED] was extensively cross-examined.[699] The Chamber took note of the Defence challenges to [REDACTED] evidence and addressed them.[700] In particular, it was alert to

[687] Appeal, para. 173 ([REDACTED]). *See* Witness Annex, para. [REDACTED].
[688] Witness Annex, para. [REDACTED].
[689] Appeal, para. 173 ([REDACTED]). *See* Witness Annex, para. [REDACTED].
[690] *See e.g.* Witness Annex, paras. [REDACTED].
[691] *See e.g.* *Ruto et al.* CD, para. 156.
[692] Witness Annex, para. [REDACTED]. *See also* [REDACTED]. *Contra* Appeal, para. 174.
[693] Witness Annex, paras. [REDACTED].
[694] *Contra* Appeal, para. 174.
[695] *Contra* Appeal, para. 174.
[696] *Contra* Appeal, para. 406. [REDACTED].
[697] *Contra* Appeal, paras. 175-176 (citing Witness Annex, para. [REDACTED]). *See also* Appeal, para. 406.
[698] Witness Annex, paras. [REDACTED]. *Contra* Appeal, para. 176.
[699] [REDACTED].
[700] *See e.g.* Witness Annex, paras. [REDACTED].

the need to identify whether there was any factor influencing the witness's evidence [REDACTED]. [REDACTED],[701] and concluded that while it could not rely on his evidence in relation to [REDACTED],[702] it could rely on his evidence on other topics where there were other indicia of reliability.[703] On [REDACTED], the Chamber found that it was unable to come to a conclusion regarding this event and would not rely on [REDACTED] evidence. But it noted that there was no indication that [REDACTED].[704] Abd-Al-Rahman ignores these features of the Chamber's analysis, which was consistent with [REDACTED].[705]

215. The ICTR jurisprudence [REDACTED] cited by Abd-Al-Rahman does not assist him.[706] Rather, it reinforces the Appeals Chamber's guidance in this Court [REDACTED],[707] [REDACTED].[708] The Chamber followed this approach. Moreover, Abd-Al-Rahman's citation to [REDACTED]. [REDACTED] is inapposite. Unlike [REDACTED], and was found to have given confused and inconsistent evidence.[709]

216. Abd-Al-Rahman alleges that the Chamber's errors regarding [REDACTED] credibility assessment impacted its findings on the [REDACTED], for which [REDACTED].[710] Further, he alleges that the Chamber's erroneous reliance on [REDACTED] evidence impacted all findings relying on his evidence.[711] [REDACTED] evidence was critical to the Chamber's findings regarding Abd-Al-Rahman's [REDACTED] such that Abd-Al-Rahman's conviction for [REDACTED] would be materially impacted if the Chamber had not relied on his evidence.[712] However, his evidence on [REDACTED],[713] including the evidence of [REDACTED].[714] Accordingly, even if the Chamber had found [REDACTED] to be wholly lacking in credibility or reliability, it may still have convicted Abd-Al-Rahman for [REDACTED].[715] Abd-Al-Rahman otherwise fails to address the material impact of any of the alleged errors concerning the Chamber's assessment of the inconsistencies between witnesses

[701] Witness Annex, para. [REDACTED].
[702] *See e.g.* Witness Annex, para. [REDACTED].
[703] *See e.g.* Witness Annex, paras. [REDACTED].
[704] Witness Annex, para. [REDACTED].
[705] [REDACTED]
[706] *Contra* Appeal, para. 176 ([REDACTED]).
[707] [REDACTED]. [REDACTED].
[708] [REDACTED].
[709] [REDACTED]. [REDACTED].
[710] Judgment, paras. [REDACTED].
[711] Appeal, para. 177 (citing Judgment, paras. 611, 622-624).
[712] Judgment, para. [REDACTED].
[713] Witness Annex, para. [REDACTED].
[714] Judgment, para. [REDACTED].
[715] Judgment, para. [REDACTED].

[REDACTED]. His arguments in that respect should be summarily dismissed.

### III.F. The Chamber reasonably relied upon contemporaneous records in assessing the credibility of certain witnesses (Ground 29)

217. The Chamber reasonably found that the fact that P-0012, P-0877 and P-0878 had taken contemporaneous notes of the relevant events enabled them to give detailed evidence, which enhanced their credibility and the reliability of relevant aspects of their evidence.[716] Abd-Al-Rahman's argument that the Chamber erred because the notes had not been made available for the Defence to challenge the witnesses on their content should be rejected.[717] Abd-Al-Rahman misconstrues the wide discretion afforded to trial chambers in the factors it may consider in assessing credibility and reliability, and the nature of his right to challenge the evidence.

218. First, the Chamber was legally entitled to rely on the witnesses' practice of taking contemporaneous notes as a factor enhancing their credibility and reliability, as it fell squarely within the Chamber's significant degree of discretion to freely assess the evidence,[718] and did not infringe Abd-Al-Rahman's rights under article 67(2), including his right to challenge the evidence.[719] The evidence was made available to him through the witnesses who gave evidence *viva voce*, and was subjected to comprehensive cross-examination by the Defence, including on the circumstances in which the witnesses took the notes and what they did with them.[720] The Prosecution discharged its article 67(2) duty by disclosing to the Defence the notes it had in its possession.[721] As for the remainder of the notes, the witnesses explained their reasons for not producing them to the OTP.[722] Since the Prosecution also did not have access to these notes, the principle of equality of arms was not violated.[723]

219. Second, the Chamber did not factually err. Its assessment of witness credibility and reliability considered a range of factors,[724] and the practice of taking contemporaneous notes was reasonably one that it found enhanced credibility and reliability given that this logically would have allowed the witnesses to better register their memories to be able to re-tell them in

[716] Witness Annex, paras. 21-23 (P-0012), 248-249 (P-0877), 254-257 (P-0878).
[717] Appeal, paras. 178-181.
[718] *See above* para. 186.
[719] *Contra* Appeal, paras. 179, 181.
[720] T-046, p. 84:13-24 (P-0012); T-055-Conf, pp. 6:17-11:3 (P-0877); T-079-Conf, pp. 22:7-27:19 (P-0878).
[721] *Ntaganda* Disclosure AD, para. 22; *Al Hassan* Protective Measures Decision, para, 17. *See* [REDACTED].
[722] *See below* para. 219.
[723] *Beraru v. Romania*, para. 70. *See Lubanga* Article 54(3)(e) Disclosure Decision, para. 79. *See also above* paras. 151-158 (Ground 14).
[724] Judgment, para. 194 (noting that the credibility and reliability assessments took into account, *inter alia*, "the richness of details and internal consistency of the narrative provided by the witness").

detail years later.[725] The Chamber appropriately noted each witnesses' explanation as to why they took notes, what details they recorded, and what happened to the notebooks. It addressed the Defence challenges in this regard.[726] It comprehensively assessed the witnesses' credibility and reliability in detail on each topic of the witnesses' evidence. Abd-Al-Rahman fails to demonstrate factual error in the Chamber's reasonable assessments. In particular:

- The Chamber reasonably found that P-0012's[727] practice of taking notes[728] enabled him to provide details regarding the dates and details of events,[729] adding to his credibility and reliability.[730] This was only one factor out of many that led the Chamber to find him credible and reliable,[731] concluding that P-0012 "in keeping with the whole tenor of his evidence [] was able to provide detailed unexaggerated, descriptive evidence, including names" and was "determin[ed] to be as accurate as possible".[732] The Chamber's rejection of the Defence's suggestion that it was convenient that P-0012 no longer had the notes[733] was reasonable given P-0012's explanation that he felt it was unsafe to keep the notes.[734]
- The Chamber reasonably concluded in light of P-0877's[735] "very detailed account [and] the cogency and precision of his evidence, including the dates of events", that P-0877 took notes while [REDACTED] and that "his evidence in this regard can be relied upon".[736] This was one factor out of several that the Chamber considered in establishing the witness's credibility and reliability,[737] making no adverse credibility findings against the witness. The Chamber's rejection of the Defence's challenges to the witness's evidence regarding the diaries[738] was reasonable, given the witness's explanation that [REDACTED].[739] Abd-Al-Rahman merely repeats his trial arguments in disagreement with the Chamber.[740]

[725] Witness Annex, para. 23 (finding in relation to P-0012 that "it is these notes which enabled P-0012 to give the dates and details of the events").
[726] Witness Annex, paras. 22-23 (P-0012), 248-249 (P-0877), 255-257 (P-0878).
[727] P-0012 was [REDACTED] at the time of the charged events: Witness Annex, para. 20.
[728] [REDACTED].
[729] Witness Annex, para. 23.
[730] Witness Annex, para. 23.
[731] *See e.g.* Witness Annex, para. 28, 29, 30, 31, 36.
[732] Witness Annex, para. 40.
[733] Witness Annex, para. 22.
[734] T-045-Conf, pp. 41:14-42:12, 43:14-20, 44:16-45:2.
[735] P-0877 was a member of the Fur tribe and a religious teacher based in Mukjar during the charged period: Witness Annex, para. 237.
[736] Witness Annex, para. 249. *See* T-053-Conf, pp. 86:7-10, 86:24-87:8.
[737] *See e.g.* Witness Annex, paras. 244, 247, 250.
[738] Witness Annex, paras. 248-249.
[739] Witness Annex, para. 249; T-055-Conf, pp. 7:4-8:15, 9:7-8, 10:1-5.
[740] Appeal, para. 180. *See* Defence Final Brief, para. 493.

- The Chamber reasonably found that P-0878's[741] practice of taking notes in a diary during the relevant period[742] enabled him to give detailed evidence and write his first account to the OTP unaided by investigators, which assisted the Chamber to find that his evidence for the most part was credible and reliable.[743] This was one factor out of several that the Chamber made regarding the witness's credibility and reliability.[744] The Chamber's rejection of the Defence claim that the witness's account of having notebooks was "fictitious"[745] was reasonable in light of the witness's explanation that he did not produce the notes to OTP investigators as he was concerned about the risk that they might be found.[746] In line with the Chamber's careful and nuanced approach to credibility assessments, it made one adverse credibility finding as to P-0878's evidence that [REDACTED]. It reiterated that "[REDACTED]", and noted that [REDACTED], as indeed was suggested by the Defence.[747] Abd-Al-Rahman repeats his trial arguments, disagreeing with the Chamber's reasonable assessment.[748]

220. Abd-Al-Rahman's argument that no reasonable trial chamber would have considered the note-taking a factor in positively assessing credibility and reliability fails in light of the Chamber's comprehensive, nuanced and careful credibility assessments summarised above.[749]

221. Moreover, Abd-Al-Rahman does not explain the material impact of the alleged errors on the Judgment, aside from claiming that had the Chamber not erred, it would not have relied on the contemporaneous notes in assessing P-0012, P-0877 and P-0878's credibility and reliability.[750] This is insufficient. First, even if the Chamber had not relied on the witnesses' practice of taking contemporaneous notes, it would have still found their evidence credible and reliable on the various topics about which they testified given the comprehensive credibility and reliability findings it made for each witness. Second, the Judgment was based on a comprehensive body of evidence based on the testimony of multiple witnesses relating to the charged events and establishing Abd-Al-Rahman's identity and responsibility. Abd-Al-Rahman has not demonstrated that the Judgment would have substantially differed had the Chamber not

[741] P-0878 was a member of the Fur tribe and [REDACTED] at the time of the events: Witness Annex, paras. 253-254.
[742] Witness Annex, para. 254; T-078-Conf, p. 74:4-5; T-079-Conf, pp. 21:7-24:24.
[743] Witness Annex, para. 256.
[744] *See e.g.* Witness Annex, paras. 254, 260-261, 264.
[745] Witness Annex, para. 255.
[746] Witness Annex, para. 254; T-078-Conf, p. 74; T-079-Conf, p. 27:1-15.
[747] Witness Annex, para. 273.
[748] Defence Final Brief, para. 11.
[749] Appeal, para. 181.
[750] Appeal, para. 181.

relied on the witnesses' practice of taking contemporaneous notes.

## IV. The Chamber properly determined that Abd-Al-Rahman is 'Ali Kushayb' (Part D)

222. In Part D of his appeal, Abd-Al-Rahman challenges various aspects of the Chamber's evidentiary analysis and findings in determining that Abd-Al-Rahman is 'Ali Kushayb'. Abd-Al-Rahman mischaracterises and selectively reads the Judgment, and merely repeats his unsuccessful trial arguments in disagreement with the Chamber. Grounds 30-33 and 35-38 should be dismissed. Moreover, he fails to demonstrate that any of the alleged errors materially impacted the Judgment. The Chamber found that there was overwhelming evidence that Abd-Al-Rahman was 'Ali Kushayb'[751]—a conclusion that it reasonably and correctly reached based on its holistic assessment of several categories of evidence.[752]

### IV.A. The Chamber complied with the Video Admissibility Appeal Judgment (Ground 30)

223. Abd-Al-Rahman alleges that the Chamber erred in law by relying on the 2020 pre-surrender video as evidence that he is known by the nickname 'Ali Kushayb', thus not complying with the Video Admissibility Appeal Judgment.[753] He claims that the Appeals Chamber limited the video's purpose to establishing his identity for surrender and not to proving his guilt or innocence. He further claims that the Chamber erroneously failed to consider the surrender context as creating a "powerful incentive" to introduce himself as 'Ali Kushayb', prejudicing him by relying on the video as proof of his identity to establish criminal responsibility. Abd-Al-Rahman's submissions should be dismissed *in limine*. He mischaracterises the Appeal's Chamber's ruling and repeats his unsuccessful arguments on an issue that was extensively litigated at trial.[754] After careful consideration,[755] the Chamber admitted the video into evidence,[756] and this was upheld on appeal.[757]

224. In the Video Admissibility Decision, the Chamber admitted the pre-surrender video into evidence, finding that article 55(2) did not apply to the circumstances surrounding the sending of the video,[758] and that there had been no violation of international law, human rights treaties,

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[751] Witness Annex, para. 637.
[752] Judgment, para. 271.
[753] Appeal, paras. 182-196 (regarding Pre-Surrender Video Recording: DAR-OTP-0216-0119; Transcript: DAR-OTP-0220-3010; Translation: DAR-OTP-0220-3015). *See* Judgment, paras. 242-249.
[754] Defence Video Admissibility Submissions; Prosecution Video Admissibility Submissions; T-104, T-105, T-106; T-108; Video Admissibility Decision; Judgment, paras. 242-249; Video Admissibility Appeal Judgment, para. 107.
[755] Video Admissibility Appeal Judgment, para. 46 ("First, the Appeals Chamber notes the careful manner in which the Trial Chamber considered this matter and arrived at its factual findings").
[756] Video Admissibility Decision.
[757] *See* Video Admissibility Appeal Judgment.
[758] Video Admissibility Decision, para. 48.

or article 21(1)(b) that would require the video's exclusion under article 69(7).[759] The Appeals Chamber, by majority, confirmed the Chamber's decision in the Video Admissibility Appeal Judgment. It found that article 55(2) did not apply because there had been no "questioning of the accused" within the meaning of article 55(2), nor "any application or interpretation" of article 55(2) that was inconsistent with internationally recognised human rights.[760]

225. In the Judgment, the Chamber correctly recalled the Appeals Chamber's reasoning.[761] It further noted that the Appeals Chamber observed that Abd-Al-Rahman's identity as 'Ali Kushayb' was a factual and preliminary matter and that discussions on the alleged crimes took place only after the identity of the person concerned had been established.[762] The Chamber was satisfied that its finding that the pre-surrender video was admissible did not go to Abd-Al-Rahman's guilt or innocence, and that a finding that Abd-Al-Rahman was known by the nickname 'Ali Kushayb' did not equate to a finding that he was criminally responsible for any of the alleged crimes in this case.[763] It thus appropriately relied on the identity-related information in the video as one item of evidence among many to establish Abd-Al-Rahman's identity as 'Ali Kushayb'. Abd-Al-Rahman fails to identify any error in the Chamber's reasonable and correct approach.

226. First, Abd-Al-Rahman misrepresents the Appeals Chamber's judgment in claiming that it "limited the video's purpose to establishing identity for surrender, not as proof of the Appellant's guilt".[764] The Appeals Chamber merely observed in *obiter dicta* that matters relevant to establishing identity were "essential prerequisites to any such questioning taking place, namely whether a person claiming to be in contact with the accused is genuine or being sure about the identity of the person to be surrendered before any questioning can take place".[765] The Appeals Chamber thus distinguished between questioning of this type, *i.e.* to establish identity, and questioning conducted by the Prosecution "with knowledge of its investigation in relation to the crimes committed, directly ask[ing] questions of a person who it has established is indeed the suspect".[766] It did not—contrary to Abd-Al-Rahman's contention—limit the manner and extent to which the Chamber could then use the pre-surrender video in its decision-making and judgment, once admitted.

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[759] Video Admissibility Decision, para. 52.
[760] Video Admissibility Appeal Judgment, paras. 105, 107.
[761] Judgment, paras. 244, 246.
[762] Judgment, paras. 244, 246.
[763] Judgment, para. 246.
[764] Appeal, paras. 182 (citing Video Admissibility Appeal Judgment, paras. 92-96), 186-187, 191, 196.
[765] Video Admissibility Appeal Judgment, paras. 91-94.
[766] Video Admissibility Appeal Judgment, para. 91.

227. Second, in arguing that the Chamber could only rely upon the video for the purpose of "neutral confirmation of identity for surrender", Abd-Al-Rahman misunderstands the Appeal Chamber's application of the *Bemba* precedent.[767] The Appeals Chamber noted that in *Bemba*, the Pre-Trial Chamber distinguished between "questioning" under article 55(2) and "an interview to establish the identity of [the suspect] and to inform him of his rights", stating that when it was the latter, "only 'evidence' obtained in the interview could potentially be excluded under article 69(7) of the Statute, *i.e.* evidence related to matters other than identity […]".[768] Abd-Al-Rahman misinterprets the Pre-Trial Chamber's reasoning to argue that the pre-surrender video could only be relied upon as "neutral confirmation of identity" and not for the "correctness of a contested alias allegation, deployed as proof of the merits of the case".[769] The *Bemba* Pre-Trial Chamber and Appeals Chamber did not specify how the identity-related information could be relied upon once admitted into evidence. It was thus open to the Chamber to consider the pre-surrender video—given it only contained identity-related information—in establishing that Abd-Al-Rahman is known as 'Ali Kushayb'. This accords with the significant discretion afforded in the free assessment of evidence to determine the issues at trial.[770]

228. Third, in his appeal, as in his final brief, [771] Abd-Al-Rahman selectively quotes the Chamber to argue that because the nickname 'Ali Kushayb' was "the heart of the case",[772] a finding on the Identity Issue is a "gateway determination underpinning attribution across the entire case", including on guilt or innocence.[773] However, he omits critical context. While the Presiding Judge stated that "[t]he heart of this case is whether or not the accused is, in fact, the man known as Ali Kushayb", she continued, "and, if so, whether he committed the acts that have been described".[774] The Chamber clearly made this distinction in the Judgment, underscoring that "the finding that the Accused had the nickname 'Ali Kushayb' does not equate to a finding that Accused is responsible for any alleged crimes".[775] It described Abd-Al-Rahman's culpability for the charged crimes in Kodoom and Bindisi, Mukjar, and Deleig in separate sections.[776] The Chamber concluded that the pre-surrender video, rather than

[767] Appeal, paras. 186-188.
[768] Video Admissibility Appeal Judgment, para. 93 (citing *Bemba* Interim Release Decision, para. 45).
[769] Appeal, para. 188.
[770] Video Admissibility Appeal Judgment, para. 79; *Bemba et al.* AJ, paras. 583-592; *Kenyatta et al.* CD, para. 80. *Contra* Appeal, paras. 185, 191.
[771] Judgment, para. 245 (citing Defence Final Brief, paras. 181-182; Defence Closing Statement, p. 36-37).
[772] Appeal, paras. 182 (fn. 510) (citing T-132, p. 67), 190.
[773] The Defence contends that, if their client is *not* the person known as 'Ali Kushayb', this would result in "nothing less than his complete acquittal". Appeal, paras. 182, 190.
[774] T-132, p. 67:6-11.
[775] Judgment, para. 246.
[776] *See e.g.* Judgment, paras. 660-680, 943-1012.

establishing Abd-Al-Rahman's guilt, "constitutes direct evidence of the Accused identifying himself as 'Ali Kushayb' and shows that his voluntary surrender to the Court was made on the basis that the arrest warrants issued against him correctly identified him by both his full name and his nickname".[777] Abd-Al-Rahman fails to show error.

229. Fourth, Abd-Al-Rahman simply rehearses his unsuccessful trial arguments that were unsupported by the evidence regarding the Prosecution's actions and their consequences.[778] Specifically: (i) The Chamber already considered and rejected his argument that the mention of 'Ali Kushayb' in the pre-surrender video was the "direct consequence of the Prosecution's habitual reference to this alias in its communications with the intermediary",[779] finding it unsupported by the evidence after calling two investigators from the Prosecution, P-1048 and P-1049, to testify.[780] The Appeals Chamber upheld this finding.[781] (ii) The Chamber reasonably rejected Abd-Al-Rahman's argument that no weight could be attached to the pre-surrender video,[782] having considered any shortcomings in the Prosecution's procedures when deciding to admit the pre-surrender video but found they did not impact its decision.[783] This was reasonable given that the credibility and reliability of both P-1408 and P-1409's testimony on their communications with the "intermediary" P-0869 was uncontested, and there was no other evidence.[784] Abd-Al-Rahman merely repeats this argument in disagreement with the Chamber's finding.[785] (iii) The Chamber correctly concluded that to draw the requested inference that Abd-Al-Rahman's use of the nickname in the video was the result of external pressure, "there must be evidence, as opposed to suggestions, from which such an inference may be made".[786] Abd-Al-Rahman shows no error by merely repeating his preferred interpretation of the evidence.

230. Finally, Abd-Al-Rahman misrepresents the impact that any purported error would have on the Judgment. Even if the Chamber had misinterpreted the Video Admissibility Appeal Judgment and improperly relied on the pre-surrender video, this would not have had a material

[777] Judgment, para. 249.
[778] *Contra* Appeal, paras. 183, 193-194.
[779] Appeal, para. 183 (citing Defence Final Brief, paras. 181-182). This "intermediary" P-0869 later became a member of the Defence team: Judgment, para. 243.
[780] T-106; T-108; Video Admissibility Decision, paras. 45-47; Video Admissibility Appeal Judgment, paras. 10-11.
[781] Video Admissibility Appeal Judgment, paras. 85-88.
[782] Judgment, paras. 247-248 (citing Defence Final Brief, paras. 184-188).
[783] Video Admissibility Decision, paras. 44, 46, 62.
[784] Video Admissibility Appeal Judgment, para. 47 (citing Video Admissibility Decision, para. 45). The Appeals Chamber observed that the Defence had accepted P-1408 and P-1409 were "truthful, candid, frank and honest during their testimony". *See* T-109, p. 69:16-18.
[785] Appeal, para. 183.
[786] Judgment, para. 248.

impact on the Identity Finding.[787] Far from the video being a "substantive pillar" of the Chamber's determination with a "direct and decisive" impact on the verdict,[788] the Chamber considered six categories of evidence to find that Abd-Al-Rahman was the man known as 'Ali Kushayb'.[789] Only one of these was the pre-surrender video.[790] The other evidence included witness recognition evidence, witness testimony, and a "stark confluence" of circumstantial factors with facts that had been agreed with the Defence.[791] In particular, a considerable portion of witness testimony directly linked Abd-Al-Rahman to the charged crimes through his legal name, and not merely by his nickname 'Ali Kushayb'.[792] The Chamber was so convinced of the "compelling and coherent" nature of the evidence already before it, it did not even rely upon additional contemporaneous documentary evidence, namely, items found in Abd-Al-Rahman's possession during his surrender, and the GoS interview with Abd-Al-Rahman in 2006.[793] The Chamber reasonably relied on the totality of this evidence in making the Identity Finding.

### IV.B. The Chamber assessed all the evidence concerning the Identity Issue and correctly applied the standard of proof (Ground 31)

231. Abd-Al-Rahman alleges that the Chamber erred by basing its Identity Finding "exclusively" on Prosecution evidence,[794] and that "[s]ignificant and consistent [Defence] evidence to the contrary" was not considered.[795] He asserts that the Chamber did not weigh testimony from Defence witnesses because it dismissed their evidence as "implausible," in a "retrograde manner" having already drawn a conclusion from the Prosecution case alone.[796] He recalls the identification-related evidence from D-0001, D-0002, D-0008, and D-0035,[797] alleging the Chamber failed to weigh their evidence "independently".[798] Abd-Al-Rahman's arguments mischaracterise the Chamber's reasoning.

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[787] *Contra* Appeal, para. 182. *Ntaganda* AJ, para. 36 (citing *Lubanga* AJ, paras. 17-18; *Ngudjolo* AJ, para. 20; *Bemba* AJ, para. 36; *Bemba et al.* AJ, para. 99); *Ongwen* AJ, para. 76.
[788] *Contra* Appeal, paras. 185, 190. Abd-Al-Rahman further argues that by the using the surrender video as "substantive proof", the Chamber risked eroding the safeguards of articles 55 and 69(7): Appeal, para. 196. The Prosecution recalls that the Appeals Chamber cannot provide guidance on the interpretation of the law in the abstract as it is not an advisory body: Video Admissibility Appeal Judgment, para. 78 (citing *Said* Appeal Admissibility Decision, para. 23).
[789] Appeal, para. 184 (citing Judgment, para. 241).
[790] Judgment, paras. 242-249.
[791] Judgment, paras. 242-249, 267.
[792] *See e.g.* Judgment, paras. 250-253.
[793] Judgment, paras. 269-270.
[794] Appeal, paras. 197-201. The Chamber did rely on Defence witness evidence regarding the identification of Abd-Al-Rahman in videos and circumstantial evidence linking characteristics of Abd-Al-Rahman to the man known as 'Ali Kushayb': Judgment, paras. 216 (fn. 392), 255 (fns. 446-447), 265-268.
[795] Appeal, para. 197.
[796] Appeal, para. 197.
[797] Appeal, paras. 199, 201.
[798] Appeal, para. 199.

232. The Chamber's assessment of the identification evidence from these Defence witnesses was measured, thorough, and reasonable. It correctly conducted a "holistic evaluation of the evidence" to find beyond reasonable doubt that Abd-Al-Rahman was also known as 'Ali Kushayb',[799] weighing all of the evidence taken together.[800] The Chamber correctly applied the 'beyond reasonable doubt' standard and provided a detailed, well-reasoned, and fair explanation of its analysis after considering the testimony of both Prosecution and Defence witnesses.[801] A chamber need not mention every piece of evidence, but rather only identify with sufficient clarity the basis of its decision,[802] as in this case. Abd-Al-Rahman merely disagrees with the Chamber's reasonable assessment.

233. First, contrary to Abd-Al-Rahman's suggestion, the Chamber did not dismiss the testimony of Defence witnesses D-0001, D-0002, D-0008, and D-0035 out of hand.[803] Rather, as noted above,[804] the Chamber comprehensively assessed their credibility and reliability and found them of limited assistance in determining the Identity Issue. It found their claims that they had *never* heard of the name 'Ali Kushayb' implausible in light of [REDACTED].[805] The Chamber also noted that there had been public reporting linking Abd-Al-Rahman to the name 'Ali Kushayb', undermining the Defence case—to which these witnesses attested—that at no time was Abd-Al-Rahman known as 'Ali Kushayb'.[806] Abd-Al-Rahman's contention that the public reporting of this link irreparably contaminated Prosecution witness testimony, and resulted in an error of fact and/or law and/or procedure, is unpersuasive.[807]

234. Second, the Chamber applied the same level of scrutiny to all witnesses. As shown above,[808] it correctly assessed the credibility and reliability of each witness (Prosecution and Defence) individually, in light of all relevant circumstances such as their relationship to and interactions with Abd-Al-Rahman, involvement in the events under consideration, possible bias towards or against the Accused, and/or motives for telling the truth or providing false

[799] *Contra* Appeal, paras. 197-201. *See above* para. 186. *See also* *Ntaganda* AJ, para. 38.
[800] *Ntaganda* AJ, para. 38; *Ongwen* AJ, para. 78.
[801] The Chamber set out the standard it applied: Judgment, paras. 193-206.
[802] *Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30; *Bemba et al.* AJ, para. 103.
[803] *Contra* Appeal, paras. 197-198.
[804] *See above* paras. 195, 199.
[805] *Contra* Appeal, para. 199. *See e.g.* Witness Annex, paras. 572-575, 580 (D-0001), 582-585, 589 (D-0002), 615-618, 623 (D-0008), 687-691 (D-0035). *See also above* para. 195.
[806] Judgment, para. 268 (citing T-155-Conf, pp. 2-9, 51-53, 87; T-156-Conf, pp. 4-5; T-158, pp. 40-42; T-149-Conf, pp. 3-33, 42-43, 48-49; T-139-Conf, pp. 53, 73-74; T-138-Conf, pp. 73-74, 84-87; T-159, pp. 45-46, 79-84). *See also below* paras. 257-263 (Ground 36).
[807] *See also below* paras. 249-256 (Ground 35), and paras. 257-263 (Ground 36).
[808] *See above* paras. 186, 204.

testimony,[809] while taking into account, holistically, the entirety of the available evidence.[810] It followed a fair procedure in which the non-calling party had ample opportunity to challenge the accuracy or veracity of a witness's evidence.[811] Consistent with its significant discretion to freely assess the evidence in the case,[812] the Chamber relied on "certain aspects of a witness's evidence, while considering other aspects unreliable", and explained why it considered parts of their evidence reliable.[813] Abd Al-Rahman has not shown that the Chamber's overall assessment of these witnesses was unreasonable, or that it relied on predetermined "assumptions" to find D-0001, D-0002, D-0008, and D-0035 not credible on the identity issue.[814] He overlooks that the Chamber, in applying the same level of scrutiny to Prosecution witnesses as it did to Defence witnesses, found that it could not rely upon the identification evidence of a number of Prosecution witnesses because their knowledge of his identity was limited,[815] based on indirect sources or fleeting encounters,[816] or potentially influenced by their knowledge of the Court proceedings;[817] or because they lied,[818] were inconsistent in their evidence,[819] or had a motive to misrepresent information regarding his identity.[820]

235. Similarly, for each Defence relevant witness, the Chamber set out the basis for its conclusion, referring to various factors including the lack of internal consistency in their testimony, non-alignment with their prior statements, and their demeanour during questioning, particularly on cross-examination. Its assessments—as shown above for D-0001,[821] D-0002,[822] D-0007,[823] D-0011,[824] D-0029[825] and D-0035[826]—were reasonable. The Chamber appropriately assessed D-0008's evidence in the same manner, reasonably finding it implausible—given [REDACTED]—that he did not connect the name 'Ali Kushayb' ([REDACTED]) to Abd-Al-Rahman, despite [REDACTED].[827] The Chamber assessed all other Defence witnesses on the

[809] *Bemba et al.* AJ, paras. 1019, 1531; *Gicheru* CD, para. 42.
[810] *Ongwen* TJ, para. 260.
[811] Judgment, paras. 199-203.
[812] ICC RPE, rule 63(2); Statute, art. 64(9); *Bemba et al.* AJ, para. 1019; *Kenyatta et al.* CD, para. 80.
[813] Judgment, para. 198 (citing *Ongwen* AJ, para. 524 (referring to *Ngudjolo* AJ, para. 168)).
[814] *Contra* Appeal, para. 199.
[815] Witness Annex, paras. 50 (P-0020), 103 (P-0131), 183 (P-0697), 518 (P-0994).
[816] Witness Annex, paras. 73 (P-0119), 173 (P-0651), 417 (P-0922), 566 (P-1074).
[817] Witness Annex, paras. 123 (P-0581), 352 (P-0907).
[818] Witness Annex, para. 223 (P-0850).
[819] Witness Annex, paras. 44 (P-0015), 131 (P-0584), 204 (P-0726).
[820] Witness Annex, para. 178 (P-0671).
[821] *See above* para. 195 (first bullet point).
[822] *See above* para. 195 (second bullet point).
[823] *See above* para. 205.
[824] *See above* para. 206.
[825] *See above* para. 201.
[826] *See above* para. 195 (third bullet point).
[827] Witness Annex, paras. 617-618, 623 (citing T-139-Conf, pp. 20-29, 36-38 54-56, 63-65, 75-77).

Identity Issue (*i.e.* D-0003, D-0005, D-0032 and D-0039) in this same correct manner.[828]

236. Considering all the above, Abd-Al-Rahman does not show that the Chamber dismissed the testimony of Defence witnesses simply because it was incompatible with the Prosecution case. His claim that the Prosecution position that he was known as 'Ali Kushayb' was "effectively treated as truth" and treated as "the starting point" of its analysis is unsupported by the record.[829] Abd-Al-Rahman shows no basis to undermine the overwhelming evidence that Abd-Al-Rahman was also known as 'Ali Kushayb'. Nor does he substantiate his broad (and repeated) claim that the alleged errors rendered the final determination on the alias unreliable.[830] This claim should again be rejected for the reasons already stated above.[831]

### IV.C. The Chamber did not erroneously discount D-0016's identity-related evidence (Ground 32)

237. Abd-Al-Rahman does not show that the Chamber erred in failing to rely upon D-0016's evidence of having once been introduced to a member of the PDF named 'Ali Kushayb' [REDACTED].[832] He argues that the Chamber did not "meaningfully" engage with discrepancies in "core identity markers" between himself and the man to whom D-0016 was introduced.[833] He claims that the Chamber only considered the discrepancy in age, whereas the "decisive" discrepancy was that the man D-0016 met was a member of the PDF.[834] He contends that the "dissimilarity between the described person" and himself heightened its probative value.[835] Abd-Al-Rahman disagrees with the Chamber's reasonable assessment. His repeated challenges to the Chamber's treatment of D-0016's identity evidence should be rejected.[836]

238. First, the Chamber reasonably found that D-0016's evidence that he was introduced to a man named 'Ali Kushayb' [REDACTED] did not materially impact the overwhelming evidence showing that the Accused was 'Ali Kushayb'.[837] [REDACTED][838]—[REDACTED].[839] In court, D-0016 could not confirm from an image of Abd-Al-Rahman that this was the person he had met.[840] In the context of such an inconclusive and weak account, the

[828] *See* Witness Annex, paras. 592-594, 597 ([REDACTED]); 603 ([REDACTED]); 683 ([REDACTED]); 702 ([REDACTED]).
[829] *Contra* Appeal, paras. 198-199 (citing Judgment, paras. 241-270).
[830] Appeal, para. 201.
[831] *See above* paras. 203, 230.
[832] *Contra* Appeal, paras. 202-208.
[833] Appeal, para. 204.
[834] Appeal, para. 203.
[835] Appeal, para. 203.
[836] *See above* paras. 208-212 (ground 26).
[837] Witness Annex, para. 637. *Contra* Appeal, para. 168.
[838] T-132-Conf, pp. 33:5-34:11, 36:7-9.
[839] [REDACTED].
[840] T-132-Conf, p. 38:21-24.

Chamber reasonably found that "given the circumstances of the meeting and the vagueness of the description, this evidence does not materially impact the overwhelming evidence showing that the Accused was 'Ali Kushayb'".[841] The Chamber otherwise reasonably found D-0016 to be largely credible and reliable, particularly on areas within his demonstrated basis of knowledge, including on legal topics and cooperation between Sudan and the Court.[842]

239. In assessing D-0016's evidence, the Chamber applied the same principles as it did in assessing "identification" evidence from other Prosecution and Defence witnesses. It considered a range of factors relevant to establishing the quality of the evidence, such as: (a) the duration of time in which the identified person was under observation; (b) whether the witness had ever seen Abd-Al-Rahman before (and if so, the number of times and in what circumstances); (c) the length of time that had elapsed between the original observation and any subsequent observation; and (d) any discrepancy between the description of Abd-Al-Rahman given by a witness and that given by others and/or the physical appearance of Abd-Al-Rahman in court (taking into account the lapse of more than 20 years).[843] Applying these factors, the Chamber did not "discount" D-0016's evidence.[844] Rather, it appropriately assessed its low probative value, consistent with the principle that it applied to all witnesses to not rely on their identifications unless satisfied that that the witness had the ability to sufficiently recognise Abd-Al-Rahman.[845] Its finding was reasonable given the nature of D-0016's evidence, in particular: the brevity of his meeting with 'Ali Kushayb' and that he had never met this person before or since, and had no reason to recognise him;[846] his difficulty in estimating the person's age;[847] [REDACTED];[848] his inability to recall from a photograph of Abd-Al-Rahman whether this was the person he had met;[849] the long period of time between the alleged meeting and his testimony; and the discrepancies with the descriptions of other witnesses.

240. Second, the Chamber considered the discrepancies in "core identity markers" between Abd-Al-Rahman and the description of the man D-0016 said he was introduced to as 'Ali Kushayb'.[850] It noted that D-0016 stated that the man was a PDF member and aged in his late

[841] Witness Annex, para. 637.
[842] Witness Annex, paras. 634-636. *See above* para. 209.
[843] Judgment, para. 210.
[844] *Contra* Appeal, paras. 208.
[845] Judgment, paras. 218.
[846] T-132-Conf, p. 34:3-11. [REDACTED]: T-132-Conf, p. 22:3-5. [REDACTED]: T-132-Conf, p. 33:17-19. *See also* T-132-Conf, p. 36:11-12.
[847] T-132-Conf, p. 36:13-16.
[848] T-132-Conf, p. 35:20-23.
[849] T-132-Conf, p. 38:21-24.
[850] *Contra* Appeal, para. 204.

30s.[851] Having properly conducted a holistic assessment of D-0016's identification evidence in light of the totality of evidence as to Abd-Al-Rahman's identity,[852] the Chamber did not err in giving it low probative value. In arguing that the discrepancies should have heightened the probative value of D-0016's evidence, Abd-Al-Rahman merely disagrees with the Chamber.[853]

241. Third, Abd-Al-Rahman's further arguments about D-0016's evidence, namely that it was "unchallenged"[854] and the Chamber did not find that the meeting did not occur,[855] must be rejected for the reasons given above.[856] Finally, and in any event, Abd-Al-Rahman fails to show how any alleged error by the Chamber in evaluating D-0016's evidence would have had an impact on the Chamber's identity finding, and consequently, his conviction.[857]

### IV.D. The Chamber properly considered alleged inconsistencies between the features of 'Ali Kushayb' and Abd-Al-Rahman's actual features (Ground 33)

242. Abd-Al-Rahman alleges that the Chamber did not consider discrepancies in the witnesses' physical descriptions of 'Ali Kushayb'.[858] He claims that "a significant body of evidence" did not match his features, and highlights small discrepancies, such as whether his ears were pierced, his hunched or bent posture, and possible facial scars.[859] He submits that the Chamber did not adequately address these discrepancies,[860] but instead relied on broad descriptors, such as dark skin, tall height and a thin build.[861] This ground of appeal should be rejected because Abd-Al-Rahman shows no error in the Chamber's assessment.[862] It holistically evaluated any inconsistencies in witness descriptions of 'Ali Kushayb's' physical appearance, correctly applying accepted principles on identification evidence.

243. First, the Chamber did not "ignore" any physical details that were adverse to the Prosecution's theory regarding 'Ali Kushayb'.[863] Rather, it carefully assessed these descriptions within the overall body of evidence. The Chamber considered any discrepancies between a witness's description and Abd-Al-Rahman as relevant to its assessment of identification

[851] Witness Annex, para. 637. *Contra* Appeal, para. 203.
[852] *Ntaganda* AJ, para. 38; *Ongwen* AJ, para. 78.
[853] *Contra* Appeal, para. 203.
[854] Appeal, para. 206.
[855] Appeal, para. 206.
[856] *See above* paras. 151-158 (Ground 14), 208-212 (Ground 26).
[857] *See above* paras. 208-212 (Ground 26).
[858] Appeal, paras. 209-220.
[859] Appeal, paras. 210 (fn. 567) (citing P-0012, P-0029, P-0129, P-0581, P-0877, P-0903, P-0905, P-0913, P-0916, P-0994, P-1061 and P-1073), 213.
[860] Appeal, para. 214.
[861] Appeal, para. 215 (citing Witness Annex, paras. 122 (P-0581), 141 (P-0585), 371 (P-0916), 383 (P-0919), 429 (P-0932), 499 (P-0990)).
[862] *Contra* Appeal, paras. 209-220. *See also above* para. 239.
[863] Appeal, para. 214.

evidence, as one factor among many. In doing so, it explicitly acknowledged the 20-year lapse in time since the witnesses' original sighting of 'Ali Kushayb' and Abd-Al-Rahman's physical appearance in court.[864]

244. Second, most witnesses mentioned by Abd-Al-Rahman as providing different physical descriptions were not "recognition" witnesses.[865] Many had only met 'Ali Kushayb' on limited occasions, and thus the basis of their knowledge of his identity was weak. Furthermore, the purported discrepancies mentioned by these witnesses were minor compared to other physical descriptors they used that matched Abd-Al-Rahman's appearance (*e.g.* tall, dark, and thin).[866] For example, P-0916 only met 'Ali Kushayb' once or twice, and described him as tall and dark skinned with a hole in his ear.[867] The Chamber properly considered his evidence, including any discrepancies, together with other evidence identifying 'Ali Kushayb'.[868]

245. Likewise, Abd-Al-Rahman shows no error in the Chamber's consideration of the testimony of P-0029, P-1073, P-1074, P-0986, and D-0016.[869] The Chamber properly noted aspects of their evidence which undermined the reliability of their "identification" testimony. Specifically: (i) the Chamber reasonably doubted P-0029's physical description of the man he knew as 'Ali Kushayb' given his hesitation in stating that one of 'Ali Kushayb's' ears was pierced, along with "severe" interpretation issues during his testimony;[870] (ii) the Chamber reasonably did not rely on P-1073's "identity" evidence as she only saw 'Ali Kushayb' once, and there was no evidence corroborating her claim that the man she saw had a scar on his forehead, or how long scars were apparent before fading, if at all;[871] (iii) the Chamber reasonably did not rely on P-1074's evidence given she only saw 'Ali Kushayb' once and not clearly as he was far away from her;[872] (iv) the Chamber reasonably found that any discrepancies in P-0986's estimated age for 'Ali Kushayb' did not undermine his evidence of having met 'Ali Kushayb' three times ([REDACTED]), and P-0986's in-court identification of Abd-Al-Rahman as 'Ali Kushayb' on two occasions, which the Chamber exceptionally (and reasonably) gave some weight on the basis that "[REDACTED]";[873] and (v) the Chamber

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[864] Judgment, para. 210. *See also above* paras. 237-241 (Ground 32).
[865] Judgment, para. 212.
[866] Witness Annex, paras. 122 (P-0581), 141 (P-0585), 371 (P-0916), 383 (P-0919), 429 (P-0932).
[867] Witness Annex, paras. 371 and 373 (citing DAR-OTP-0224-0023-R01 at 0035, paras. 56-57; DAR-OTP-00000060 at 2, para. 19; T-075-Conf, pp. 11:40-41). *Contra* Appeal, fn. 575.
[868] Witness Annex, para. 374.
[869] Appeal, paras. 216, 218 (fn. 583).
[870] Witness Annex, paras. 55-57.
[871] Witness Annex, paras. 560-561.
[872] Witness Annex, paras. 566, 570.
[873] Witness Annex, paras. 485-489, 493-496. After the first break, P-0986 requested special measures to prevent direct eye contact with Abd-Al-Rahman in court: Witness Annex, para. 489. *See also above* paras. (Ground 27).

reasonably did not rely on D-0016's evidence of his one-time introduction to a man named 'Ali Kushayb', including his estimate of the man's age, for the reasons given above.[874]

246. Third, Abd-Al-Rahman's argument that the Chamber speculated as to why a physical mark from the ear piercing that P-0029 and P-1073 had attributed to 'Ali Kushayb' was no longer apparent on Abd-Al-Rahman is unpersuasive.[875] The Chamber used common sense to account for the possible disappearance of a piercing after decades. The Chamber also clarified that the fact that there was no visible sign of an ear piercing 20 years later did not undermine P-0029's evidence given other aspects of his testimony that were consistent with surrounding evidence regarding Abd-Al-Rahman's identity.[876]

247. Fourth, Abd-Al-Rahman's argument that the Chamber did not adequately consider discrepancies in witness evidence regarding the purported age of 'Ali Kushayb' should be rejected.[877] While age was only one component of the Chamber's findings on the identity issue, the Chamber did consider age to be relevant when assessing witness descriptions, especially for "recognition" witnesses P-0012 and P-0905.[878] While witness testimony was essential to the Chamber's finding on the Identity Issue, it was considered together with multiple other categories of evidence, including the 2020 pre-surrender video of Abd-Al-Rahman.[879]

248. Fifth, Abd-Al-Rahman's claim that media exposure after 2007 may have "influenced *ex post facto* recognition and descriptive convergence" should be rejected for the reasons below.[880] Finally, the witnesses' physical descriptions of Abd-Al-Rahman were a minor component of their "identity" evidence, and the Identity Finding was based on a range of evidence (testimonial, audio-visual, documentary, and circumstantial evidence, supported by the agreed facts).[881] As such, even if the Chamber had erred—which it did not—this would not have impacted the Judgment.

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[874] *See above* paras. 208-212 (Ground 26), 237-241 (Ground 32). *Contra* Appeal, para. 218.
[875] *Contra* Appeal, para. 216.
[876] Witness Annex, para. 59.
[877] Appeal, para. 218.
[878] Judgment, para. 262(c) ("The Chamber has also taken into consideration the fact that the witnesses' description of 'Ali Kushayb' corresponds to some of the facts agreed between the parties in relation to the Accused's background. These include: […] (c) P-0905 estimated that, between 2000 and 2004, 'Ali Kushayb' was approximately 50 to 60 years old. P-0012 similarly estimated that 'Ali Kushayb' was in his fifties in the early 2000s. The Accused was in his mid-50s in 2003-2004"). *See also* Annex A to Third Joint Submission on Agreed Facts, Agreed Fact 1.
[879] Judgment, para. 241. *Contra* Appeal, para. 219. *See also above* 237-241 (Ground 32).
[880] *Contra* Appeal, paras. 220, 221-231. *See below* paras. 249-256 (Ground 35).
[881] Judgment, paras. 238-271.

### IV.E. The Chamber properly considered any alleged impact of the public release of court documents on the evidence (Ground 35)

249. Abd-Al-Rahman argues that the Chamber erred in failing to consider his claim that Prosecution witnesses had been contaminated by the Court's public release of documents since 2007, in particular the release of the arrest warrant application on 27 February 2007 attributing the nickname 'Ali Kushayb' to Abd-Al-Rahman.[882] Abd-Al-Rahman's unsuccessful, now recycled, arguments from trial should be rejected.[883]

250. First, the Chamber addressed any concrete evidence-based allegations of contamination when individually assessing witnesses.[884] It properly considered the relevant and probative evidence on the record, rather than improperly speculating about a hypothetical impact of a generalised, non-specific risk. Abd-Al-Rahman merely disagrees with the Chamber's approach, which properly assessed witness evidence on an individualised basis, while taking into account the entire body of evidence.[885] In the absence of clear, cogent and convincing evidence demonstrating the effect of this hypothetical risk *vis-à-vis* specific witnesses, it was reasonable for the Chamber not to disregard all witness evidence obtained after 2007 based on an hypothetical and assumed "systemic" contamination.[886] The Chamber based its decision on evidence, not speculation, and did not violate article 74(2) and (5) of the Statute.[887]

251. Second, as acknowledged by the Chamber, there was evidence on the record linking Abd-Al-Rahman to the nickname 'Ali Kushayb' pre-dating the release of the arrest warrant application on 27 February 2007[888]—in particular from two "recognition" witnesses (P-0012[889] and P-0643[890]) who were interviewed prior to February 2007.

252. The Chamber also noted that the Prosecution's arrest warrant application did not include several identifying details linking Abd-Al-Rahman to the nickname 'Ali Kushayb', including his medical role in the SAF, his rank of *musa'id* ("warrant officer"), and his later service in the CRF.[891] The Chamber reasonably discounted Abd-Al-Rahman's general contamination

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[882] Appeal, paras. 221-231. *See* Judgment, para. 263 (citing Defence Final Brief, paras. 501-503, 697-698, 706, 714-715, 722, 734; Defence Closing Statement, pp. 29-30).
[883] *Bemba et al.* AJ, para. 111; *Lubanga* AJ, para. 33.
[884] Judgment, para. 264. *See e.g.* Witness Annex, paras. 13-14 (P-0011), 252 (P-0877), 323 (P-0903), 352 (P-0907), 442-443 (P-0932), 507-508 (P-0990).
[885] Judgment, paras. 197 (citing *Ngudjolo* AJ, para. 168), 206.
[886] *Ntaganda* TJ, paras. 48-49. *Contra* Appeal, para. 230.
[887] *Contra* Appeal, para. 227.
[888] *See e.g.* Prosecution Final Brief, paras. 28-51.
[889] Witness Annex, para. 20; Judgment, paras. 250-251. P-0012 was interviewed by the Prosecution [REDACTED]: *see* DAR-OTP-0119-0503-R01.
[890] Witness Annex, para. 157; Judgment, paras. 250-251. [REDACTED]: DAR-OTP-0014-0213 at 0214; T-057-Conf, p. 50; T-059-Conf, pp. 55, 57-59
[891] Judgment, para. 264.

argument, noting that the "degree of contextual and descriptive detail" given by many Prosecution witnesses regarding the personal background and profession of 'Ali Kushayb', in particular witnesses who knew Abd-Al-Rahman well, such as P-0883, P-0905, and P-0935, lent further credence and credibility to their evidence.[892]

253. Third, Abd-Al-Rahman's assertion that the purported error was compounded when the Chamber relied on the alignment of a witness's testimony with agreed facts (because these details were publicly available) is unpersuasive.[893] First, these facts were not agreed between the parties until the trial phase began in 2021, while the statements of the witnesses on whom the Chamber relied (containing identity markers corroborating the agreed facts) predated this.[894] Second, the Chamber primarily relied on witnesses who had known Abd-Al-Rahman well and for a long period, including P-0012, P-0643, P-0883, P-0905, P-0935, and P-1021.[895] The testimony of these witnesses, most of whom testified *viva voce*, conformed to their prior statements and contained many other corroborative details providing circumstantial evidence that Abd-Al-Rahman was 'Ali Kushayb'.[896]

254. Fourth, the Chamber reasonably relied on "the degree of contextual and descriptive detail" for witnesses, in particular P-0905 and P-0935, when rejecting claims of contamination.[897] Abd-Al-Rahman attributes the detail of their testimony to the public attribution of the nickname 'Ali Kushayb' and community entrenchment linking him to the name,[898] but offers no evidence to support this claim.[899] Moreover, he also overlooks several aspects of the Chamber's reasoning in assessing these witnesses as credible.[900] The Chamber found numerous aspects of P-0905's testimony to be credible and reliable, including his clarity, reasoning, reaction when challenged, and [REDACTED][901]—which put him in an "ideal

[892] Judgment, para. 264.
[893] Appeal, para. 226.
[894] Judgment, paras. 262-264. *See e.g.* DAR-OTP-0119-0503-R01 at 0511, para. 33, and 0512, para. 38. [REDACTED], when P-0012 was interviewed, he stated that 'Ali Kushayb', whose "real name is Ali Muhammad ALI", was the *Agid Al-Ogada* in Wadi Salih, owned a pharmacy in Garsila, and had previously been in the military.
[895] *See also* Judgment, para. 250 ("The Chamber considers the evidence given by eight Prosecution witnesses to be particularly instructive in relation to the Identification Issue. These are witnesses who: (i) knew the full name of 'Ali Kushayb' to be 'Ali Muhammad Ali Abd-Al-Rahman' (or a variant thereof); (ii) had a credible and reliable basis for their knowledge of his name and nickname; (iii) whose identification evidence contained credible indices of reliability; and (iv) gave evidence of interacting with, and/or seeing or being in the presence of 'Ali Kushayb' during the charged period").
[896] Judgment, paras. 265-268. *Contra* Appeal, para. 230.
[897] *Contra* Appeal, para. 225 (citing Witness Annex, paras. 326-327, 329 (P-0905), 445-448 (P-0935)).
[898] Appeal, para. 225 (citing Defence Final Brief, para. 102). Abd-Al-Rahman provides only a literary reference supporting his claim that prolonged public repetition of information can produce a "form of narrative conformity".
[899] Appeal, para. 227.
[900] Appeal, para. 225 (fn. 593).
[901] [REDACTED]: Witness Annex, para. 330.

position to have contact with and be aware of the person and activities of 'Ali Kushayb'."[902] As for P-0935, the Chamber relied on multiple factors supporting the credibility and reliability of his testimony, including that [REDACTED].[903]

255. Fifth, Abd-Al-Rahman incorrectly claims that the Chamber reversed the burden of proof on the issue of contamination.[904] Noting the recent introduction of regulation 23*ter*, he submits that it was "wrong" for the Prosecution to have publicised his arrest warrant application, which risked the integrity of the proceedings and gave it the "unfair advantage" of potentially contaminated evidence, and alleges that the Chamber failed to redress this harm.[905] The Chamber did not reverse the burden of proof, and no issue of unfairness arises. The Prosecution was not bound to disprove a hypothetical contamination of witnesses in the absence of concrete evidence relating to specific witnesses. Furthermore, Abd-Al-Rahman had adequate time and resources to adduce evidence of any actual alleged contamination of Prosecution witnesses during the trial proceedings,[906] as well as ample opportunity at trial to cross-examine witnesses about contamination and otherwise challenge the Prosecution case.[907] The Chamber, reasonably, did not assume that every witness was lying or mistaken, but assessed their credibility concretely, based on the evidence on the record.[908]

256. Finally, Abd-Al-Rahman does not explain how, in practice, the Chamber should have adopted the Defence recommendation to treat the alleged risk of contamination (due to the public dissemination of the 2007 arrest warrant application) as a "structural reliability" risk.[909] The Chamber approached identity-related information elicited from witnesses with caution[910] and considered any indications of bias and motive.[911] This assessment already included an explicit recognition that it was possible that more than one person could be mistaken, or a

[902] Witness Annex, para. 329.
[903] Witness Annex, paras. 447-448 (citing T-090-Conf, pp. 15-16, 91-93). [REDACTED]: T-074-Conf, p. 8 (P-0883); T-085-Conf, pp. 24, 27-28 (P-0905).
[904] Appeal, paras. 224, 227.
[905] Appeal, para. 228.
[906] *See also* Procedural Challenges Decision, para. 45 (citing *Lubanga* Transcripts Decision, para. 19; *Lubanga* Victim Participation ALA Decision, p. 7; *Uganda* AWA ALA Decision, para. 30).
[907] *See also* Judgment, paras. 199-203.
[908] Judgment, para. 222.
[909] Appeal, para. 228.
[910] Judgment, para. 207 ("Identification evidence does not need to be of any particular type, but caution is required in assessing it due to the 'vagaries of human perception and recollection', in particular, where identification is made in 'turbulent and traumatising circumstances'", citing *Ntaganda* TJ, para. 71; *Bemba* TJ, para. 241).
[911] Judgment, para. 194(ii) (reciting factors taken into account in assessing witness evidence including "the individual circumstances of the witness, including their relationship to the Accused, age, the provision of assurances against self-incrimination, any relationship with the parties to the conflict, indication of bias against the Accused—or the lack thereof—and if appropriate, motives for giving evidence").

witness could have been influenced by another.[912]

### IV.F. The Chamber properly allowed witnesses to be cross-examined on the 2013 media reports, and their submission into evidence (Ground 36)

257. Abd-Al-Rahman alleges that the Chamber erred in law and/or procedure in treating media reports produced by the Prosecution during its cross-examination of Defence witnesses as corroborative material relevant to establishing that he is known as 'Ali Kushayb'.[913] This ground of appeal should be dismissed. Abd-Al-Rahman mischaracterises the Chamber's reasoning, overstating the weight reasonably given to these reports.

258. As a preliminary matter, Abd-Al-Rahman appears to conflate two different categories of 2013 media reports that the Chamber relied on in the Judgment: (i) the Chamber reasonably relied on one set of 2013 media reports concerning Abd-Al-Rahman's assassination attempt, as another form of "confluence" between agreed biographical facts and witness testimony about 'Ali Kushayb', whilst acknowledging their limited probative value;[914] (ii) the Chamber also allowed a second set of 2013 media reports about the conflict between the Ta'aisha and Salamat tribes into the record, primarily through the Prosecution's cross-examination of Defence witnesses to test their credibility and reliability, and based on three Defence witnesses who confirmed that their contents were largely accurate.[915] However, contrary to Abd-Al-Rahman's assertions, the Chamber only mentioned the second set of media reports in passing in its Judgment, and did not rely on them at all in its identity finding.[916] The Prosecution thus responds to Abd-Al-Rahman's arguments only *vis-à-vis* the first set of media reports on his assassination attempt that were used to cross-examine six Defence witnesses.[917] Abd-Al-Rahman shows no error in the Chamber's treatment of these reports.

259. First, the Chamber could properly allow into evidence the open source media reports

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[912] Judgment, para. 211.
[913] Appeal, paras. 232-235.
[914] Judgment, paras. 265-268. Notably, Abd-Al-Rahman does not contest that he had been the subject of an assassination attempt in Nyala in 2013: Appeal, para. 232. *See also* Judgment, para. 268 (*citing* Defence Final Brief, paras. 729-730).
[915] Judgment, para. 268 (citing T-154-Conf, pp. 20-21 (D-0001); T-155-Conf, pp. 87-91 (D-0003); T-159-Conf, pp. 47-49 (D-0039)).
[916] Judgment, para. 268.
[917] Although the 2013 media articles about Abd-Al-Rahman's assassination attempt were only used in the cross-examination of six witnesses (D-0001, D-0002, D-0003, D-0005, D-0007, and D-0032), the Chamber did not rely on all of these witnesses in the Judgment. *See* Judgment, fn. 497 (citing T-155, pp. 2-9 (D-0001); T-155-Conf, pp. 51-53, 87, T-156-Conf, pp. 4-5 (D-0003); T-158, pp. 40-42 (D-0005); T-149-Conf, pp. 31-33, 42-43, 48-49 (D-0007); T-139, pp. 53, 73-74 (D-0008); T-138, pp. 73-74, 84-87(D-0011)). D-0039 was cited by the Chamber in support of the proposition that Abd-Al-Rahman experienced an attempted assassination, but his evidence was not adduced in response to the use of media articles in cross-examination: *see* Judgment, fn. 497 (citing T-159, pp. 45-46, 79-84 (D-0039)).

which the Prosecution used in cross-examining several Defence witnesses.[918] Abd-Al-Rahman argues that the Chamber was required under article 69(4) of the Statute to assess the relevance and probative value of these reports independently, instead of treating them as corroborative proof.[919] However, while no evidence was adduced regarding the sources or authors of the media reports, subsequent confirmation by Defence witnesses that the contents were largely accurate supports the inference that the editorial process was sound. Abd-Al-Rahman fails to show the Chamber erred by giving such reports limited weight when assessing the witnesses' identification evidence. Likewise, his argument that the Chamber violated article 74(5) by not sufficiently addressing the "methodological concern" of the reports being used as support for his nickname, even though they were "not verified" and the Prosecution had already attributed the nickname 'Ali Kushayb' to Abd-Al-Rahman, must be rejected.[920]

260. Second, the Chamber reasonably relied on the 2013 media reports as relevant to its assessment of Abd-Al-Rahman's identity as 'Ali Kushayb'.[921] One of the articles mentioned Abd-Al-Rahman by both his full legal name and his nickname, "Ali Muhammad Ali Abd-al-Rahman known as Ali Kushayb".[922] This reference is significant given that the Defence acknowledge that Abd-Al-Rahman had been the subject of an assassination attempt.[923]

261. Third, the Chamber reasonably gave these reports only limited probative value on the Identity Issue because of their date,[924] that is, approximately ten years after the charged events. It found that these reports lent some support for the Prosecution's case that Abd-Al-Rahman was known as 'Ali Kushayb', and undermined the Defence case that he was never known by that nickname or that 'Ali Kushayb' was an invented figure.[925] The Chamber did not find that Abd-Al-Rahman was known "*at all times*" as 'Ali Kushayb', but rather summarised the Prosecution's position, to which it found the articles lent some support.[926] Given the Defence argument that Abd-Al-Rahman was *never* known as 'Ali Kushayb', and that a person named

[918] Judgment, para. 268. *Contra* Appeal, paras. 232-235. *See e.g.* *Popović et al.* Use of Statements in Cross-Examination Decision, p. 2-3; *Ntaganda* AJ, para. 46.
[919] Appeal, para. 232.
[920] Appeal, para. 235.
[921] *See e.g* *Kenyatta et al.* CD, para. 79*Katanga & Ngudjolo* Bar Table Decision, paras. 26-28.
[922] DAR-OTP-00006171 (Translation: DAR-OTP-00006771).
[923] Appeal, para. 232; Defence Final Brief, para. 729.
[924] Judgment, para. 268.
[925] Judgment, para. 268.
[926] *Contra* Appeal, para. 232. *See* Judgment, para. 268 ("However, these reports add some support for the Prosecution's case that the Accused was at all times known by this nickname and undermines the Defence case that at no time was the Accused known by that nickname or that 'Ali Kushayb' was an invented figure and did not actually exist").

'Ali Kushayb' did not exist,[927] the Chamber reasonably placed some reliance on these reports.

262. Fourth, while some of the articles used to cross-examine Defence witnesses mentioned the case before the Court, and that Abd-Al-Rahman was a fugitive,[928] this does not undermine the Chamber's minimal reliance on them. The Chamber properly exercised its discretion by giving these materials limited weight when it assessed the evidence of identification on the record in light of other factors, including the Defence agreement that the assassination attempt had occurred, on which Defence witnesses concurred.[929] The Chamber did not need to "distinguish[] between media repetition and independent proof"[930] when the allegations about the influence of public disclosure on witness testimony were not substantiated by evidence.[931] Abd-Al-Rahman repeats his unsuccessful trial arguments in disagreement with the Chamber.[932]

263. Finally, Abd-Al-Rahman fails to establish that any purported error had a material impact on the Judgment. The Chamber placed limited reliance on these media reports given the wealth of other evidence establishing its finding that Abd-Al-Rahman was known as 'Ali Kushayb', such that any alleged error would not have impacted this finding or his conviction.

### IV.G. The Chamber properly relied on evidence of witness recognition in videos and photographs (Ground 37)

264. The Chamber reasonably and correctly relied on evidence of witness recognition of 'Ali Kushayb' in photographs and videos of Abd-Al-Rahman. The Chamber limited recognition evidence to those who "were previously acquainted with the Accused",[933] relying on five witnesses P-0643, P-0874, P-0883, P-0905 and P-1021.[934] The Chamber also noted that it considered this recognition evidence alongside the other evidence these witnesses provided linking Abd-Al-Rahman to the nickname 'Ali Kushayb'.[935]

265. After protracted denials during trial, Abd-Al-Rahman no longer disputes that he is the individual in the photographs and videos used for recognition purposes.[936] However, he still repeats his unsuccessful trial argument that the Chamber did not conduct a sufficient assessment

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[927] Judgment, para. 268 (citing *contra* T-161, p. 69; Defence Closing Statement, pp. 41-42; Defence Pre-Trial Brief, para. 5).
[928] Appeal, para. 235 (citing Defence Final Brief, paras. 728-731).
[929] *Ntaganda* AJ, paras. 45-46.
[930] Appeal, para. 235.
[931] *See above* paras. 249-256 (Ground 35).
[932] Defence Final Brief, paras. 728-731.
[933] Judgment, paras. 216-218, 254-261. *Contra* Appeal, paras. 236-241.
[934] Appeal, para. 236 (citing Judgment, para. 254).
[935] Judgment, para. 261.
[936] Appeal, para. 237 (citing Defence Final Brief, para. 190). 96. [REDACTED]: Judgment, fn. 446 (citing T-139-Conf, pp. 82-85). [REDACTED]: Judgment, fn. 447 (citing T-156-Conf, pp. 8-15 (D-0003); T-158-Conf, pp. 74-81 (D-0005); T-159-Conf, pp. 89-91 (D-0039)).

of reliability and probative when assessing witness recognition in photographs and videos, in light of the manner in which they were obtained and used.[937] He complains that the Prosecution used an "inherently suggestive" method, in which witnesses were shown a single photograph, leading to a confirmatory response.[938] Abd-Al-Rahman's arguments should be rejected.

266. As noted above,[939] the Chamber clearly set out its criteria for assessing the reliability and credibility of identification evidence, in particular the evidence in which witnesses recognised Abd-Al-Rahman in photographs and videos.[940] It consistently applied these criteria for all witnesses, providing detailed and reasoned explanations for its assessment. Abd-Al-Rahman's reliance on ICTY jurisprudence regarding dock identifications is inapposite.[941] The evidence from these five witnesses were not dock identifications. Rather, these witnesses gave evidence that they recognised Abd-Al-Rahman as 'Ali Kushayb', after the basis of their knowing him had been well-established. The Chamber did not rely on the recognitions of these witnesses alone to make the Identity Finding. Rather, it considered their evidence together with the other evidence that the witnesses provided.[942]

267. The reasonableness of the Chamber's approach is apparent in its individualised assessments of each witness recognition: (i) its finding that P-0643 had a solid personal and professional basis for recognising Abd-Al-Rahman was reasonable in light of his extremely detailed evidence and credible explanation for knowing his full name,[943] in particular, [REDACTED],[944] and that he linked the name 'Ali Kushayb' to Abd-Al-Rahman independently of any Court proceedings;[945] (ii) its finding that P-0874's identity evidence was credible and reliable was reasonable given the period of time in which P-0874 knew Abd-Al-Rahman, the special circumstances of his observations in 2003, the distance and regularity of his observations,[946] his lack of animus towards Abd-Al-Rahman, [REDACTED],[947] and his

[937] *See* Judgment, paras. 216-218 (citing T-057, p. 36). *Contra* Appeal, para. 236.
[938] Appeal, para. 237.
[939] *See also above* paras. 237-241 (Ground 32), 242-248 (Ground 33).
[940] Judgment, paras. 254-261.
[941] *Contra* Appeal, para. 238.
[942] Judgment, para. 261.
[943] Witness Annex, para. 158.
[944] [REDACTED]: Witness Annex, paras. 155-156 (citing T-056-Conf, pp. 20-26).
[945] P-0643 first linked the name 'Ali Kushayb' to Abd-Al-Rahman [REDACTED], before the ICC arrest warrant was issued: Witness Annex, para. 157 (citing DAR-OTP-0014-0213; T-057-Conf, p. 50; T-059-Conf, pp. 55, 57-59). In addition, before appearing in Court, P-0643 sent investigators a copy of the Um Sory video on his own initiative because he saw it on YouTube. He sent the video to "confirm to the investigator the identity of Ali Kushayb": T-057-Conf, pp. 36:13-24, 42:5-11; T-059-Conf, pp. 34:11-36:25 (version shown DAR-OTP-0220-4835).
[946] [REDACTED]: Witness Annex, para. 226 (citing T-082-Conf, pp. 6-7, 65-66, 73-74). [REDACTED]: Witness Annex, para. 226 (citing T-082-Conf, pp. 36-40; T-083-Conf, pp. 11-12).
[947] Witness Annex, para. 230.

knowledge of Abd-Al-Rahman's other nickname "Abu Nasser",[948] which is consistent with the Defence case;[949] (iii) its finding that P-0883's identity evidence was credible and reliable was reasonable given his lack of embellishment,[950] objectivity, and apparent lack of motive to lie, interest to serve and/or animosity towards Abd-Al-Rahman,[951] that he took contemporaneous notes during the events,[952] had known Abd-Al-Rahman personally and professionally for many years,[953] [REDACTED];[954] (iv) its finding that [REDACTED] placed the witness in "an ideal position to have contact with and be aware of the person and activities of 'Ali Kushayb'"[955] was reasonable given his personal and professional knowledge of Abd-Al-Rahman before 2003, [REDACTED],[956] and his clarity, rationality, and reaction upon being challenged as indicators of his credibility;[957] (v) despite finding some aspects of P-1021's testimony to be unpersuasive,[958] its finding that it could rely on P-1021's recognition that Abd-Al-Rahman was 'Ali Kushayb' was reasonable given the "[REDACTED]" and "[REDACTED]" of P-1021's interactions with Abd-Al-Rahman by virtue of [REDACTED].[959]

268. The Chamber thus carefully assessed the recognition evidence, including regarding a witness's potential motive, and did not ascribe probative value to witnesses who did not know Abd-Al-Rahman before the events.[960] The Chamber even considered the possible confirmatory impact of the single photograph identification, and accordingly, did not rely on these identifications unless the witness had credible and reliable evidence of their knowledge and ability to recognise Abd-Al-Rahman before being shown the photograph.[961] The Chamber's approach conforms with the jurisprudence on recognition evidence.[962]

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[948] Witness Annex, para. 226 (citing T-082-Conf, p. 71).
[949] Defence Final Brief, paras. 745, 759.
[950] Witness Annex, para. 289.
[951] Witness Annex, para. 301.
[952] Witness Annex, paras. 279-280 (citing T-072-Conf, pp. 48, 78-80).
[953] [REDACTED]: Witness Annex, paras. 286 (citing T-072-Conf, pp. 37-38, 47-48), 292.
[954] Witness Annex, paras. 284-286 (citing T-071-Conf, pp. 14-25; T-073-Conf, p. 79; T-074-Conf, pp. 7-8).
[955] Witness Annex, para. 329. [REDACTED].
[956] Witness Annex, paras. 326-327 (citing T-085-Conf, pp. 17-30, 35-38; T-087-Conf, pp. 21-23, 29-30).
[957] Witness Annex, para. 329.
[958] Witness Annex, paras. 530-532 (citing T-081-Conf, pp. 90-92).
[959] [REDACTED]: Witness Annex, paras. 529-530 (citing T-081-Conf, pp. 3-4, 20, 90-92), 534-536.
[960] Judgment, paras. 216, 254.
[961] Judgment, para. 218.
[962] The Prosecution notes that the cases cited by Abd-Al-Rahman concerned very different circumstances, including circumstances in which the in-court identification was made at the explicit prompting of the examining counsel, not recognitions or spontaneous identifications: *cf.* Appeal, para. 238. *See e.g.* *Kunarac et al.* TJ, para. 562 ("Each of these witnesses was asked whether she could identify any of the persons in the courtroom as the man who raped her. Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight has been given by the Chamber to these 'in court' identifications."); *Limaj et al.* TJ, para. 613. *See also below* paras. 270-275 (Ground 38).

269. The recognition evidence was but one category of evidence that the Chamber used to determine that Abd-Al-Rahman had the nickname 'Ali Kushayb' such that even if the Chamber had erred—which it did not—this would not have impacted the Judgment.[963]

### IV.H. The Chamber properly relied on in-court recognition evidence from three witnesses (Ground 38)

270. The Chamber properly allowed into evidence spontaneous in-court recognition evidence from three witnesses, P-0585, P-0878, and P-0986.[964] The Chamber admitted this evidence for the limited purpose of establishing that the person the witnesses stated they recognised before and during the events as 'Ali Kushayb' was Abd-Al-Rahman.[965] Abd-Al-Rahman argues that the Chamber erred in law by attaching weight to in-court identification evidence as proof that witnesses knew him during 2003-2004, departing from its own rule that little weight should be attached to in-court identification.[966] His arguments should be rejected. He mischaracterises the Chamber's reasoning and misconstrues the relevant law.

271. First, the Chamber properly applied a cautious and nuanced approach to in-court recognition evidence. It correctly held that "virtually no weight" can be attached "if it is a first-time in-court identification of a stranger".[967] The Chamber also discouraged any possible solicitation of dock identification during witness testimony.[968] It carefully distinguished between identity-related evidence from witnesses who did not know Abd-Al-Rahman before the events, and *recognition* evidence from those who did, including when considering in-court recognition evidence by the latter witnesses. Even then, the Chamber did not use these identifications to "shore up a weak" or "support a tenuous" identification,[969] and gave only minimal weight to the in-court identifications by witnesses who gave credible and reliable evidence of the basis for their subsequent recognition.[970]

272. Second, the three witnesses to whom the Chamber attributed some weight to their in-court identification evidence were not "strangers" identifying Abd-Al-Rahman as 'Ali Kushayb'. Their evidence were not "dock identifications" as such. They all had special circumstances that gave their identifications greater reliability. Moreover, the Chamber only mentioned their in-court identifications in passing and primarily relied on other evidence they

[963] *Contra* Appeal, para. 241.
[964] Judgment, para. 214 (fn. 391).
[965] Judgment, para. 215.
[966] Appeal, paras. 242-245.
[967] Judgment, para. 214.
[968] Judgment, para. 214 (citing T-039, p. 28:4-11). Generally, the Prosecution did not solicit dock identifications.
[969] Judgment, para. 214.
[970] Judgment, para. 215.

gave that established their knowledge of Abd-Al-Rahman's identity as 'Ali Kushayb' in the relevant period.[971] The Chamber's reasoning in assigning limited weight to recognition by these three witnesses shows no error: (i) P-0585 had known Abd-Al-Rahman [REDACTED][972] and had the "benefit of interacting, observing and speaking to the Accused for many years in times of peace and at times in close proximity";[973] (ii) P-0878 had known Abd-Al-Rahman [REDACTED][974] and [REDACTED],[975] which the Defence did not challenge;[976] and (iii) P-0883, who pointed to Abd-Al-Rahman many times during his testimony, had known Abd-Al-Rahman both personally and professionally for many years, including during 2003-2004. The Chamber included him in its list of witnesses who knew Abd-Al-Rahman particularly well.[977]

273. The only witness whose in-court *identification*, not recognition, the Chamber exceptionally afforded some limited weight to was P-0986 due to the special circumstances surrounding his interactions with Abd-Al-Rahman. P-0986 had known Abd-Al-Rahman [REDACTED][978] and [REDACTED].[979] After P-0986 had twice identified Abd-Al-Rahman as the man he knew as 'Ali Kushayb' in court, he asked for special measures so that he would not have direct eye contact with him.[980] The Chamber noted that "[REDACTED]". Having found the witness had no motive to invent the identity of [REDACTED], the Chamber reasonably determined that P-0986's account was likely credible and reliable.[981]

274. Abd-Al-Rahman's claim that allowing in-court identification evidence was unfair,[982] and that any prejudice was not "cured" by giving in-court identifications little weight,[983] mischaracterises the Judgment. The Chamber exercised due caution *vis-à-vis* this evidence, and ultimately did not include it in the six categories of evidence that it relied on to make the Identity

[971] The Chamber found that P-0585's in-court identification had limited probative value; it mentioned P-0878's in-court identification only in passing when assessing his evidence; and it mentioned P-0883's in-court identification in passing when assessing his evidence and not at all in its overall reasoning and conclusion attributing the nickname 'Ali Kushayb' to Abd-Al-Rahman: Witness Annex, paras. 142 (P-0585), 258 (P-0878), 287 (P-0883); Judgment, paras. 214-215, 258 (P-0883).
[972] Witness Annex, paras. 141-142 (citing T-099-Conf, pp. 40-43, 47-49; T-101-Conf, pp. 35-36; T-102-Conf, pp. 14-15).
[973] Witness Annex, para. 144 (citing T-102-Conf, pp. 31-32).
[974] Witness Annex, para. 258 (citing T-077-Conf, pp. 15-17).
[975] Witness Annex, para. 258 (citing T-077-Conf, pp. 62-63).
[976] Witness Annex, para. 261 (citing T-078-Conf, pp. 58-65).
[977] Judgment, paras. 214-215, 250-253, 258. *See also* paras. 264-269 (Ground 37).
[978] Witness Annex, para. 485 (citing DAR-OTP-0222-0437-R01 at 0442-0443, paras. 24-27; T-065-Conf, p. 68; T-066-Conf, pp. 18-19). *See also above* para. 245.
[979] Witness Annex, paras. 486-487 (citing DAR-OTP-0222-0437-R01 at 0447-0449, paras. 47-56; T-065-Conf, pp. 10-13, 46-50, 54, 59; T-066, pp. 25-26).
[980] Witness Annex, paras. 489 (citing T-065-Conf, pp. 30, 38-39, 40-43; T-066-Conf, pp. 20-21).
[981] Witness Annex, para. 496.
[982] Appeal, para. 245.
[983] Appeal, para. 245.

Finding.[984]

275. Finally, even if, *arguendo,* the Chamber erred in admitting and/or giving limited weight to these in-court identifications, this would not have materially impacted the Chamber's findings and his conviction, given the wealth of other evidence conclusively establishing that Abd-Al-Rahman was also known as 'Ali Kushayb'.[985]

## V. Abd-Al-Rahman held a position of authority and influence (Part E)

276. The Appeals Chamber should reject the grounds in Part E. Abd-Al-Rahman shows no error of law or fact in the Chamber's finding that he held a position of authority and influence during the charged events.[986] Rather than engaging with the Chamber's findings and reasoning, Abd-Al-Rahman mischaracterises the Judgment, disagrees with the Chamber's conclusions through extensive references to his final trial brief, and contests findings the Chamber did not make.[987] Throughout, Abd-Al-Rahman also incorrectly alleges that the Chamber erred in law in violation of articles 66(2) and 66(3) by misapplying the beyond reasonable doubt standard.[988] However, he fails to identify any element that the Chamber was required to establish beyond reasonable doubt but did not. Instead, he either speculates that doubt exists, or complains that the Chamber did not make findings beyond reasonable doubt on matters that were not only unnecessary, but irrelevant to the charges.[989]

277. Even if the Chamber had erred—which it did not—any such error would have no material impact on the Judgment.[990] Abd-Al-Rahman exaggerates the effect of the alleged errors, at times frivolously.[991] The Chamber's finding that Abd-Al-Rahman held a position of authority and influence during the charged period was based on six categories of evidence.[992] These categories contained an overwhelming body of evidence, enabling the Chamber to make multiple factual findings regarding, *inter alia,* acts and conduct demonstrating Abd-Al-

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[984] Judgment, para. 241. *See also above* para. 230. Abd-Al-Rahman cites the *Kamuhanda* judgment, in which the witness that made the in-court identifications only did so after being asked to look in the courtroom as a whole and see if they could identify the accused. These cases concerned solicited, not spontaneous, identifications. Moreover, the Appeals Chamber in *Kamuhanda* found that the Chamber's reliance on these in-court identifications did not amount to an error invalidating the decision because it was only one element in a larger process. *See* *Kamuhanda* AJ, para. 244. *See also above* paras. 264-269 (Ground 37).
[985] *Ntaganda* AJ, para. 43; *Ongwen* AJ, para. 84.
[986] *Contra* Appeal, paras. 246-299.
[987] *See e.g. below* paras. 279, 281, 288, 294, 302, 307, 317.
[988] Appeal, paras. 248, 256, 266, 272, 288, 291.
[989] *See below* paras. 286-288, 300, 315.
[990] *Contra* Appeal, paras. 257, 267, 272, 275, 285, 291-292, 299.
[991] For example, Abd-Al-Rahman suggests that an alleged error in an observation made by the Chamber in footnote 2277 affected the Judgment and that correcting it would assist in his acquittal: Appeal, para. 299.
[992] Judgment, paras. 658-680. *See below* para. 280.

Rahman's authority.[993] In its findings on Abd-Al-Rahman's criminal liability, the Chamber relied on its determination that Abd-Al-Rahman held a position of authority and influence[994] and, where appropriate, on the particular factual findings underlying that conclusion, as well as on other findings (beyond those addressed in its assessment of Abd-Al-Rahman's position of authority and influence) that also demonstrated such authority.[995] Abd-Al-Rahman's unsubstantiated arguments alleging a material impact on the Judgment namely, that the absence of evidence of his authority over the *Janjaweed* warrants acquittal on all charges, fails to meet the appellate standard.[996]

## V.A. The Chamber properly found that Abd-Al-Rahman was a *de facto Janjaweed* leader (Ground 40)

278. In assessing whether Abd-Al-Rahman was a leader of the *Janjaweed*,[997] the Chamber properly found that he held a position of authority and influence during the charged events,[998] including exercising *de facto* authority as a *Janjaweed* leader.[999]

### *V.A.1. The Chamber did not err in fact in finding that Abd-Al-Rahman was a de facto Janjaweed leader*

279. Abd-Al-Rahman does not show that the Chamber erred in fact in its assessment. Instead, he merely repeats his unsuccessful trial arguments, mischaracterises the Judgment by claiming that the Chamber summarily dismissed his arguments, and criticises the Chamber for not making findings on issues that it was not required to address.[1000]

280. The Chamber reasonably found that Abd-Al-Rahman was a *de facto Janjaweed* leader, on the basis of "overwhelming evidence" [1001] relating to: (i) his relationship with the GoS leadership;[1002] (ii) his "relationship with the GoS forces at the locality level";[1003] (iii) his role in recruiting members of the *Janjaweed* and in distributing matériel to them;[1004] (iv) his "role

[993] *See below* fns. 1002-1007, para. 286.
[994] *See e.g.* Judgment, paras. 983, 988, 1002.
[995] *See e.g.* Judgment, paras. 977, 979, 983-989, 993, 1002.
[996] *See below* paras. 289, 301.
[997] Judgment, para. 11.
[998] Judgment, para. 659. *See* paras. 658-680.
[999] Judgment, para. 679. *See also* para. 1002.
[1000] *Contra* Appeal, paras. 246-257.
[1001] Judgment, para. 679. *See also* paras. 675, 983, 988, 1002.
[1002] Judgment, paras. 660-663. The Chamber discussed the evidence of: P-0643, P-0874, P-0883, P-0905, P-0935, and P-1021. It found that Abd-Al-Rahman received instructions from GoS officials to carry out military operations.
[1003] Judgment, paras. 664-668. The Chamber discussed the evidence of: P-0643, P-0878, P-0883, P-0986, P-1021, and D-0016, and made several factual findings. *See below* paras. 286 and 291.
[1004] Judgment, paras. 669-672. The Chamber discussed the evidence of: P-0883, P-0012, P-0643, P-1021, P-0547, P-0874, P-0913, P-0763, and P-0905, and made several factual findings. *See below* para. 286.

within the *Janjaweed*";[1005] (v) his "apparent position as *agid al-ogada;"*[1006] and, (vi) his "enlistment in the CRF".[1007]

281. Abd-Al-Rahman's claim that the Chamber "summarily dismissed" his Defence argument, that he "had never been and could not have been a *Janjaweed,* even less so one of their leaders", mischaracterises the Judgment.[1008] The Chamber addressed this argument and dismissed it in assessing whether Abd-Al-Rahman was a *Janjaweed* leader.[1009] This argument relied on: (i) the alleged "neutrality of the Ta'aisha tribe"; (ii) alleged tensions between it and the Salamat tribe; and, (iii) the claim that Abd-Al-Rahman could not have disobeyed the Ta'aisha *nazir*'s alleged instruction not to participate in the conflict without consequences.[1010] The Chamber explicitly found that the Ta'aisha tribe's position in the armed conflict had no impact on its findings regarding Abd-Al-Rahman's authority over the *Janjaweed.*[1011] Accordingly, Abd-Al-Rahman's arguments do not undermine the Chamber's finding regarding his *de facto* authority as a *Janjaweed* leader. That the Chamber did not consider this argument warranted further reasoning—despite Abd-Al-Rahman dedicating a full line of defence to it—shows no error.[1012] Nor do Abd-Al-Rahman's extensive references to arguments in his final trial brief.[1013] Rather, they reflect that he merely disagrees with the Chamber's findings.

282. Moreover, the Prosecution was not required to prove, nor was the Chamber required to make findings, beyond those made, on the "nature" and "structure" of the *Janjaweed* or on Abd-Al-Rahman's position as a *Janjaweed* leader.[1014] The Chamber, relying on substantial Prosecution evidence, made multiple findings on who the *Janjaweed* were.[1015] In addition, Abd-

[1005] Judgment, paras. 673-674. The Chamber discussed the evidence of: P-0883, P-0905, P-0763, P-0878 (and other evidence on who were the deputies of Abd-Al-Rahman), and made several factual findings. *See below* para. 286.
[1006] Judgment, para. 675. The Chamber discussed the evidence of: P-0547, P-0585, P-0643, P-0905, P-0877, and P-0012. It found that while "it is understandable that several witnesses formed the view that [Abd-Al-Rahman] was a *Janjaweed* leader because he held the title of *agid al-ogada*", Abd-Al-Rahman's "authority did not stem from his title. *See below* paras. 302-305.
[1007] Judgment, paras. 676-680. The Chamber discussed *inter alia* the evidence of: P-0643, P-0874, P-0883, P-0769, P-0905, P-0994, D-0032, D-0035. It found that Abd-Al-Rahman "enlisted in the CRF sometime between 2004 and 2005", and that the "limited and inconsistent evidence raising the possibility that [Abd-Al-Rahman] was deployed to the CRF in early March 2004 does not raise any reasonable doubt regarding [Abd-Al-Rahman]'s presence and authority over the *Janjaweed* in the aforesaid location and within the timeframe of the charges".
[1008] Appeal, para. 247.
[1009] Judgment, paras. 658-680.
[1010] Appeal, para. 246.
[1011] Judgment, para. 679 ("*[r]egardless* of the Ta'aisha's position regarding the armed conflict, the Chamber is satisfied based on the evidence taken as a whole, that this does not undermine its findings regarding [Abd-Al-Rahman]'s authority over the *Janjaweed*", emphasis added).
[1012] *Contra* Appeal, paras. 246-247.
[1013] *Contra* Appeal, para. 247 (fns. 632-636).
[1014] *Contra* Appeal, para. 247.
[1015] Judgment, paras. 323-333. *Contra* Appeal, paras. 247, 249.

Al-Rahman provides no basis for his suggestion that the Chamber was required to make specific findings on "when and how" he became a *Janjaweed* leader, especially when the Chamber explicitly found that, while the evidence does not clearly reveal how he became a *Janjaweed* leader, it does clearly reveal that he held such a position.[1016]

### *V.A.2. The Chamber correctly applied the standard and burden of proof*

283. Abd-Al-Rahman fails to demonstrate that the Chamber erred in law.[1017] He alleges, first, that the Chamber misapplied the "beyond reasonable doubt" standard;[1018] and second, that the Chamber reversed the burden of proof.[1019] Neither allegation has merit. The Chamber correctly applied the "beyond reasonable doubt" standard,[1020] requiring such proof from the Prosecution for any facts "indispensable for entering a conviction, namely those constituting the elements of the crimes or modes of liability charged".[1021] Contrary to Abd-Al-Rahman's assertion, it is only a *reasonable* doubt—not any doubt—that must benefit the accused.[1022]

284. The first alleged error of law should be dismissed for several reasons.[1023] First, Abd-Al-Rahman mischaracterises the Prosecution position,[1024] and merely advances his preferred approach to the evidence. He shows no error by suggesting that the Chamber should have weighed the evidence that he was a *Janjaweed* leader against evidence about the *Janjaweed*.[1025]

*285.* Second, Abd-Al-Rahman mistakenly emphasises that the Chamber did not mention him in its description of the recruitment of the *Janjaweed* in 2003-2004.[1026] This ignores that, under the heading "*Janjaweed*", the Chamber explicitly stated that Abd-Al-Rahman's "position within the *Janjaweed* will be addressed in Section 5.IV."[1027]

286. Third, the Chamber's conclusion that Abd-Al-Rahman exercised *de facto* authority over the *Janjaweed* is reasonable and supported, *inter alia*, by its findings that: (i) he led the

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[1016] Judgment, para. 983. *Contra* Appeal, para. 247.
[1017] *Contra* Appeal, paras. 248-256.
[1018] Appeal, paras. 248-256.
[1019] Appeal, para. 256.
[1020] Judgment, paras. 166-169. *See* para. 176.
[1021] Judgment, para. 167.
[1022] *E.g. Ngudjolo* AJ , para. 109. *See* Judgment, para. 168 (and references cited therein). *Contra* Appeal, para. 248.
[1023] *Contra* Appeal, paras. 249-256.
[1024] *Contra* Appeal, para. 250 (The Prosecution did not focus its argument on demonstrating that Abd-Al-Rahman had acted as a *Janjaweed* leader based on his title as *agid al-ogada*. This title was only one *indicium* of his position of authority which is consistent with the Chamber's finding (Judgment, para. 675). Abd-Al-Rahman also falsely submits that the Prosecution did not adduce evidence regarding what *agid al-ogada* means and the Chamber relied on some of the evidence adduced by the Prosecution (Judgment, para. 325)). *See also below*, paras. 302-305.
[1025] *Contra* Appeal, para. 249.
[1026] *Contra* Appeal, para. 251.
[1027] Judgment, para. 323.

*Janjaweed* in joint operations in Kodoom and Bindisi, Mukjar, and Deleig;[1028] (ii) he oversaw the recruitment of *Janjaweed* members, and the distribution of ammunition, weapons, salaries and supplies to them;[1029] and, (iii) he instructed lower-ranking members of the *Janjaweed* prior to or during the charged operations (including the "*amsah aksah*" instruction).[1030]

287. Abd-Al-Rahman shows no error in any of these findings; nor does he even engage with the Chamber's reasoning. Rather, he takes issue with the Chamber not making findings that were not needed.[1031] Factors such as, "when and how" Abd-Al-Rahman had joined the *Janjaweed* and became one of their leaders were not relevant, let alone indispensable for Abd-Al-Rahman's conviction. [1032] The Chamber did not err by not determining them. Similarly, the baseless two-prong test invented by Abd-Al-Rahman which, given its irrelevance, was understandably not addressed by the Chamber, shows no error.[1033] In particular, the Ta'aisha tribe's participation in the GoS' counter-insurgency, and whether Abd-Al-Rahman was or was not incorporated into one of the PDF, SAF, CRF, the NISS or the PPF,[1034] were not relevant factors for the Chamber's assessment. Abd-Al-Rahman's repetition of trial arguments to assert that these two prongs were not met is therefore irrelevant.[1035]

288. Abd-Al-Rahman's second alleged error of law should likewise be dismissed. His claim—that the Chamber concluded that he "was a *Janjaweed* on the basis that it was not convinced by the Defence's demonstration that his tribal affiliation prevented him from joining them"—mischaracterises the Judgment.[1036] The Chamber concluded that Abd-Al-Rahman was a *de facto Janjaweed* leader after a careful assessment of the overwhelming evidence falling under several categories and in light of the parties' submissions.[1037]

### *V.A.3. There is no material impact on the Judgment*

289. Abd-Al-Rahman does not explain how any of the alleged errors affected the Judgment.[1038] His argument—that "without being a *Janjaweed*" he could not have participated

[1028] Judgment, para. 668.
[1029] Judgment, paras. 669-672.
[1030] Judgment, para. 673.
[1031] *Contra* Appeal, paras. 250-256.
[1032] *Contra* Appeal, para. 250.
[1033] *Contra* Appeal, paras. 251-255.
[1034] Abd-Al-Rahman also mischaracterises the Judgment by arguing that the *Janjaweed* were sub-categorised into PDF, SAF, CRF, NISS or PPF, and that, consequently, if he was not formally part of one of those bodies, he could not be considered part of the *Janjaweed*: *contra* Appeal, paras. 251-254. This, however, does not reflect the Chamber's findings, which clearly distinguished the *Janjaweed* from various bodies that comprised the GoS forces: *see e.g.* Judgment, paras. 280, 299, 304, 328, 333.
[1035] *Contra* Appeal, paras. 251-256.
[1036] *Contra* Appeal, para. 256.
[1037] *See above* para. 280.
[1038] *Contra* Appeal, para. 257.

in the charged operations; perpetrated, co-perpetrated, or ordered the charged crimes; and no trier of fact would have convicted him of any counts—is overly broad and does not meet the appellate standard. As noted, in its findings on Abd-Al-Rahman's criminal liability, the Chamber relied on its overall conclusion that he held a position of authority and influence and also, where appropriate, on the specific factual findings supporting that conclusion, as well as on other findings— beyond those addressed in section IV of the Judgment—demonstrating his *de facto* authority.[1039] Abd-Al-Rahman should have identified which findings were affected by the alleged errors, and in what manner, but he fails to do so.[1040]

### V.B. The Chamber properly found that Abd-Al-Rahman had a relationship with the leadership of the GoS, and GoS forces at the locality level (Ground 44)

290. In assessing Abd-Al-Rahman's position of authority and influence during the charged events, the Chamber properly considered evidence concerning, *inter alia*: (i) his relationship with the GoS leadership;[1041] (ii) "his relationship with the GoS forces at the locality level";[1042] and, (iii) his role in recruiting *Janjaweed* members and distributing matériel to them.[1043]

291. On this basis, the Chamber properly found, *inter alia,* that Abd-Al-Rahman: (i) received instructions from GoS officials to carry out military operations; (ii) worked together with GoS officials to implement the GoS' counter-insurgency efforts at the locality level; (iii) "worked jointly on the ground with GoS forces, leading the *Janjaweed* in joint operations in Kodoom and Bindisi, Mukjar, and Deleig"; (iv) issued instructions to members of the GoS forces, in the context of the operations in Kodoom and Bindisi, Mukjar, and Deleig; (v) had authority of the *Janjaweed* and the GoS forces during the Mukjar and Deleig Operations; and, (vi) "instructed members of GoS forces to transfer detainees, open cells, lead detainees onto vehicle and shoot and kill detainees".[1044]

292. Abd-Al-Rahman's assertions that the Chamber erred in fact and/or law in making these findings, or that these alleged errors stem from Ground 40, are meritless.[1045]

293. First, the Chamber did not err in finding that Abd-Al-Rahman held a position of authority and influence, including *de facto* authority over the *Janjaweed*.[1046]

294. Second, Abd-Al-Rahman mischaracterises the Judgment by arguing that the above

[1039] *See above* para. 277 (and references therein).
[1040] *Contra* Appeal, para. 257.
[1041] Judgment, paras. 660-663.
[1042] Judgment, paras. 664-668.
[1043] Judgment, paras. 669-672. *Contra* Appeal, paras. 258-267.
[1044] Judgment, paras. 660-672, *especially* paras. 663, 668.
[1045] *Contra* Appeal, para. 260.
[1046] *See above* paras. 278-289.

findings of the Chamber depended on a "preliminary finding" that he "was a member of the *Janjaweed*, and in particular one of their leaders".[1047] To the contrary, the Chamber's findings regarding Abd-Al-Rahman's relationship with the GoS and his role in recruiting *Janjaweed* members and distributing matériel to them, were instead based on the overwhelming evidence on the record.[1048] These findings, among others, supported the Chamber's conclusion that Abd-Al-Rahman was a *de facto Janjaweed* leader.[1049] The Chamber's findings concerning Abd-Al-Rahman's acts *vis-à-vis* the *Janjaweed*[1050] do not show that the Chamber relied on a preliminary finding that Abd-Al-Rahman was a *Janjaweed* leader. Such findings were rather based on the multiple and varied sources of evidence, which in turn supported the Chamber's conclusion that Abd-Al-Rahman was *a de facto Janjaweed* leader.[1051]

295. One example of Abd-Al-Rahman's mischaracterisation of this aspect of the Judgment is his allegation that the Chamber found that he received direct instructions from GoS officials "because he was a *Janjaweed* leader".[1052] In fact, the Chamber noted that "[s]everal witnesses working for the GoS gave evidence that [Abd-Al-Rahman] received instructions from the 'government', from 'higher-ups' and from the Ministry of Interior".[1053] It summarised evidence from P-0643, P-0874, P-0883, and P-0935.[1054] It then concluded—based on "the circumstances surrounding the *Janjaweed* attacks led by [Abd-Al-Rahman], the consistent and clear evidence given by several witnesses, and the statements made by the [Abd-Al-Rahman] himself"—that he received instructions from senior GoS officials to carry out military operations.[1055] Therefore, while Abd-Al-Rahman claims that if the finding that he was a *Janjaweed* leader fails, all factual findings about his acts of authority would also fail, the opposite is true. [1056] In other words, for the finding that he was a *Janjaweed* leader to fail, all factual findings showing that he exercised acts of authority over the *Janjaweed* would need to fail.

296. Third, Abd-Al-Rahman fails to show that the evidence concerning Arab tribal leader Emir Hessine Sayyid Al-Helu ("Al-Helu") detracts from the findings on Abd-Al-Rahman's leadership role, or creates any reasonable doubt.[1057] The Chamber reasonably found that Al-

[1047] *Contra* Appeal, para. 261.
[1048] *See above* fns. 1002-1007. *See also* Judgment, paras. 660-674.
[1049] Judgment, para. 679.
[1050] Appeal, para. 262.
[1051] *Contra* Appeal, para. 262.
[1052] Appeal, para. 262.
[1053] Judgment, para. 662.
[1054] Judgment, para. 662.
[1055] Judgment, para. 663.
[1056] *Contra* Appeal, para. 263.
[1057] *Contra* Appeal, para. 263.

Helu's role did not create doubt about Abd-Al-Rahman's role, but merely showed that Arab tribal leaders were also involved in the GoS' counter-insurgency.[1058] Similarly, Abd-Al-Rahman's repeated criticisms of the Chamber's decision not to make findings regarding "why" or "how" he became a *Janjaweed* leader, or as to which alleged sub-category of the *Janjaweed* he belonged,[1059] are irrelevant, and raise no doubt about his role within the *Janjaweed*.[1060]

297. Fourth, the Chamber adequately explained its finding that Abd-Al-Rahman was "head of the *Mujahidin* Committee, a sub-committee of the Mobilisation Committee in Wadi Salih, which was in charge of mobilising, organising and preparing the *Janjaweed* for 'war'".[1061] It reasonably relied on P-0643's evidence, which did not require corroboration,[1062] to find that the functions of the Mujahidin Sub-Committee were not "duplicative of the functions of the Mobilisation Committee", or "redundant compared to those of the PDF Coordinator".[1063]

298. Moreover, the Chamber found that, while P-0643 was the only witness to testify about the establishment of a *Mujahidin* Sub-Committee with Abd-Al-Rahman as its leader, his evidence on this point "was not 'contradicted' by that of P-1021 and D-0016".[1064] Specifically, P-1021's evidence was that the security committee did not have a *Mujahidin* Sub-Committee, related to the Mukjar locality and not to Garsila (which was in the Wadi Salih locality).[1065] As for D-0016, the Chamber noted that he had a limited understanding of the relevant details of the Mobilisation Committee's structure.[1066] The Chamber also considered D-0036's evidence, finding *inter alia,* that much of his evidence on the PDF fell outside the scope of Darfur in 2003-2004, and noting his limited knowledge on the PDF's role.[1067]

299. Abd-Al-Rahman identifies no error in the Chamber's reasoning. He incorrectly claims that the Chamber ignored P-1021's and D-0036's evidence as they were not cited in the Judgment,[1068] despite their evidence being discussed in the Witness Annex—an integral part of the Judgment.[1069] Furthermore, Abd-Al-Rahman's claim of a factual error regarding "Committee" versus "Sub-Committee" is semantic rather than substantive: the Chamber clearly

[1058] *See below* para. 316 (third bullet point). *See* Judgment, para. 672.
[1059] *See above* para. 282 and fn. 1034.
[1060] *Contra* Appeal, para. 263.
[1061] Judgment, para. 667 (fn. 2223: relying on the evidence of P-0643 and rejecting the Abd-Al-Rahman's submissions based on the evidence of D-0016). *See also* para. 53. *Contra* Appeal, paras. 264-266.
[1062] *Ongwen* AJ, fn. 1249; *Lubanga* AJ, para. 218. *See* Judgment, paras. 179-181.
[1063] Judgment, fn. 2223.
[1064] Witness Annex, para. 161.
[1065] Witness Annex, paras. 160-161. *See generally* paras. 159-162.
[1066] Witness Annex, paras. 160-161. *See generally* paras. 159-162.
[1067] Witness Annex, paras. 695, 697. *See generally* paras. 692-697.
[1068] *Contra* Appeal, paras. 264-265.
[1069] Judgment, para. 6.

defined the *Mujahidin* Committee as a *sub-committee* of the Mobilisation Committee.[1070]

300. Finally, Abd-Al-Rahman's claim of an error of law based on article 66(3) should be rejected. None of the alleged errors discussed in this section concern a finding that required proof beyond reasonable doubt. Nor does Abd-Al-Rahman explain how any of the alleged errors create reasonable doubt about his *de facto* authority, which in any event is supported by multiple strands of evidence, let alone his guilt. He again repeats his own self-serving misconception that there is a lack of evidence that he was a *Janjaweed*.[1071]

301. Even if the Chamber had erred—which it did not—any such error would not have a material impact on the Judgment. Abd-Al-Rahman's exaggerated arguments regarding the alleged impact of these errors are, for the same reasons advanced under Ground 40, incorrect.[1072] Moreover, Abd-Al-Rahman's direct relationship with the GoS leadership and GoS forces at the locality level, in the context of which the Chamber noted his role as head of a *Mujahidin* Committee, were only some of the factors considered by the Chamber to find that Abd-Al-Rahman held authority and influence during the charged events.[1073]

### V.C. The Chamber properly noted that several witnesses described Abd-Al-Rahman as *agid al-ogada* and perceived him as a *Janjaweed* leader (Grounds 45-47)

302. Abd-Al-Rahman's arguments alleging errors of fact and/or law regarding his position as *agid al-ogada* should be dismissed *in limine*. They do not relate to any finding actually made by the Chamber.[1074] The Chamber did not make a finding that Abd-Al-Rahman was *agid al-ogada*,[1075] so it could not have erred in fact or in law in that regard. Rather, as acknowledged by Abd-Al-Rahman,[1076] the Chamber emphasised that Abd-Al-Rahman's authority did not derive from his "apparent position" as *agid al-ogada*, but from his *de facto* authority over the *Janjaweed* and on some occasions over members of the GoS forces.[1077]

303. The Chamber noted the evidence of several witnesses, including P-0547, P-0585, P-0643, P-0984, and P-0012, who described Abd-Al-Rahman as *agid al-ogada*, and observed that it was understandable that several witnesses viewed him as a *Janjaweed* leader because he held the title of *agid ol-ogada*.[1078] Abd-Al-Rahman shows no error in the Chamber's observation,

[1070] *Contra* Appeal, para. 265. *See* Judgment, paras. 53, 667.
[1071] *Contra* Appeal, paras. 266-267.
[1072] *Contra* Appeal, para. 267.
[1073] Judgment, paras. 658-668.
[1074] *Contra* Appeal, paras. 268-275.
[1075] *Contra* Appeal, paras. 268, 271, 272, 273.
[1076] Appeal, para. 270.
[1077] Judgment, para. 675.
[1078] Judgment, para. 675.

which is reasonable and grounded in the evidence. Contrary to his submissions, the witnesses' perception of Abd-Al-Rahman's authority due to his title as *agid al-ogada* reflects their own understanding of the role of *agid al-ogada*, not the Chamber's assessment of that role.[1079] Thus, while the Chamber properly found that *agid al-ogada* was not necessarily limited to a role of coordination of *agada* of the same tribe,[1080] whether, in fact, *agid al-ogada* was an inter-tribal position, or one limited to authority over *ogada* of the same tribe, was irrelevant to the witnesses' perception.[1081]

304. Again, instead of identifying an error, Abd-Al-Rahman: (i) irrelevantly repeats his trial submissions regarding the position of *agid al-ogada,* the entirely separate purported role of D-0003 as an *agid-ogada* of the Ta'aisha tribe in Rahad Al-Berdi, South Darfur, and the position of the Ta'aisha tribe in relation to the conflict in 2003-2004;[1082] (ii) relies on evidence from witnesses that the Chamber found lacked credibility and reliability;[1083] and, (iii) selectively discusses evidence from witnesses alleging discrepancies.[1084]

305. Even if the Chamber had erred in its observation—which it did not—such an error would have had no impact on the Chamber's finding regarding Abd-Al-Rahman's guilt.[1085] The Chamber's assessment of Abd-Al-Rahman's role as *agid al-ogada*, which was only one *indicium* of his position of authority,[1086] had limited relevance to the Chamber's finding that Abd-Al-Rahman was in a position of authority and influence during the charged events.[1087]

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[1079] *See e.g.* T-099, pp. 41 (P-0585 stating: "Later on, Ali Kushayb was appointed *agid al-ogada* or the *agid* of the agids. […] The *agid* is a person who has a group of soldiers, so he leads these soldiers during military operations. Then he would meet with other *agids* and so on. […] *Agid al-ogada* was managing and directing all these agids. He was providing them with weapons and ammunition. He was providing them with orders and instructions about the locations where they have to go during their military operations"); T-066, p. 64 (P-0984 stating "Because Ali Kushayb was known as *agid al-ogada*. The Janjaweed used to call Ali Kushayb *agid al-ogada*, which means, if you want to explain that, that he's like the prime minister. […] *Agid al-ogada* means that he was in charge of all the *agids*, and the *agid* would have his own men and he would be in charge of them. So one *agid*, one colonel, would be in charge of 300 or 400 soldiers. The same for other colonels. And the *agid al-ogada* would be in charge of all the *agids*").

[1080] *Contra* Appeal, paras. 272-274 (Abd-Al-Rahman's position that there was no evidence that *agid al-ogada* exercised authority beyond the limits of his tribe is incorrect. It overlooks the evidence relied upon by the Chamber, which included P-0012, P-0585, and P-0877. His contention that the Chamber failed to define the nature and function of *agid al-ogada* is equally unfounded, as those issues were expressly addressed in the Judgment (para. 325). Finally, his argument that the Chamber reversed the burden of proof rests on his misunderstanding of the Judgment: the Chamber did not find that *agid al-ogada* had inter-tribal authority because it rejected the Defence's submission that such authority was limited to his tribe, but because the evidence established that the role of *agid al-ogada* was not limited to the coordination of *agada* of the same tribe. It addressed the Defence submissions and concluded they did not undermine it: *see* Judgment, fn. 722.

[1081] *Contra* Appeal, para. 272.

[1082] *Contra* Appeal, paras. 270-272.

[1083] *Contra* Appeal, para. 272.

[1084] *Contra* Appeal, para. 273.

[1085] *Contra* Appeal, para. 275.

[1086] *See above* fn. 1024.

[1087] Abd-Al-Rahman seems to partially acknowledge this: Appeal, paras. 268-271.

## V.D. The Chamber reasonably found that the *Janjaweed* included members of the Ta'aisha tribe (Ground 48)

306. The Chamber reasonably found that the Janjaweed included members of the Ta'aisha tribe, and that the Ta'aisha tribe's position in the armed conflict did not undermine the Chamber's findings concerning Abd-Al-Rahman's authority over the Janjaweed.

### *V.D.1. The Chamber made no finding on the Ta'aisha tribe's involvement in the counter-insurgency*

307. The Chamber made no finding on whether the Ta'aisha tribe was involved in the 2003-2004 counter-insurgency. Thus, Abd-Al-Rahman's arguments alleging an error of fact by purportedly finding that the Ta'aisha tribe was not involved in the counter-insurgency, should be dismissed *in limine*.[1088] Instead, the Chamber reasonably found, after carefully considering the evidence,[1089] that "members of the *Janjaweed* came from Arab tribes, including the Ta'aisha"[1090] It did not reverse the burden of proof,[1091] or commit any other error of fact.[1092]

308. First, Abd-Al-Rahman shows no error in the Chamber's application of the burden of proof. While the Chamber did not accept the Defence submission that the Ta'aisha tribe was neutral, its finding that the *Janjaweed* included members of the Ta'aisha tribe did not rest on a rejection of that submission. Rather, the Chamber relied on the evidence of P-0020, P-1042, and P-0085 to find that members of the Ta'aisha tribe were involved in the *Janjaweed*.[1093]

309. In particular, the Chamber considered the Defence's submission that the Ta'aisha tribe had a neutral position and refused to join the counter-insurgency, but found that this allegation was not substantiated.[1094] The Chamber expressed concerns about the credibility and reliability of D-0001, D-0002, D-0003, D-0007, D-0008, D-0029 and D-0039, on whom Abd-Al-Rahman once again relies in his appeal.[1095] The Chamber found that the evidence of these witnesses lacked "any probative value" on this issue.[1096] The Chamber also addressed the Defence's arguments in respect of P-0585 and D-0036, whose testimonies he again relies upon in this appeal.[1097] With regard to P-0585, the Chamber noted that the witness merely referred to some of the tribes that were represented in the *Janjaweed* in his area.[1098] As to D-0036, the Chamber

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[1088] *Contra* Appeal, paras. 276-280.
[1089] *Contra* Appeal, para. 276.
[1090] Judgment, para. 324.
[1091] *Contra* Appeal, paras. 276, 285.
[1092] *Contra* Appeal, paras. 276-285.
[1093] Judgment, para. 324 (fn. 712).
[1094] Judgment, para. 324 (fn. 712).
[1095] Appeal, paras. 278, 284, fns. 711-712, 714. *See also* fn. 729.
[1096] Judgment, para. 324 (fn. 712).
[1097] Appeal, paras. 277, 279.
[1098] Judgment, para. 324 (fn. 712: referring to T-099, p. 62).

noted that he conceded the limits of his knowledge in this respect.[1099]

310. To conclude that members of the Ta'aisha tribe were included in the *Janjaweed*, the Chamber relied on the evidence of P-0020, who explained that while some Ta'aisha members remained neutral, others responded to the call for mobilisation. It further observed that P-0020's evidence was corroborated by that of P-1042, the expert jointly appointed by the parties.[1100] Further corroboration was also provided by P-0585, who also referred to Ta'aisha members joining the counter-insurgency.[1101] Although the Defence relies on P-1042's in-court testimony, the Chamber considered that this statement was not internally inconsistent with the witness's expert report.[1102] The Chamber's conclusion that the *Janjaweed* included members of the Ta'aisha tribe was therefore reasonable and based on a sound evidentiary assessment.

311. Second, Abd-Al-Rahman does not show the Chamber erred in fact in its assessment of the evidence. The Chamber reasonably found that the composition of the *Janjaweed* included members of the Ta'aisha tribe, based on its careful review of the evidence. Abd-Al-Rahman does not address the evidence of P-0020, P-1042, or P-0085 regarding the involvement of Ta'aisha members in the *Janjaweed*. Rather, he mischaracterises their evidence concerning the Ta'aisha tribe's involvement in the counter-insurgency.[1103] His submission that no reasonable chamber could have relied on this evidence to conclude that the Ta'aisha tribe joined the counter-insurgency should be rejected, as this was not the Chamber's finding.[1104] Moreover, P-0085 explicitly listed the Ta'aisha tribe among those Arab tribes that have "joined the *Janjaweed*", in the context of the 2003-2004 counter-insurgency.[1105] The Chamber was entitled to rely on his statement, even if admitted under Rule 68(2)(c), as it was not the *sole or decisive* basis for Abd-Al-Rahman's conviction.[1106]

### *V.D.2. The Chamber did not find that Abd-Al-Rahman was a "stray member" of the Ta'aisha*

312. The Chamber did not find that Abd-Al-Rahman's individual participation in the counter-

[1099] Judgment, para. 324 (fn. 712). *See also above* para. 298.
[1100] Judgment, para. 324 (fn. 712: referring to DAR-OTP-0220-1623, at 1676, para. 141). P-1042 is the expert jointly appointed by the parties. Abd-Al-Rahman misstates P-1042's evidence by wrongly transposing his evidence about the Habbaniya tribe to the Ta'aisha tribe.
[1101] Judgment, para. 324 (fn. 712: referring to DAR-OTP-0110-0054-R02, at 0057, para. 10).
[1102] Judgment, para. 324 (fn. 712). The Chamber correctly observed that the Defence relied on P-1042 in court testimony to support its claim that the Ta'aisha tribe was not involved in counter-insurgency, and correctly referenced the relevant evidence from P-1042: *contra* Appeal, para. 283. The Chamber's reference to footnote 2876 of the Defence's Final Brief, rather than footnote 2894 (or even footnote 207), does not constitute an error of fact, but appears to be a typographical or citation mistake.
[1103] *Contra* Appeal, paras. 277-280, 282.
[1104] *Contra* Appeal, paras. 281-282.
[1105] *Contra* Appeal, para. 281 (citing DAR-OTP-0110-0054-R02, at 0057, para. 10). The temporal scope of P-0085 evidence is clear from [REDACTED].
[1106] *See e.g. Ntaganda* AJ, para. 630.

insurgency was contrary to his tribal instructions.[1107] It therefore could not have committed any error, as Abd-Al-Rahman alleges, in relation to a finding it did not make. Abd-Al-Rahman's argument is further premised on the assertion that participation by a member of the Ta'aisha tribe in the *Janjaweed* would constitute disobedience of the *nazir*'s order and lead to serious consequences. However, the Chamber rejected this argument, noting serious concerns regarding the credibility and reliability of the witnesses cited by Abd-Al-Rahman in support of it.[1108]

#### *V.D.3. The Ta'aisha tribe's position regarding the armed conflict has no impact on the Judgment*

313. In any event, any alleged error regarding the Ta'aisha tribe's purported neutrality would not have materially affected the Chamber's essential findings.[1109] The Chamber noted that a central Defence argument was that Abd-Al-Rahman could not have been a *Janjaweed* leader because of: (i) the Ta'aisha tribe's neutrality; (ii) the tensions between the Salamat tribe, and the Fur and Ta'aisha tribes; and, (iii) the serious consequences Abd-Al-Rahman would allegedly have faced for disobeying an alleged instruction from the *nazir* of the Ta'aisha tribe. The Chamber nevertheless found that, "regardless" of the Ta'aisha tribe's position regarding the armed conflict, this cannot undermine its findings regarding Abd-Al-Rahman's authority over the *Janjaweed*. This is because its conclusion was supported by overwhelming evidence that Abd-Al-Rahman exercised *de facto* authority over the *Janjaweed*.[1110]

### V.E. The Chamber properly assessed the roles played by Hamdi, Hassaballah, Solonga and Al-Helu (Grounds 49-52)

314. The Chamber correctly found that the roles played by Hamdi Sharaf-Al-Din Sid Ahmad ("Hamdi"), Abd-Al- Rahman Dawud Hammudah ("Hassaballah"), Al-Sadiq Ahmad Uthman Zakariya ("Solonga") and Al-Helu had no impact on Abd-Al-Rahman's role or criminal responsibility, and provided sufficient reasons for its conclusion.[1111] Abd-Al-Rahman's extensive references to his final trial brief, specifically his rejected arguments regarding the "redundancy" of his authority and role in relation to these four individuals, do not establish any error of fact or law in the Chamber's assessment.[1112]

315. Abd-Al-Rahman correctly acknowledges that the roles of these individuals, noted

[1107] *Contra* Appeal, para. 285.
[1108] Abd-Al-Rahman cites D-0001, D-0002, D-0003, D-0005, D-0028, D-0029 and D-0039: Appeal, fn. 729. The Chamber previously expressed serious concerns regarding the credibility and reliability of D-0001, D-0002, D-0003, D-0007, D-0008, D-0029 and D-0039 and found their evidence to lack "any probative value" on this issue (*see above* para. 309). It also found that D-0005 was not a credible witness, and that the evidence of D-0028 was generally not relevant: Witness Annex, paras. 607, 805.
[1109] *Contra* Appeal, para. 285.
[1110] Judgment, para. 679. *See above* para. 281 (fn. 1011).
[1111] *Contra* Appeal, paras. 286-292.
[1112] Appeal, para. 287 (fns. 736-740).

repeatedly by the Chamber throughout the Judgment, do not exclude his contribution.[1113] Yet, he incorrectly argues that the Chamber erred in law, in violation of article 66(3), based on speculation that doubts exist because these individuals enjoyed allegedly the same authority as him.[1114] The Chamber did not accept that any of these individuals performed the same functions and had the same authority as Abd-Al-Rahman. Only Abd-Al-Rahman was found to be the leader of the *Janjaweed* in the Wadi Salih and the Mukjar localities.[1115] Moreover, to establish Abd-Al-Rahman's criminal liability, the Chamber did not need evidence of any specific rank or title he held within the *Janjaweed* since it found that he was a *de facto Janjaweed* leader. This matter is irrelevant, and Abd-Al-Rahman does not demonstrate otherwise.[1116]

316. Furthermore, the Chamber did not err in fact when considering the impact and roles of these individuals. It thoroughly examined how Abd-Al-Rahman's authority had combined with these other individuals, and consistently found that the roles of these individuals did not detract from their findings in relation to Abd-Al-Rahman's authority:

- With respect to Hassaballah and Solonga, the Chamber found that Abd-Al-Rahman commanded the *Janjaweed* contingent involved in the Kodoom and Bindisi operation. It noted that Hassaballah (the civilian PDF coordinator for Garsila), and Solonga (the civilian PDF coordinator for Mukjar), were present in the *Janjaweed* convoy, and that throughout the operation Abd-Al-Rahman issued instructions to Hassaballah and held meetings with Solonga.[1117] The Chamber thus concluded that even if individuals, such as these PDF coordinators, may have exercised a degree of authority during the Kodoom and Bindisi operation, Abd-Al-Rahman exercised the highest authority over those present and participating in these operations.[1118]
- With respect to Hamdi, the Chamber found that Abd-Al-Rahman commanded the *Janjaweed* at Deleig Police Station on 5 March 2004, explicitly noting that Hamdi's role did not derogate from Abd-Al-Rahman's authority.[1119]
- With respect to Al-Helu, the Chamber found that the Abd-Al-Rahman oversaw the recruitment of *Janjaweed* members, and the distribution of ammunition, weapons, salaries

[1113] Appeal, para. 287.
[1114] *Contra* Appeal, paras. 287-289.
[1115] *Contra* Appeal, para. 289. The Chamber clearly distinguished between the *Janjaweed* which were an irregular forces, and the GoS forces. It did not find that the *Janjaweed* sub-categorised into PDF, SAF, CRF, NISS or PPF, but also distinguished between the *Janjaweed* and these bodies: *contra* Appeal, para. 289. *See above* fn. 1034.
[1116] *Contra* Appeal, para. 287.
[1117] *See further below* paras. 362, 364, 367, 371, 401, 404.
[1118] Judgment, para. 396 (fn. 1009). *See also e.g.* paras. 306, 397, 405, 421, 441, 668, 1003(d-e).
[1119] Judgment, para. 607 (fn. 1991). *See also* fn. 2959. *See also e.g.* paras. 306, 580, 588, 665, 962, 967-97, 974-981, 983-989. *See further below* paras. 401, 404, 420-423, 430, 443.

and supplies to them, and that he instructed his deputies to distribute salaries to the *Janjaweed* within their purview. Recognising some evidence suggesting that Al-Helu played a role in the mobilisation, arming, and the conduct of operations of 'Arab tribes militia', the Chamber did not consider this detracted from its finding on Abd-Al-Rahman's role.[1120] The Chamber reasonably found that the evidence shows that Arab tribal leaders were also involved in the implementation of the GoS' counter-insurgency efforts.[1121]

### V.F. The Chamber reasonably found that Abd-Al-Rahman was an influential figure in the Wadi Salih area before the conflict (Ground 53)

317. The Appeals Chamber should dismiss Ground 53 in *limine* because Abd-Al-Rahman does not challenge any finding made by the Chamber.[1122] The Chamber did not make a *finding* that "not long after the time relevant to the charges, Abd-Al-Rahman was an experienced soldier with a supervisor role in the CRF".[1123] Nor did it rely on such a proposition to reach its conclusion on Abd-Al-Rahman's guilt.[1124]

318. The Chamber found that Abd-Al-Rahman was an influential figure in the Wadi Salih area before the conflict, and rejected the Defence's submissions that he was no more than a simple pharmacist.[1125] In so finding, the Chamber noted that, even before the conflict, Abd-Al-Rahman was both well-known and well respected in the Wadi Salih area,[1126] and that, this respect derived from Abd-Al-Rahman's military background,[1127] the pharmacy he operated in Garsila,[1128] and his travels to various markets.[1129] In the *footnote* to its finding,[1130] the Chamber recalled its significant concerns regarding the credibility and reliability of D-0007, D-0011, D-0029 and D-0032. However, it observed that the Defence's claim that Abd-Al-Rahman could not have held a position of authority at the material time was undermined by those witnesses who stated that "*not long after the time relevant to the charges, [Abd-Al-Rahman] was an experienced soldier with a supervisor role in the CRF.*"[1131] This observation, while reasonable,

[1120] Judgment, para. 672. *See also above* 296.
[1121] Judgment, para. 672. *See also* para. 345.
[1122] *Contra* Appeal, para. 293.
[1123] Appeal, paras. 293-296.
[1124] *Contra* Appeal, paras. 297, 299.
[1125] Judgment, para. 680.
[1126] Judgment, para. 680.
[1127] Judgment, para. 680 (fn. 2272). The Chamber cited the evidence of: P-0874; P-0878, P-0883, P-0903, P-0905, P-0921, P-0931, P-0935, and P-0990.
[1128] Judgment, para. 680 (fn. 2273). The Chamber cited the evidence of: P-0931, P-0883, P-0990, and P-0986.
[1129] Judgment, para. 680 (fn. 2274). The Chamber cited the evidence of: P-0907. The Chamber highlighted that "witnesses described how the pharmacy and its immediate environs were a meeting place for [Abd-Al-Rahman] and leaders of Arab tribes and some came to know him because he was called in to mediate in tribal negotiations (Judgment, para. 680 (fns. 2275-2276) (citing evidence of: P-0643, P-0883, P-0931, P-0932, and P-0585)).
[1130] Judgment, fn. 2277.
[1131] Judgment, para. 680.

was clearly not a finding of the Chamber.

## VI. The Chamber properly rejected any defence of mistake of law (Part H)

319. The Chamber correctly found that mistake of law under article 32(2) did not apply to Abd-Al-Rahman since the crimes charged did not require any legal appreciation. It rejected Abd-Al-Rahman's claim that he "acted under the genuine and honest belief" that the charged crimes were lawful.[1132]

320. Abd-Al-Rahman shows no error in the Chamber's conclusions.[1133] His submissions, which largely reiterate arguments already rejected at trial, misrepresent the Chamber's findings and the applicable law, and advance factual claims based on an incorrect legal standard. Ultimately, despite their framing through multiple legal and factual arguments—at times inconsistent, repetitive, and unclear—Abd-Al-Rahman's submissions can be reduced to a single assertion: that Harun's speech in Mukjar, before the Kodoom and Bindisi operations—a gathering he claims not to have attended—led him to believe that attacking civilians, killing and raping them, and pillaging their property, was lawful, mandatory and/or without criminal sanction. This was legally incorrect, and unsupported by the evidence. Grounds 54 and 56-57 should therefore be dismissed.

### VI.A. The Chamber provided sufficient reasoning for its conclusion (Ground 54)

321. Abd-Al-Rahman submits that the Chamber erred by providing insufficient reasoning when dismissing his trial submissions and allegedly ignoring evidence which, he submits, was "clearly relevant to the findings" on mistake of law.[1134] However, his submissions merely repeat his trial arguments, and ignore the relevant legal framework and the Chamber's reasoning.

#### *VI.A.1. The Chamber's findings*

322. First, the Chamber held that for war crimes under article 8(2) of the Statute, the perpetrator need not have reached a *legal conclusion* as to the protected status of persons or property protected under international humanitarian law. Rather, they need only have been aware of the *factual circumstances* that established such status.[1135] It emphasised, "it need not be established that the Accused assessed the situation and/or was aware of the legal status of the victims or objects".[1136] For each war crime charged under direct or co-perpetration, it found

[1132] Judgment, paras. 776, 948 (addressing Defence Final Brief, paras. 798-826).
[1133] Appeal, paras. 300-325
[1134] Appeal, paras. 300-305.
[1135] Judgment, para. 776 (addressing Defence Final Brief, paras. 707-826 and referring to Elements of Crimes, fn. 32 and *Katanga* TJ, fn.1831, relying in turn on *Katanga & Ngudjolo* CD, para. 297). *See also* Judgment, paras. 730, 751, 764, 770 (referring to para. 776).
[1136] Judgment, para. 948.

Abd-Al-Rahman was indeed aware of the factual circumstances that established such status.[1137]

323. On this basis, the Chamber properly concluded that the allegation of mistake of law as a ground to exclude criminal liability was unsubstantiated.[1138] This accords with the established legal principle under article 32(2) that mistake of law may exclude criminal responsibility only when the mental element of the offence requires knowledge of a legal characteristic (legal appreciation)—a requirement that does not apply to the crimes charged in this case.[1139]

324. Second, in finding that the criminal laws applicable to Abd-Al-Rahman in Sudan at the time of the charged crimes clearly defined offences comparable to those charged against him (for the distinct purpose of article 22(2): the principle of legality),[1140] the Chamber further observed that Abd-Al-Rahman "was able to appreciate that his conduct was criminal".[1141] While the Chamber was not obliged to make this finding to satisfy article 22(2),[1142] nor for the purpose of article 32(2), this further underscored that no possible mistake of law could have arisen, and is therefore additionally challenged by Abd-Al-Rahman under Grounds 56-57.[1143]

325. Before responding to Abd-Al-Rahman's arguments, the Prosecution will show that the Chamber's findings correctly reflect the legal framework for mistake of law under article 32(2).

### *VI.A.2. Mistake of law under article 32(2)*

326. The Chamber's finding that mistake of law was not available as a defence in this case[1144] is legally correct, consistent with the jurisprudence of the Court and the Statute.

327. In *Al Hassan*, the accused argued—similarly to Abd-Al-Rahman—that he acted "in a way that he honestly believed was lawful".[1145] The Majority[1146] found that a mistake of law defence was unavailable.[1147] It reasoned that article 32(2) permits only a 'narrow' defence—one that negates *mens rea*—and not a 'broad' excuse for conduct mistakenly believed to be lawful. In the Majority's view, "the plain language of the Statute makes the scope of mistake of

[1137] Judgment, paras. 948, 953, 995 (referring to para. 948). For relevant war crimes committed during the Kodoom and Bindisi operation charged under 25(3)(b), the Chamber found that the perpetrators were aware of the factual circumstances establishing the protected status (*see* paras. 858, 880, 912, 919) and that Abd-Al-Rahman was aware and could foresee that the charged crimes would be committed in the implementation of his orders (*see* paras. 1008-1009).
[1138] Judgment, paras. 776, 948 (addressing Defence Final Brief, paras. 798-826).
[1139] *Al Hassan* TJ, paras. 1767-1769.
[1140] Judgment, para. 51. On the principle of legality, *see generally above* paras. 3-27; Judgment, paras. 28-60.
[1141] Judgment, para. 54.
[1142] *See above* para. 7.
[1143] *See below* paras. 348-357 (Grounds 56-57).
[1144] Judgment, paras. 776, 948.
[1145] *Al Hassan* TJ, para. 1768.
[1146] The Majority was formed by Judges Akane and Prost. Judge Mindua dissented.
[1147] *Al Hassan* TJ, para. 1774.

law within the meaning of Article 32(2) relatively limited."[1148] Such a mistake "shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime".[1149] The Majority concluded that "mistake of law is a ground for excluding criminal responsibility only when knowledge of a legal characteristic is required by the requisite mental element of the offence."[1150] This was the correct interpretation of the Statute.

*VI.A.2.a. Mistake of law under article 32(2) permits only a 'narrow' defence, not a 'broad' excuse for conduct mistakenly believed to be lawful*

328. Article 32(2) provides:

> A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.[1151]

329. Correctly interpreted, this provision allows mistake of law as a defence only in narrow circumstances: where the mental element of the crime requires a legal appreciation (knowledge of a legal characteristic), and the accused is mistaken in that specific respect, or otherwise only if the conditions in article 33 are satisfied (for superior orders). For the reasons below, article 32(2) prohibits exoneration for any other form of mistake of law.

330. First, the initial sentence of article 32(2) establishes the general rule that mistake of law as to whether charged conduct "is a crime within the jurisdiction of the Court" shall *not* be a defence. This reflects the well-established principle that '*ignorantia legis non exusat*', which encompasses both the substantive and procedural dimensions of jurisdiction.[1152]

331. Second, the next sentence of article 32(2) provides—exhaustively[1153]—for two exceptions or qualifications to the general rule, as signified by the term "however". The first exception is a mistake of law which "negates the mental element required" by a charged crime. The second exception is where article 33 of the Statute applies, a provision which permits a

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[1148] *Al Hassan* TJ, para. 1767.
[1149] *Al Hassan* TJ, para. 1764.
[1150] *Al Hassan* TJ, para. 1769.
[1151] Statute, art. 32(2).
[1152] Eser, pp. 943-944 ("this is not merely to be understood in terms of a procedural error of the perpetrator; for due to the double structure of the Rome Statute in providing both the procedural jurisdiction of the Court and the definition of the prohibited international crimes, the perpetrator's ignorance of the Court's jurisdiction can, at the same time, imply […] ignorance of the international prohibition. Consequently, in precluding the jurisdictional mistake, Article 32(2) sentence (1) excludes the *ignorance of the prohibition* as well", emphasis supplied). *See also* Ambos (2013), p. 371.
[1153] The general terms in which the first sentence of article 32(2) is expressed, and the exhaustive listing of the exceptions in the second sentence of article 32(2), means that no additional form of mistake of law defence may be contemplated under article 31(3) of the Statute. *Cf.* Coco, pp. 156-159.

defence of adherence to superior orders in certain limited circumstances.[1154]

332. The concept of 'negating the mental element' has particular significance, insofar as it refers to one of the two main approaches most commonly used in national jurisdictions to conceptualise a mistake of law. These are, either:[1155]

- "[M]istake as to whether a certain conduct is lawful (*erreur sur l'illicéité*, in French; or *Verbotsirrtum*, in German)". In theoretical terms, this is an excuse, typically based on an erroneous belief (arising in certain defined circumstances) that the perpetrator was acting lawfully. Such mistakes may be regarded as legally unavoidable, often due to a failure by the State to make the content of the law sufficiently accessible and foreseeable. This type of mistake applies, in principle, to any crime—although in particular to 'regulatory' offences (or *mala prohibita*) rather than more obvious criminal conduct (*malum in se*).
- "[M]istake on a material element of the crime which requires a legal assessment" (*erreur de droit sur les faits*, in French; *Tatbestandsirrtum*, in German; e*rrore sulla legge extra-penale integratrice*, in Italy). This negates *mens rea*, and as such requires close assessment of the elements of the relevant crime(s).

333. The express reference in article 32(2) to "negat[ing] the mental element required by such a crime" reflects the *latter* conceptualisation of the defence of mistake of law—a defence whose availability depends on whether the *mens rea* of a particular crime requires a legal appreciation, and thus does not apply to *all* article 5 crimes. This is consistent with the general rule in the first sentence, which expresses the drafters' intention to adopt a narrow approach to the defence of mistake of law.[1156]

334. There is a coherent relationship between the general rule in the first sentence of article 32(2)—excluding any defence based on ignorance of the prohibition of article 5 crimes—and the general rule on *mens rea* in article 30, which does not require any assessment of the broader legal (or normative) context of the conduct by the perpetrator. Article 30 has been described as reflecting a purely "psychological concept of the mental element", and not a more normative one requiring the accused person to undertake any assessment of the unlawfulness of their conduct. This was a deliberate choice by the drafters, consistent with the narrow approach to

[1154] Abd-Al-Rahman clarified at trial that he did not allege a superior order defence under article 33: *see* Defence Closing Statement, pp. 94:5-97:17. The Prosecution will not address this second exception.
[1155] *See e.g.* Coco, pp. 15, 35-36, 38, 40-41, 45, 230-231. *See also generally* Ambos (2013), pp. 366-368.
[1156] This is also consistent with the reference in the second sentence of article 32(2) to article 33, since the latter article is a special form of mistake as to whether conduct is lawful (based on superior orders): *see e.g.* Coco, pp. 148-155, 230-231. This reflects the drafters' conscious choice to limit the extent to which a mistake as to whether conduct is lawful can excuse criminal responsibility.

mistake of law in article 32(2).[1157]

335. This interpretation is supported by the Elements of Crimes. These establish three key principles, which emphasise that any *mens rea* requirement calling for a legal appreciation is an exception, to be construed narrowly, rather than a rule.

336. In the General Introduction to the Elements of Crimes, paragraph 4 states generally that:

> With respect to mental elements associated with elements involving value judgement, such as those using the terms 'inhumane' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.[1158]

337. The reference to "value judgement" in this context includes appreciation or assessment of law. For example, in drafting this provision "[i]t was generally felt that article 30 should *not* lead to the result that a perpetrator's *knowledge of a legal term, or his or her value judgement*, would be determinative for the inference of individual criminal responsibility. It should be enough that the perpetrator was aware of *the factual circumstances* that formed the basis for a certain conclusion as to a legal circumstance or a certain value".[1159]

338. Further, consistent with this intention, the drafters clarified that certain *mens rea* requirements demand no normative evaluation, but only knowledge of the relevant factual circumstances.[1160] Taking all this together, the Elements of Crimes clearly show that, unless

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[1157] *See e.g.* Eser, pp. 904 ("the Rome Statute appears to adhere to a narrower psychological concept of the mental element (intent and knowledge according to Article 30 of the ICC Statute) […] This more psychological approach rather than a normative reproach [sic] may also explain why mistake of law shall exclude criminal responsibility only if it negates the 'mental element' (Article 32(2) of the ICC Statute)"), 941 ("the mental element does not require more than the perpetrator's awareness of the social significance of a definitional element, it presupposes neither positive knowledge of the underlying legal provisions nor of their jurisprudential interpretation"). *See also* Ambos (2013), p. 370; Kelt and von Hebel, p. 36 ("The principle of *mens rea* coverage cannot be said to require that the perpetrator was aware that the act was criminalized. This is one of the fundamental principles of criminal law recognized in most national legal systems and in international law"). *See further* Coco, p. 160.

[1158] Elements of Crimes, General Introduction, para. 4.

[1159] Kelt and von Hebel, p. 34 (emphasis added). *See also* p. 37 (recalling that, after brief discussion, it was not felt that further guidance concerning the issue of mistake of law was required); Ambos (2013), p. 372 (providing evidence supporting the view that the drafters did not consider it necessary to prove "that the accused personally completed the correct normative evaluation").

[1160] For example, Elements of Crimes, article 8, Introduction ("[t]here is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international"); Elements of Crimes, article 8(2)(a)(i), element 3 (the perpetrator need only be "aware of the *factual circumstances* that established that protected status"), fn 32 (noting that this formulation "recognizes the interplay between articles 30 and 32" and that for war crimes under article 8(2)(a) and other crimes under article 8(2), the perpetrator need only be aware "of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict"). *See also* Judgment, paras. 776, 948. *See further* Dörmann et al., p. 118 (observing that this footnote emphasises "the general rule that while ignorance of the facts may be an excuse, ignorance of the law (in this case of the Geneva Conventions and its definitions of protected persons or property) is not", and adding that, "[a]lthough one might argue that this explicit statement is self-evident and therefore redundant, it was felt that such a clarification would be useful"); Coco, p. 231 ("the particular language often adopted in the ICC Elements of Crimes quite obviously aims at restricting resort to mistake of law even as a *mens rea*-negating defence").

otherwise provided, there is no general *mens rea* requirement that an accused person appreciates the unlawful nature of their conduct.

339. Third, article 32(2) uses the term "may": a mistake of law negating the required mental element "may" be a ground excluding criminal responsibility. The use of this term differs from article 32(1) (mistake of fact), which instead uses the term "shall". It indicates some level of discretion[1161] to disallow a defence of mistake of law even when the mistake negates the mental element—for example when the mistake was not honest or reasonable.[1162]

340. In conclusion, article 32(2) is clear that mistake of law is not a general defence. A defence is only potentially established where a mistake of law negates a specific mental element of a crime requiring a legal appreciation. Even then, a chamber may potentially decline to exclude criminal responsibility where the conduct of the accused was not honest or reasonable.

*VI.A.2.b. The charged crimes do not require a legal appreciation*

341. The Chamber correctly rejected the defence of mistake of law in this case because none of the crimes charged required a legal appreciation as part of their *mens rea*.

342. First, as article 33 makes clear, crimes against humanity under article 7 are "manifestly unlawful".[1163] It is a natural corollary of this principle that it need not be proved that a perpetrator had formed any specific legal appreciation in order to establish these crimes. Crimes against humanity under article 7 encompass "conduct which is impermissible under generally applicable international law, as recognised by the principal legal systems of the world."[1164] The *Al Hassan* Trial Chamber unanimously agreed that this statement reflected the drafters' endorsement of "the fact that the 'crimes expressly enumerated in article 7 are themselves already generally recognised to be impermissible'."[1165] Further, while elements 2 of forcible transfer (article 7(1)(d)) and other inhumane acts (article 7(1)(k)) appear to refer to normative requirements,[1166] element 3 clarifies that the perpetrator need only be aware of the relevant "factual circumstances", and not their legal appreciation.[1167]

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[1161] Commentators differ on the scope of the discretion implied: *see e.g.* Eser, pp. 941-943; Ambos (2013), pp. 373-374; Coco, pp. 146-147.
[1162] Schabas (2016), p. 658 ("There is some support in the literature for the view that only mistake of law that is 'unavoidable' or 'reasonable' should be allowed as a defence").
[1163] *See* Statute, art. 33(2). The crimes against humanity of which Abd-Al-Rahman was convicted were murder and attempted murder (counts 2, 17, 19, 27, 29), other inhumane acts (counts 6), rape (count 8), forcible transfer (counts 10), persecution (counts 11, 21, 31), and torture (counts 12, 22).
[1164] Elements of Crimes, article 7, Introduction, para. 1.
[1165] *Al Hassan* TJ, para. 1136. *See also* para. 1137. *See further* Robinson, pp. 70-71.
[1166] *See e.g.* Elements of Crimes, article 7(1)(d), element 2; article 7(1)(k), element 2.
[1167] *See e.g.* Elements of Crimes, article 7(1)(d), element 3 ("The perpetrator was aware of the factual circumstances that established the lawfulness of such presence"); article 7(1)(k), element 3 ("The perpetrator was aware of the factual circumstances that established the character of the act").

343. Second, as noted by the Chamber,[1168] none of the war crimes of which Abd-Al-Rahman was convicted requires a legal appreciation as part of their *mens rea*.[1169] In particular, for the war crimes of murder, torture, outrages upon personal dignity, and destroying enemy property, where the victims or objects in must have a protected status under IHL, the Elements of Crimes expressly provide that the perpetrator need only be "aware of the *factual circumstances* that established [that protected] status",[1170] and do not require a legal appreciation. The war crime of rape imposes no such status requirement,[1171] and the war crime of directing an attack against a civilian population is silent on the matter.[1172]

344. The defence of mistake of law under article 32(2) was thus not available for any of the crimes of which Abd-Al-Rahman was convicted. The Chamber correctly rejected it.

### *VI.A.3. The Chamber provided sufficient reasoning*

345. Abd-Al-Rahman submits that the Chamber erred in law by not providing sufficient reasoning when dismissing his trial submissions "on mistake of law, consisting in the genuine and honest belief that committing the acts described in the charges was not only legal, but mandatory, under the Sudanese law and on the absence of knowledge that these constituted crimes under international law".[1173] Further, he claims the Chamber ignored evidence which was "clearly relevant to the findings" on mistake of law.[1174] Abd-Al-Rahman merely repeats his trial arguments and ignores the relevant legal framework and the Chamber's reasoning.

346. First, the Chamber expressly considered the evidence that Abd-Al-Rahman alleges it ignored, as explained below, including when it assessed his article 22(1) submissions on *nullum crimen sine lege*. It concluded that he was "able to appreciate that his conduct was criminal",[1175] and that a reasonable person in his position "would not have been 'deceived' into believing that

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[1168] Judgment, para. 948 ("the relevant war crimes only require knowledge of certain factual circumstances") .
[1169] The war crimes of which Abd-Al-Rahman was convicted were: directing an attack against a civilian population under article 8(2)(e)(i) (count 1), murder and attempted murder under article 8(2)(c)(i) (counts 3, 18, 20, 28, 30), pillage under article 8(2)(e)(v) (count 4), destroying enemy property under article 8(2)(e)(xii) (count 5), outrages upon personal dignity under article 8(2)(c)(ii) (counts 7, 16, 26), rape under article 8(2)(e)(vi) (count 9), and torture under article 8(2)(c)(i) (counts 13, 23).
[1170] *See e.g.* Elements of Crimes, article 8(2)(c)(i)-1, element 3; article 8(2)(c)(i)-4, element 4; article 8(2)(c)(ii), element 4; article 8(2)(e)(xii), element 4.
[1171] *See e.g.* Elements of Crimes, article 8(2)(e)(vi)-1.
[1172] *See e.g.* Elements of Crimes, article 8(2)(e)(i). Contextually, however, other 'unlawful attack' offences (such as directing attacks on personnel or objects involved in a humanitarian assistance or peacekeeping mission), which likewise require the victims or objects were entitled to the same protection as "civilians or civilian objects", expressly state that the perpetrator need only be "aware of the factual circumstances that established that protection": *see* Elements of Crimes, article 8(2)(e)(iii), elements 4-5.
[1173] Appeal, para. 300.
[1174] Appeal, paras. 303-305.
[1175] Judgment, para. 54.

his acts and conduct during the charged events were legal or justified".[1176]

347. Second, the evidence in question is not relevant to the Chamber's findings on mistake of law under article 32(2).[1177] As explained above, an erroneous belief of acting lawfully is not *per se* a ground excluding criminal responsibility under the Statute.[1178] The Chamber was thus not required to recall its prior findings and reasoning, or to re-consider the evidence in question again, when reaching its conclusion. It correctly focused on whether any of the "relevant war crimes" required a legal appreciation as part of their *mens rea*[1179]—thus potentially providing a basis for Abd-Al-Rahman's submissions on mistake of law.[1180] Having found it sufficed that the accused knew of the relevant factual circumstances, without a legal appreciation, the Chamber properly concluded that Abd-Al-Rahman's submissions on mistake of law were unpersuasive. No further reasoning was required for him to exercise his rights of appeal—which he has done.

### VI.B. The Chamber properly found that a person in Abd-Al-Rahman's position would not have believed his acts and conduct were legal or justified (Grounds 56-57)

348. Abd-Al-Rahman shows no error by his further claim that the Chamber erred in concluding that Harun's speech would not have led any "reasonable person in the position of the Accused […] into believing that his acts and conduct during the charged events were legal or justified".[1181] Under article 32(2), ignorance or mistake that particular conduct amounts to a crime within the jurisdiction of the Court is not a general defence, and Abd-Al-Rahman is incorrect to suggest that article 30(3) requires knowledge that "the commission of crimes would incur criminal action in the ordinary course of events".[1182] Nor could Abd-Al-Rahman's *mens rea* be negated by Harun's speech since none of the charged crimes required that he made any legal appreciation.[1183] Grounds 56 and 57 thus misunderstand the law and cannot materially affect the Judgment or the convictions, and for these reasons alone should be dismissed. Yet for the sake of completeness, the Prosecution also addresses the deficiencies in Abd-Al-Rahman's reading of the Judgment, in which the Chamber's factual reasoning likewise discloses no error.

349. The Chamber had considered the significance of Harun's speech both in the context of

[1176] Judgment, para. 59. *See also* Judgment, paras. 38-59 (addressing Defence Final Brief, paras. 238-269, 807-816). *See also above* paras. 6-7, 56-59; *below* paras. 348-357.
[1177] *Contra* Appeal, para. 305.
[1178] *See above* paras. 319, 322-340.
[1179] Judgment, paras. 776, 948.
[1180] Judgment, para. 948.
[1181] Judgment, para. 59. *Contra* Appeal, paras. 307-325.
[1182] Appeal, paras. 313, 323. *See above* paras. 319, 322-340.
[1183] *See above* paras. 341-344.

its principle of legality assessment under article 22(2),[1184] and in the context of its substantive assessment of the charges.[1185] The Chamber found that "in a public address [Harun] told the gathered *Janjaweed* to 'wipe out and sweep away the Fur do not keep anyone alive' and that the Fur population of Mukjar "would be 'raped', 'killed' and their properties 'looted'."[1186] Abd-Al-Rahman "was present at this public meeting, standing close to Minister Harun; and also addressed the crowd, speaking 'on behalf of the *Janjaweed'*."[1187] The Chamber concluded that when Abd-Al-Rahman later instructed the *Janjaweed* to *'amsah aksah'* and 'wipe out and sweep away', both "he and the *Janjaweed* were well aware of the meaning and significance of the phrases", calling for the commission of the charged crimes.[1188]

350. The Chamber further found that (by implication) Harun's and Abd-Al-Rahman's speeches would have given the impression to the *Janjaweed* that the charged "crimes were sanctioned by the State" and therefore that the *Janjaweed* had "a license to commit them" in accordance with Abd-Al-Rahman's instructions.[1189] Significantly, this finding must be read with the Chamber's previous finding that—at least—"a reasonable person in the position of [Abd-Al-Rahman] would still not have been 'deceived' into believing" that the charged crimes "were legal or justified".[1190] While this objective finding was made by the Chamber for the purpose of its principle of legality assessment,[1191] it nonetheless precluded any notion that Abd-Al-Rahman himself might subjectively have been led into mistake. In this context, the Chamber specifically noted that Abd-Al-Rahman "held a high-ranking position as a senior *Janjaweed* leader with a substantial set of responsibilities and powers, and that he spent a considerable part of his career in the SAF." It also recalled its findings that "the domestic laws of Sudan […] clearly described the prohibited conduct and crimes comparable to the crimes charged".[1192]

351. Abd-Al-Rahman now claims that "the only reasonable conclusion was [instead] that Harun's speech […] had induced a mistake of law negating knowledge that the acts ordered would incur criminal action […] in the mind of the audience, *including the Appellant*."[1193] In his submission, if all "*Janjaweed* considered that they had received a licence to commit crimes

[1184] Judgment, para. 51. *See above* paras. 6, 56-59.
[1185] Judgment, paras. 354, 382-387, 1004-1005.
[1186] Judgment, para. 1004.
[1187] Judgment, para. 1004.
[1188] Judgment, para. 1005.
[1189] Judgment, para. 1005.
[1190] Judgment, para. 59.
[1191] *See above* paras. 6-7, 60.
[1192] Judgment, para. 59.
[1193] Appeal, para. 313 (emphasis added). *See also* paras. 319, 323. The Prosecution notes that Abd-Al-Rahman bases his submission on attending Harun's speech, while also claiming that he did not attend it: *see e.g.* paras. 320, 323.

from Harun […] this at least provides a reasonable doubt that the Appellant […] also believed that Harun […] had given him a licence to attack the Fur and perform the acts mentioned in Harun's speech without risk of prosecution".[1194]

352. Abd-Al-Rahman's argument reveals his misreading of the Judgment. In considering who had heard Harun's speech—calling for the commission of the charged crimes, and promising impunity—the Chamber did not distinguish between Abd-Al-Rahman and other "members of the *Janjaweed* [who] undertook the Kodoom and Bindisi Operation".[1195] Yet its conclusions do contain two important nuances which Abd-Al-Rahman overlooks.

353. First, the Chamber was careful not to confuse the promise of impunity (whether proceedings would be initiated as a consequence of conduct) with legality (whether the conduct is criminal or not).[1196] In this context, while recognising that Harun promised impunity to Abd-Al-Rahman and the *Janjaweed* in the course of instructing the commission of the charged crimes, the Chamber did not suggest that the *Janjaweed* could have believed that the charged conduct was not criminal or was even lawful. Rather, it only found that they understood they had been given "a licence" to commit such crimes—as illustrated by its reference to one *Janjaweed* member thanking Al-Bashir for the "opportunity" to rape, beat, and mistreat P-0011, expressing the ambition that "we don't want these people to stay alive".[1197]

354. Abd-Al-Rahman incorrectly assumes that a mistaken expectation of impunity is the same as—or even relevant to—a mistake of law.[1198] In particular, under article 32(2), the mistaken view that *as a matter of fact* a criminal proceeding or sanction is not anticipated to ensue does not "negate the mental element required by […] a crime".[1199] Abd-Al-Rahman's assumption that a perpetrator should escape criminal responsibility because he wrongly anticipated that he could commit crimes "without risk of prosecution" would turn the logic of mistake of law on its head.[1200] If accepted, this would reward systemic, calculated lawbreaking and transform (real or imagined) promises of impunity into a shield against criminal liability.

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[1194] Judgment, para. 324.
[1195] Judgment, para. 1005.
[1196] *Contra* Appeal, paras. 311-313.
[1197] Judgment, para. 1005.
[1198] *See e.g.* Appeal, paras. 312 ("licence to commit the crimes"), 313 ("negating knowledge that […] would incur criminal action") 314 (knowledge that "the commission of crimes would incur criminal sanction"), 321 ("commit crimes without risk of prosecution"), 322 ("was authorised and incurred no sanction"), 323 ("face criminal action in the ordinary course of events"), 324 ("licence to attack the Fur […] without risk of prosecution"), 325 ("he was permitted to commit the acts mentioned against the Fur without risk of prosecution").
[1199] Statute, art. 32(2). Specifically, the first sentence of article 32(2) states that "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall *not* be a ground for excluding criminal responsibility" (emphasis added).
[1200] *Contra* Appeal, para. 321.

355. Second, with specific regard to Abd-Al-Rahman and in any event, the Chamber further emphasised the distinction between promised impunity and legality. Not only did it reiterate that a reasonable person in his position would not have been deceived by Harun's speech,[1201] it also expressed the view in passing—while beyond the requirement of article 22(2)—that he was in fact "able to appreciate that his conduct was criminal 'in the sense generally understood'".[1202] This was consistent, *inter alia*, with the Chamber's findings of Abd-Al-Rahman's senior position in the *Janjaweed*, and his echoing of Harun's language when instructing the *Janjaweed* to carry out the charged crimes.[1203]

356. Other findings in the Judgment are likewise incompatible with Abd-Al-Rahman's submission that he believed his conduct was lawful, including: that he carried out some crimes in a particularly cruel manner;[1204] that he was ordered to move and re-bury bodies to conceal evidence of the killings;[1205] and that Al-Tayyib questioned Abd-Al-Rahman's instruction to kill detainees and those who surrendered.[1206] Both as a matter of law and as a matter of fact, the charged conduct was manifestly unlawful,[1207] and Abd-Al-Rahman does not show otherwise.

357. Finally, Abd-Al-Rahman argues that he was not only authorised but obliged to commit the charged crimes or he would have incurred the death penalty under domestic law.[1208] This unsupported submission—rejected by the Chamber[1209]—is immaterial to any mistake of law. Notably, when asked by the Presiding Judge, the Defence clarified that it did not advance a defence of duress under article 31(1)(d) or a defence of superior orders under article 33.[1210]

## VII. The Chamber properly assessed the Kodoom and Bindisi operation (Part I)

358. The Chamber properly convicted Abd-Al-Rahman under article 25(3)(b) for ordering the crimes committed during the Kodoom and Bindisi operation.[1211] It reasonably assessed the evidence to conclude that (i) Abd-Al-Rahman "held a *de facto* position of authority vis-à-vis the *Janjaweed* during the Kodoom and Bindisi Operation";[1212] (ii) he "issued instructions and directions to the *Janjaweed* throughout the Kodoom and Bindisi Operation to commit the

[1201] Judgment, para. 59.
[1202] Judgment, para. 54. *Contra e.g.* Appeal, paras. 315, 317, 319-320, 323.
[1203] Judgment, para. 1005.
[1204] Judgment, para. 991.
[1205] Judgment, paras. 649-651.
[1206] Judgment, paras. 539, 557.
[1207] *See e.g. above* para. 342.
[1208] Appeal, paras. 314-315, 322, 325.
[1209] Judgment, paras. 43-44. *See also above* paras. 42, 47.
[1210] *See e.g.* T-162, p. 94.
[1211] Judgment, para. 1012.
[1212] Judgment, para. 1002.

crimes charged under Counts 1 to 11";[1213] (iii) his "instructions had a direct effect on the commission of the crimes by the *Janjaweed*";[1214] (iv) Abd-Al-Rahman "was aware and could foresee that the crimes […] would be committed in the ordinary course of the attacks on Kodoom and Bindisi during the implementation of his orders";[1215] and (v) he was "aware that crimes were being committed in the course of the implementation of his orders".[1216]

359. Abd-Al-Rahman shows no error of law or fact in these findings, but rather merely disagrees with the Chamber's conclusions, repeating his unsuccessful trial arguments. At times, his submissions misrepresent the Chamber's findings or the applicable law, or advance factual claims based on incorrect legal standards. Grounds 64-68 should be dismissed. In responding to these grounds of appeal, the Prosecution will address them in the same order they were addressed by the Chamber:[1217] first, Abd-Al-Rahman's position of authority (Ground 64); second, the existence of an order and its direct effect on the commission of the crimes (Grounds 66-67); and third, Abd-Al-Rahman's *mens rea* (Grounds 65 and 68).

## VII.A. The Chamber properly found that Abd-Al-Rahman exercised authority over the perpetrators of the Kodoom and Bindisi attacks (Ground 64)

360. Abd-Al-Rahman shows no error in the Chamber's finding that he held a *de facto* position of authority over the *Janjaweed* during the Kodoom and Bindisi operation.[1218]

### *VII.A.1. The Chamber did not err in fact*

361. Abd-Al-Rahman's unsupported arguments do not show the Chamber erred in fact in its findings in paragraph 1002 (a), (b) and (e).[1219] As explained above,[1220] the Chamber's finding that Abd-Al-Rahman was a leader of the *Janjaweed* was reasonable and based on "overwhelming evidence".[1221] Likewise, Abd-Al-Rahman shows no error in the Chamber's finding that he was in a position of authority *vis-à-vis* the *Janjaweed* contingent that arrived in Mukjar on or around 8 August 2002.[1222]

362. Abd-Al-Rahman submits that the Chamber failed to examine "whether a superior-subordinate relationship existed between the Appellant" and PDF coordinators and other *Janjaweed* leaders during the Kodoom and Bindisi operation, and instead inferred his position

[1213] Judgment, paras. 1003-1005.
[1214] Judgment, paras. 1006-1007.
[1215] Judgment, paras. 1008, 1010-1011.
[1216] Judgment, para. 1009.
[1217] Judgment, paras. 1002-1011.
[1218] Judgment, para. 1002.
[1219] Appeal, paras. 326-338. Although Appeal, fn. 808 only refers to Judgment para. 1002 (a)-(b), the Prosecution understands from Appeal para. 328 that Abd-Al-Rahman challenges also Judgment para. 1002(e).
[1220] *See above* paras. 279-282 (Ground 40).
[1221] Judgment, para. 679. *See also* paras. 675, 680, 983, 1002(a).
[1222] Judgment, para. 1002(b).

of authority "from an erroneous finding that he issued orders to Hassaballah and PDF coordinator Solonga."[1223] As shown above,[1224] the Chamber correctly found that the roles played by others, including Hassaballah and Solonga, had no impact on Abd-Al-Rahman's role or criminal responsibility during the Kodoom and Bindisi—or any other—operation.

363. Abd-Al-Rahman's submissions also mischaracterise the Judgment. The Chamber did not find that the *Janjaweed* were sub-categorised into the PDF, SAF, CRF, NISS or PPF, and therefore it was not required to determine Abd-Al-Rahman's place in these forces' "hierarchical command structures".[1225] Likewise, it is irrelevant that Abd-Al-Rahman was not formally "a member" of the PDF or any of the other GoS Forces, or that there was no formal chain of command linking him to the PDF coordinators which took part in the attack.[1226] As the Chamber properly found, "[n]o formal superior-subordinate relationship between the accused and the physical perpetrator is required; the accused need only possess the authority to order the physical perpetrator to commit the criminal act(s)."[1227] It was sufficient to find, as the Chamber did, that Abd-Al-Rahman could issue orders and reprimand these PDF coordinators in the course of the attack.[1228]

364. The Chamber carefully analysed evidence regarding Abd-Al-Rahman's conduct throughout the Kodoom and Bindisi operation to conclude that he held a *de facto* position of authority in relation to members of the *Janjaweed*, including other *agids*, and could issue orders and instructions to members of other GoS Forces present during the operation.[1229] The Chamber reasonably concluded that Abd-Al-Rahman was the highest authority on the ground "even if individuals like the PDF coordinators and other *Janjaweed* leaders may have exercised a degree of authority".[1230] It based this on evidence from four witnesses who "closely followed" the operation[1231] that Abd-Al-Rahman: (i) issued instructions to Hassaballah; (ii) held meetings with Solonga as well as with members of the *Janjaweed*; and (iii) "subdued dissent and protestations" raised by a PDF coordinator, a CRF member and *Janjaweed* leaders.[1232]

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[1223] Appeal, para. 331. *Contra* Judgment, para. 1002(e).
[1224] *See above* paras. 314-315.
[1225] *Contra* Appeal, para. 332. *See above* fns. 1034, 1115.
[1226] *Contra* Appeal, para. 331.
[1227] Judgment, para. 803.
[1228] Judgment, paras. 396 (fn. 1009), 1002-1003. It suffices that the direct perpetrators regarded the accused as "speaking with authority" (*Semanza* AJ, para. 363) in the sense that they perceived (*Gacumbitsi* AJ, para. 185) his words as orders to perform certain acts or omissions, and that they felt obliged to comply.
[1229] *Contra* Appeal, para. 328.
[1230] Judgment, para. 396, fn. 1009.
[1231] These were P-0874, P-0878, P-0921, P-1021: *see* Judgment, para. 368. The Chamber further relied on the evidence of a member of the National Security Service who saw "signal communications stating that 'Ali Kushayb' led the *Janjaweed* in operation in Bindisi". *See* Judgment, para. 396 (fn. 1009). *See also* para. 289.
[1232] Judgment, para. 396, fn. 1009. *See also* paras. 397, 401-402, 405, 416, 436-441.

365. Finally, Abd-Al-Rahman's reference to evidentiary assessments in other cases does not avail him.[1233] Such assessments necessarily arise from the specific evidentiary record, factual circumstances, and legal issues in those cases, and show no error in the Judgment.

### *VII.A.2. The Chamber did not err in law*

366. The Chamber sufficiently identified the recipients of the orders given by Abd-Al-Rahman throughout the Kodoom and Bindisi operation.[1234] The Chamber was not required to identify every physical perpetrator who implemented his orders.[1235] It sufficed for the Chamber to identify the group of persons who committed the crimes and/or those who conveyed the orders to the physical perpetrators, as it did.[1236] The Chamber not only identified and sufficiently defined the *Janjaweed* as a group[1237] but also—in relation to Kodoom and Bindisi—identified GoS Forces members and *Janjaweed* leaders who received Abd-Al-Rahman's orders and relayed them to the physical perpetrators.[1238]

367. To the extent that Abd-Al-Rahman argues that the *Janjaweed* who committed the crimes in Kodoom and Bindisi were not the same as those who had previously arrived in Mukjar—who the Chamber found to be under his control[1239]—this finds no support in the record and ignores the Chamber's findings. The Chamber found that Abd-Al-Rahman commanded both the *Janjaweed* contingent that arrived in Mukjar on or around 8 August 2003,[1240] and that which attacked Kodoom and Bindisi days later.[1241] The Chamber also found that some specific *Janjaweed* who were present in Mukjar on or around 8 August 2003, such as Samih,[1242] also took part in the Kodoom and Bindisi operation.[1243] Overall, the Chamber reasonably assessed the totality of the evidence to conclude that throughout the Kodoom and Bindisi operation Abd-Al-Rahman was the highest authority on the ground.[1244] Notably, he issued instructions not only to senior figures like Samih and Hassaballah but also to lower level *Janjaweed* members (who

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[1233] Appeal, para. 332.
[1234] *Contra* Appeal, paras. 333-337.
[1235] *Contra* Appeal, para. 336.
[1236] *See* *Bemba et al.* AJ, paras. 847-848 (in the context of "solicitation" under article 25(3)(b)); *Karera* AJ, para. 318; *Semanza* AJ, para. 363 (determining that the Appellant directed "attackers, including soldiers and *Interahamwe*", a militia, *see also* para. 358); *Gacumbitsi* AJ, paras. 182-187 (finding the Appellant responsible for ordering not only the communal police, over which he held a superior authority, but all other attackers, such as the *Interahamwe*); *Blaškić* AJ, para. 588 (identifying "HVO troops" as the recipients of the orders); *Boškoski and Tarčulovski* AJ, para. 75 (finding that the direct perpetrators were members of the police).
[1237] Judgment, paras. 323-324, 328.
[1238] *See e.g.* Judgment, paras. 396, 401-402, 405 (in relation to Hassaballah), 437-441.
[1239] Appeal, paras. 333.
[1240] Judgment, para. 380.
[1241] Judgment, para. 396.
[1242] Judgment, para. 382. The Chamber also mentioned the presence in Mukjar of Bonjouse, who [REDACTED] stated was present during the attack on Kodoom and Bindisi. *See* [REDACTED].
[1243] Judgment, para. 396. *Contra* Appeal, para. 337.
[1244] Judgment, paras. 396 (including fn. 1009), 436-441.

addressed Abd-Al-Rahman as "Excellency Ali" or "Commander Ali").[1245]

## VII.B. The Trial Chamber reasonably established that Abd-Al-Rahman ordered the crimes committed in Kodoom and Bindisi (Grounds 66-67)

368. Abd-Al-Rahman shows no error in the Chamber's finding that he issued relevant orders, and that these had a direct effect on the commission of the charged crimes.

### *VII.B.1. The Chamber reasonably found that Abd-Al-Rahman issued orders to the Janjaweed to commit the charged crimes*

369. The Chamber reasonably concluded that Abd-Al-Rahman "issued instructions and directions to the *Janjaweed* throughout the Kodoom and Bindisi Operation to commit the crimes charged under Counts 1 to 11."[1246] This was based on factors including: Abd-Al-Rahman's constant presence on the ground; his effective command and control over the *Janjaweed*; the pattern of *Janjaweed* crimes; Abd-Al-Rahman's instructions to senior *Janjaweed* and PDF figures; the respect shown to Abd-Al-Rahman by *Janjaweed* members; specific instructions given by Abd-Al-Rahman concerning the commission of crimes; Abd-Al-Rahman's threats to any who sought to refuse his instructions.[1247]

370. The Chamber found that during the operation Abd-Al-Rahman used expressions such as "*Allahu Akbar", "amsah aksah"* and "*wipe out and sweep away"* to instruct the *Janjaweed* to commence their attacks. In context, these instructions meant "to kill without any limit or 'relentlessly', to leave no trace (by burning), and metaphorically to 'wipe out', 'clean' and 'sweep away'."[1248] The Chamber also established that in a speech delivered before the operation Harun used these expressions, effectively communicating to those present that they were licenced to "*inter alia* rape, killing civilians and pillaging."[1249]

371. Abd-Al-Rahman incorrectly argues that the "only positive order that the Trial Chamber identified during the attack on Kodoom is that of the torture of P-0986".[1250] Notably, he omits to mention other positive orders that the Chamber reasonably found Abd-Al-Rahman issued before the attack on Kodoom, such as: (i) rejecting *umdah* Dawud Dahab's criticism of the crimes being committed;[1251] (ii) ordering *Janjaweed* to move towards Kodoom;[1252] (iii) instructing Hassaballah to "move on" to Kodoom;[1253] (iv) reprimanding *Janjaweed* members

[1245] Judgment, para. 1003.
[1246] Judgment, para. 1003.
[1247] *See* Judgment, para. 1003.
[1248] Judgment, para. 1004.
[1249] Judgment, para. 1005. *See also above* paras. 348-357.
[1250] Appeal, para. 350.
[1251] Judgment, paras. 401-402.
[1252] Judgment, para. 403.
[1253] Judgment, para. 405.

for not taking medicines found around a dead body; and (v) asking a CRF officer during the attack on Kodoom to give him the ammunition he was carrying.[1254]

372. Similarly, concerning the torture of P-0986, Abd-Al-Rahman omits relevant findings. Abd-Al-Rahman asked the *Janjaweed* why were they standing there. When Abd-Al-Rahman was told by *Janjaweed* members that P-0986 was still alive, he called P-0986 an *abid* ("slave") and, on receiving their request for permission to kill him, instructed the *Janjaweed* to "torture him until he tells where the other people are", and then to kill him. The *Janjaweed* addressed Abd-Al-Rahman as 'Excellency Ali" or 'Commander Ali".[1255]

373. The Chamber reasonably relied on P-0986's evidence and dismissed the Defence's assertions about the purported effect of malaria on his cognitive functions.[1256] Abd-Al-Rahman merely reargues his unsuccessful trial arguments, which led the Presiding Judge to rule that the Defence could call an expert to comment on the issue and/or ask the witness about the symptoms that he suffered.[1257] When the Defence cross-examined P-0986 on this topic, the witness responded that he did not experience symptoms that would affect his cognitive faculties.[1258] Abd-Al-Rahman further chose not to call an expert on the purported effects of malaria. He can show no error in these circumstances.

374. Abd-Al-Rahman misreads the Judgment in claiming that the Chamber erred by treating "'hand gestures'" and the blowing of a whistle as "orders", without establishing the "direct effect" of this conduct on subsequent crimes.[1259] The Chamber did not find that Abd-Al-Rahman blew a whistle to order crimes but rather to summon his *agids* to meetings where he praised the *Janjaweed* for teaching the enemy a lesson,[1260] and directed them to continue to destroy the reminder of the villages.[1261] Likewise, the Chamber reasonably relied on evidence of Abd-Al-Rahman's hand gestures as showing his ability to instruct members of the *Janjaweed* in the course of the Kodoom and Bindisi operation that he was coordinating on the ground.[1262]

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[1254] Judgment, para. 416.
[1255] *See* Judgment, paras. 412-415.
[1256] Witness Annex, paras. 484-496.
[1257] T-065, pp. 20:19-21:1.
[1258] Witness Annex, para. 493. *Contra* Appeal, para. 350.
[1259] Appeal, para. 351.
[1260] Judgment, paras. 437-438.
[1261] Judgment, para. 439. It is also noteworthy that the Chamber heard further evidence of Abd-Al-Rahman using a whistle in Kodoom to gather the Janjaweed: Witness Annex, para. 60.
[1262] Judgment, paras. 436, 1003(k). [REDACTED] also described Abd-Al-Rahman using such hand gestures to direct the attacking forces throughout the attack, *see* [REDACTED].

### *VII.B.2. The Chamber reasonably found that Abd-Al-Rahman's orders had a direct effect on the commission of the charged crimes*

375. Contrary to Abd-Al-Rahman's submissions,[1263] the Chamber expressly determined that his orders had a direct effect on the commission of crimes.[1264] The Chamber so concluded based on its findings that: (a) Abd-Al-Rahman "commanded the *Janjaweed* contingent that undertook the Kodoom and Bindisi Operation, and directed them at all stages"; (b) *Janjaweed* commenced their attacks after he issued his instructions; and (c) it was during these attacks that the charged crimes were committed.[1265] The Chamber also found it significant that *Janjaweed* members sought Abd-Al-Rahman's permission to kill P-0986.[1266] As described above, the Chamber relied on multiple factors to establish Abd-Al-Rahman's orders during the operation.[1267]

376. Abd-Al-Rahman incorrectly submits that the Chamber erred by ignoring that the crimes were committed "in the implementation of orders delivered to [the] various components of the broader *Janjaweed* group [PDF, SAF, CRF, NISS and PPF] through their respective hierarchies" and irrespective of his whistle and gestures.[1268] First, Abd-Al-Rahman mischaracterises the Chamber's findings on the composition of the *Janjaweed*. As shown above, the Chamber clearly distinguished the *Janjaweed* from various components of the GoS forces.[1269]

377. Second, Abd-Al-Rahman's unsubstantiated assertion that other persons issued orders to the *Janjaweed* cannot undermine the Chamber's reasonable finding that Abd-Al-Rahman was the highest authority on the ground.[1270] It also found that the "PDF '*assisted*' the *Janjaweed* in operations in 2003 and 2004, notably during the attacks on Bindisi".[1271]

378. Third, Abd-Al-Rahman's self-serving suggestion that Harun in fact ordered the crimes in the Kodoom and Bindisi operation—based on the speech Harun gave to the *Janjaweed* in Mukjar on around 9 August—is factually inaccurate and legally flawed.[1272] The Chamber thoroughly examined Harun's speech and found that it called for rape, killing and pillage.[1273] However, it also reasonably found that it was Abd-Al-Rahman as the *de facto* commander on the ground who, days later on 15 August, implemented Harun's words instructing the *Janjaweed*

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[1263] Appeal, paras. 351-353.
[1264] Judgment, paras. 1006-1007.
[1265] Judgment, para. 1006.
[1266] Judgment, para. 1007.
[1267] *Contra* Appeal, para. 351-353. *See above* paras. 369-372.
[1268] Appeal, para. 353.
[1269] *See* Judgment, paras. 280, 304, 328, 333. *See also above* para. 363, and fns. 1033, 1115.
[1270] *Contra* Appeal, para. 353. *See* Judgment, para. 396 (fn. 1009).
[1271] Judgment, para. 330 (emphasis added) *See also* Appeal, fn. 861. *See above* the Prosecution's response to this ground of appeal at paras. 279-282, 314-315.
[1272] *Contra* Appeal, paras. 354-355. Concerning this speech, *see* Judgment, paras. 354, 384-387.
[1273] Judgment, paras. 1004-1005.

to advance to Kodoom and Bindisi.[1274] Abd-Al-Rahman's instructions—repeating Harun's message to '*amsah aksah*' and '*wipe out and sweep away*'—were understood to entail the charged crimes.[1275] Abd-Al-Rahman shows no error by claiming that the Chamber should have entertained an "alternative explanation" based on Harun's criminal responsibility. Even if Harun may *also* bear responsibility for ordering the crimes in Kodoom and Bindisi, this does not negate Abd-Al-Rahman's criminal responsibility. Abd-Al-Rahman's premise—that only the senior authority in a chain of command is responsible for ordering[1276]—lacks any merit and fundamentally misinterprets articles 25(3)(b) and 33 of the Statute.[1277]

### VII.C. The Trial Chamber properly assessed Abd-Al-Rahman's *mens rea*, including for rape (Grounds 65, 68)

379. Abd-Al-Rahman shows no error in the Chamber's reasonable finding that he "was aware and could foresee" that the charged crimes "would be committed in the ordinary course of the attacks on Kodoom and Bindisi during the implementation of his orders."[1278] Abd-Al-Rahman's submissions largely repeat his unsuccessful trial arguments, misrepresent the Chamber's findings and the applicable law, and incorrectly portray factual challenges as legal ones.

380. Since there is no doubt that the Chamber correctly directed itself in law,[1279] Abd-Al-Rahman essentially contends—incorrectly—that there was no evidentiary basis for the Chamber's conclusion that he possessed the required *mens rea*. This is untenable in light of the Chamber's reasonable findings that Abd-Al-Rahman: (a) knew of the "meaning and significance of the phrases '*amsah aksah*' and 'wipe out and sweep away'" to the *Janjaweed*, and used this phrase in his instructions to them; (b) was present during the attacks, so that he "saw and was aware of" the manner in which the *Janjaweed* implemented his orders, and; (c) knew of the manner in which the *Janjaweed* had implemented his orders in attacks preceding those on Kodoom and Bindisi.[1280] The Trial Chamber also noted several incidents, both before and during the attacks, which demonstrated that Abd-Al-Rahman "was aware that crimes were being committed in the course of implementation of his orders."[1281]

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[1274] Judgment, para. 1005.
[1275] Judgment, para. 1005. *See also above* paras. 348-357.
[1276] Appeal, paras. 354-355.
[1277] *See e.g.* *Boškoski & Tarčulovski* AJ, para.167.
[1278] Judgment, para. 1008. *Contra* Appeal, paras. 339-348, 357-364.
[1279] Judgment, para. 806 (requiring 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"). *See also* para. 706 (equating the "ordinary course of events" standard to "virtual certainty"). *Compare* Statute, arts. 25(3)(b), 30(3).
[1280] Judgment, para. 1008.
[1281] Judgment, para. 1009.

### *VII.C.1. The Chamber properly found that Abd-Al-Rahman possessed the requisite mens rea under article 25(3)(b)*

381. The Chamber correctly and reasonably concluded that Abd-Al-Rahman had the required *mens rea* for the charged crimes. He directed his forces throughout the Kodoom and Bindisi operation from the ground,[1282] gave them instructions about the route, mode and continuation of the attack,[1283] and told them to "*amsah aksah*" and to "wipe out and sweep away"—in the sense of killing, raping and pillaging the Fur.[1284] Based on these findings, the Chamber reasonably concluded that Abd-Al-Rahman at least knew that as a result of his orders the crimes would be committed in the ordinary course of events, especially given his presence on the ground[1285] and the large-scale violence in the operation.[1286] Based on a careful assessment of all the relevant facts, a chamber may find that even generally framed orders encompass instructions to commit crimes under the Statute, issued with the necessary *mens rea*.[1287]

382. Abd-Al-Rahman does not show that the Chamber erred in applying the correct *mens rea* standard, given its accurate statement of the applicable law.[1288] The Chamber was not obliged to restate each time that "ordinary course of events" entails "virtual certainty". The 'legal error' which Abd-Al-Rahman purports to discern is no more than cloaked disagreement with the Chamber's factual conclusions.

383. Abd-Al-Rahman's unsupported argument that the Chamber erred by not conducting a "holistic assessment" of the evidence for each charged crime is equally misplaced.[1289] The Chamber's holistic approach is clear from the structure of the Judgment—which, before assessing Abd-Al-Rahman's *mens rea*, progressively analysed his position of authority and influence,[1290] his role in the armed conflict,[1291] and his involvement in each charged operation.[1292] The Chamber expressly stated that it considered Abd-Al-Rahman's actions, orders and instructions throughout the operation to fully assess his responsibility.[1293]

384. Further, by concluding that Abd-Al-Rahman could foresee that "the crimes charged under Counts 1 to 11" would be committed in the ordinary course of events in implementing

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[1282] Judgment, paras. 416, 436-441.
[1283] Judgment, paras. 397, 399, 401-403, 405, 414, 416, 436-441, 1003(b) (d) (e) (g)-(j).
[1284] Judgment, paras. 361, 363-366, 397, 399, 401-403, 405, 673, 825-826, 919, 1004-1005, 1011.
[1285] *See e.g.* *Boškoski & Tarčulovski* AJ, para. 132.
[1286] *See e.g.* *Đorđević* AJ, paras. 920-926.
[1287] *See e.g.* *Ntaganda* TJ, paras. 1177-1189.
[1288] *Contra* Appeal, paras. 345-348. *See* Judgment, paras. 706, 806, 1008.
[1289] *Contra* Appeal, para. 344.
[1290] Judgment, Section 5.IV.
[1291] Judgment, Section 5.II.
[1292] Judgment, Section 5.III.
[1293] Judgment, para. 1001.

his orders, the Chamber made findings for each (type of) charged crime.[1294] Abd-Al-Rahman overlooks that all the charged crimes under counts 1 to 11 were committed in the same course of conduct, in execution of his instructions '*amsah aksah*' and to 'wipe out and sweep away'.[1295] Abd-Al-Rahman's suggestion that the Chamber failed to make *mens rea* findings for each type of charged crime is untenable. The Chamber reasonably analysed Abd-Al-Rahman's *mens rea* for the charged crimes in the Kodoom and Bindisi operation jointly, especially considering that he was on the ground directing an unlawful attack on the civilian population.[1296]

385. Abd-Al-Rahman disputes only some of the Chamber's findings underlying its conclusion about his *mens rea*,[1297] even though the Chamber's conclusion on his *mens rea* was based on a comprehensive evaluation of multiple factors.[1298] Abd-Al-Rahman's piecemeal challenges demonstrate no error in the Chamber's assessment.

386. The Chamber reasonably relied on evidence regarding Abd-Al-Rahman's knowledge of the crimes perpetrated throughout the broader attack that culminated in Kodoom and Bindisi.[1299] P-1021 testified that, upon seeing Nyerli—one of the villages attacked in the course of the operation—being burned down, he asked Abd-Al-Rahman why he had done it and, in response, was told it was "none of [his] business".[1300] *Umdah* Dawud Dahab also questioned Abd-Al-Rahman about hitting or killing persons, and burning houses, and his concerns were similarly dismissed.[1301] Far from being "of a general nature about the decision to attack these localities",[1302] these interactions specifically questioned the occurrence of crimes throughout the attack and show that Abd-Al-Rahman was aware of their occurrence.[1303] Similarly, P-0874 was dismissed by Abd-Al-Rahman after questioning the annihilation of Muslim persons and villages.[1304] In any event, and based on multiple sources of corroborating evidence—including four witnesses who "closely followed" the operation[1305]—the Chamber found that Abd-Al-Rahman was on the ground, commanding the forces and could see that crimes were being committed.[1306] Moreover, the Chamber reasonably relied on other interactions that "took place

[1294] Judgment, para. 1008. *Contra* Appeal, para. 344.
[1295] Judgment, para. 1005.
[1296] Judgment, paras. 1004-1005. *See e.g. Ntaganda* AJ, paras. 1114-1115; *Ntaganda* TJ, para. 1171. *See also Boškoski & Tarčulovski* AJ, para. 132.
[1297] Appeal, para. 344 (referring only to some of the incidents the Chamber considered at Judgment, para. 1009).
[1298] Judgment, paras. 1008-1009.
[1299] *Contra* Appeal, para. 344.
[1300] Judgment, para. 398.
[1301] Judgment, paras. 401-402.
[1302] Appeal, para. 344.
[1303] *Contra* Appeal, para. 344.
[1304] Judgment, para. 436 (citing T-082-Conf, pp. 38-40).
[1305] *See* Judgment, para. 368.
[1306] Judgment, para. 1009.

during or after the attacks" to establish Abd-Al-Rahman's *mens rea*.[1307] This careful analysis reflects the holistic approach that Abd-Al-Rahman mistakenly contends was missing.

### *VII.C.2. The Chamber properly established that Abd-Al-Rahman had the mental elements for the crimes that he ordered*

387. Abd-Al-Rahman further argues that the Chamber erred "by limiting its analysis to the mental elements for the charged crimes in Counts 1-11 for the *Janjaweed*, without engaging in legal reasoning as to how this mental element extended to the Appellant as well".[1308] However, the Chamber was not required to make such findings. Having established that the direct perpetrators possessed the mental elements of the crimes, it sufficed for the person ordering the crimes to act "with direct intent in relation to his own […] ordering" at least knowing that the crimes (including all relevant elements) would take place in the ordinary course of events.[1309]

### *VII.C.3. The Chamber reasonably found that Abd-Al-Rahman knew that rape would be committed in the ordinary course of events*

388. The Chamber reasonably found that Abd-Al-Rahman had the *mens rea* required for rape, in that the occurrence of this crime was foreseeable in the ordinary course of events.[1310] It found that: (i) during the period of the conflict in Darfur, attacks on villages were marked by sexual violence and;[1311] and (ii) the expressions "*amsah aksah*" and "wipe out and sweep away", widely used by Abd-Al-Rahman during the Kodoom and Bindisi operation, encompassed an instruction *inter alia* to commit rape.[1312] Abd-Al-Rahman repeats his trial arguments but does not show any error in the Chamber's reasoning and conclusion.

389. To determine the meaning of "*amsah aksah*" and "wipe out and sweep away", the Chamber drew on Harun's speech before the operation,[1313] other speeches from the same time period,[1314] and Abd-Al-Rahman's later use of these terms in a subsequent operation.[1315] The Chamber did not err by relying on the evidence of multiple witnesses regarding the use and

[1307] These interactions—which included Abd-Al-Rahman's instruction to *Janjaweed* in Kodoom to torture and kill P-0986, his congratulations to the *agids* for teaching the Fur a lesson they will never forget, and his orders to continue the operation and "destroy the remainder of the villages of Bindisi and Mukjar"—demonstrate his awareness that crimes were committed as a consequence of his orders. *Contra* Appeal, para. 344.
[1308] Appeal, para. 347. *See also* paras. 345-346.
[1309] *Kordić and Čerkez* AJ, para. 29. *See also Said* CD, p. 59, para. 38; *Boškoski & Tarčulovski* AJ, para. 67 ("where the direct perpetrators' knowledge of the status of the victims was part of the Trial Chamber's factual findings, the Appeals Chamber need not consider whether such findings are necessary for a conviction for planning, instigating and ordering").
[1310] Judgment, para. 1008.
[1311] Judgment, paras. 281, 438 (fn. 1320).
[1312] Judgment, para. 1005.
[1313] Judgment, paras. 354, 387, 1004.
[1314] Judgment, para. 519.
[1315] Judgment, paras. 468, 1011.

meaning of the expressions throughout the conflict in Darfur.[1316]

390. The Chamber reasonably concluded that these expressions encompassed rape. It took into account, *inter alia*, P-0878's evidence about the high-level delegation meeting which took place in Mukjar on around 9 August 2003, in which *Janjaweed* were publicly encouraged to commit the attacks that followed.[1317] P-0878 provided a wealth of detail in his account, in part due to his relatively contemporaneous record keeping.[1318] As noted by the Chamber, P-0878 provided details about "how he came to be present in the vicinity" and where this meeting took place, which gave him a good vantage point to observe and hear what was being said.[1319] These details were consistent with [REDACTED] and [REDACTED] in the Kodoom and Bindisi operation. The Chamber reasonably concluded that "his evidence on this aspect of the events is credible and reliable".[1320] Furthermore, P-0878's evidence about this meeting is generally consistent with the evidence of [REDACTED], P-0029, P-0916 and P-0984, in relation to the overall content of Harun's address to the *Janjaweed* and Abd-Al-Rahman's presence at that meeting. The Chamber reasonably considered that small discrepancies with the account of [REDACTED] "are to be expected in recollections of what was clearly an unexpected and dramatic event".[1321] Furthermore, P-0878 provided evidence that Abd-Al-Rahman addressed the crowd "on behalf of the *Janjaweed*".[1322] Lastly, P-0878's evidence is also corroborated by P-0643, who received a contemporaneous account from P-0878 regarding this episode.[1323]

391. Abd-Al-Rahman submits that "[n]o reasonable trier of fact could have been convinced that […] [Abd-Al-Rahman] knew to the requisite 'virtual certainty' standard that rapes would have occurred in Bindisi in the ordinary course of events", when the evidence on the record does not prove that he was made aware that rapes happened during the course of the attacks on other villages or was present when rapes did occur in Bindisi.[1324] This argument should be dismissed. To the contrary, the evidence shows that rapes occurred repeatedly and openly during the operation, often associated with other charged crimes. Perpetrators frequently used derogatory language that mirrored Abd-Al-Rahman's own rhetoric during the attack.[1325] Rapes were a consistent feature of the prior GoS counter-insurgency campaigns and the Darfur conflict

[1316] *Contra* Appeal, para. 361.
[1317] Judgment, paras. 354, 382-387. *See also* paras. 363-366.
[1318] Witness Annex, paras. 254-257.
[1319] Witness Annex, para. 264.
[1320] Witness Annex, para. 264.
[1321] Witness Annex, para. 263.
[1322] Judgment, para. 383. *Contra* Appeal, para. 361.
[1323] Judgment, fn. 960.
[1324] Appeal, paras. 360-362.
[1325] Judgment, paras. 398, 407, 413-415, 422, 429-435, 868-869, 895-900.

itself.[1326] Abd-Al-Rahman repeats his trial argument but fails to show that the Chamber was unreasonable to find that he meant or knew that rapes would occur in the ordinary course of the attack on Bindisi when he ordered attackers to "wipe out and sweep away" or to "*amsah aksah*".

392. In this context, Abd-Al-Rahman is not assisted in challenging the Chamber's evidentiary assessment by reference to other cases, which necessarily turn on their own facts.[1327] Yet the caselaw of this Court illustrates that the use of general instructions by an individual to an armed group may well be understood, and intended to be understood, to include an instruction to commit sexual violence.[1328]

## VIII. The Chamber properly assessed the Mukjar and Deleig operations (Part J)

393. Abd-Al-Rahman shows no error in the Chamber's findings concerning the Mukjar and Deleig operations, either on his own role as a co-perpetrator or aspects of the crime-base evidence. Grounds 70 and 72-76 should be dismissed.[1329]

### VIII.A. The Chamber properly found that Abd-Al-Rahman was a co-perpetrator of the crimes at Mukjar and Deleig (Ground 70)

394. Abd-Al-Rahman shows no error in the Chamber's findings that he was a co-perpetrator of the crimes committed in the Mukjar and Deleig operations.[1330] As correctly stated, this does not entail "that the Accused had the sole responsibility or was mainly responsible for these crimes, nor that he made an essential contribution to each criminal incident".[1331] Rather, "the decisive consideration is whether, without the Accused's contribution, the crime(s) could not have been committed or would have been committed in a significantly different way."[1332]

#### *VIII.A.1. Abd-Al-Rahman shows no error in the Mukjar findings*

395. Abd-Al-Rahman shows no error in the Chamber's finding of "a common plan specifically directed at the commission of the crimes of murder, torture, outrages upon personal dignity and persecution" in the Mukjar operation,[1333] in which Abd-Al-Rahman was a member,[1334] and to which he made an essential contribution.[1335] Abd-Al-Rahman relitigates unsuccessful trial arguments, and mistakes the applicable law and findings.[1336]

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[1326] Judgment, paras. 281, 1010.
[1327] *Contra* Appeal, para. 359.
[1328] *See e.g.* *Ntaganda* AJ, paras. 459-472; *Ntaganda* TJ, paras. 415, 617, 805-806, 1181, 1186-1187.
[1329] *Contra* Appeal, paras. 365-441.
[1330] *Contra* Appeal, paras. 365-383.
[1331] Judgment, para. 989.
[1332] Judgment, para. 989.
[1333] Judgment, para. 970
[1334] Judgment, paras. 960, 962-963.
[1335] Judgment, paras. 982-989.
[1336] *Contra* Appeal, paras. 368-374.

396. First, Abd-Al-Rahman shows nothing unreasonable in the finding on the existence of the Mukjar Common Plan and the persons involved.[1337] It is immaterial whether members of the common plan had an "official role" or not,[1338] where—as the Chamber reasonably found—the "co-perpetrators were deployed on the ground, directly participated in the implementation of the plan and acted with the same common agreement."[1339] Abd-Al-Rahman merely disagrees with the Chamber by asserting that he held no relevant position, but shows nothing unreasonable in the Chamber's conclusion.[1340] Likewise, he fails to show that the Chamber erred by "omit[ing] individuals from the Mukjar Common Plan".[1341] To the contrary, the Chamber expressly found that "other members of the *Janjaweed* and GoS Forces, also deployed on the ground and who directly participated in the commission of the crimes, *were also* members of the Mukjar Common Plan", with the sole exception of Al-Tayyib and Abd-Al-Mun'im.[1342] While Abd-Al-Rahman now claims it is "incoherent to omit" Al-Tayyib, this shows nothing unreasonable in the Chamber's findings.[1343]

397. Second, Abd-Al-Rahman shows nothing unreasonable in the finding that he made an essential contribution to the commission of the crimes within the context of the common plan.[1344] In particular, his claim that his non-participation would not have wholly prevented the commission of the alleged crimes mistakes the applicable law,[1345] and merely repeats his unsuccessful trial argument.[1346] As the Chamber reasonably found, Abd-Al-Rahman played a key role in defining the common plan, leading the *Janjaweed*, facilitating operational coordination based on instructions from the highest levels of the Sudanese government, instructing and supervising forces on the ground, and directly participating in crimes.[1347] This was based on abundant evidence, including on: (i) Abd-Al-Rahman's role and reputation as "a *Janjaweed* leader"; (ii) his conduct immediately prior to the operations, and; (iii) his conduct

[1337] *Contra* Appeal, paras. 369-370, 372.
[1338] *Contra* Appeal, paras. 369-370. *But see also* Judgment, para. 962 (noting that most of the co-perpetrators, but not all, "held high positions in the different GoS Forces, namely the PDF and the SAF, *or within the Janjaweed*", emphasis added).
[1339] *See* Judgment, para. 962. *See further* paras. 963 ("the co-perpetrators clearly acted in a coordinated and planned manner"), 964 ("each of the co-perpetrators was present and actively involved in the preparation and implementation of elements of the plan", "interacted with one another in different combinations before the operation and during the implementation of the common plan", and "issued consistent instructions and orders").
[1340] *Contra* Appeal, para. 370 (cross-referring to Ground 40). *See above* paras. 278-289 (Ground 40).
[1341] *Contra* Appeal, para. 372.
[1342] Judgment, para. 962 (emphasis added).
[1343] In particular, while the Chamber apparently did not consider that it was established beyond reasonable doubt that Al-Tayyib *was* a member of the common plan, on the basis of the evidence presented, this did not necessarily imply a finding beyond reasonable doubt that he was *not* a member of the common plan.
[1344] *Contra* Appeal, paras. 371, 373.
[1345] *Contra* Appeal, paras. 371, 373. *See e.g. Ntaganda* AJ, para. 1041. *See also above* para. 394.
[1346] Judgment, para. 989.
[1347] *See* Judgment, para. 987.

during the operations.[1348] Abd-Al-Rahman's disagreement shows nothing unreasonable in the Chamber's analysis of specific aspects of this evidence, or its overall conclusion.[1349]

### *VIII.A.2. Abd-Al-Rahman shows no error in the Deleig findings*

398. Abd-Al-Rahman likewise shows no error in the Chamber's findings that he participated in the Deleig Common Plan, to which he made an essential contribution, and in which he shared the same discriminatory intent.[1350] Since he fails to develop any argument on this latter point, it will not be further addressed and should be dismissed *in limine*.

#### *VIII.A.2.a. The Chamber clearly articulated Abd-Al-Rahman's role*

399. Abd-Al-Rahman shows no error by his claim that the Chamber "made no clear findings on how the key co-perpetrators […] acted in coordination" with him.[1351] Yet to the contrary, the Chamber found that Abd-Al-Rahman and his co-perpetrators "clearly acted in a coordinated and planned manner."[1352] It described in detail their "multiple interaction and concerted coordinated actions" in the unfolding of the Deleig operation.[1353] Recalling the presence of the co-perpetrators at different sites where crimes were committed, the nature of the tasks they each undertook—including the fact that Abd-Al-Rahman and others gave instructions and engaged in the direct perpetration of the crimes—and the prevailing circumstances, the Chamber was satisfied that Abd-Al-Rahman and the other co-perpetrators "had mutual awareness that their joint efforts in the implementation of the common plan would result in the commission of each of the crimes it encompassed."[1354]

400. Further, the Chamber considered how Abd-Al-Rahman's role and reputation permitted him to lead operations such as in Deleig. It recalled his reputation in Wadi Salih and role as a *Janjaweed* leader, his authority over *Janjaweed* members and other lower-ranking members, and his direct access to key figures at the highest level of the Sudanese government and at the locality level. It concluded that "the combination of these factors made the Accused a leader who commanded respect and therefore obedience from others."[1355] Given these findings, it was immaterial that Abd-Al-Rahman did not hold an official position in the GoS Forces—he was able to and did participate in the Deleig Common Plan regardless.[1356]

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[1348] *See* Judgment, paras. 983-986. *See also* paras. 658-680. *Concerning* Abd-Al-Rahman's role in the *Janjaweed*, *see above* paras. 278-289 (Ground 40).
[1349] *Contra* Appeal, para. 373 (concerning Abd-Al-Rahman's role in logistics).
[1350] Appeal, para. 375 (citing Judgment, paras. 959, 972-981).
[1351] Appeal, para. 376.
[1352] Judgment, para. 975.
[1353] Judgment, para. 976. *See also* paras. 977-980.
[1354] Judgment, para. 981.
[1355] Judgment, para. 983.
[1356] *Contra* Appeal, para. 376. *See also above* paras. 278-289 (Ground 40).

401. The Chamber's analysis of Abd-Al-Rahman's role in the Deleig Common Plan was clear and reasonable. Abd-Al-Rahman merely seeks to overstate the roles of his co-perpetrators.[1357] For example:

- Abd-Al-Rahman repeatedly submits that Hamdi was in charge of the Deleig operation, but the Chamber made no such finding.[1358] Rather, it found that Hamdi "was present and issued instructions relating to the search and arrest operation in Deleig", and thereafter continued to Kailek.[1359] Hamdi did not command the *Janjaweed* ("*Mujahidin*") in Garsila,[1360] and the witnesses cited by Abd-Al-Rahman did not say so.[1361] [REDACTED].[1362]
- While Hassaballah was the PDF coordinator in Garsila, the Chamber found that he assumed this role only *after* the three operations.[1363] Likewise, while Hassaballah was present when Jenif was killed, and at the execution site near Fere, the Chamber made no specific finding that he was "involved", as Abd-Al-Rahman claims.[1364] Nor did the Chamber find that Muqaddam Idriss was "involved" in the executions near Fere.[1365]

#### *VIII.A.2.b. The Chamber's analysis did not depend on Abd-Al-Rahman's Garsila statement*

402. Abd-Al-Rahman incorrectly argues that the Chamber's finding of his authority over the *Janjaweed* during the Deleig operation was based on a single statement he made in Garsila.[1366] Yet to the contrary, the Chamber's finding was based on "an assessment of his acts and conduct in Deleig" *in combination with* this statement.[1367] There was nothing "illogical" or "contradict[ory]" about his statement, nor was it taken out of context.[1368] On the first day of the Deleig operation, at the Garsila SAF base, Abd-Al-Rahman [REDACTED].[1369] Since Abd-Al-Rahman's alleged authority stemmed from his role as commander of the *Janjaweed*, his statement was of patent relevance to that fact—he was obviously not, for example, claiming to

[1357] Appeal, para. 376.
[1358] *Contra* Appeal, paras. 376, 379. *See also above* para. 316; *below* paras. 420, 422-423 (Ground 74).
[1359] Judgment, para. 594. *See also* para. 978.
[1360] *Contra* Appeal, para. 376.
[1361] Appeal, para. 376 (citing P-0643, P-0892 and P-0905). [REDACTED].
[1362] *See* [REDACTED]. [REDACTED].
[1363] *Contra* Appeal, paras. 376, 379. *See* Judgment, para. 306 (Hassaballah became the PDF coordinator after the murder of Jenif (the former PDF coordinator) during the Deleig operation). *See also above* para. 316.
[1364] *Contra* Appeal, para. 379. *See* Judgment, paras. 611 (present when Jenif was killed and told Abd-Al-Rahman that Jenif had taken weapons and ammunition), 623 (present at the execution site near Fere), 979.
[1365] *Contra* Appeal, para. 379. *See* Judgment, para. 623 (present at the execution site near Fere), 979.
[1366] Appeal, para. 377.
[1367] *See* Judgment, para. 589 (fn. 1912: cross-referring to paras. 586, 602, 611-612, 617-618, 620, 624, 643).
[1368] *Contra* Appeal, para. 377.
[1369] Judgment, para. 586; T-071-Conf, pp. 56, 65, 67; T-072-Conf, pp. 6-7. Abd-Al-Rahman said: "No, I am the commander […] I have no time. I can't wait for an authorisation from the commander. And I have just been with the commander already and I have instructions from him". [REDACTED]. *See* Judgment, para. 589 (fn. 1903).

be the commander of the SAF.

*VIII.A.2.c. Abd-Al-Rahman made an essential contribution to the crimes in Deleig*

403. Abd-Al-Rahman fails to show any error in the Chamber's carefully reasoned finding that, without his contribution, the Deleig crimes "would have been committed in a significantly different way".[1370] In particular, he is not assisted by his claim that "the number and positions of authority encumbered by the other participants" precluded his own essential contribution.[1371]

404. Abd-Al-Rahman fails to show that the roles of his co-perpetrators prevented him from making an essential contribution to the crimes. As noted by the Chamber, "it need not find that the Accused had the sole responsibility or was mainly responsible for these crimes" to convict him as a co-perpetrator.[1372] In relation to Hamdi, it found that the fact that he was present and issued instructions relating to the search and arrest operation in Deleig did not diminish Abd-Al-Rahman's essential contribution.[1373] There is similarly no basis to consider that the roles of Hamdi and Hassaballah in the "preparation of the recruitment, organisation, equipment and financing of the *Janjaweed*" detracted from his own role in recruiting members of the *Janjaweed*, and distributing matériel and weapons to them.[1374]

405. In any case, Abd-Al-Rahman's acts and conduct underpinning his essential contribution were extensive—there is no serious question that they amounted to an essential contribution in this case. The Chamber concluded that Abd-Al-Rahman's "leadership of the *Janjaweed*, combined with his presence and his actions in preparation of, and throughout" the Deleig operation amounted to an essential contribution.[1375] It found that he "was present and intervened throughout the different stages (preparation and execution) of the Deleig Common Plan and personally carried out the material elements of some of the crimes that were part of the same."[1376] It recalled that Abd-Al-Rahman: led the *Janjaweed* in this joint operation with GoS Forces; personally committed crimes, namely torture, outrages upon personal dignity and murder; personally brought detainees to the Garsila SAF base and provided intelligence and issued orders in relation to others, some of whom were later killed in Deleig; was present, issued orders and participated in the search and arrest operation; was present at the Deleig Police Station, including where the detainees were held and mistreated; commanded the *Janjaweed* at

[1370] Judgment, para. 988. *Contra* Appeal, paras. 380, 382 (referring to Judgment, paras. 986, 988).
[1371] *Contra* Appeal, para. 378. *See also above* paras. 314-316.
[1372] Judgment, para. 989.
[1373] Judgment, para. 988 (fn. 2959).
[1374] *Contra* Appeal, para. 380. *See* Judgment, paras. 984, 987.
[1375] Judgment, para. 988. *See also* para. 984 (conduct immediately before the Mukjar and Deleig operations).
[1376] Judgment, para. 986. *See also* paras. 984, 987. *Contra* Appeal, para. 378 (contesting participation in "preparation and planning" for the Deleig operation).

the police station; questioned detainees; decided whether detainees should be released; physically and verbally abused detainees in front of *Janjaweed* and GoS Forces; killed detainees in front of *Janjaweed* and GoS Forces; gave instructions to *Janjaweed* and GoS Forces to load detainees onto vehicles and supervised the process; supervised the transport of detainees to execution sites; and, at one site, ordered members of the *Janjaweed* and GoS Forces to take detainees off the vehicles and execute them.[1377]

406. Abd-Al-Rahman also argues that he "could not be responsible […] for the mistreatments committed at the Police station before his arrival".[1378] First, the Chamber found that he arrived at Deleig Police Station "some time before 13:00" (rather than "only at 1 pm", as submitted by Abd-Al-Rahman).[1379] Second, since Abd-Al-Rahman was convicted of the relevant crimes as a co-perpetrator, his responsibility did not depend on him being physically present when the crimes were committed—as correctly noted by the Chamber.[1380]

407. Abd-Al-Rahman argues that "there is no finding that he interacted with co-perpetrators or controlled the physical perpetrators", and "no clear finding on how [he] used the organisation/the system which was already in place and running up, in which he had no control."[1381] First, the Chamber made extensive findings on the interaction and coordination between the co-perpetrators, including Abd-Al-Rahman.[1382] Second, the concept of co-perpetration is based on "joint control over the crime".[1383] As correctly stated by the Chamber, "to hold an individual criminally responsible as a co-perpetrator under the notion of 'control over the crime', it must be shown that (i) there was a common plan between at least two persons, and (ii) the contribution of the co-perpetrators was essential."[1384] It does not require showing that Abd-Al-Rahman "controlled the physical perpetrators" or that he "used" or "controlled" some "organisation" or "system", as he suggests.[1385] Third, to any extent Abd-Al-Rahman is attempting to argue that he was powerless during the Deleig operation, this is contradicted by the Chamber's findings—in particular, that he led the contingent of *Janjaweed* and GoS Forces

[1377] Judgment, para. 986.
[1378] Appeal, para. 382.
[1379] Judgment, para. 604.
[1380] Judgment, paras. 797 (citing *Bemba et al.* TJ, para. 69 (referring to *Lubanga* AJ, paras. 458, 460, 465-466)). *See also below* para. 431 (Ground 74).
[1381] Appeal, para. 382.
[1382] *See above* paras. 399-401.
[1383] *See* Judgment, para. 793 (citing *Bemba et al.* TJ, para. 62; *Lubanga* AJ, para. 922).
[1384] Judgment, para. 794.
[1385] Appeal, para. 382. Such factors may be relevant to criminal responsibility as an indirect perpetrator or indirect co-perpetrator under article 25(3)(a) of the Statute, however neither of these modes of liability were alleged in this case. *See e.g. Ongwen* AJ, paras. 627-628, 630, 637-638.

that entered Deleig, and commanded the *Janjaweed* at the Deleig Police Station that day.[1386]

408. Abd-Al-Rahman appears to argue further that the Chamber wrongly found that his role in recruiting members of the *Janjaweed*, and distributing matériel and weapons to them, was in furtherance of the implementation of the Deleig Common Plan.[1387] As correctly found by the Chamber, Abd-Al-Rahman's participation in these preparatory acts "was key in defining the contours of both [the Mukjar and Deleig] plans and in securing human and material resources to ensure their implementation."[1388] Abd-Al-Rahman fails to show that this finding was unreasonable. P-0905 did not testify that the weapons "were distributed to fight the rebels of Abdel Wahid, not civilians".[1389] Rather, he stated that the "[REDACTED]".[1390]

409. Abd-Al-Rahman also argues that his "contribution to the methodical preparation, planning and coordination in furtherance of the Deleig Common Plan were not established beyond reasonable doubt, considering the several flawed factual findings made as a result of the wrong analysis of the evidence."[1391] He argues that the Chamber failed to "clarify his specific place, authority and role" in implementing the Deleig Common Plan, and to "establish that [he] acted with a shared common awareness or intent to contribute to the common plan".[1392] Abd-Al-Rahman fails to demonstrate that any of these factual findings were unreasonable.[1393] Further, as noted above, the Chamber clearly articulated his role and based its conclusion regarding the shared common awareness between Abd-Al-Rahman and his co-perpetrators on extensive factual findings.[1394] Abd-Al-Rahman fails to show that the Chamber's conclusion or the underlying factual findings were unreasonable.

### VIII.B. The Chamber properly assessed crimes against children at Mukjar Police Station (Ground 72)

410. Abd-Al-Rahman shows no error in the Chamber's findings that children were

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[1386] Judgment, paras. 589, 607.
[1387] Appeal, para. 380 (referring to Judgment, para. 984: Abd-Al-Rahman "oversaw the recruitment of members of the *Janjaweed* and the distribution of matériel to them" and "coordinated the distribution of weapons to the *Janjaweed* at the Garsila SAF base").
[1388] Judgment, para. 987. The Appeals Chamber has found that conduct forming part of the essential contribution can be carried out not only at the execution stage of the crime, but also at its planning and preparation stage. *See* *Ntaganda* AJ, paras. 1066, 1041; *Lubanga* AJ, para. 469.
[1389] *Contra* Appeal, para. 380 (citing T-088-Conf, pp. 7, 9).
[1390] T-088-Conf, p. 7:14-25 (emphasis added). *See also* pp. 8:8-23, 10:3-11:9. He further stated that [REDACTED] was "[REDACTED]": T-088-Conf, p. 9:4-21.
[1391] Appeal, para. 381. *See also* para. 278 (where Abd-Al-Rahman submits he did not take any action in the preparation and planning of the Deleig Common Plan).
[1392] Appeal, para. 381 (referring to Judgment, paras. 975, 976, 981).
[1393] *See below* paras. 419-454 (Grounds 74-75). The Prosecution notes that not all of the alleged "flawed findings" listed in paragraph 381 of the Appeal Brief are in fact argued in Grounds 74-75.
[1394] *See above* paras. 399-401.

sometimes arrested at checkpoints outside Mukjar, and detained at Mukjar Police Station.[1395] The Chamber did not consider the evidence piecemeal, or make contradictory findings. Rather, it carefully reviewed and weighed the evidence of witnesses including P-0905, P-0129, and P-0984.[1396] Abd-Al-Rahman's three criticisms of the Judgment are baseless, repeating his trial arguments.[1397] In any event, even if children had not been detained at Mukjar Police Station, this would not have materially affected either the Chamber's finding that an attack was directed against the civilian population,[1398] nor that a significant number of persons were victimised.[1399]

411. First, Abd-Al-Rahman's complaint that the Judgment uses "vague and imprecise" language to describe the detainees ("boys", "young men", "children") shows no error.[1400] These terms simply reflected the cited evidence, recognising the age range of male detainees and the terms variously used to describe them.[1401] They evoke no inconsistency or ambiguity.

412. Second, Abd-Al-Rahman complains that the Chamber's findings were based only on the evidence of three witnesses—showing no error[1402]—and asserts that they are "uncorroborated" and led to "contradictory findings".[1403] He also claims that there was no foundation for the Chamber's specific observation later in the Judgment that "boys as young as 9 or 10 years old were detained at Mukjar Police Station".[1404] Abd-Al-Rahman merely disagrees with the Chamber's assessment but does not show that it was unreasonable. In particular:

- P-0905 saw "children" detained at Mukjar Police Station.[1405] Separately, in another passage of his evidence, he stated that "a *sheikh* and some young boys aged 8-11 were driven to a different location and executed."[1406] While the Chamber did not rely on P-0905's evidence

[1395] *Contra* Appeal, paras. 384-391. *See* Judgment, paras. 484, 491, 506.
[1396] *Contra* Appeal, paras. 389-390. *See e.g.* Judgment, paras. 484, 491, 494, 506.
[1397] *See e.g.* Appeal, para. 385. *Compare* Defence Final Brief, para. 468.
[1398] *Contra* Appeal, para. 391 (citing Judgment, para. 822: finding that, in light of "all the circumstances described above as a whole, and bearing in mind the explicit goal of the State policy […], […] the attack was directed against a civilian population").
[1399] *Contra* Appeal, para. 391 (citing Sentencing Judgment, para. 147: "the significant number of victims, identified in the Trial Judgment, is a common aggravating factor for all the operations").
[1400] *Contra* Appeal, para. 386.
[1401] *See e.g.* Judgment, paras. 484 (fn. 1512: using the term "young men" based on the evidence of the witnesses referred to therein), 491 (fn. 1537: using the term "children" based on P-0984's evidence that he saw 13- or 14-year-olds arrested at checkpoints).
[1402] *Contra* Appeal, para. 387 (claiming that "[n]ine other Prosecution witnesses were detained or present at the Mukjar Police Station and never testified to the presence of children"). *But see below* fn. 1416. Furthermore, concerning the detention of children at checkpoints, while the Chamber relied primarily on the evidence of P-0984, it also noted the evidence of P-0922, P-0129, P-0028, and P-0892 concerning the searching of "young men": *see* Judgment, paras. 484 (fn. 1512), 491 (fn. 1537).
[1403] Appeal, para. 388.
[1404] Appeal, para. 387 (citing Judgment, paras. 822, 879: cross-referring to paras. 506, 524).
[1405] Judgment, para. 506 (fn. 1600: citing T-088-Conf, p. 69).
[1406] *See e.g.* Witness Annex, para. 339 (fn. 1276: citing T-086-Conf, pp. 28-31).

concerning this later event,[1407] it was not unreasonable or "incoherent" for it to accept P-0905's *separate evidence* of the presence of children at the police station.[1408]

- P-0129 also saw "children" detained at Mukjar Police Station,[1409] and saw Abd-Al-Rahman hit and severely injure a boy of "about 9 or 10 years old who was sitting next to *Umdah* Yahya Ahmad Zarruq."[1410] While the Chamber recognised some "inconsistencies in the detailed account given by P-0129 […] relating to Mukjar police station", it concluded that his evidence was "credible and reliable" concerning the incident in which Abd-Al-Rahman "beat[] the detainees and made threats".[1411]
- P-0984 stated that "children" were "arrested and detained" at checkpoints.[1412] In another passage of his evidence, as recalled by the Chamber, he said that a "13 year old boy was arrested" when *Janjaweed* and GoS Forces "conducted house to house searches and arrested people in their homes, the market and other places".[1413] Since this was a different incident, no inconsistency arises from P-0984's evidence that the boy was released.[1414]

413. Third, Abd-Al-Rahman shows no error in the Chamber's careful consideration of the potential significance of the fact that other witnesses at Mukjar Police Station did not recall seeing children.[1415] The Chamber reasonably explained why this did not undermine the evidence of the presence of children given the factual circumstances.[1416] Even if the Chamber only mentioned P-0129 expressly, its approach was relevant to all the witnesses concerned.

### VIII.C. The Chamber properly assessed P-0919's evidence about mistreatment at Mukjar Police Station (Ground 73)

414. Abd-Al-Rahman shows no error in the Chamber's reliance on P-0919's evidence about mistreatment of detainees at Mukjar Police Station, including "burning them, shaving their

[1407] *See* Witness Annex, paras. 340-342 (emphasising that there was no "indication that P-0905 intentionally tried to mislead or lie to the Chamber").
[1408] *Contra* Appeal, para. 388. Abd-Al-Rahman incorrectly characterises this as "the same evidence".
[1409] Judgment, para. 506.
[1410] Judgment, para. 524.
[1411] *Contra* Appeal, para. 388. *See* Witness Annex, paras. 93-94 (*especially* fn. 319: citing *inter alia* DAR-OTP-0223-0157-R02, paras. 53, 57 (the evidence that Abd-Al-Rahman hit a 9- or 10-year-old boy, cited by the Chamber at paragraph 524 (fn. 1683) of the Judgment).
[1412] Judgment, para. 491 (fn. 1537: citing T-066, p. 66).
[1413] Judgment, para. 494 (*especially* fn. 1551: citing T-066, p. 68).
[1414] *Contra* Appeal, para. 388.
[1415] *Contra* Appeal, para. 389.
[1416] *See* Judgment, para. 506 (fn. 1600: noting that the detention cells were "crowded" and that witnesses such as P-0919 observed "events from a different vantage point" such that it is "plausible" witnesses such as P-0919 "did not see any children").

heads and severing their ears".[1417] Having carefully considered this evidence, including Abd-Al-Rahman's specific objections, the Chamber reasonably determined that "P-0919's detailed evidence in relation to the events during his detention [is] credible and reliable."[1418] Abd-Al-Rahman merely disagrees with the Chamber's assessment in three respects, showing no error.

415. First, Abd-Al-Rahman shows no error by repeating his unsuccessful trial argument concerning the absence of direct corroboration of P-0919's evidence on this issue, notwithstanding his claim that other witnesses were "detained at the same moment at the same place".[1419] The Chamber expressly considered this argument, but reasonably rejected it because "the conditions of detention were very poor and overcrowded so that witnesses would have varying vantage points viewing events and therefore have differing recollections."[1420] Abd-Al-Rahman's reiteration of his view that other witnesses would have mentioned "novel, traumatic and unique incidents" is misplaced since the Chamber did not accept the premise that all witnesses had the same opportunity to observe such events.[1421]

416. Second, Abd-Al-Rahman disputes the plausibility of P-0919's evidence. For example, he repeats his unsuccessful claim that detainees—including P-0919 himself—could not have been burned with a hot iron because there was no source of electrical power in the cells. However, the Chamber expressly accepted P-0919's evidence of a generator located nearby.[1422] Abd-Al-Rahman's repeated reference to the absence of electric light in the cell does not contradict the reasonable possibility that there was nevertheless a means of obtaining electricity if required.[1423] Nor was there any requirement to show a particular link between the direct physical perpetrators of this incident and Abd-Al-Rahman.[1424] Abd-Al-Rahman's subjective view of the "credibility" of the claims that three detainees would have their ears severed or their

[1417] *Contra* Appeal, paras. 392-401. *See* Judgment, para. 873 (cross-referring to paragraphs 527, 530, 542). *See further* paras. 527 (recalling P-0919's evidence that he was "hit on the head with a stick" and "burned with an iron by members of the CRF", and that other detainees were interrogated and also "burned with an iron", relying on the evidence at fns. 1699-1701: citing T-060, pp. 23-24, 30-31; T-061, pp. 19-20; DAR-OTP-0217-0444; DAR-REG-0001-0012; DAR-OTP-0217-0445; DAR-OTP-0217-0446), 530 (recalling P-0919's evidence that "*Janjaweed* shaved the heads and severed the ears of some detainees with a knife", while Abd-Al-Rahman "was standing near and watching", relying on the evidence at fns. 1704-1707: citing T-060, pp. 18, 20-21, 26, 29). *See also* Appeal, para. 394. The Chamber did not rely on P-0919's evidence at paragraph 542 of the Judgment, which related to Abd-Al-Rahman hitting "several detainees with his axe as they were exiting the cell".
[1418] Witness Annex, paras. 388-390.
[1419] *Contra* Appeal, paras. 393, 399-400. *See* Defence Final Brief, para. 508. Repetition of trial submissions concerning the assessment of evidence are insufficient on appeal if they merely advance a different interpretation to that taken by the Chamber: *see Bemba et al.* AJ, para. 111; *Lubanga* AJ, para. 33.
[1420] Witness Annex, para. 389.
[1421] *Contra* Appeal, para. 399.
[1422] Witness Annex, para. 389.
[1423] *Contra* Appeal, para. 396.
[1424] *Contra* Appeal, para. 396. *See also above* para. 407.

heads shaved is immaterial.[1425]

417. Third, Abd-Al-Rahman incorrectly claims that the Chamber was required to analyse whether the shaving of detainees' heads *itself* met the severity threshold required to convict him of torture under counts 12-13.[1426] However, since this act formed part of a broader course of conduct, no such analysis was required.

418. Finally, and in any event, Abd-Al-Rahman incorrectly asserts that his convictions under counts 12-13 (torture as a crime against humanity and as a war crime), and 16 (outrages upon personal dignity) are "based almost entirely" on P-0919's evidence.[1427] To the contrary, his convictions under counts 12-13 were based on the Chamber's broader findings concerning the verbal and physical abuse of "at least 100 predominantly Fur men and boys" at Mukjar Police Station, "over the course of at least two days", which in addition to the incidents described by P-0919 included "beating the detainees using sticks and whips" and holding them in "inhumane" detention conditions resulting in the deaths of at least three men.[1428] His conviction under count 16 was based on a similar breadth of conduct.[1429]

## VIII.D. The Chamber properly assessed Abd-Al-Rahman's role in the Deleig operation (Ground 74)

419. Abd-Al-Rahman shows no error in the Chamber's factual findings concerning his role in the commission of crimes in the Deleig operation.[1430] He fails to show that any of the Chamber's findings were unreasonable nor does he demonstrate that the Chamber failed to properly apply the burden or standard of proof,[1431] on which the Chamber correctly directed itself.[1432] He merely disagrees with the findings and repeats many of the same arguments already rejected by the Chamber at trial. Further, many of the findings Abd-Al-Rahman challenges do not relate to facts that were indispensable for entering a conviction.[1433] Indeed, to affect his convictions, many findings would need to be overturned. Falling short of this, he fails to demonstrate that these alleged errors had any material impact on his convictions.[1434]

### *VIII.D.1. Abd-Al-Rahman inaccurately blames Bakhit, Hamdi and Hassaballah*

420. Abd-Al-Rahman submits that the Deleig operation "fell under the overall authority of

[1425] *Contra* Appeal, paras. 397-398.
[1426] *Contra* Appeal, para. 398.
[1427] *Contra* Appeal, para. 401.
[1428] *See* Judgment, para. 873.
[1429] *See* Judgment, paras. 902-905.
[1430] *Contra* Appeal, paras. 402, 404, 425.
[1431] *Contra* Appeal, para. 404. *See below* paras. 424-447.
[1432] *See* Judgment, paras. 166-168.
[1433] *See* Judgment, para. 167. *See below* paras. 424, 434-435, 439-440, 442-443, 447.
[1434] *Contra* Appeal, para. 425.

Major Bakhit",[1435] while also repeatedly submitting that that Hamdi "was in charge of the whole Deleig Operation".[1436] Neither submission is accurate.

421. First, the Chamber did not find that the Deleig operation fell under the overall authority of Major Bakhit, but only that the town of Deleig came under his authority since it was within the area of operations of the Garsila SAF Battalion which he commanded.[1437]

422. Second, the Chamber did not find that Hamdi was in charge of the *whole* Deleig operation.[1438] Rather, Hamdi "was present and issued instructions relating to the search and arrest operation in Deleig" and thereafter he continued to Kailek.[1439] It was Abd-Al-Rahman who "led the contingent" of *Janjaweed* and GoS Forces that entered Deleig.[1440] The witnesses cited by Abd-Al-Rahman (P-0883 and P-0905) do not support that Hamdi was in charge of the whole operation.[1441] In fact, P-0883 explicitly rejected the Defence proposition that the Deleig operation was "under the direct command and supervision of the SAF".[1442] P-0907 also rejected the suggestion that Hamdi was in charge, stating that it was Ali Kushayb.[1443]

423. Abd-Al-Rahman also submits that the Deleig operation was "implemented by" Hamdi and Hassaballah.[1444] While they participated in the operation, they did so *together with* Abd-Al-Rahman and the other co-perpetrators.[1445] As already emphasised, the participation of other persons, such as co-perpetrators, does not derogate from Abd-Al-Rahman's responsibility.[1446] As the Chamber correctly stated, "it need not find that the Accused had the sole responsibility or was mainly responsible for these crimes".[1447] Rather, "the decisive consideration was whether, without the Accused's contribution, the crime(s) could not have been committed or would have been committed in a significantly different way."[1448] Abd-Al-Rahman shows no error in the Chamber's approach or its findings.

### *VIII.D.2. Abd-Al-Rahman participated in the search and arrest operation in Deleig*

424. Abd-Al-Rahman argues that "the evidence relied upon in the Trial Judgment does not

[1435] Appeal, para. 403.
[1436] Appeal, paras. 408. *See also* paras. 418, 423, 425. *See also above* paras. 314, 316 (second bullet point).
[1437] Judgment, para. 293. *See also* T-072, p. 58:12-16 (P-0883); T-090-Conf, pp. 6:18-7:1, 80:4-19 (P-0935).
[1438] *Contra* Appeal, paras. 408, 425 (citing Judgment, paras. 588, 594, 978).
[1439] Judgment, para. 594.
[1440] Judgment, para. 589.
[1441] Appeal, para. 423 (citing T-074, pp. 49-50 (concerning Hamdi's role in the search and arrest part of the operation); T-086-Conf, pp. 39-40; T-088-Conf, p. 81 ([REDACTED]).
[1442] *See* T-074, p. 65:9-12.
[1443] T-096, p. 47:3-9.
[1444] Appeal, para. 403.
[1445] *Contra* Appeal, para. 403 (citing only the Defence Final Brief). *See* Judgment, paras. 972-989.
[1446] *See above* paras. 314-316, 394. *See also* Judgment, para. 607 (fn. 1991).
[1447] Judgment, para. 989.
[1448] Judgment, para. 989.

give any role to [him] in the preparation and conduct of the arrests and detention in Deleig".[1449] In particular, he argues that the Chamber erred in law or fact when it found that Abd-Al-Rahman participated in the arrest of *Umdah* Kindiri in Deleig.[1450]

425. Abd-Al-Rahman shows no error in the Chamber's findings on the arrest of *Umdah* Kindiri. These findings were based on the *direct* evidence of P-0955, who [REDACTED].[1451] The Chamber reasonably found that P-0955's identification of Abd-Al-Rahman "whilst grounded on indirect evidence, [was] credible and reliable."[1452] This evidence comprised not only the identification of Abd-Al-Rahman at the time of the arrest by [REDACTED], but also his identification after a later incident by a second person (who knew him as having a house in Garsila and pharmacy near Garsila market), as well as P-0955's later sighting of him in front of the pharmacy.[1453]

426. The fact that the evidence pointed to Abd-Al-Rahman's direct participation in this one arrest, and not in all or many of the other arrests, is insignificant. It has no logical impact on the Chamber's finding regarding his participation in the arrest of *Umdah* Kindiri.[1454] Nor does it matter that P-0883, P-0905 and P-0935 did not provide evidence regarding Abd-Al-Rahman's presence during the search and arrest operation in Deleig—not least since P-0883 and P-0935 were not in Deleig that day, and P-0905 [REDACTED].[1455] The Chamber's finding that Hamdi "was present and issued instructions relating to the search and arrest operation in Deleig" does not contradict or undermine its finding that Abd-Al-Rahman participated in the arrest of *Umdah* Kindiri.[1456] Rather, these two findings are compatible.

### *VIII.D.3. Abd-Al-Rahman commanded the Janjaweed at Deleig Police Station*

427. Abd-Al-Rahman argues that the Chamber's finding that "the Accused commanded the *Janjaweed* at Deleig Police Station that day" (i.e. 5 March 2004) "was impossible to ascertain beyond reasonable doubt" on the evidence.[1457] His arguments lack merit, and fail to show that the Chamber's finding was unreasonable.

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[1449] *Contra* Appeal, para. 405.
[1450] *Contra* Appeal, para. 405 (citing Judgment, paras. 602, 908; Witness Annex, paras. 459-460).
[1451] *Contra* Appeal, para. 405. *See* Judgment, para. 602 (fns. 1966-1975: citing DAR-OTP-0220-0620-R02 at 0628, paras. 11, 14, 32, 34-37, 40-43; T-064, p. 9).
[1452] Witness Annex, para. 462.
[1453] Witness Annex, paras. 460-461. *Contra* Appeal, para. 405.
[1454] *Contra* Appeal, para. 405.
[1455] *Contra* Appeal, para. 405. *See* Witness Annex, paras. 298, 451, 453; T-086-Conf, pp. 43:1-45:7.
[1456] Judgment, para. 594. *Contra* Appeal, para. 405. For clarity, the Prosecution notes that the evidence of [REDACTED] and P-0907 supported the assertion that Hamdi was present at the Deleig police station that day, but not specifically that he was in charge of the search and arrest operation. *See* [REDACTED]; T-096, p. 35:12-23 (P-0907 merely heard later that Hamdi had been present at the police station).
[1457] Appeal, paras. 407, 410 (citing Judgment, paras. 607, 979).

428. Abd-Al-Rahman argues, based on allegations concerning P-0905's credibility and reliability, that "[n]o reasonable trier of fact would have made any findings beyond reasonable doubt [on Abd-Al-Rahman's acts and conduct] based on P-0905's uncorroborated evidence."[1458] First, P-0905 was just one of the witnesses relied on by the Chamber in relation to Abd-Al-Rahman's acts and conduct at the police station.[1459]

429. Second, Abd-Al-Rahman fails to show that the Chamber's reliance on P-0905 was unreasonable.[1460] In particular, he shows no error in the Chamber accepting P-0905's evidence that "Ali Kushayb" was present in Deleig, despite his screening note recording that he "believed" he saw him there.[1461] As the Chamber generally recalled, screening notes were compiled by investigators after initial telephone contact with witnesses, and were not shown to or signed by the witness, nor read back to them until a later stage.[1462] The Chamber "rigorously scrutinised" any discrepancies between any screening note and the witness's evidence, and identified a number of common explanations.[1463] It concluded that "the consistency of such explanations reflect the reality of the process involved in obtaining evidence of witnesses to events such as these" and therefore, as a general rule, it did not consider such discrepancies a bar to assessing the witness as credible.[1464] In relation to P-0905 specifically, the Chamber was satisfied that "when challenged by the Defence on this point in court, the witness was resolute that he was with the Accused in Deleig."[1465] It found his account of the events in and around Deleig "compelling in its detail" and his evidence that Abd-Al-Rahman was present at the executions at Fere (outside Deleig) supported by surrounding circumstances.[1466]

430. Abd-Al-Rahman also notes that the Chamber found that "[Hamdi]'s role does not derogate from the authority of the Accused" without furthering developing how it reached that finding or its implications.[1467] This is incorrect. As already noted, the Chamber *did* further develop this finding and its implications in the section on the Deleig Common Plan, which

[1458] Appeal, para. 406.
[1459] *See e.g.* Judgment, paras. 606-607, 610-612, 617-618, 620, 621 (referring to P-0994, P-0736, P-0718, P-0907). *Contra* Appeal, para. 406.
[1460] *Contra* Appeal, para. 406. [REDACTED].
[1461] Appeal, para. 406.
[1462] Judgment, para. 223.
[1463] Judgment, para. 225 (including the length of time which had elapsed since the events, the unexpected and traumatic nature of the events, and, in relation to screening notes in particular, the fact that witnesses were unexpectedly contacted and could not see or verify the identity of the person questioning them, and connection and interpretation issues).
[1464] Judgment, para. 226.
[1465] Witness Annex, para. 343.
[1466] Witness Annex, paras. 346-347.
[1467] Appeal, para. 407 (referring to Judgment, para. 607 (fn. 1991)).

contains its comprehensive findings on the roles of the co-perpetrators.[1468]

431. Abd-Al-Rahman further argues that the Chamber made no finding on how Abd-Al-Rahman commanded the *Janjaweed* before he arrived at Deleig Police Station sometime before 13h00, or after he left.[1469] But it was not necessary for Abd-Al-Rahman to have been physically present at the Deleig Police Station throughout the day to be in command of the *Janjaweed* there. The Chamber stated that it based its finding that Abd-Al-Rahman led the contingent of *Janjaweed* and GoS Forces that entered Deleig that day (which was linked to its finding that he commanded the *Janjaweed* at the Deleig Police Station)[1470] on "an assessment of the acts and conduct of the Accused in Deleig and the fact that the Accused himself stated that he was the commander of the *Janjaweed*."[1471] Abd-Al-Rahman fails to show that this was unreasonable.

432. Finally, Abd-Al-Rahman argues that the Chamber "failed to discuss the contradictory evidence as to who were the persons in control of the detainees at the Deleig Police Station, before and during [his] alleged presence".[1472] But the Chamber did not need to make specific findings on such evidence. First, while P-0584 stated that a person named Sadig Derwa was leader of the *Janjaweed*,[1473] this evidence was ambiguous and of low probative value.[1474] Second, the evidence of P-0955 and P-0905 concerning whichever police officer was in charge of the Deleig Police Station at the time of the operation did not contradict the Chamber's finding on Abd-Al-Rahman's authority.[1475] Being the police officer ordinarily in charge of the police station is not the same as being the *Janjaweed* leader in charge of the Deleig operation. As correctly found by the Chamber—far from being in charge—the police in Deleig were powerless to stop the Deleig operation.[1476]

### *VIII.D.4. Abd-Al-Rahman mistreated detainees at Deleig Police Station*

433. Abd-Al-Rahman argues that the Chamber made "unclear and flawed" findings

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[1468] Judgment, paras. 959, 972-989 (*see esp.* para. 989).
[1469] Appeal, para. 408 (citing Judgment, para. 606).
[1470] *See* Judgment, para. 607 (fn. 1991: cross-referring to fn. 1912).
[1471] *See* Judgment, para. 589 (fn. 1912: cross-referring to paras. 586 (stating that he was the commander), 602 (participation in the arrest of *Umdah* Kindiri), 611-612 (killing Jenif and *Sheikh* Motor), 617-618 (ordering and supervising the loading of detainees onto vehicles, and telling Issa Harun to board a vehicle), 620 (instructing that the detainees be driven away), 624 (instructing that the detainees be unloaded at execution sites), 643 (agreeing to release a detainee)). *See also* para. 606 (fn. 1991).
[1472] Appeal, para. 409.
[1473] *Contra* Appeal, para. 409.
[1474] [REDACTED]. *See* [REDACTED]. Further, while the Chamber did not rely on his identification of Ali Kushayb outside the police station, P-0584 also stated that Ali Kushayb was "the commander of the militias", that [REDACTED], and that it was Ali Kushayb who ordered the loading of prisoners onto trucks. *See* T-092-Conf, pp. 15:10-18, 16:20-17:9, 60:12-16, 67:8-68:10, 73:14-15; Witness Annex, para. 131.
[1475] *Contra* Appeal, para. 409. P-0955 did not know Juma'a Hasan Fadhali before the events and only heard later that he was in charge of the Deleig police station. *See* T-064, pp. 12:23-13:6. [REDACTED]. *See* [REDACTED].
[1476] Judgment, para. 601.

regarding mistreatment of detainees at the Deleig Police Station.[1477]

434. First, the evidence of P-0905 and P-0907 regarding Abd-Al-Rahman's conduct outside the police station is consistent.[1478] The Chamber's finding that P-0905 "clearly observed events occurring both inside and outside Deleig Police Station, including the actions of, and statements made by, the Accused"[1479] does not mean that P-0905 witnessed *each and every act and statement* made by Abd-Al-Rahman. The fact that [REDACTED][1480] does not exclude that P-0907 (at the same or a different time) saw Abd-Al-Rahman stepping on the detainees and walking on their backs (including his own).[1481] These accounts are compatible and the Chamber did not need to make a specific finding reconciling them.[1482]

435. Second, it is immaterial and unsurprising that P-0905 and P-0973 did not specifically corroborate P-0994's evidence that he heard Abd-Al-Rahman tell *Umdah* Kindiri, "[t]his is your last day on earth, get ready for the *al-qiyamah* (the doomsday or judgment day)".[1483] There is no evidence that P-0905 or P-0973 were inside the police station when this interaction occurred.[1484] Nor did the Chamber find that P-0905 "was closely with [Abd-Al-Rahman] at all times".[1485] P-0973 was later held in an approximately 5 by 6 metre windowless cell inside the police station, so densely packed with detainees that some were lying on top of each other—conditions which could have impacted his ability to witness such an interaction.[1486] In any case, corroboration is not legally required for every factual finding.[1487]

436. Third, the Chamber's finding that Abd-Al-Rahman killed Jenif inside Deleig Police Station is not contradicted by P-0931's evidence.[1488] P-0931 merely stated that he *heard* that Jenif was killed in Deleig, he did not know how he was killed, and "[p]robably Hassaballah, along with his men, killed him".[1489] By contrast, P-0905 gave evidence that [REDACTED] Abd-Al-Rahman killing Jenif, in Hassaballah's presence.[1490] The Chamber did not need to explain why it relied on P-0905's [REDACTED] evidence over [REDACTED] P-0931. Nor

[1477] Appeal, para. 411.
[1478] *Contra* Appeal, para. 411.
[1479] Witness Annex, para. 343. *Contra* Appeal, para. 411.
[1480] T-086-Conf, p. 45:12-24.
[1481] *See* Judgment, para. 610 (citing T-094, pp. 34-35; T-095, p. 52; T-096, pp. 17, 22, 31-32).
[1482] *Contra* Appeal, para. 411.
[1483] *Contra* Appeal, para. 412 (citing Judgment, para. 636).
[1484] [REDACTED]. *See* [REDACTED]. [REDACTED]. *See* [REDACTED].
[1485] *Contra* Appeal, para. 412. *See above* para. 434.
[1486] Judgment, para. 635.
[1487] *See* Judgment, para. 179 (referring to ICC RPE, rule 63(4)).
[1488] *Contra* Appeal, para. 412 (citing Judgment, para. 611).
[1489] T-062, p. 51:7-20. The Defence also cites P-0994 ([REDACTED]) and P-0643 ([REDACTED]). *See* Appeal, para. 413 (fn. 1038: citing DAR-OTP-0222-0055-R01, paras. 69, 71; T-056-Conf, p. 88; T-058-Conf, p. 35).
[1490] Judgment, para. 611 (citing T-086-Conf, pp. 45-49).

does the absence of corroboration from P-0973 or P-0607 impact the Chamber's finding that Abd-Al-Rahman killed Jenif.[1491] There is no evidence that P-0973 was inside the police station when Jenif was killed,[1492] or that P-0607 ever was on that day.[1493]

437. Further, as reasonably found by the Chamber, the discrepancies between the evidence of P-0994 and P-0907 on the precise manner of Jenif's arrival at the police station did not impact P-0994's credibility and reliability.[1494] As it noted, "[g]iven that people remember traumatic events differently, it is unexceptional that witness accounts on the precise circumstances of Jenif's arrival differ somewhat."[1495] It was entirely reasonable for the Chamber to rely on P-0994's evidence that Jenif was present at the police station that day.[1496]

438. Fourth, Abd-Al-Rahman fails to show that the Chamber's finding that Abd-Al-Rahman killed *Sheikh* Motor outside Deleig Police Station was unreasonable.[1497] This finding was based on the direct evidence of P-0907,[1498] and corroborated by P-0584 (in relation to *Sheikh* Motor being struck, but not that the perpetrator was Abd-Al-Rahman).[1499] P-0907's evidence alone would have been sufficient to base this finding. Further, Abd-Al-Rahman fails to articulate how the absence of corroboration from P-0905, P-0994, P-0973, P-0607, P-0712 or P-0651 has any bearing on this finding.[1500] These witnesses did not provide "overwhelming evidence that no such event took place".[1501] There is no evidence that these witnesses were even present and able to observe the event when Abd-Al-Rahman killed *Sheikh* Motor.[1502]

439. Finally, Abd-Al-Rahman does not develop his argument that "there are no factual findings or evidence of any discriminatory language used by the Appellant in Deleig" affecting his convictions for counts 27-28, 31.[1503] This should be dismissed *in limine*.

#### *VIII.D.5. Detainees were loaded onto vehicles at Deleig Police Station*

440. Abd-Al-Rahman fails to show that the Chamber was unreasonable in finding that "at least four groups of detainees were transported from the police station over the course of the

[1491] *Contra* Appeal, para. 413.
[1492] [REDACTED], which occurred *after* Jenif was killed. *See* Judgment, paras. 611, 617; DAR-OTP-0220-0736-R01 at 0743, para. 34; T-086-Conf, p. 49:1-16.
[1493] Witness Annex, para. 779; DAR-OTP-0203-0164-R02 at 0178, 0180, paras. 51, 56.
[1494] *Contra* Appeal, para. 413. *See* Judgment, para. 611, fn. 2010; Witness Annex, para. 523.
[1495] Witness Annex, para. 356.
[1496] *See* Judgment, para. 611, fn. 2010.
[1497] *Contra* Appeal, para. 414.
[1498] Judgment, para. 612 (citing T-094, pp. 32, 38-39; T-096, pp. 11-12, 20, 22, 24, 25, 27, 29).
[1499] Judgment, para. 612 (fn. 2019); Witness Annex, para. 131.
[1500] *Contra* Appeal, para. 414.
[1501] *Contra* Appeal, para. 414.
[1502] P-0712, for example, was never at the police station that day: *see* Witness Annex, para. 187.
[1503] *Contra* Appeal, para. 415.

afternoon of 5 March 2004".[1504] The evidence relied on by the Chamber was not contradictory. P-0994 and P-0907 both saw four transports.[1505] P-0607 was released after observing three and P-0725 left the area after observing two.[1506] In any case, minor discrepancies between the witnesses' observations do not render the finding unreasonable.[1507]

441. Abd-Al-Rahman also fails to show that P-0607's evidence undermines the Chamber's finding that Abd-Al-Rahman was commanding the *Janjaweed* and oversaw the loading of vehicles.[1508] For a start, the Chamber did not find that Abd-Al-Rahman "started 'commanding' the *Janjaweed* around 1 p.m."—only that he arrived at Deleig Police Station some time before 13h00.[1509] Further, P-0607's estimation that the first loading occurred prior to "noon prayers" (which took place at 13h38)[1510] does not undermine the totality of the evidence underpinning the Chamber's finding that the loading began sometime between 16h00 and 17h00.[1511]

442. Abd-Al-Rahman also fails to show that the Chamber's finding that "not all detainees being held outside the police station were loaded onto vehicles" was unreasonable.[1512] It is clear, based on its holistic assessment of the evidence, that the Chamber considered the evidence of P-0651 and P-0973 to be more accurate on this discrete point.[1513] The Chamber did not need to give detailed reasoning on each and every factual finding, particularly on a relatively minor point such as this. Abd-Al-Rahman also fails to show that this alleged error had "a significant impact on the factual findings on the number of detainees sent to several execution sites and on the authority exercising control."[1514] The Chamber's finding that some detainees were released rather than loaded onto vehicles, if anything, *reduces* the number of detainees sent to execution sites. Moreover, Abd-Al-Rahman does not explain how this finding has anything to do with findings on "the authority exercising control".[1515]

443. Finally, Abd-Al-Rahman fails to show that the Chamber erred "in giving too much weight to the statements of P-0907 and P-0994 […] in its finding at paragraph 620 about a 'passcode-Garsila' allegedly used by [Abd-Al-Rahman]."[1516] Whilst the Chamber did not

[1504] Appeal, para. 416 (referring to Judgment, para. 619).
[1505] Judgment, para. 619 (fn. 2064); DAR-OTP-0222-0055-R01 at 0067, paras. 56-57; T-094-Conf, pp. 42-43.
[1506] Judgment, para. 619 (fn. 2064); DAR-OTP-0203-0164 at 0179, paras. 53-56 (P-0607); DAR-OTP-0210-0122 at 0131-0132, paras. 73, 75 (P-0725).
[1507] *See* *Bemba* CD, para. 55; *Gbagbo & Blé Goudé* NCTA Judge Herrera Carbuccia Dis. Op., para. 34.
[1508] Appeal, para. 416 (referring to Judgment, paras. 606, 617).
[1509] *Contra* Appeal, para. 416. *See* Judgment, para. 606.
[1510] Fifth Agreed Facts, p. 5, no. 35.
[1511] Judgment, para. 617.
[1512] *Contra* Appeal, para. 417.
[1513] Judgment, para. 619 (fn. 2067).
[1514] *Contra* Appeal, para. 417.
[1515] *Contra* Appeal, para. 417.
[1516] Appeal, para. 418 (referring to Judgment, para. 620).

explicitly find that Abd-Al-Rahman referred to Garsila as a "passcode",[1517] it was clearly of the view that Abd-Al-Rahman did not mean for detainees to be taken there. To the contrary, it found that he was part of a common plan with murder of these predominantly Fur men as its ultimate goal.[1518] This was not based on a single finding about a "passcode" but rather on a large body of evidence establishing the existence of the common plan.[1519] It is of no consequence that P-0905 did not give evidence about the use of a "passcode".[1520] Further, the Chamber made no finding and there is no evidence showing that Hamdi was in charge of the whole Deleig operation.[1521] Abd-Al-Rahman's contention that the detainees may have ultimately arrived at execution sites because Hamdi ordered their execution is speculative and baseless.[1522]

### *VIII.D.6. Abd-Al-Rahman participated in the murders at execution sites outside Deleig*

444. Abd-Al-Rahman argues that the Chamber erred in relying on P-0905 to find that the *Janjaweed* and SAF participated in the killings near Fere on 5 March 2004, and that Abd-Al-Rahman had a role in those executions.[1523] He fails to show that the Chamber's reliance on P-0905 was unreasonable.[1524] In addition, the Chamber correctly noted that P-0905's account of the events in Deleig was compelling in its detail, and his evidence that Abd-Al-Rahman was present at the Fere executions was supported by the surrounding circumstances—further demonstrating that it was reasonable to rely on P-0905's evidence.[1525]

445. Abd-Al-Rahman observes that there are no findings in the Judgment on his acts and conduct in relation the executions near Koska, and submits that his "involvement in these executions is simply not established".[1526] Similarly, he argues that the Judgment makes no findings on the presence or role played by Abd-Al-Rahman in the execution of the group of community leaders near Fere on 7 March 2004.[1527] He submits that no reasonable trier of fact could convict Abd-Al-Rahman for these executions "in absence of information as to who executed them and why and/or upon whose order they did so".[1528]

446. But Abd-Al-Rahman ignores that he was convicted for these crimes of murder in Deleig

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[1517] *See* Judgment, para. 620 (noting that P-0994 "surmised that the reference to Garsila was a 'passcode'").
[1518] Judgment, paras. 972-973.
[1519] *See* Judgment, paras. 972-981.
[1520] *Contra* Appeal, para. 418.
[1521] *Contra* Appeal, para. 418. *See above* para. 422.
[1522] *Contra* Appeal, para. 418.
[1523] Appeal, para. 419 (referring to Judgment, para. 624-628, 921; Witness Annex, paras. 345, 347). The Prosecution notes that paragraphs 626-628 relate to the killings near Koska, not Fere.
[1524] [REDACTED].
[1525] Witness Annex paras. 346-347.
[1526] Appeal, para. 420 (referring to Judgment, paras. 626-634).
[1527] Appeal, para. 421 (referring to Judgment, paras. 641-646).
[1528] Appeal, para. 422.

as a co-perpetrator.[1529] The Chamber found that the murders at those locations were committed in the implementation of the Deleig Common Plan, of which Abd-Al-Rahman was part and to which he made an essential contribution.[1530] To establish his criminal responsibility under this mode of liability, there was no need for Abd-Al-Rahman to have been physically present at those execution locations.[1531] Nor was it necessary to prove the identities of the physical perpetrators, the reason/s why they carried out the execution, or the identity of any specific person who may have issued an order for the execution.[1532] It is immaterial that the Chamber did not specifically find that Abd-Al-Rahman's reference to Nyala was a "passcode".[1533]

447. Lastly, Abd-Al-Rahman fails to properly develop his argument that P-0907's evidence "cannot be considered as aligned with P-0994's evidence".[1534] P-0907's account that he saw "the *umdahs*" on the back of the same vehicle that had transported detainees to execution sites two days before clearly corroborates P-0994's evidence regarding this same group.[1535]

### *VIII.D.7. Abd-Al-Rahman's attempt to raise a new alibi should be rejected*

448. Abd-Al-Rahman appears to argue that—rather than [REDACTED] (his intended alibi during trial)[1536]—he was actually in *Garsila* with a high-level SAF delegation during the Deleig operation.[1537] This submission is baseless and lacks credibility. First, P-0883's evidence does not support this proposition. To the contrary, [REDACTED].[1538] Second, given the Defence's indication that it had intended to raise an alibi for the crimes committed in the Deleig operation, the Chamber already considered "whether there was any evidence which could undermine the accounts of the witnesses who identified the Accused as not only being present, but taking part in the events which form the factual basis for the charges". It found that there was "no such credible evidence".[1539] Third, pursuant to rule 79(1)(a), the Defence was required to give notice of its intention to raise the existence of an alibi, specifying, *inter alia*, the *place or places where the accused claims to have been present* at the time of the alleged crime. Notice must be given with sufficient time to enable the Prosecution to prepare adequately and to respond. Abd-Al-

[1529] Judgment, para. 997.
[1530] Judgment, paras. 958-997.
[1531] *See also above* para. 406.
[1532] *Contra* Appeal, para. 422.
[1533] *Contra* Appeal, para. 421 (referring to Judgment, para. 643).
[1534] *Contra* Appeal, para. 421.
[1535] Judgment, paras. 643-644.
[1536] *See* Defence Alibi Submission, para. 15.
[1537] Appeal, para. 424. The Prosecution notes that the Chamber did not find that this delegation was "coordinating" the Deleig operation from Garsila, as suggested by Abd-Al-Rahman, but only that the delegation "was sent by command in Khartoum to monitor combat operations in the Wadi Salih area". *See* Judgment, para. 583.
[1538] *Contra* Appeal, paras. 423-424. *See* Judgment, para. 588 (fn. 1908); T-071-Conf, pp. 65:4-67:21.
[1539] Judgment, para. 997.

Rahman's attempt to raise this new alibi on appeal, having given no notice in this respect during the trial, lacks all credibility.[1540] Fourth, the new proposed alibi is not even consistent with the alibi that he had intended to raise during the trial, further underscoring its lack of credibility.[1541]

### VIII.E. The Chamber properly assessed Abd-Al-Rahman's role in Garsila (Ground 75)

449. Abd-Al-Rahman fails to show that the Chamber erred in finding that he: (i) acted in the Garsila arrest operations prior to the Deleig operation;[1542] and (ii) provided intelligence at the Garsila SAF base, leading to many arrests, in which he participated.[1543] Moreover, he fails to show that the alleged errors materially affected his convictions.

450. First, the Chamber's findings on Abd-Al-Rahman's role in relation to arrests in Garsila were reasonable.[1544] P-0883's evidence—even taken alone—was a sufficient basis for these findings. In addition, the Chamber reasonably relied on the evidence of P-0994 and P-0935. The reference to P-0994's statement in footnote 1887 of the Judgment is not erroneous.[1545] This paragraph was merely cited by the Chamber as support for the fact that *Sheikh* Abdulaziz was *sheikh* of the western neighbourhood.[1546] Further, P-0935's evidence on arrests in Garsila *was* related to events before the Deleig operation.[1547] Although P-0935 did speak about arrests occurring after the Deleig operation, he also gave evidence about arrests occurring in relation to the military operations at Silik and Sindu—which occurred *before* Deleig.[1548]

451. Second, the evidence of P-0883 was sufficient to support the Chamber's finding that Abd-Al-Rahman brought *Sheikh* Abdulaziz and Hassan Adam Musa to the Garsila SAF base.[1549] The Chamber did not erroneously rely on item DAR-OTP-0219-5253-R01 (a

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[1540] *See e.g.* *Ngirabatware* AJ, paras. 193-196; *Ndahimana* AJ, paras. 106-115; *Kanyarukiga* AJ, paras. 92-102; *Munyakazi* AJ, paras. 13-19; *Kalimanzira* AJ, paras. 54-58. The Prosecution also queries whether the filing of an alibi notice would even be procedurally possible at this late stage.
[1541] Defence Alibi Submission, para. 15 ([REDACTED]). *See also* Defence Final Brief, paras. 65, 785.
[1542] Appeal, paras. 426 (citing Judgment, paras. 580-581, 586, 975), 428.
[1543] Appeal, paras. 426 (citing Judgment, paras. 580-581(a-d), 586), 428. Abd-Al-Rahman also refers to the Chamber's finding that "[t]he arrested persons were detained with the approval of the SAF Garsila Base Commander, Major Bakhit, and under the oversight of Lt. Hamdi", however he does not identify any error in this finding in the submissions that follow.
[1544] Judgment, paras. 580-581.
[1545] *Contra* Appeal, para. 429.
[1546] Judgment, para. 581 (fn. 1887: citing DAR-OTP-0222-0055-R01 at 0072, para. 80).
[1547] *Contra* Appeal, para. 429 (fns. 1069, 1071: referring to Judgment, para. 580 (fns. 1872-1873: citing T-090, pp. 41, 43)).
[1548] *See especially* T-090, pp. 41:6-18, 43:1-16. *See also* pp. 31:8-10, 37:5-9 (for evidence that the Deleig operation occurred after Silik and Sindu).
[1549] *Contra* Appeal, paras. 429-432. *See* Judgment, para. 581(d) (fn. 1887: citing T-071, pp. 52-53; T-072, p. 51, *referring* to DAR-OTP-0221-0408 (Translation DAR-0TP-0219-5247-R01); DAR-OTP-0221-0411-R01 (Translation DAR-OTP-0219-5253-R01); T-074, pp. 13-15, 17). The Prosecution notes that item DAR-OTP-0219-7071-R01 does not form part of the handwritten notes of P-0883, but is rather [REDACTED]. *Contra* Appeal, para. 429 and fn. 1072 (incorrectly noted as DAR-OTP-0129-7071-R01).

handwritten note made by P-0883).[1550] Clearly, it did not consider this note in isolation, but together with P-0883's testimony concerning the persons named in the note.[1551] The handwritten note merely complemented P-0883's testimony.[1552] Abd-Al-Rahman observes that there is no discussion in the Judgment regarding a purported difference between P-0883's in-court testimony and his written statement.[1553] However, P-0883's statement was not submitted into evidence.[1554] Nor did the Defence put this purported difference to P-0883 during cross-examination or make this argument in its final submissions.[1555] Having not done so, Abd-Al-Rahman cannot now complain that the Chamber did not consider this point.

452. Abd-Al-Rahman shows no error in the Chamber's findings regarding these arrests.[1556] He argues, based on P-0883's evidence, that the arrest of Hassan Adam Musa and *Sheikh* Abdulaziz was a "private issue" unrelated to the charges and unconnected to the armed conflict, the attack against the civilian population, and the Deleig Common Plan. He apparently argues that the Chamber (wrongly) inferred that Abd-Al-Rahman was motivated to arrest these two men due to discrimination against Fur men perceived as rebels.[1557]

453. These arguments are misconceived. His role in bringing these two men to the Garsila SAF base was patently relevant to the charges. As the Chamber found, these men were later detained and killed in Deleig, and Abd-Al-Rahman's role in their arrests formed part of his essential contribution to the crimes committed pursuant to the Deleig Common Plan.[1558] There is no legal requirement for every factual finding to be connected to the contextual elements of the crimes, as Abd-Al-Rahman suggests.[1559] Further, he fails to identify where or how the Chamber is said to have "inferred" discriminatory intent in relation to these arrests—it did not.[1560] Nor did the Chamber describe these arrests "as a strictly private matter".[1561] To any

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[1550] *Contra* Appeal, para. 431.
[1551] *See* Judgment, para. 501(d) (fn. 1887: citing P-0883's testimony together with his handwritten notes).
[1552] *See* T-071, pp. 52-53.
[1553] Appeal, para. 432.
[1554] *See* DAR-OTP-0218-0059-R01. P-0883 was called *viva voce*, and only certain extracts of his statement were submitted into the record. *See* T-071-Conf, p. 6:16-25; DAR-OTP-00000064; DAR-OTP-00000065 ([REDACTED]).
[1555] *See* T-071; T-072; T-073; T-074. *See also* Defence Final Brief, paras. 145-149, 458-460, 569-574, 629-630; T-161, pp. 86:19-87:20.
[1556] *Contra* Appeal, para. 433.
[1557] Appeal, para. 433.
[1558] Judgment, para. 986(iii).
[1559] *See* Appeal, para. 433.
[1560] *See e.g.* Judgment, paras. 956, 996 (finding Abd-Al-Rahman's discriminatory intent for the crime of persecution in Mukjar and Deleig).
[1561] *Contra* Appeal, para. 433 (citing Judgment, para. 581(d)). The Chamber merely noted that: "According to P-0883, it was rumoured that Hassan Adam Musa had complained to *Sheikh* Abdulaziz that 'Ali Kushayb' was having an affair with his wife, and *Sheikh* Abdulaziz then proposed to the *umdah* of Garsila, *Umdah* Eid, that 'Ali Kushayb' be forced to swear that he would stop going to Hassan Adam Musa's house".

extent Abd-Al-Rahman is attempting to argue that any personal motive he may have had concerning these two victims nullifies his discriminatory intent, this is wrong in law.[1562] In any case, he fails to properly articulate how this would be relevant to the errors in this ground.

454. Finally, Abd-Al-Rahman fails to demonstrate any material impact on his convictions. He merely asserts, without further explanation, that the alleged errors impacted the Chamber's findings on his "position of authority and participation in the Deleig Common Plan, which was relied upon in his conviction for all counts (position of authority)" and the Deleig counts (Counts 22-31)."[1563] However, the Chamber's findings on these two aspects of the case were based on a large number of specific findings.[1564] Abd-Al-Rahman fails to show how the absence of these few, relatively minor, findings would have changed the Chamber's overall conclusions.

## VIII.F. The Chamber properly assessed crimes against boys in Deleig (Ground 76)

455. In asserting that 'boys' were targeted in the Deleig operation, Abd-Al-Rahman mischaracterises the Judgment and fails to show any error in the Chamber's findings regarding the victimisation of some boys.[1565]

### *VIII.F.1. The Chamber did not find that boys were specifically targeted in Deleig*

456. The Chamber did not find that the *Janjaweed* and GoS Forces "particularly and intentionally" targeted boys in Deleig.[1566] Rather, it found that the *Janjaweed* and GoS Forces "targeted predominantly Fur men of fighting age".[1567] The Chamber's finding at paragraph 593 (that the "*Janjaweed* and GoS Forces […] conducted house to house searches for weapons and for Fur men and boys who were not from Deleig, and who they suspected of being, or supporting, rebels")[1568] must be read together with its overall finding on targeting.[1569] Seen properly in context, the use of the phrase "men and boys" in this sentence means nothing more than "males". The sentence should not be understood—as Abd-Al-Rahman suggests[1570]—as a finding that boys were specifically targeted as such.

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[1562] *Kvočka et al.* AJ, paras. 106, 367; *Jelisić* AJ, para. 49; *Tadić* AJ, para. 269; *Krnojelac* AJ, paras. 102, 186; *Case 001* AJ, para. 240; *Popović et al.* AJ, para. 733.
[1563] Appeal, para. 434.
[1564] *See* Judgment, paras. 660-680 (findings on Abd-Al-Rahman's position of authority and influence); 972-984, 986-989 (findings on the Deleig Common Plan). The findings in paragraphs 580 or 581 are cited only three times in each section: paras. 665 (fn. 2220), 668 (fn. 2231), 673 (fn. 2250), and 975 (fn. 2914), 978 (fn. 2924), 986 (fn. 2948).
[1565] Appeal, para. 435 (referring to Judgment, paras. 593, 594, 596, 597, 598, 600, 604, 618, 822, 836, 874, 876, 881, 906, 910, 975, 978, 995), 441.
[1566] *Contra* Appeal, para. 437. *See also* paras. 435-436, 441. *See also below* paras. 462-482 (Part K).
[1567] Judgment, para. 936. The Prosecution understands that the Chamber's use of the word "men" in this context to mean "males".
[1568] Appeal, para. 436.
[1569] Judgment, para. 936.
[1570] Appeal, para. 436.

457. In arguing that the Chamber erred in the finding (which it did not make) that boys were specifically targeted, Abd-Al-Rahman points to evidence that adult males were targeted by the Deleig operation, and to the Chamber's findings that some students and some children were spared arrest or released.[1571] These findings and this evidence are, in fact, merely consistent with the finding that the targeting was of "predominantly Fur men of fighting age".[1572]

458. Abd-Al-Rahman also interprets the Chamber's finding that the "*Janjaweed* and GoS Forces arrested predominantly Fur men and boys on the street, outside mosques, and in houses" as a finding that boys were specifically targeted.[1573] While his interpretation is not supported by the plain text of the Judgment, the finding itself was supported by evidence.[1574] The Chamber found that some boys were arrested: P-0718 (about 12 years old) was arrested and struck by the *Janjaweed*,[1575] and three boys between 12-14 years old were arrested and killed.[1576] The Chamber's findings that a few boys *were* ultimately arrested, mistreated and/or killed do not contradict or undermine its finding on targeting—these findings are compatible with each other.

459. Similarly, Abd-Al-Rahman points to the Chamber's findings that certain boys were victimised during the Deleig operation to argue that these examples are too few to support that boys were specifically targeted.[1577] Again, the Chamber did not find that boys were specifically targeted, and therefore did not rely on these examples to support any such finding. Whether the perpetrators could have reasonably mistaken these boys as adults is therefore also irrelevant.[1578]

460. Abd-Al-Rahman further argues that the Chamber "based some of its findings on a misinterpretation of testimonies regarding the age of the 'children' and 'boys' arrested", and asserts that it wrongly referred to P-0712 and P-0607 as children.[1579] First, the Chamber reasonably found that the account of P-0907 (that *Umdah* Adam Ismail negotiated with the *Janjaweed* for the release of some children), was consistent with the account given to P-0712 by his classmate (that the *Janjaweed* ordered *Umdah* Adam Ismail to identify whether his classmate was from Deleig and that, once this was confirmed by a Fur police officer, he was

[1571] Appeal, paras. 436, 439. *See* Judgment, paras. 600, 613, 614. The Prosecution notes that P-0712 did not testify that "those targeted during the Deleig Operation were any males between the ages of 20 and 60, i.e. adults". *Contra* Appeal, para. 436 (citing DAR-OTP-0209-1884-R04, paras. 32-38). This information is however found in the HRW report at DAR-OTP-0003-0099 at 0123-0124. *See* Appeal, para. 436 (fn. 1087).
[1572] Judgment, para. 936. *See also below* paras. 466-468.
[1573] Appeal, para. 436. *See* Judgment, para. 596.
[1574] *Contra* Appeal, para. 436.
[1575] Judgment, paras. 596, 599. For P-0718's age, *see* DAR-OTP-0209-2004-R02 at 2007, para. 14; DAR-OTP-0220-4792 at 4792, para. 3.
[1576] Judgment, paras. 618, 634 (Abu Bakar Suleiman Abakar, no more than 12-13 years old; son of Issa Harun, about 13-14 years old; Zakaria Abdelmawla Abakar, no more than 12-13 years old).
[1577] Appeal, paras. 437-438.
[1578] *Contra* Appeal, para. 437.
[1579] *Contra* Appeal, para. 440.

released).[1580] Abd-Al-Rahman's argument that the Chamber may have wrongly assumed that P-0712's classmate was a child due to "cultural or linguistic differences" is speculative and baseless.[1581] Second, the Chamber made no finding regarding the ages of P-0712 or P-0607 (nor of P-0712's classmate).[1582] Further, the accounts of P-0907 and P-0712 are consistent irrespective of how old P-0712 and his classmate were, in particular, since both say that *Umdah* Adam Ismail was present and involved in releasing detainees outside the police station.[1583]

### *VIII.F.2. The Chamber did not err in finding that some children were loaded onto vehicles*

461. Abd-Al-Rahman shows no error in the Chamber's finding that "[c]hildren as young as 13 or 14 years old were among those loaded onto the vehicles",[1584] which was based on P-0907's evidence.[1585] As the Chamber noted, there is no legal requirement for corroboration.[1586] The Chamber reasonably relied on P-0907's identification of these children, whom he recognised.[1587] It also reasonably relied on P-0907's evidence that the three children were loaded onto the vehicles, and his evidence that certain children from his family were either left behind (and not arrested) or were released when they arrived at the police station—his evidence on these points was not contradictory.[1588] This was not contradicted by P-0994's evidence that he released [REDACTED].[1589] Nor was it inconsistent with the perpetrators targeting "predominantly Fur men of fighting age".[1590]

## IX. The Chamber properly approached the crime of persecution (Part K)

462. Abd-Al-Rahman shows no error in the Chamber's findings on persecution. The Chamber properly applied the concept of "intersectionality" in addressing each of the three charges (counts 11, 21 and 31), and did not err in referring to the Mukjar Locality Building under count 21. Abd-Al-Rahman shows nothing incorrect or unreasonable in the Chamber's

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[1580] Judgment, para. 614.
[1581] Appeal, para. 440.
[1582] *Contra* Appeal, para. 440.
[1583] *Contra* Appeal, para. 440.
[1584] *Contra* Appeal, para. 437.
[1585] Judgment, para. 618 (citing T-095, pp. 8-9; T-096-Conf, p. 38). Abd-Al-Rahman submits that the Chamber also relied on a list of victims (DAR-OTP-00000431) for this finding. *See* Appeal, para. 438. This list was not cited by the Chamber at fn. 2055, but was cited for a related finding at fns. 2122 and 2123. Three children were identified among those executed: the son of Issa Harun, Abu Bakar Suleiman Abakar and Zakaria Abdelmawla Abakar. *See above* fn. 1576.
[1586] Judgment, para. 179 (referring to ICC RPE, rule 63(4)).
[1587] Judgment, para. 618 (fn. 2055: citing T-095, pp. 8:22-9:15). *Contra* Appeal, para. 438. [REDACTED]. [REDACTED].
[1588] *See* T-094, pp. 31:18-22, 33:3-7; T-096, p 15:13-25. *Contra* Appeal, para. 438. Contrary to Abd-Al-Rahman's submission, P-0907 did not state, as a general proposition, that children were not led to the police station or were released when they got there.
[1589] *Contra* Appeal, para. 438 (citing DAR-OTP-0222-0055-R01 at 0066, para. 53).
[1590] Judgment, para. 936.

careful analysis. Grounds 77-79 should be dismissed in their entirety.[1591]

463. The Chamber convicted Abd-Al-Rahman for ordering the persecution charged in count 11,[1592] and for perpetrating (both directly and jointly) the persecution charged in counts 21 and 31.[1593] Its findings were legally correct and factually reasonable. Under count 11, it found that the *Janjaweed* persecuted, on political and ethnic grounds, the predominantly Fur population of Kodoom, Bindisi, and surrounding areas, perceived as belonging to, or being associated with, or supporting the rebel armed groups.[1594] Under counts 21 and 31, it found that the *Janjaweed* and GoS Forces persecuted, on political, ethnic, and gender grounds, predominantly Fur men in Mukjar and Deleig, and surrounding areas, perceived as belonging to, or being associated with, or supporting rebel armed groups.[1595]

### IX.A. The Chamber properly approached the concept of "intersectionality" in assessing the persecution charges (Grounds 77-78)

464. While Abd-Al-Rahman suggests that Grounds 77-78 address the Chamber's "[a]pplication of the theory of 'intersectionality' in the assessment of the charges of persecution", this does not accurately describe either the Judgment or Abd-Al-Rahman's own claims on appeal.[1596] The Judgment does not refer to "intersectionality" in the abstract, but noted correctly that "[a] victim can suffer a higher risk of victimisation because of the *intersection* of different factors of discrimination."[1597] Intersectionality is not required by any article 5 crime, but is simply the analytical perspective informing the allegation that the *Janjaweed* and GoS Forces, as well as Abd-Al-Rahman himself, targeted victims based on multiple intersecting impermissible grounds, rather than only one.[1598] This is what the Prosecution pleaded,[1599] which was reasonably found by the Chamber to have been established

[1591] *Contra* Appeal, paras. 442-459.
[1592] *See* Judgment, paras. 999, 1012.
[1593] *See* Judgment, paras. 942, 954-956, 958, 997.
[1594] Judgment, paras. 928, 939, 941.
[1595] Judgment, paras. 929, 939, 941.
[1596] *Contra* Appeal, sub-title preceding para. 442.
[1597] Judgment, para. 787 (emphasis supplied, citing *Ntaganda* Reparations Order, para. 60).
[1598] *See e.g.* *OPT* AO, Declaration of Judge Charlesworth, paras. 4-5; *Gonzales Lluy v. Ecuador*, Concurring Opinion of Judge Poisot, paras. 11-12. *See also* *OPT* AO, para. 190; OTP *Policy on Gender-Based Crimes*, paras. 65, 75.
[1599] *See e.g.* T-160, pp. 95:19-96:1 ("[I]ntersectionality is a tool to analyse the factual reality in a given context to fully capture and describe forms of discrimination which would otherwise be lost or factually not captured. The notion […] simply recognises the multiplicity of grounds as a matter of evidence, not as a matter of law. These multiple intersecting discriminatory grounds […] best describe and fully capture the reality of the […] discriminatory targeting"). *See also* Prosecution Final Brief, para. 213 ("Although a single ground may suffice in principle, the multiple intersecting discriminatory grounds alleged best describe and fully capture all aspects of the discriminatory targeting in this case. This intersectional discrimination cumulatively borne by the victims created a unique and distinct burden on them—not limited to or captured by any one prohibited ground. The victims were particularly vulnerable for all these cumulative reasons"). *See also* Confirmation Decision, para. 80.

on the evidence beyond reasonable doubt.[1600]

465. Notwithstanding the title of Grounds 77-78, Abd-Al-Rahman does not challenge the correctness *in principle* of the Chamber's finding that victims could be targeted on multiple intersecting grounds.[1601] Rather, he only raises narrower claims arguing that the Chamber erred in assessing those grounds *individually*, namely regarding: (i) supposed age-based targeting; (ii) political targeting, and; (iii) gender targeting.[1602] His claims show no error, and should be dismissed. In any event, Abd-Al-Rahman does not challenge the Chamber's reasonable finding that victims were also targeted on *ethnic* grounds.[1603] There is no basis to reverse in their entirety his convictions under counts 11, 21, and 31.[1604]

### *IX.A.1. The Chamber did not find that victims were targeted on age grounds*

466. Abd-Al-Rahman incorrectly claims that the Chamber erred by failing to give regulation 55(2) notice "of its intention to vary the legal characterisation of the crime of persecution under Counts 21 and 31 by modifying the intersectional factors for discrimination to include a fourth factor of age."[1605] This must be rejected since the underlying premise is wrong—the Chamber did *not* "add[] a fourth factor for discrimination based on age".[1606] Not only is this expressly contradicted by the plain finding of targeting based (only) on "*political affiliation, ethnic identity and perceived gender role*",[1607] but Abd-Al-Rahman misapprehends the significance of the Chamber's passing reference that the targeted victims were "of fighting age".[1608]

467. First, the Chamber's observation was simply an accurate reflection of the evidence. Notably, the Chamber found that, in the Mukjar and Deleig operations, the *Janjaweed* and GoS Forces did not arrest "women", "children" "some boys", or "elderly men".[1609]

468. Second, the Chamber did not refer to the age of the victims to establish an additional ground for targeting them, but rather to rebut Abd-Al-Rahman's evidentiary claim that "men" were *not* targeted at all.[1610] By referring to "*fighting* age" men, the Chamber emphasised that

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[1600] *See* Judgment, para. 936.
[1601] *See e.g.* Appeal, paras. 442-454.
[1602] *See* Appeal, para. 454.
[1603] *See e.g.* Judgment, paras. 928-929, 933, 936.
[1604] *Contra* Appeal, para. 454.
[1605] *Contra* Appeal, paras. 445-446.
[1606] *Contra* Appeal, para. 442.
[1607] Judgment, para. 936 (emphasis added). *See also* para. 929.
[1608] Judgment, para. 936.
[1609] Judgment, para. 934. *See further* paras. 484, 491, 494, 600. *But see also* Prosecution Final Brief, para. 240.
[1610] *See* Judgment, para. 936 (fn. 2826: referring, *inter alia*, to Defence Final Brief, paras. 647-654, 664, 673-675, in which Abd-Al-Rahman submitted that "the OTP does not include the criteria of the age group of the perceived rebels as an[] identifying factor for the targeted group being potential rebels who may have been presumably of fighting age" and that, "[i] the present case, violence was directed against men identified as rebels in Mukjar and

the perpetrators targeted what they saw as an essential male characteristic, as understood within the context of society in Darfur.[1611] Furthermore, this socially constructed link between 'maleness' and (perceived) ability to 'fight' was expressly charged under counts 21 and 31,[1612] and therefore Abd-Al-Rahman was fully informed of this allegation.[1613] The perpetrators' decision to spare males who were perceived as *unable* to "fight", as well as women, was consistent with the targeting of fighting age men based on their "perceived gender role". Abd-Al-Rahman shows nothing unreasonable in this conclusion. Indeed, he admits that, "within Sudan's patriarchal society at the time, […] men assumed roles in security and combat".[1614]

469. Furthermore, Abd-Al-Rahman can show no prejudice because his conviction for persecution under counts 21 and 31 was *not* characterised by the Chamber as including age discrimination.[1615] Rather, he was convicted as charged, with the same legal characterisation. Abd-Al-Rahman is mistaken in his apparent view that regulation 55(2) entitled him to notice of the Chamber's *factual* basis for rejecting his unconvincing interpretation of the evidence.

### *IX.A.2. The Chamber correctly applied the law regarding persecution on political grounds*

470. Abd-Al-Rahman incorrectly claims that the political discrimination charged in the case—targeting those "perceived as belonging to, or being associated with, or supporting the rebel armed groups"—was "legally flawed".[1616] In his view, in confirming the charges, the Pre-Trial Chamber "erred in finding that this ground, so defined, could constitute a discriminating factor […] in the particular circumstances of this case."[1617] Recalling the Chamber's finding that the perpetrators considered "non-Arab" tribes to be rebels and thus "the enemy", Abd-Al-Rahman asserts that this "subjective belief excluded any possible discriminatory intent".[1618]

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Deleig without a gender-based motive" because "[t]he target was identified as potential rebels, not as males fulfilling a socially constructed role").

[1611] *See e.g.* T-160, p. 96:13-18 ("In addition to the sex-specific pattern of targeting in Mukjar and Deleig, the Defence have acknowledged that in [the] patriarchal context of Sudanese society, male equal[s] rebel and rebel equal[s] male. This establishes that the perception of fighting-age Fur males as rebels is gender based and their targeting is discriminatory"). *See also* Statute, art. 7(3) ("For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, *within the context of society*", emphasis added).

[1612] *See* Confirmation Decision, Disposition ("CONFIRMS the charges against Mr Abd-Al-Rahman as follows"), paras. 80, 116 (referring for the purpose of both counts 21 and 31 to "the socially-constructed gender role presuming males to be fighters").

[1613] While regulation 55 is inapposite since the Chamber did not legally recharacterise the conduct charged under counts 21 and 31 at all, in any event no greater notice could have been given than that already contained in the charges in this case.

[1614] *See e.g.* Defence Final Brief, para. 670. *See also* para. 674 ("It is a fact that the male gender is the one who is predominantly involved in warfare as was the case in Darfur in 2003-2004 and remains the case today. This perception is a realistic understanding of power dynamics of the Sudanese patriarchal society").

[1615] *Contra* Appeal, para. 446.

[1616] *Contra* Appeal, para. 447. *See also* para. 442.

[1617] Appeal, para. 447.

[1618] Appeal, para. 448. *See e.g.* GCIV, art. 3.

This is based on his *a priori* assumption that a perpetrator's belief that they are "fighting the identified enemy"—in this case, the "rebels"—is incompatible with "any possible discriminatory intent".[1619] This is incorrect, for several reasons.

471. First, Abd-Al-Rahman's resort to the IHL framework is misguided and incorrect. He ignores that the victims in this case were civilians and/or fighters *hors de combat*, and therefore specifically protected from adverse distinction (discrimination) of all kinds, irrespective of the applicable legal regime.[1620] He also wrongly assumes that IHL displaces the application of international human rights law when, to the contrary, many provisions of these regimes are complementary.[1621] As such, the victims were protected from inhumane treatment and adverse distinction at all material times under both IHL and international human rights law.[1622] This remained true even if (for the sake of argument) those persons were "suspected of being rebels".[1623] Abd-Al-Rahman's sweeping suggestion that "[b]eing associated with the rebels […] is a ground for losing one's protection in time of armed conflict" is manifestly incorrect.[1624]

472. Second, Abd-Al-Rahman offers no logical basis or legal authority to support his self-serving assumption that a victim's perceived affiliation to an "enemy" *necessarily* precludes discriminatory intent.[1625] The contrary is true. Victims of persecution may often be considered the perpetrators' enemy—especially where the crime occurs in the context of an armed conflict. Yet this cannot excuse or negate conduct which does in fact: (i) severely deprive of fundamental rights contrary to international law; (ii) one or more members of "any identifiable group or collectivity"; (iii) on impermissible grounds under international law.[1626] If those elements are met, establishing the crime of persecution, the perpetrator's broader motive or reason for

[1619] Appeal, para. 448. *See also* para. 443.
[1620] *Contra* Appeal, paras. 449-451.
[1621] *See e.g.* *Nuclear Weapons* AO, para. 25; *Wall* AO, para. 106; *OPT* AO, para. 99; HRC General Comment 36, para. 64; HRC General Comment 35, para. 64; 2025 Commentary to GCIV, Introduction, mns. 34, 125-126, 129.
[1622] *See e.g.* 2025 Commentary to GCIV, Introduction, mns. 41-50; 2025 Commentary to GCIV, Common Article 3, mns. 624-644, 651-656; Murray, pp. 211-214 (mns, 9.01-9.10).
[1623] *Cf.* Appeal, para. 450. *But see* Judgment, paras. 935-936 (noting that predominantly Fur men of fighting age were targeted based on the perception that they were affiliated with the rebels, and emphasising that this conduct was not justified by the fact that some members of the Fur tribe were recruited by the rebels). *See also* para. 932 (rejecting any justification for the relevant conduct on the basis of a declaration of a state of emergency under Sudanese law); Prosecution Final Brief, paras. 239-240.
[1624] *Contra* Appeal, para. 451.
[1625] *Contra* Appeal, paras. 448, 450.
[1626] In the particular context of persecution carried out in armed conflict, international practice affirms the importance of a careful factual assessment of relevant conduct, within its proper context, to ascertain its true nature and the corresponding legal framework(s): *see e.g.* *Brđanin* AJ, paras. 166-167. *See also* Pocar, p. 362 ("acts in furtherance of persecutory policies may not be cloaked by seemingly lawful measures in order to avoid individual criminal responsibility").

carrying out such conduct is legally immaterial.[1627] Specifically, it is not exonerating that a perpetrator may intentionally carry out persecution to advance their position in a conflict.

473. This holds no less true where victims are targeted on political grounds.[1628] Abd-Al-Rahman shows no error in the Chamber's recognition that "'[p]olitical' grounds include targeting by reason of political affiliations, whether actual or only perceived by the perpetrator".[1629] Contrary to his assertion that "[b]eing associated with the rebels is not a political affiliation", it is well established that, "[w]ith regard to political grounds specifically, the perpetrator may define the targeted victims based on a subjective assessment as to what group or groups pose a political threat or danger", and this "may include various categories of persons" and be based on negative as well as positive perceived characteristics.[1630]

474. Third, Abd-Al-Rahman's obscure reference to so-called "top-up incrimination" is legally irrelevant.[1631] It is well established that particular conduct may satisfy the elements of multiple crimes under the Statute. The legal implications of this concurrent criminal responsibility are primarily addressed by means of: (a) the law on permissible cumulation of convictions, and; (b) the law on sentencing. The Judgment reflects precisely this approach, and is unchallenged by Abd-Al-Rahman in this respect.[1632] Finally, there is no proper legal basis for his undeveloped assertion that persecution convictions "cannot" be entered in addition to the convictions for the underlying acts themselves, contradicting decades of international practice.

### *IX.A.3. The Chamber reasonably found that the victims were targeted on gender grounds*

475. Abd-Al-Rahman incorrectly claims that the Chamber's finding concerning the "perceived gender roles" of Fur men "was founded on no evidence whatsoever".[1633] First, this claim is incorrect because—as Abd-Al-Rahman himself acknowledges—the Chamber expressly found that he gave instructions "to kill or wipe all men, but no women," and this was based *inter alia* on the evidence of P-0905, which he superficially dismisses as "unreliable".[1634] Yet there is no requirement that this "credible" evidence must be corroborated, and the Chamber

[1627] *See e.g. Đorđević* AJ, para. 887 ("personal motive does not preclude a perpetrator from also having the requisite specific intent").
[1628] *Contra* Appeal, para. 451.
[1629] Judgment, para. 787 (quoting *Ongwen* TJ, para. 2737). *See also* Appeal, para. 444.
[1630] *Case 001* AJ, para. 272 (cited in *Ongwen* TJ, para. 2737, fn. 7194). *Contra* Appeal, para. 451.
[1631] *Contra* Appeal, para. 452. *See also* para. 450.
[1632] *See e.g.* Judgment, paras. 840-842, 930.
[1633] *Contra* Appeal, para. 453.
[1634] Appeal, para. 453. *See e.g.* Judgment, paras. 361 (fns. 866, 868: citing T-085-Conf, pp. 54-55, 60-61), 365 (fn. 887: citing T-085-Conf, p. 53; T-097-Conf, p. 16), 467 (fn. 1431: citing T-085-Conf, p. 54), 468, 934.

reasonably relied upon it.[1635] Nor was P-0905's evidence the sole evidence supporting the required inference that predominantly Fur men were targeted on gender grounds. To the contrary, the Chamber emphasised the pattern of criminality which at Mukjar and Deleig primarily targeted men.[1636] This was wholly reasonable.

476. Second, Abd-Al-Rahman shows no error concerning the evidence that "could" in principle "support a finding" that the perpetrator targeted victims on impermissible grounds.[1637] In particular, he wrongly assumes it is necessary to show that victims were treated less advantageously than other persons.[1638] All that is legally required is that victims are *targeted for severe deprivations of fundamental rights on impermissible grounds*.[1639] While a pattern of differential targeting may be evidentially relevant, there is no legal duty—and, indeed, it would be improper—to require evidence of a hierarchy of discrimination or to rank the ostensible harm of different crimes or rights violations against one another.

477. Third, Abd-Al-Rahman shows no error by complaining that "no expert sociological evidence" was introduced concerning "socially constructed gender role perception at the material time in Sudan".[1640] There is no legal requirement for expert evidence to prove a charge of persecution, and in any event the evidence adduced by the Prosecution did establish the facts material to the charges.[1641] Abd-Al-Rahman was at all times free to call such evidence himself, if he considered it pertinent to his defence. His strategic choice not to do so is implicit in his acknowledgement that the perception of men as predominantly involved in combat was "a realistic understanding of power dynamics of the Sudanese patriarchal society".[1642]

### IX.B. The Chamber did not convict Abd-Al-Rahman of events at the Mukjar Locality Building (Ground 79)

478. While the Chamber referred to events at the Mukjar Locality Building in convicting

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[1635] *Contra* Appeal, para. 453. On corroboration, *see e.g.* ICC RPE, rule 63(4); Judgment, paras. 179-181; *Bemba et al.* AJ, para. 1084; *Ntaganda* AJ, para. 672. On P-0905's credibility, *see e.g.* Witness Annex, para. 336. [REDACTED].
[1636] *See* Judgment, para. 934 (cross-referring to paragraphs 484, 486, 491, 494-502, 506, 530, 551-567, 591-602, 604-610, 622-634, 642-646, 873, 875, 878-879, 902-903-904, 909, 920-921, 923-927).
[1637] *Contra* Appeal, para. 453.
[1638] *See e.g.* Appeal, para. 453 ("even if the Appellant said that women should not be killed and should be spared, this was understood by the *Janjaweed* as meaning that women could be tortured and raped. Women are not less discriminated against and/or persecuted by being tortured and raped than men by being killed").
[1639] *See e.g.* Elements of Crimes, art. 7(1)(h), element 3.
[1640] *Contra* Appeal, para. 453.
[1641] Furthermore, P-1042—a joint expert—did refer for example to "militarized and patriarchal values promoted by successive governments, especially exacerbated in times of war, [which] pushed men into identities constructed around power and violence": *see* DAR-OTP-0220-1623 at 1641-1642, para. 52, 1680-1681, paras. 151-152; T-027, p:9-16; T-028 pp. 11:2-16, 17:7-15.
[1642] *See e.g.* Defence Final Brief, para. 674. *See also* para. 670.

Abd-Al-Rahman of persecution in the Mukjar operation,[1643] those events formed no part of his conviction under *any* charge, including count 21. Since Abd-Al-Rahman fails to show that his conviction exceeded the scope of the charges,[1644] Ground 79 must be dismissed.

479. Under count 21, Abd-Al-Rahman was charged with persecution occurring "*by way of the criminal acts listed in Counts 12-20*, in Mukjar and surrounding areas, in late February/early March 2004".[1645] Counts 12-16 charge Abd-Al-Rahman with torture, other inhumane acts, cruel treatment, and outrages upon personal dignity committed against "*Fur men in Mukjar Police Station* between late February and early March 2004", and counts 17-20 charge Abd-Al-Rahman with murder and attempted murder in *locations "outside of Mukjar* between late February and early March 2004".[1646] Accordingly, notwithstanding the broad geographic scope of count 21, it does not encompass the victimisation at Mukjar Locality Building.

480. Nothing in the Judgment is inconsistent with this analysis, or otherwise suggests that Abd-Al-Rahman was convicted of the crimes at Mukjar Locality Building. When determining that victims in Mukjar had been severely deprived of fundamental rights, the Chamber relied solely on "its findings on the facts and the law" concerning counts 12-13 and 16-20.[1647] None of these findings relied on criminal acts at the Locality Building.[1648] Likewise, when assessing Abd-Al-Rahman's criminal responsibility, the Chamber did not refer to the Locality Building.[1649] Yet this did not mean that the events at Mukjar Locality Building were irrelevant. To the contrary, when considering the gender component of the persecution—which it ultimately affirmed[1650]—the Chamber nonetheless acknowledged that persons detained at the Locality Building were "predominantly Fur persons".[1651]

481. Abd-Al-Rahman shows no error in the Chamber's analysis. Nothing in the convictions entered by the Chamber exceeded the plain terms of the charges.[1652] Nor does Abd-Al-Rahman

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[1643] *See* Judgment, paras. 497-501, 934. *See also* Appeal, para. 455. Mukjar Locality Building was used to detain some of the arrested persons, primarily women and children who were predominantly Fur, rather than Mukjar Police Station, which was used to detain arrested men: paras. 497-498. The predominantly Fur women and children detained at the Locality Building were held in inadequate conditions, and were beaten and verbally abused by their captors, but were not registered or questioned: paras. 500-501.
[1644] *Contra* Appeal, paras. 455-460.
[1645] *See* Judgment, para. 17 (count 21, emphasis added).
[1646] *See* Judgment, para. 17 (counts 12-20, emphasis added).
[1647] Judgment, para. 931.
[1648] Concerning counts 12-13, *see* Judgment, paras. 871, 873, 875-879, 881. Concerning count 16, *see* Judgment, paras. 892, 902-905, 910-911. Concerning counts 17-20, *see* Judgment, paras. 915, 920, 923-926.
[1649] *See e.g.* Judgment, paras. 943 (Abd-Al-Rahman's personal conduct at Mukjar Police Station), 960-971 (the Mukjar Common Plan), 985 (Abd-Al-Rahman's essential contribution to the Mukjar Common Plan), 990-996 (Abd-Al-Rahman's intent in respect of the Mukjar Common Plan).
[1650] *See* Judgment, para. 936.
[1651] *See* Judgment, para. 934. *See also* para. 497 ("Generally, women and children").
[1652] *Contra* Appeal, paras. 457-458.

show anything unreasonable in the Chamber's approach to the events at Mukjar Locality Building, as a matter of evidence.[1653] The Chamber could reasonably conclude that the events at the Locality Building did not preclude its overall inference of persecution on gender grounds when considered within the broader context—in particular, the overwhelming and conspicuous commission of crimes against predominantly Fur men.[1654]

482. Since the Chamber did not convict Abd-Al-Rahman of the events at Mukjar Locality Building under count 21, the essential premise of Ground 79 is incorrect. Yet even if the Chamber had convicted him of the events at the Locality Building under count 21, and even if this was erroneous, the impact on Abd-Al-Rahman's conviction would still be minimal since this was just one of multiple locations where crimes were committed.[1655]

## CONCLUSION

483. For all the reasons above, Abd-Al-Rahman's convictions should be affirmed in their entirety, and his appeal should be dismissed.

**Nazhat Shameem Khan, Deputy Prosecutor**

Dated this 29th day of June 2026

At The Hague, the Netherlands

[1653] *Contra* Appeal, para. 459.

[1654] *See* Judgment, para. 934.

[1655] *Contra* Appeal, para. 460. Events relevant to Abd-Al-Rahman's criminal responsibility for the Mukjar Operation occurred not only at the Mukjar Locality Building, but also at other locations in and around Mukjar such as checkpoints, residents' homes, the market, the police station, and various execution sites outside Mukjar: *see e.g.* Judgment, paras. 480-496, 502-574.