

Sentencing Hearing
WITNESS: DAR-D31-P-0016

(Open Session)

ICC-02/05-01/20

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Sentencing Hearing - Courtroom 1
9 Tuesday, 18 November 2025
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: [9:36:17] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:36:52] Yes, good morning to all.
15 Yes, I think you'd better call the case again, please.
16 THE COURT OFFICER: [9:37:00] Good morning, Madam President, your Honours.
17 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus
18 Ali Muhammad Ali Abd-Al-Rahman, case reference ICC-02/05-01/20.
19 And for the record, we are in open session.
20 PRESIDING JUDGE KORNER: [9:37:16] Yes, thank you very much.
21 Appearances, please, from the Defence.
22 MR LAUCCI: [9:37:27] Good morning, Madam President, your Honours, dear
23 colleague. The Defence team is the same as yesterday, with the notable addition of
24 Madam Haneen Ghali.
25 PRESIDING JUDGE KORNER: [9:37:42] Thank you very much, Mr Laucci.

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1 Prosecution.

2 MR NICHOLLS: [9:37:44] Good morning, Madam President, good morning,
3 your Honours, good morning to everybody in the room. Same as yesterday.
4 Thank you.

5 PRESIDING JUDGE KORNER: [9:37:51] Thank you, Mr Nicholls.

6 And finally, the representatives of the victims.

7 MS VON WISTINGHAUSEN: [9:37:54] Yes, good morning, Madam President,
8 your Honours. Good morning to everyone in and around the courtroom.
9 The composition is the same with the valuable addition of a new case manager we
10 have in our team sitting here in the middle, his name is Mohammed Bitar.
11 Thank you.

12 PRESIDING JUDGE KORNER: [9:38:11] Thank you very much, Ms von
13 Wistinghausen.

14 Yes, Mr Laucci, I gather that the witness is ready, but it's a 63(3) one, so you need to
15 do a summary.

16 MR LAUCCI: [9:38:25] Precisely, Madam President.

17 So, Witness D-16 has given a statement to the Defence setting out his opinion on
18 the relevant provisions of Sudanese law contained in documents and statutes,
19 including the 1998 Constitution, the 1991 Criminal Act and the 1986 Armed Forces
20 Act on the crimes that he finds equivalent to the counts for which

21 Mr Abd-Al-Rahman has been convicted, as well as the sentences applicable to those
22 crimes in Sudanese law.

23 Witness D-16 also clarifies that some sentences, such as the death penalty and
24 imprisonment, cannot be imposed on convicted persons who reach the age of 70 years,
25 except in the exceptional case of the offence of *hiraba*.

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1 I thank you.

2 PRESIDING JUDGE KORNER: [9:39:45] Yes, thank you very much, Mr Laucci.

3 Very succinct, if I may say so.

4 Yes, can we have the witness brought to the room, please, where he is.

5 (The witness enters the video-link location)

6 MR LAUCCI: [9:40:15] And I would like, with your permission, to start in closed
7 session.

8 PRESIDING JUDGE KORNER: [9:40:21] Yes. Although, is that so that he can give
9 some details of who he is?

10 MR LAUCCI: [9:40:28] I will ask him to identify himself, you know, the usual
11 procedure.

12 PRESIDING JUDGE KORNER: [9:40:32] Well, I was going to say, I mean, he has
13 actually appeared before but --

14 MR LAUCCI: [9:40:36] Ah, so if you don't need that ...

15 PRESIDING JUDGE KORNER: [9:40:39] Well, I suppose -- well, no, the public won't
16 hear about it anyhow because they are not in court -- I mean because it will be in
17 private session.

18 MR LAUCCI: [9:40:47] Yes, and he is a witness under a protection programme.

19 PRESIDING JUDGE KORNER: [9:40:52] Yes, right, so I don't think you need trouble
20 with that.

21 MR LAUCCI: [9:40:55] Okay.

22 PRESIDING JUDGE KORNER: [9:40:56] But he will have to take the declaration
23 again.

24 Sir, good morning to you, and welcome back to the court. Can you hear and
25 understand me?

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1 WITNESS: DAR-D31-P-0016

2 (The witness speaks Arabic)

3 (The witness gives evidence via video link)

4 THE WITNESS: [9:41:11](Interpretation) Good morning. I hear you loud and clear.

5 PRESIDING JUDGE KORNER: [9:41:14] As you know, because you've appeared

6 before, the -- your evidence will begin with the taking -- the making of the solemn

7 declaration. I don't know whether you've got a copy in front of you. Yes, you have,

8 I'm told. So would you be good enough to read it out, please. Thank you.

9 THE WITNESS: [9:41:39](Interpretation) I solemnly undertake to tell the truth,

10 the whole truth and nothing but the truth.

11 PRESIDING JUDGE KORNER: [9:41:48] Thank you very much, sir.

12 I don't imagine you'll be here as long as you were last time or anything like that.

13 And I know Mr Laucci has explained to you what you're going to be talking about.

14 So, without further ado, Mr Laucci.

15 MR LAUCCI: [9:42:08] Thank you, Madam President. And I'm sure we have to

16 blame it on my French accent, but in the summary that I read, the transcript got

17 17 years, it was 70, just a correction.

18 QUESTIONED BY MR LAUCCI:

19 Q. [9:42:32] Good morning, Mr Witness.

20 A. [9:42:33] Good morning, Mr Laucci.

21 Q. [9:42:35] Because that's the second time you appear in this case,

22 Madam President has accepted that there was no need to go through the usual

23 identification session, so I skip that part.

24 Can we have on the screen, not for the public, please, document in tab number 2 in

25 the list, which is the second witness statement of Witness D-16.

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1 THE COURT OFFICER: [9:43:11] Could counsel please read the ERN into the case
2 record.

3 MR LAUCCI: [9:43:14] Yes, DAR-D31-00000363.

4 And I would like to go on page 2. Ah, page 3, I am told. No, page 2. And
5 the page would have to be shown to the witness on the screen.

6 Q. [9:44:12] Mr Witness, I ask the Court to show you the second page of your
7 statement, that's for you to confirm that the signature that appears there is yours?

8 A. [9:44:29] Yes, it is my signature.

9 PRESIDING JUDGE KORNER: [9:44:31] Can I just confirm, Mr Laucci, I've got
10 the right statement, it's the one that runs to 27 pages.

11 MR LAUCCI: [9:44:42] That's the one dated 16 to 18 October, but, yes. Yeah,
12 the other one was much longer.

13 PRESIDING JUDGE KORNER: [9:44:50] Yes, thank you.

14 MR LAUCCI: [9:45:06]

15 Q. [9:45:07] Do you see the document on your screen, Mr Witness?

16 A. [9:45:09] I do.

17 Q. [09:45:10] Ah. And you have page 2?

18 A. [09:45:11] (No interpretation).

19 THE INTERPRETER: [9:45:16] I heard answer: I do.

20 Can you hear me? Can you hear me?

21 PRESIDING JUDGE KORNER: [9:45:20] Yes, we can hear you.

22 THE INTERPRETER: [9:45:21] Mr Laucci doesn't, apparently.

23 MR LAUCCI: [9:45:28] I do not get the interpretation. Ah, because -- yes, of course.
24 My fault.

25 Q. [9:45:33] Okay. So, sorry, I did not get your answer. Do you confirm that it is

1 your signature?

2 A. [9:45:44] I do.

3 Q. [9:45:45] Can we move to page 26 of the statement, please.

4 When you have it, can you confirm that it is as well your signature.

5 A. [9:46:16] Yes, it is my signature.

6 Q. [9:46:19] Thank you very much for that. And last -- last week on Thursday,
7 13 November, we had a preparation session. Do you confirm that before that
8 preparation session you had the opportunity to read again your statement that was
9 given to you by the Court?

10 A. [9:46:51] Yes, I was able to look at my statement.

11 Q. [9:46:56] Thank you. And after this reading session, were there any corrections,
12 clarifications or additions that you wanted to make to your statement?

13 A. [9:47:15] No. No clarifications or additions to make. But I remembered that
14 with regards to treating *sheikhs* according to Sudanese law, there is a recent judicial
15 implementation that was used with former president al-Bashir and Bakri Hassan
16 Saleh, former vice-president, in addition to Abdel Raheem Muhammad Hussein.
17 The crimes they committed were not considered part of the *hudud* or prescribed
18 penalty crimes or *qisas* or attributive punishment crimes. Therefore, house arrest
19 was applied on them and they were treated like *sheikhs*, or elderly people, and that are
20 published precedents in this regard issued by the Supreme Court of Sudan.

21 Q. [9:48:19] I thank you for this clarification. We had inserted a note about it in
22 the preparation log, but indeed you -- what you just said is very valuable as
23 a confirmation of this clarification.

24 With that clarification, do you agree that your statement corresponds to the truth to
25 the best of your knowledge and recollection?

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1 A. [9:49:00] My statement is fully compatible with judicial precedents in Sudan and
2 law in Sudan.

3 Q. [9:49:14] Thank you, Mr Witness. And so do you agree that we submit your
4 statement into evidence before this Court?

5 A. [9:49:29] Yes.

6 Q. [9:49:29] Thank you.

7 So the Defence will ask the second statement, DAR-D31-00000363, to be admitted in
8 evidence.

9 PRESIDING JUDGE KORNER: [9:49:45] We agree.

10 MR LAUCCI: [9:49:47] Thank you.

11 MR JEREMY: [9:49:48] Madam President.

12 PRESIDING JUDGE KORNER: [9:49:50](Microphone not activated)

13 MR JEREMY: [9:49:52] Well, no, I mean, we've -- we've made our position on that
14 we -- that we oppose the submission of this statement. Your Honours have ruled on
15 that issue. That's -- that's not why I'm rising now.

16 PRESIDING JUDGE KORNER: [9:49:59] All right.

17 MR JEREMY: [9:50:00] Just a small clarification to the transcript, which I think may
18 be helpful and I think it's some terminology that I think will come up during
19 the examination. So I believe the witness referred to *hudud* crimes and also *qisa*,
20 Q-I-S-A, crimes.

21 PRESIDING JUDGE KORNER: [9:50:25] Sorry, where's that?

22 MR JEREMY: [9:50:26] At lines -- page 6, lines 25 and page 7, line 1. So just so
23 that's clear.

24 PRESIDING JUDGE KORNER: [9:50:42] Wait a moment, I'm trying --

25 MR NICHOLLS: [9:50:43] So the -- it actually says the rhymes, but the crimes they

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1 committed were not considered, and I think it should be *hudud* crimes --

2 PRESIDING JUDGE KORNER: [9:50:48] Oh, right.

3 MR JEREMY: [9:50:50] -- or *qisa* crimes. So just -- and I think that terminology is
4 going to come up so just if that is helpful.

5 PRESIDING JUDGE KORNER: [9:51:00] Yeah, all right. Thank you very much.

6 MR LAUCCI: [9:51:04] Madam President, with all the best attempt to stay in public,
7 I have one question to ask in closed session that's related to the issue about
8 the witness appearance today, that we -- that was solved before his appearance.

9 PRESIDING JUDGE KORNER: [9:51:21] If this is because you're concerned that
10 the Chamber might take a dim view of what happened, I think I can speak for all of us
11 and say we're prepared to accept that there was some kind of misunderstanding.

12 MR LAUCCI: [9:51:39] Maybe the parties would get -- would like to get some
13 explanation on this.

14 PRESIDING JUDGE KORNER: [9:51:45] All right. Well, all right, if you want to do
15 that, Mr Laucci, I won't stop you.

16 MR NICHOLLS: [9:51:48] We don't need an explanation.

17 PRESIDING JUDGE KORNER: [9:51:49] Well, okay, Mr Laucci, if you'd prefer to
18 give an explanation, we'll go into private session.

19 MR LAUCCI: [9:51:51] Thank you.

20 (Private session at 9.52 a.m.)

21 THE COURT OFFICER: [9:52:10] We are in be private session, Madam President.

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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16 (Open session at 9.57 a.m.)
17 THE COURT OFFICER: [9:57:22] We're back in open session, Madam President.
18 MR LAUCCI: [9:57:25]
19 Q. [9:57:26] Mr Witness, we are back in open session and I have to ask you about
20 a document that was shown to you last Thursday during your preparation session.
21 That's document in tab 15 in the list of materials, DAR-D31-0000366. It's in English.
22 If we can have it on the screen, please, available for the public.
23 Tell me when you see the document, Mr Witness.
24 Yes, and this document also exists in Arabic. That's DAR-D31-0000367, tab
25 number 16, but let's use the English version.

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1 THE COURT OFFICER: [9:58:53] Apologies, 366 is currently being displayed and it
2 is the Arabic version.

3 MR LAUCCI: [9:59:02] Ah.

4 THE COURT OFFICER: [9:59:03] So if you wish for us to --

5 MR LAUCCI: [9:59:04] Ah, 367, then.

6 THE COURT OFFICER: [9:59:05] Perfect.

7 MR LAUCCI: [9:59:06] My mistake.

8 Q. [9:59:23] Mr Witness, do you see the document?

9 A. [9:59:31] I see the translation of the document.

10 Q. [9:59:36] Yes. Can you tell the Court if that is the case that you were familiar
11 with before we have shown you this document?

12 A. [9:59:50] Yes.

13 Q. [9:59:53] And these documents, that's rather towards --

14 A. [9:59:55](Overlapping speakers).

15 Q. [9:59:56] Sorry.

16 A. [10:00:00] This prior document was issued by the Supreme Court. In this
17 document the court states that measures applicable to elderly people are not to be
18 executed by prison administrations, but by the public police, and not by the
19 administration of prisons and correctional facilities. So this is a measure applicable
20 to elderly people whereby a person would be returned from their location -- would be
21 taken from their location to a -- to a different location.

22 To my knowledge, President Omar al-Bashir has been the subject of this and is in
23 a place different from his place of birth and different from the capital of the country.
24 The same thing is applied to Abdel Raheem Muhammad Hussein and Bakri Hassan
25 Saleh.

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1 Q. [10:01:17] Thank you, Mr Witness.

2 With that clarification, we will ask the Chamber to admit documents 16 and -- 15 and
3 16, sorry, DAR-D31-00000366 and 367 into evidence.

4 PRESIDING JUDGE KORNER: [10:01:32] Yeah. Well, this time I'll check.

5 Mr Jeremy, any objection?

6 MR JEREMY: [10:01:39] I mean, I didn't object in advance to the use of this, of this
7 document. I don't see how it is relevant to your Honours' determination of sentence
8 and your determination of what a reasonable person in the position of the accused
9 could have expected to be punished for in 2003 and 2004. Nevertheless, if
10 the Defence want to submit it, then we won't object.

11 PRESIDING JUDGE KORNER: [10:02:07] Yeah, and on this occasion, because
12 the victims are actually parties, I think, to this, any objection, Ms von Wistinghausen?

13 MS VON WISTINGHAUSEN: [10:02:19] No, thank you, Madam President. No
14 objection.

15 PRESIDING JUDGE KORNER: [10:02:23] All right. Thank you.

16 Yes, all right. Yes, Mr Laucci, those are admitted.

17 MR LAUCCI: [10:02:27] Thank you, Madam President.

18 Q. [10:02:29] Mr Witness, I try to go very quickly. I have three questions for you.
19 Very focused. And after that I will move on.

20 Mr Witness, first question I have is about the Central Reserve Forces, the CRF. Can
21 you please summarise for the Court what is the usual normal mission of the Central
22 Reserve Forces.

23 MR JEREMY: [10:03:00](Microphone not activated).

24 PRESIDING JUDGE KORNER: [10:03:00](Microphone not activated). All right.

25 Are you objecting, Mr --

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1 MR JEREMY: [10:03:04] I'm objecting on the basis of relevance.

2 PRESIDING JUDGE KORNER: [10:03:07] Yeah. That's my immediate reaction,

3 Mr Laucci. What's the relevance of this to any sentence?

4 MR LAUCCI: [10:03:12] Can I answer without being listened to by the witness,

5 Madam President?

6 PRESIDING JUDGE KORNER: [10:03:18] I suppose so. Can we cut off the feed, or

7 not?

8 THE COURT OFFICER: [10:03:54] The audio to the witness has been cut off.

9 PRESIDING JUDGE KORNER: [10:03:57] All right. Yes, Mr Laucci.

10 MR LAUCCI: [10:03:58] Thank you, Madam President.

11 According to the trial judgment the attacks on Kodoom and Bindisi were perpetrated

12 in the presence of members of the Central Reserve Forces and I want to clarify with

13 the witness whether it forms part of the usual mission of the Central Reserve Forces to

14 protect the population, because that's relevant for the definition of *hiraba*.

15 PRESIDING JUDGE KORNER: [10:04:28](Microphone not activated).

16 THE INTERPRETER: [10:04:34] Microphone, please, your Honour.

17 PRESIDING JUDGE KORNER: [10:04:37] Sorry, yeah. I'm sorry, yeah.

18 I'm afraid you really lost me there, Mr Laucci. The presence of the CRF in the attacks

19 has got to do what -- well, apart from whether it has anything to do with *hiraba*, what

20 has that got to do with sentence?

21 MR LAUCCI: [10:05:02] One of the issue that I will have to submit to you is whether

22 the exception to the exclusion of imprisonment for people of more than 70 years

23 applies in this case. And the answer to that question depends on whether one of

24 the counts for which Mr Abd-Al-Rahman has been found guilty can be seen as an

25 equivalent to *hiraba* under Sudanese law because *hiraba* is the exception. People

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1 above 70 years can go -- can be sentenced for imprisonment for a maximum period of
2 seven years. I want to know if that exception is applicable in light of the -- the -- this
3 event in Kodoom and Bindisi.

4 PRESIDING JUDGE KORNER: [10:05:56] Yes, Mr Jeremy.

5 MR JEREMY: [10:05:57] Yes, thank you, Madam President, your Honours.

6 So, to be clear, a sentencing hearing is not an opportunity to re-litigate issues decided
7 at trial, decided in your judgment. It's not an opportunity for Mr Laucci to conduct
8 re-re-examination of a witness to whom he has already directed questions on *hiraba* to.
9 The jurisprudence on that is very clear, we cite it in our filing 1248, the Ntaganda,
10 Bemba decisions, paragraphs 8 and 17. If Mr Laucci has factual legal issues to raise
11 in relation to *hiraba*, then the appropriate forum to do that would be before the
12 Appeals Chamber.

13 The Chamber has made findings in relation to *hiraba* in this case. The Chamber has
14 been clear that the purpose of calling D-16 at these sentencing submissions is to hear
15 about his legal interpretation of sentencing in Sudanese law, and therefore if
16 Mr Laucci wants to say to the witness what is the sentence in relation to *hiraba*, then
17 that is fine, we wouldn't object to that. But if he is to start to try and re-open
18 the entire concept of *hiraba*, when it applies, if the CRF were present in Kodoom, in
19 Bindisi, then that is totally inappropriate in the course of this sentencing hearing, in
20 my submission, your Honour.

21 PRESIDING JUDGE KORNER: [10:07:26] Mr Laucci.

22 I must say I agree with Mr Jeremy. And, indeed, there are a number of occasions
23 when you do try to re-open this, as I'm going to deal with at the end of this.

24 MR LAUCCI: [10:07:40] I thought I was not, Madam President. But if you tell me
25 that your trial judgment includes a positive finding that a crime that is equivalent to

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1 *hiraba* was committed, I have no more questions on this topic.

2 PRESIDING JUDGE KORNER: [10:07:58] Well, I'm not telling you anything,

3 Mr Laucci. You can read what is in our sentence -- in our trial judgment. What

4 I am saying is that Mr Jeremy is right when he says there is clear authority that you

5 cannot seek to re-open matters which have been the subject of the trial judgment at

6 a sentencing hearing. You can argue this, as he has said, in one of your 79 grounds

7 for the Appeals Chamber.

8 MR LAUCCI: [10:08:31] Very well, Madam President. But I'm still not clear as to

9 whether the opinion of the Chamber is whether something equivalent to *hiraba* was

10 committed in Kodoom and Bindisi.

11 PRESIDING JUDGE KORNER: [10:08:42] Well, I'm afraid you'll just have to live

12 with that, Mr Laucci.

13 MR LAUCCI: [10:08:46] Okay.

14 PRESIDING JUDGE KORNER: [10:08:47] You can ask him in general terms. What

15 you can't do is go into specifics like that.

16 MR LAUCCI: [10:08:55] Let's save time. Thank you, Madam President.

17 We can re-open the --

18 PRESIDING JUDGE KORNER: [10:09:02] Sorry, back into -- yes, re-open the link

19 and then back into public session, please. Open session. Oh, we were in open

20 session.

21 MR LAUCCI: [10:09:25] Mr Witness ...

22 THE COURT OFFICER: [10:09:28] Madam President, the audio to the witness has

23 been reconnected.

24 PRESIDING JUDGE KORNER: [10:09:33] Yes, thank you.

25 MR LAUCCI: [10:09:40]

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1 Q. [10:09:41] Mr Witness, forget my previous questions, I withdraw it. And I'm
2 left with one question for you.

3 Can we have, please, on the screen document number 14 in the list of materials.

4 That's DAR-OTP-0118-0075, which is the English version of the 1986 People's Armed
5 Forces Act and I would like to go at page 0082, that is article 4 of this act.

6 A. [10:10:48] (No interpretation).

7 Q. [10:10:49] Mr Witness, in your statement in relation to count 1, the attack on
8 Kodoom and Bindisi as a war crime, I asked you what was the applicable sentence
9 under Sudanese law and you refer -- you referred to the act of 1986 in your answer.

10 PRESIDING JUDGE KORNER: [10:11:25] What paragraph is that, please, Mr Laucci?

11 MR LAUCCI: [10:11:28] In the statement?

12 PRESIDING JUDGE KORNER: [10:11:29] Yeah.

13 MR LAUCCI: [10:11:31] Unfortunately ...

14 (Counsel confers)

15 MR JEREMY: [10:11:50] I think it's paragraph 20, your Honours.

16 MR LAUCCI: [10:11:51] Thank you. Paragraph 20.

17 Q. [10:12:03] So my question is, Mr Witness, this attack on Kodoom and Bindisi
18 was, according to the trial judgment, perpetrated by a group of people called
19 the Janjaweed. Can you please tell us in which category of the article 4
20 the Janjaweed are falling, please?

21 A. [10:12:39] Article 4 has determined -- I don't see the article before me, but I have
22 seen it quite enough to memorise it. Article 4 specifies those who fall under the
23 provision of the 1986 Sudanese Armed Forces Act. Article 4 cannot be separated
24 from article number 5 from the same act. *Darfur was declared an emergency area.
25 All the police forces and security forces, according to this article, article 4, work under

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1 the command of the armed forces and any crimes committed there are prosecuted
2 according to the 1986 Armed Forces Act.

3 Q. [10:13:46] Thank you. So to be clear, is there any category of article 4 under
4 which the Janjaweed would fall, or shall we refer only to Article 5?

5 MR JEREMY: [10:14:05] Objection, relevance, Madam President.

6 PRESIDING JUDGE KORNER: [10:14:10] I mean, there's a lot one could query
7 the relevance of in this whole statement, Mr Jeremy, so I don't think it really matters if
8 there's one more aspect.

9 MR JEREMY: [10:14:24] Okay. But just for the record again, we're going back into
10 issues that Mr Laucci explored with this witness extensively during his direct
11 examination and I struggle to see how these questions are relevant to sentencing,
12 which is the purpose of these proceedings.

13 PRESIDING JUDGE KORNER: [10:14:42] All right.
14 Mr Laucci.

15 MR LAUCCI: [10:14:43] Well, the purpose is to understand the ... yes, the purpose is
16 to understand the response from the witness and how the 1986 act applies in his
17 expert opinion on the Janjaweed.

18 PRESIDING JUDGE KORNER: [10:15:05] But didn't he -- I thought -- I mean it's
19 a long time since I've read this witness's evidence, but I thought he did deal with that
20 during trial, it was part of the reason why you called him. I'm pretty certain he did.

21 MR LAUCCI: [10:15:22] I can refer to his former responses to this question, but in
22 the purpose of the sentencing, because he was referring expressly on this provision, I
23 thought it was good to clarify it with him.

24 PRESIDING JUDGE KORNER: [10:15:36] Well, Mr Jeremy, I'm pretty certain -- I
25 think you're right, he did deal with this during the trial, because that's one of

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1 the reasons why he was called.

2 MR JEREMY: [10:15:49] Yes, Madam President, I have got the reference here.

3 Transcript 131, pages 21 -- sorry, 20 to 21 in particular. And again, your Honours,
4 this is going back into issues that have already been explored --

5 PRESIDING JUDGE KORNER: [10:16:01] Yeah. All right.

6 MR JEREMY: [10:16:02] -- and this should not be re-examination by Mr Laucci.

7 PRESIDING JUDGE KORNER: [10:16:08] Yeah. No. All right.

8 Mr Laucci, unless you have got anything else to say, then I agree. I mean, you are
9 really attempting to go back over issues that are -- were litigated.

10 MR LAUCCI: [10:16:20] Thank you, Madam President. In that case, I have no more
11 questions and I may reserve my other questions for re-examination, if necessary.

12 Thank you, Mr Witness.

13 PRESIDING JUDGE KORNER: [10:16:31] Well, I'm afraid you can't do that. You
14 can only re-examine on issues that come out during cross-examination.

15 MR LAUCCI: [10:16:39] Yeah, I mean, of course.

16 PRESIDING JUDGE KORNER: [10:16:40] Okay, all right.

17 MR LAUCCI: [10:16:41] Within that limit.

18 PRESIDING JUDGE KORNER: [10:16:42] All right. Okay. Thank you.

19 Mr Jeremy.

20 MR JEREMY: [10:16:49] Thank you, Madam President, your Honours. I have no
21 cross-examination, thank you.

22 PRESIDING JUDGE KORNER: [10:16:55] Yes.

23 Ms von Wistinghausen.

24 MS VON WISTINGHAUSEN: [10:16:59] Nothing from us, Madam President.

25 Thank you.

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- 1 PRESIDING JUDGE KORNER: [10:17:03] All right. Thank you.
- 2 MR LAUCCI: [10:17:06] Which obviously makes no re-examination on the Defence
3 side.
- 4 PRESIDING JUDGE KORNER: [10:17:11] I don't -- I'll just check with my colleagues,
5 any questions?
- 6 Judge Alapini -- no, no? Okay.
- 7 No, no questions from the judges.
- 8 Sir, thank you very much for attending that completes your evidence today.
- 9 Yes, you want to say something? I'm afraid --
- 10 THE WITNESS: [10:17:38](Overlapping speakers).
- 11 PRESIDING JUDGE KORNER: [10:17:43] Sir, about what?
- 12 THE WITNESS: [10:17:44](Interpretation) Yes. About my -- our situation in
13 the programme, in the protection programme.
- 14 PRESIDING JUDGE KORNER: [10:17:54] No, I'm afraid -- I'm afraid not, sir.
- 15 Anything you want to raise about that you can raise with the persons with you. It's
16 got nothing to do with us. So thank you very much.
- 17 THE WITNESS: [10:18:12](Interpretation) We have already raised this, but there was
18 no response.
- 19 PRESIDING JUDGE KORNER: [10:18:16] Well, I'm very sorry, sir, but this is not
20 the forum --
- 21 THE WITNESS: [10:18:17](Overlapping speakers).
- 22 PRESIDING JUDGE KORNER: [10:18:18] This is not the forum to raise issues such
23 as this. So thank you very much, sir, that completes your evidence and you can
24 leave the place where you are, thank you.
- 25 Can we cut the feed.

1 (The witness is excused)

2 PRESIDING JUDGE KORNER: [10:18:50] Yes, Mr Laucci -- sorry, yes, Mr Laucci.

3 So yesterday you were about to begin with your submissions in respect, I think you
4 said, of the victims.

5 MR LAUCCI: [10:19:04] Yes, Madam President. But before that, with your
6 permission, we had requested the possibility of having a final greeting session, so
7 a very short break to have a greeting session with the witness.

8 PRESIDING JUDGE KORNER: [10:19:20] I don't remember seeing that, but, all right,
9 you want the break to be taken now.

10 MR LAUCCI: [10:19:28] There is a solution. My colleague Iain Edwards starts and
11 I go to visit the witness and I come back when it's done.

12 PRESIDING JUDGE KORNER: [10:19:39] Yes, all right. That's fine with us, yes.
13 Thank you.

14 MR EDWARDS: [10:20:23] Good morning.

15 Your Honour, I will shortly address you on the mitigating circumstances present in
16 this case. But before I do, there are three brief points I would like to make regarding
17 the gravity of the crimes for which Mr Abd-Al-Rahman has been convicted. These
18 supplement some of Mr Laucci's submissions already made and perhaps others that
19 he'll make later on today. But the thrust of the submissions is that the crimes for
20 which Mr Abd-Al-Rahman has been convicted do not meet the level of extreme
21 gravity that justify the imposition of a term of life imprisonment under
22 Article 77(1)(b).

23 Firstly, the Prosecution and the LRV have addressed you, both in written submissions
24 and orally, on the gravity of the offending. It is admittedly a trite point, by which I
25 mean it's not a particularly original or insightful point, but it's worth making anyway:

1 All cases that are heard at this Court are grave. It is in the nature of the jurisdiction
2 of this Court that all cases that come before it are the most serious crimes of concern
3 to the international community.

4 The gravity bar is already very high. So to give Article 77(1)(b) any sense, extreme
5 gravity cannot mean the same thing here that it would in a domestic court. Extreme
6 gravity, we submit, within the meaning of Article 77(1)(b), must be understood to
7 mean extreme within the context of the grave crimes that are routinely considered at
8 this Court.

9 Secondly, I would like to address you on the temporal scope or duration of
10 the offending, as found. Passing reference is made to this in paragraphs 167 and 168
11 of the Prosecution's submissions. And Mr Nicholls yesterday spoke of crimes
12 committed over a lengthy period of time at page 3 of yesterday's transcript,
13 the uncorrected transcript.

14 For their part, the LRV at paragraph 55 of their submissions argue that the four
15 incidents form a single course of conduct. And as a matter of law, we agree. But in
16 terms of the temporal scope as a matter of fact, we submit that it is clear that
17 the period of time in which crimes for which Mr Abd-Al-Rahman falls to be sentenced,
18 those crimes were committed in a relatively limited period of time. So as far as
19 the Kodoom and Bindisi attacks are concerned, they took place over two days, 15 and
20 16 August 2003. Even if you were to conclude that you cannot reasonably ignore
21 the operations that preceded Bindisi -- sorry, Kodoom and Bindisi, operations against
22 the nine villages to the north and east of Mukjar, these started, as you found, on
23 9 August 2023.

24 PRESIDING JUDGE KORNER: [10:24:34] Three.

25 MR EDWARDS: [10:24:35] Sorry, 2003.

1 Whilst it's right to say that Mr Abd-Al-Rahman was not charged with any crimes
2 relating to these preceding operations and can't be sentenced for any crimes,
3 nevertheless, factoring in those preceding attacks, we're talking about a period of
4 about a week.

5 The Chamber then heard evidence of the Sindu and Mukjar operations, which
6 occurred in February 2004, some five months later. Mr Abd-Al-Rahman is not
7 charged with any crimes for which he falls to be sentenced over that five-month
8 intervening period.

9 The crimes relating to Mukjar occurred in late February or early March 2004. And
10 the crimes for which he stands to be sentenced at Mukjar police station and then
11 the executions outside of Mukjar occur over a period of days. We're not talking
12 about weeks, we're certainly not talking about months. The crimes in and around
13 Deleig for which Mr Abd-Al-Rahman has been convicted, 5 and 7 March,
14 immediately following on from Mukjar. We say that it cannot sensibly be concluded
15 that there is no overlap between those two operations, Deleig and Mukjar. But,
16 again, Mukjar and Deleig, we're talking about a week, maybe days, not months.

17 The Prosecution's brief submissions on the question of temporal scope being a factor
18 that demand a finding of extreme gravity so as to justify a term of life imprisonment
19 do not survive contact with any reasonable analysis of the facts, your Honour.

20 We also say that Mr Abd-Al-Rahman's case can be distinguished from that of other
21 cases that come before the ICC, where the temporal scope of offending was truly
22 significant, was truly large and was truly grave. Lubanga was convicted for offences
23 that spanned the whole period between September 2002 and August 2003.

24 Ntaganda was convicted for offences spanning the whole period of August 2002 to
25 December 2003. Ongwen was convicted of crimes over the three-year period of

1 1 July 2002 to the end of December 2005. Three-and-a-half-year period, rather.

2 So the shorter and more limited periods of Mr Abd-Al-Rahman's criminality, as found
3 by your Honours' Chamber, is a relevant and significant factor that ought to be taken
4 into account in bringing the gravity of these crimes down from the level of extremity
5 urged by the Prosecution and that might otherwise warrant a sentence of life
6 imprisonment.

7 My third and final point on gravity before moving on to mitigation relate to,
8 specifically, the rape counts for which Mr Abd-Al-Rahman is to be sentenced. I
9 make it absolutely clear from the start that the Defence does not and has never
10 disputed that rapes and other acts of sexual violence occurred in the Mukjar and
11 Wadi Salih localities in 2003 and 2004. We made that clear during the trial. I
12 reiterate that we make that clear now. Nothing I say is intended to diminish the
13 seriousness of the rapes and sexual violence suffered by all the victim survivors, some
14 of whom testified with such courage at this trial. We don't dispute their terrible
15 suffering at the time and the suffering that continues today from the consequences of
16 that violence.

17 Whilst Mr Abd-Al-Rahman has been convicted of rape as both a crime against
18 humanity and a war crime, it was never part of the Prosecution's case that he ever
19 committed rape or any offence of sexual violence as a direct perpetrator. It has never
20 been suggested that any victims of rape were forced into sexual slavery. His case,
21 Mr Abd-Al-Rahman's case, can be contrasted, we say, with, for example, Mr Ongwen,
22 who was convicted of rape, of forced marriage, of sexual slavery as a direct
23 perpetrator over periods extending over many years, where women and girls were
24 raped systematically, day after day, week after week, month after month. He doesn't
25 fall into that category.

1 Mr Ntaganda was found to have been aware of women and girls being brought to his
2 camp and even brought women to his camp himself, knowing what was likely to
3 happen to them.

4 So we submit that that contrast between Mr Abd-Al-Rahman's case and those of
5 others brings the sentence for the rape of no fewer than 16 women and girls down
6 from the near maximum sentence of 27 years recommended by the Prosecution.

7 And this should also be taken into account in the contribution that the rape
8 convictions make to the level of extremity of the totality of Mr Abd-Al-Rahman's
9 criminality, as found, that the Prosecution misguidedly argues warrant a sentence of
10 life imprisonment.

11 That's all I have to say about gravity.

12 Turning then to mitigating features that exist in this case, and really the submissions
13 on mitigating circumstances have been set out fairly fully in our brief. I'm certainly
14 not going to waste the Court's time by repeating them. I'm going to limit myself to
15 addressing the points made by the Prosecution from paragraph 145 onwards in their
16 sentencing submissions and from the submissions made by my learned friend for
17 the victims.

18 Let me deal first with a topic that has created some rather heated debate, and it's
19 the matter of voluntary surrender. It is the first point, point a) at page 43 of
20 the Prosecution's submission.

21 PRESIDING JUDGE KORNER: [10:32:35](Microphone not activated)

22 MR EDWARDS: [10:32:36] Yeah.

23 PRESIDING JUDGE KORNER: [10:32:55] Yes.

24 MR EDWARDS: [10:32:55] And we deal with the question of voluntary submissions
25 in our paragraphs 81 to 86 at point f). And, as I say, we rely on those submissions.

1 Cooperation is provided for in the texts by Rule 145(2)(a)(ii) in the Rules as
2 a mitigating factor. The most decisive way an indicted person can cooperate with
3 the Court is through voluntary surrender, we say. It will be noted that Rule 145, if
4 you have it before you now -- well, perhaps you can take it on trust.

5 PRESIDING JUDGE KORNER: [10:33:50] I will take it on trust, but I was just
6 thinking that we didn't appear to have a copy of either the Statute or the Rules here in
7 court.

8 MR EDWARDS: [10:33:59] Can I hand up my copy.

9 PRESIDING JUDGE KORNER: [10:34:02] I think we're going to be given.

10 Even better if we've got three copies.

11 Thank you very much.

12 Yes.

13 MR EDWARDS: [10:34:45] Yes, 145(2)(a)(ii). I'll read it:

14 "Mitigating circumstances such as:" -- so it's not an exclusive list:

15 "The convicted person's conduct after the act, including any efforts by the person to
16 compensate the victims and" - here I stress - "any cooperation with the Court".

17 Now, Rule 145(2)(a)(ii) contains no limiting sub rule. It doesn't say that cooperation
18 has to be of a certain nature or done within a certain deadline. It's open-ended.

19 The words in the text are "any cooperation with the Court". Full stop.

20 The Prosecution takes a rather maximalist, rather breathless position that shows no
21 evidence of having been passed through any filter of moderation. The Prosecution
22 ask the Trial Chamber to find - sorry, forgive me - to find extremity, leaving no room
23 for mitigation.

24 But here there is real mitigation. It's mitigation that permits the Chamber to take
25 a step back from the exceptional line of life imprisonment so that that sentence can be

1 reserved for the very worst of the worst.

2 In --

3 PRESIDING JUDGE KORNER: [10:36:40] Sorry, Mr Edwards.

4 I think they're just saying -- well, the Prosecution, and indeed the representatives of
5 the victims, are both saying you don't get any credit for it, and I think that's what you
6 need to deal with.

7 MR EDWARDS: [10:36:57] Yeah.

8 PRESIDING JUDGE KORNER: [10:36:58] Because you, as you said when you
9 arrived here. Sorry, you -- Al-Rahman said when he arrived here --

10 MR EDWARDS: [10:37:08] Yeah.

11 PRESIDING JUDGE KORNER: [10:37:09] -- he surrendered because he was wanted
12 in Sudan and feared for his life.

13 MR EDWARDS: [10:37:18] Well, that that is -- that's right, that's what they say.

14 PRESIDING JUDGE KORNER: [10:37:23] No, that's what he says.

15 MR EDWARDS: [10:37:25] Well, the Prosecution make that argument.

16 PRESIDING JUDGE KORNER: [10:37:27] Yeah.

17 MR EDWARDS: [10:37:28] I was going to come to it in a moment, but I'll deal with it
18 now. In other words, they're saying that he had a selfish reason for surrendering
19 himself to the Court.

20 For the Prosecution, for my learned friend, his motives for surrender aren't pure
21 enough and that should erase all mitigation afforded to him.

22 The Prosecution cite to no -- nor do the LRV, cite to no judicial authority for the
23 proposition that, below a certain level of virtuousness connected to surrender, no
24 mitigation should attach. Not only is this an argument, we say, devoid of any merit,
25 it would require an application of the most subjective assessment of righteousness

1 that this Chamber, we say, should not engage in.

2 But moving on from that, it's more accurate to describe Mr Abd-Al-Rahman's motives
3 as mixed rather than entirely selfish. Even if there was an element of his having
4 a preference for not being arrested in Sudan and facing the prospect of detention in
5 a Sudanese jail, followed by a trial in autocratic Sudan, followed by possibly the death
6 sentence, who could blame him for having that preference?

7 But that's not the end of the matter. In his unsworn statement of 13 December 2024,
8 this is transcript 162, he explains that there were other motives, "so that the Court
9 would look into my case and tell me what my fate is." And the Prosecution even cite
10 that at their footnote 391. He is prepared to submit himself to the authority of
11 the Court to defend himself and to learn of his fate.

12 So to say that his impure motive is the entire truth of the matter is simply not accurate.
13 The black and white picture painted by my learned friends is rather more nuanced,
14 rather more complex.

15 Moving on from that, we would say that, so what if his motives were less than purely
16 selfless, if they were less than 100 per cent noble? The fact of the matter is he did
17 surrender and the direct result of that --

18 PRESIDING JUDGE KORNER: [10:40:37] Sorry, Mr Edwards.

19 MR EDWARDS: [10:40:39] No, I can pause if --

20 PRESIDING JUDGE KORNER: [10:40:41] No, I'm looking -- I'm actually looking
21 for -- I printed out the -- Mr Abd-Al-Rahman's remarks, both at the beginning and
22 the end, and I left them in court last night, but they seem to have gone AWOL
23 somewhere, unless ...

24 Does anybody know what happened to my ...

25 All right, you carry on, Mr Edwards. I'll find it in the break.

1 MR EDWARDS: [10:41:21] Yes. The point I was making is so what? The fact is he
2 did surrender and the direct result of that decision is that the Court has conducted its
3 only trial arising out of the tragic events in Darfur in 2003 and 2004. The direct result
4 is that victims have been able to come to this court and tell their stories.

5 And your Honours, we make this point because we think it's fair. For the most part,
6 in terms of crime base witnesses, the Defence did not challenge the essence of their
7 evidence, did not challenge the traumatic events that they suffered. For the most
8 part, the Defence accepted the truth of the crime base witnesses, of their accounts of
9 the crimes that they endured, their suffering and their suffering to this day.

10 And, indeed, there were occasions when in your Honours' closing words to witnesses
11 you said to crime base witnesses that the Defence had not taken account -- taken issue
12 with their accounts.

13 We did throughout the trial minimise, as best as we could, any re-traumatisation of
14 Prosecution and LRV witnesses whilst advancing as robustly as we could our case
15 based on decoupling the alleged links, alleged as they were, between our client and
16 the crimes.

17 Your Honours have seen for yourselves how courageous and dignified the crime base
18 witnesses were when they testified, and you may think that for many it amounted to
19 a cathartic experience. They told their stories to a room full of strangers in
20 a far-away land who were happy and prepared to listen to them and believe them.

21 And you may think that that played some small contribution to their healing. None
22 of that would have been possible had Mr Abd-Al-Rahman not surrendered himself.

23 And we say, for that he deserves some credit.

24 Now, the Prosecution and the victims rely on what the Trial Chamber says in

25 Ntaganda. In our submission, following that reasoning would be to take the wrong

1 path and would continue to send out the wrong signal that was originally sent out in
2 Ntaganda. You're not bound by the Trial Chamber's decision in Ntaganda. It
3 wasn't a point taken on appeal so we don't have Appeals Chamber authoritative
4 words of wisdom on the question. The Prosecution I think also relied on Mrksic and
5 Pandurevic from the ICTY at their paragraph 148. You are not bound by that.
6 There is no doubt, I think it's agreed, that voluntary surrender brings considerable
7 benefits to international courts. There are nearly 30 persons who have been indicted
8 by the Court and who remain at large, including Messrs al Bashir, Harun, Hussein,
9 Banda, all from Sudan; Saif Gaddafi in Libya; Kony. There may be many more who
10 are the subject of warrants of arrest that are currently under seal.
11 The Court has no police force. The Court relies on the cooperation of national
12 authorities to effect arrests and the transfer of indictees to the custody of the Court.
13 The history of that cooperation can properly be described as uneven. Just this year
14 a State Party, Italy, arrested a suspect pursuant to an arrest warrant and refused to
15 hand him over. Hungary, a State Party, has refused to execute an ICC arrest warrant
16 against another indictee, and that has led to Hungary notifying its withdrawal from
17 the Rome Statute.
18 You cannot -- this Court cannot rely on the cooperation exclusively on -- on
19 States Parties, on the cooperation and good will of parties to bring suspects to
20 the Court. It cannot be enough if the Court has an interest in fully exercising its
21 mandate. As a matter of realpolitik, the Court has to rely on indictees surrendering
22 themselves and nothing should be done to dissuade indictees to do so. Everything,
23 on the other hand, should be done to signal that those who will hand themselves in
24 can expect that that act, whether selfish or selfless, will be taken into account as
25 mitigation. Your Chamber has an opportunity today, an important opportunity to

1 give that signal and to break from the, I'll describe it as the unfortunate finding in

2 Ntaganda, that a delay will reduce its value as a mitigating factor. Voluntary

3 submissions should be encouraged at any time and should be rewarded.

4 PRESIDING JUDGE KORNER: [10:47:35] As I said, Mr Edwards, I think

5 the argument is not so much that he didn't surrender himself, but that the reason for

6 the surrender is exigent circumstances in his home -- where he was, as it was with

7 Ntaganda, is the argument.

8 So just so that we're clear, you argue that even if it is not, as you put it, motives are

9 mixed, and not entirely a voluntary one, for the purposes of encouraging people to

10 surrender on the basis that there will be some kind of a reduction, there should be

11 a reduction?

12 MR EDWARDS: [10:48:32] Yes.

13 PRESIDING JUDGE KORNER: [10:48:33] And that the extent of the reduction, you

14 argue, do you, is -- would be the reason, the other -- well, the extent -- the length of

15 time, the reasoning behind it, all of that would be factors the Court should take

16 into -- could take into account?

17 MR EDWARDS: [10:48:51] Yes, I don't suggest that they couldn't be taken into

18 account. But I think the crux of our position is that the eventual presence of an

19 indictee's -- of an indictee at this Court, even if delayed, will always be infinitely

20 preferable to no presence at all.

21 PRESIDING JUDGE KORNER: [10:49:15] Yeah.

22 MR EDWARDS: [10:49:16] So even if delayed, and even if the motives are mixed,

23 the fact of voluntary surrender should be taken into account. And as a matter of

24 principle, it's wrong that it isn't. So we ask you, tear up the Ntaganda authority,

25 the jurisprudence from Ntaganda. It's wrong in principle and it's dangerous.

1 I have another point to make, and it's moving from the general, from the argument of
2 principle to the specific in this case. Your Honour will recall that there were
3 some -- much litigation in the early stages of this case about the criminalisation or not
4 of cooperation with the Court under Sudanese criminal law.

5 PRESIDING JUDGE KORNER: [10:50:14] Well, it's still continuing, Mr Edwards, as I
6 see, from the appeal.

7 MR EDWARDS: [10:50:20] Indeed. But on the basis of your Honours'
8 findings -- because that's all I need to -- that's all I need to refer myself to. In your
9 decision 561 of 21 January 2022, you found that there was not, at that date, any
10 surviving criminalisation of cooperation with the ICC in Sudanese law, and that
11 finding was based on a report of the matter produced by the Registry. The Sudanese
12 statute, the Miscellaneous Amendments Act promulgated on 22 April 2020 amended
13 article 3 of the Criminal Procedure Act of 1991. And paragraph 3 of article 3 had
14 prohibited any government entity or any person from providing any assistance or
15 support to anyone. And here I quote:

16 "... in transferring a Sudanese national to courts abroad on account of being accused of
17 committing a crime that constitutes a violation of International Humanitarian Law,
18 including crimes against humanity, genocide and war crimes."

19 And that filing is Annex 1 to filing 496 of 22 October 2021.

20 The unambiguous, the absolute prohibition contained in the article which was
21 amended in 2022 suggests that an accused person, him or herself would be in
22 violation -- sorry, April 2020, not 22, suggests that an accused person, him or herself,
23 would be in violation of Sudanese criminal law for attempting to surrender himself to
24 a court outside of Sudan.

25 And it's through that prism of domestic incrimination, penalisation that

1 Mr Abd-Al-Rahman's failure to take the first steps to surrender himself to the Court
2 can be seen. It mitigates significantly, we say, the delay. Had he surrendered
3 himself earlier, he would be -- he would fall afoul of Sudanese criminal law.

4 PRESIDING JUDGE KORNER: [10:53:02] Well, you've lost me there completely, I'm
5 afraid. He surrendered himself in June '20?

6 MR EDWARDS: [10:53:12] Yes.

7 PRESIDING JUDGE KORNER: [10:53:13] The law, you say, has come in in April '20;
8 is that right? Where is it?

9 MR EDWARDS: [10:53:20] April 2020, yes.

10 PRESIDING JUDGE KORNER: [10:53:21] April 2020.

11 MR EDWARDS: [10:53:24] Yes. He surrendered himself.

12 PRESIDING JUDGE KORNER: [10:53:26] In June.

13 MR EDWARDS: [10:53:26] In June, yes.

14 PRESIDING JUDGE KORNER: [10:53:28] So before then he wouldn't have been
15 afoul of Sudanese criminal law?

16 MR EDWARDS: [10:53:32] No, after April -- after April 2020, he --

17 PRESIDING JUDGE KORNER: [10:53:36] Yes. You -- after April -- you say after
18 April '20 it became a crime again to -- or it became a crime.

19 MR EDWARDS: [10:53:43] No, it's exactly the opposite, your Honour. Up until, up
20 until April 2020, it was a crime to cooperate with the ICC.

21 PRESIDING JUDGE KORNER: [10:53:55] I did think this was part of the argument
22 in the -- during the course of the trial.

23 MR EDWARDS: [10:54:04] Yes.

24 PRESIDING JUDGE KORNER: [10:54:05] And that -- I can't remember the reason
25 why we found it, but it was -- we found that it wasn't a criminal offence.

1 MR EDWARDS: [10:54:16] No. Well, the situation was this.

2 Your Honours found that the miscellaneous -- your Honours found at the time of our
3 argument that cooperation with the ICC was not criminalised in Sudan. You made
4 that finding on the basis of a Registry report containing -- which referred to
5 correspondence with the Government of Sudan who pointed the Registry to an
6 amendment in the criminal law of Sudan contained in the Miscellaneous
7 Amendments Act which was promulgated on 22 April 2020.

8 Prior to that promulgation, cooperation with the ICC had been criminalised. After
9 April 2020, it was no longer criminalised. The debate between the Defence and
10 the Prosecution, and ultimately you found for the Prosecution, was that we said
11 the Miscellaneous Amendments Act was not clear enough to demonstrated that
12 continuing *de facto* criminalisation of cooperation with the ICC continued even
13 beyond April 2020.

14 But before April 2020, I think it's right to say that there was never any dispute that it
15 was criminalised.

16 PRESIDING JUDGE KORNER: [10:55:49](Microphone not activated)

17 MR NICHOLLS: [10:55:50] I don't want to object. There certainly was a dispute.

18 PRESIDING JUDGE KORNER: [10:55:53] Yeah.

19 Well, I do -- I remember, as I say, I remember the dispute, I just don't remember
20 the details.

21 But, in any event, Mr Edwards, I'm not at all clear what that has got to do with your
22 client's decision to surrender himself because he said himself it had nothing to do
23 with the criminal -- whether or not it was criminalised. It was all to do with whether
24 or not he was being sought for the purposes of arrest for the short period of time that
25 Sudan had a democratic government of sorts.

1 MR EDWARDS: [10:56:32] Correct. And that -- well, correct. That that
2 was -- those were the submissions that we made on instruction and that ...

3 PRESIDING JUDGE KORNER: [10:56:43] Go on, Mr Edwards.

4 MR EDWARDS: [10:56:45] And that was what Mr Abd-Al-Rahman said in unsworn
5 statements. All we're saying is that it is our submission that on top of everything
6 else, for many of those 13 years between the issuing of the arrest warrant and his
7 surrender, we say the criminalisation of cooperation in the ICC was a factor. It
8 was -- it was -- it was a reality. It was a reality in Sudan.

9 And I simply refer you to Annex 1 of filing 496 of 22 October 2021 in which
10 the Registry makes the position reasonably clear.

11 PRESIDING JUDGE KORNER: [10:57:30] All right, Mr Nicholls.

12 MR NICHOLLS: [10:57:31] I really apologise for rising and objecting during these
13 submissions, but we've gotten to the point now where my friend is testifying. They
14 made their argument before. Mr Laucci said in the opening, "I'll tell you the reason
15 he surrendered, it was because he thought he was going to get arrested and it would
16 have been much worse in Sudan." Now he had in his head it would be criminalised,
17 he would be committing a crime. I mean, he cannot testify about his client's motive
18 when the client has not testified at all. I'm not, on my feet, sure what unsworn
19 statements he's referring to, but he cannot give evidence that that this is a reason that
20 at this point, apparently, the client has a deep understanding of Sudanese criminal
21 law and that that was in his mind and that was part of his motivation. And if it
22 wasn't, it's totally irrelevant.

23 PRESIDING JUDGE KORNER: [10:58:29] Yeah. All right.

24 Mr Edwards, that must be right. Your client didn't give evidence, as it was his right.
25 He made some unsworn statements, which we're entitled and you are entitled to look

1 at, but you cannot give evidence about matters that he didn't give evidence about, or
2 indeed didn't say anything about.

3 MR EDWARDS: [10:58:50] And, your Honour, if it came across that I was giving
4 evidence, if it was coming across that I was telling the Court what was in
5 Mr Abd-Al-Rahman's mind in the absence of him even giving an unworn statement,
6 that was never my intent. I am simply saying that as a matter of Sudanese law,
7 cooperation at the time was criminalised. That is all. Nothing more and nothing
8 less.

9 PRESIDING JUDGE KORNER: [10:59:21] All right.
10 Is that a suitable point to take the break?

11 MR EDWARDS: [10:59:26] Yes.

12 PRESIDING JUDGE KORNER: [10:59:26] Or do you want to say anything else about
13 this aspect?

14 MR EDWARDS: [10:59:30] No. If your Honour just give me a moment. I jumped
15 back and forth in my submissions to deal with a matter that your Honour raised early
16 on, but I think I have covered everything that I wanted to say about surrender.
17 Would you just -- no, that is a good natural break.

18 PRESIDING JUDGE KORNER: [10:59:49] All right. Can I say straight away, as I
19 said to Mr Laucci yesterday, I interrupted, but I think because I suppose you and I,
20 Mr Edwards, are both used to judges interrupting counsel, but if you'd prefer, there
21 are a number of matters, particularly that have been raised by the Prosecution and by
22 the Representative of Victims which I feel, in fairness to you and so we can
23 understand the position, you need to deal with. But I can leave them until the end,
24 or I can deal with them as and when they arise, the topics. As I said to Mr Laucci
25 yesterday, whichever you prefer.

1 MR EDWARDS: [11:00:37] My preference, I won't speak for Mr Laucci, my
2 preference in the course of my submissions - and I'm about a third of the way through
3 what I wanted to say - is if your Honour is happy to ask them at the time, that way it's
4 all fresh in our minds, and I'll deal with them as we come across them.

5 PRESIDING JUDGE KORNER: [11:00:57] Yes. That's very helpful. Thank you,
6 Mr Edwards. And I see Mr Laucci nodding.

7 Yes, we'll take the break now until 11.30.

8 THE COURT USHER: [11:01:09] All rise.

9 (Recess taken at 11.01 a.m.)

10 (Upon resuming in open session at 11.37 a.m.)

11 THE COURT USHER: [11:37:37] All rise.

12 Please be seated.

13 PRESIDING JUDGE KORNER: [11:38:17] Yes, Mr Edwards.

14 MR EDWARDS: [11:38:22] Yes. Your Honours, I was talking a little earlier about
15 criminalisation. I'm not going to take your Honours through it, but it's -- I'd invite
16 your Honours to read paragraph 40 of filing 561, together with the annex to filing 496,
17 which was the Registrar's report, paragraph 7 and 8 thereof, and specifically
18 paragraph 8, in which -- I think these are confidential, so I'm not going to read
19 anything from them, but the sentence starting with the word "therefore."

20 PRESIDING JUDGE KORNER: [11:39:16] But I do think, Mr Edwards -- and I think
21 I'd better make it clear to you, so you can deal with this one. I think the objection by
22 Mr Nicholls is correct. There's no evidence at all that this had any effect on your
23 client's mind.

24 MR EDWARDS: [11:39:33] I was just -- I don't have anything more to say about that,
25 I was just clarifying what the parties' positions were and what your Honours' finding

1 was about continuing criminalisation. But if your Honour finds that that's not going
2 to move the needle, as it were, then I can move on.

3 PRESIDING JUDGE KORNER: [11:39:52] Unless you can persuade me otherwise, I
4 think the objection made by the Prosecution for the purposes of sentence, we have to
5 look at what was in your -- and allowing credit for his surrender, we have to look at
6 what was in your client's mind, and there's no evidence at all that this had any effect
7 on his decision or not to surrender.

8 MR EDWARDS: [11:40:22] Very well, I'm going to move on.

9 PRESIDING JUDGE KORNER: [11:40:25] Yes, all right.

10 MR EDWARDS: [11:40:28] Having dealt with the issue of voluntary surrender, at
11 point (b) page 44 of the Prosecution's submissions, we deal with the question of the
12 expression of remorse. That's covered at point (j) of the Defence's submissions at
13 paragraphs 91 to 100, and that will be dealt by Mr Laucci very shortly.

14 What I'm going to move on to -- and I'm taking these in order in the Prosecution's
15 submissions, that's why there is a bit of jumping around, I'm afraid, but we thought
16 that was probably the safest way of doing it.

17 Age, family situation and lack of previous convictions. So this is at point (c) at
18 page 45 of the Prosecution's submissions. Now, We cover these points at (c), (d),
19 and (h). I rely on those submissions, but I am just going to expand on one or two
20 points now.

21 The Prosecution, and I think the victims as well, say that family circumstances, such
22 as those of Mr Abd-Al-Rahman, are common to many convicted persons,

23 unexceptional and, therefore, undeserving of mitigation. Well, it's nevertheless
24 something that you have to take into account because the Statute says so. The

25 Prosecution rely in their submission that family circumstances and age, and so on, can

1 just be swept away and ignored. They rely on the Yekatom and Ngaïssona
2 sentencing observations, Bemba sentencing judgment. But we say these are
3 inapposite to Mr Abd-Al-Rahman's situation for this reason, specifically relating to
4 the loss of family members.

5 Now, in Bemba, I think the issue that was pled -- pleaded on his behalf was that
6 whilst in detention, he lost both his parents and was unable to assist in burying them
7 or visiting their grave. Mr Abd-Al-Rahman hasn't lost a parent, he's lost a child.
8 He's lost two children. Your Honours know this. He lost two sons. He had to
9 mourn them alone in his cell, thousands of miles from his grieving family, unable to
10 perform funeral rites for his children, to bury them or to visit their graves, unable to
11 be present with his family to comfort them or for them to comfort him.

12 The Yekatom and Ngaïssona case law, such as it is, and Bemba, is not binding
13 jurisprudence on your Honours. This was the position taken by other
14 Trial Chambers.

15 Now, we're not suggesting that Mr Abd-Al-Rahman's heartbreak at losing two sons in
16 the course of his incarceration should, in and of itself, result in you reducing his
17 sentence by very many years, but it's something that you can and something that you
18 should take into consideration when determining the overall sentence. If you were
19 to take the approach taken by the Chambers in Yekatom and Ngaïssona and in Bemba
20 that, in essence, that doesn't matter, would, in our respectful submission, be rather
21 heartless.

22 As far as his family situation is concerned - and we've addressed this in our
23 submissions but I'm going to reiterate one or two points - he has done his best to
24 continue to support his family, and the ways in which he has continued to support his
25 family demonstrate the authenticity of his family ties. They've been consistent,

1 provoked by a genuine commitment and a genuine desire to support and provide for
2 his impoverished dependents. He sends them the little money he is able to earn,
3 instead of spending it on himself to make the conditions of his detention here that
4 little more bearable. This is not necessarily common to all detainees, and you can't
5 find that it is common to all detainees.

6 PRESIDING JUDGE KORNER: [11:45:34] Sorry, Mr Edwards, but as a matter of
7 interest on this question of supporting family, I did remember that there was evidence
8 that he owned more than one house in Rahad Al-Berdi, or property, had quite a lot
9 of - which I don't think is part of the present conflict, although I may be wrong - quite
10 a lot of cattle, sheep and whatever, plus houses in Garsila and elsewhere. So, are
11 you saying that your instructions are that none of that is available to his family?

12 MR EDWARDS: [11:46:10] Yes. Well, our instructions are that if that was the case
13 years ago, it is certainly not the case now.

14 In a moment, I will refer you to a certain medical report, but I'm not going to be able
15 to refer you to it in open session, I'm afraid. But there is a paragraph in that report
16 that deals with this precise point. I'll put it on the record now so that we don't lose it.
17 Just bear with me for a second.

18 Now, I may be rather optimistic -- no, I think I was too optimistic. I'll find it a bit
19 later, but it's in the -- it's in that report, paragraph 38 of that report.

20 And, while I'm on the topic, your Honours will be aware that apart from a single
21 family visit that took place at a time before the war broke out again, that there's been
22 no physical contact with his family at all since his arrival in The Netherlands -- video
23 calls, which is better than nothing, but that's all.

24 We set out in our paragraph 52 our submission that the Trial Chamber can and
25 should take into account the impact of Mr Abd-Al-Rahman's detention on the rights

1 of his children, particularly his minor children, and there are five minor children aged
2 between 12 and I think 16, maybe 17.

3 A substantial sentence of imprisonment seen from the perspective of those children
4 punishes not only the father, but children, the innocent children, also. The longer
5 the sentence of imprisonment, the graver the impact.

6 We deal with this in our submissions, I really don't need to repeat the matter, but we
7 ask you to accept that is a relevant factor to take into consideration in the
8 determination of the overall sentence.

9 As far as Mr Abd-Al-Rahman's age, 76 now, by a significant margin the oldest
10 convicted person to be sentenced at this Court. For the avoidance of doubt, because
11 it was raised by the Prosecution, we're not suggesting that his age in 2003 or 2004 is of
12 any relevance. It's not. It's his age now which is of relevance. He's a man who, if
13 not in the winter months of his life, then certainly in the late autumn. Any sentence
14 of imprisonment of any significant length is likely to amount, in concrete terms, in
15 a sentence that will see him spending the rest of his life in prison, subject to
16 everything that Mr Laucci will address you on in a moment. And that sort of
17 a sentence in which the convicted person has, in essence, no hope of release before his
18 death, is particularly onerous, it is particularly harsh. It is far harsher for a convicted
19 person of more advanced years than for a younger person.

20 And where a convicted person is deprived of any hope of release, any hope of ever
21 seeing his family again in normal circumstances, any hope of returning to one's
22 homeland, any hope of any sense of normalcy, imprisonment becomes unbearable.
23 This point of a lack of hope for convicted persons who are sentenced to what in the
24 UK is described as a whole life term, was -- and your Honour may be familiar with
25 the case, it was dealt at the European Court of Human Rights in the case of Vinter and

1 Others v. The United Kingdom, 9 July 2013, Grand Chamber, application numbers
2 66069/09, 130/10 and 3896/10.

3 And, your Honours, we can send you the authority, but at paragraph 119 of that
4 ECHR judgment, the Grand Chamber says this:

5 "... the Court considers that, in the context of a life sentence, Article 3 [Article 3 of the
6 ECHR] must be interpreted as requiring reducibility of the sentence, in the sense of
7 a review which allows the domestic authorities to consider whether any change in the
8 life prisoner are so significant, and such progress towards rehabilitation has been
9 made in the course of the sentence, [so] as to mean continued detention can no longer
10 be justified on legitimate penological grounds."

11 The argument that was put forward in Vinter and Others was a whole life tariff, with
12 essentially no prospect of parole, amounted to a breach of Article 3. I raise that to set
13 out some context to what is -- what the consequences of life imprisonment might be.

14 Now, at this Court, Article 110 of the Rome Statute sets out the test for -- or, rather,
15 the conditions for a convicted person seeking early release -- forgive me, it's of the
16 Statute, yes, "Review by the Court concerning reduction of sentence".

17 Article 110.2 states that: "The Court alone [has] the right to decide any reduction of
18 sentence ...".

19 Article 110.3: "When the person has served two thirds of the sentence, or 25 years in
20 the case of life imprisonment, the Court shall review the sentence to determine
21 whether it should be reduced."

22 That tends to suggest, Your Honours, that if the Court were to follow the
23 recommendation of the Prosecution and pass a sentence of life imprisonment,
24 Mr Abd-Al-Rahman would have no possibility of seeking a reduction of sentence
25 until the passage of 25 years. He will be 101 years old. So that is what I mean when

1 I say -- well, certainly a sentence of life imprisonment would deprive him of any hope
2 of release, and any significant sentence at all would equally, in reality, deprive him of
3 any hope of release.

4 As Mr Abd-Al-Rahman gets older, his life in prison, you can accept, I submit, will
5 become more, not less, onerous. Old age will increasingly become a vulnerability,
6 and this is touched upon in paragraph 63 of the report that I will return to a little bit
7 later. Without identifying the author, paragraph 63 is not redacted and, for the
8 purposes of this submission, I'm going to read it in full.

9 Paragraph 63 is subtitled "Age and prison environment":

10 "Older individuals in prison typically have higher health and social-care needs, and
11 prison settings are often not well adapted for ageing (mobility, continence, night-time
12 support). Extended detention tends to accelerate deconditioning and dependency;
13 a lengthy custodial sentence is likely to intensify those pressures."

14 I would submit that this is a matter of commonsense. One doesn't need to be an
15 expert to understand the truth of those observations. But, in sum, we say this:

16 Deprivations associated with incarceration will become harder to cope with, are
17 likely to accelerate the aging process and, really, he faces a future of being caught up
18 in his remaining years in a vicious cycle of finding it, as he ages -- as he ages, finding
19 it increasingly hard to cope in prison, which in turn exacerbates his frailties, which in
20 turn accelerates the aging process, which in turn makes it even harder for him to cope,
21 and so on. A spiral of greater and greater decline.

22 Paragraph 65 of the expert's report deals with, in general terms, the mental health of
23 older prisoners, that imprisonment later in life carries the risk of demoralisation, low
24 mood, sleep disturbance, reduced motivation, especially during lengthy sentences.

25 The impact may become significant over the long term as isolation continues.

1 Bereavements remain only partly processed. Language barriers hinder effective
2 communication. Your Honours will know that in some countries elderly prisoners
3 are imprisoned in specialised detention facilities, set up to confront the very
4 particular challenges of accommodating the elderly.

5 The downward spiral that I alluded to a moment ago in Mr Abd-Al-Rahman's case
6 might be mitigated if he were transferred to a country of enforcement that makes
7 specific provision for elderly prisoners. But if not, and if Mr Abd-Al-Rahman is
8 obliged to spend his -- to serve out his sentence in the general population, this will
9 likely contribute to making his sentence all the more onerous.

10 So, we say that the Prosecution's submissions that his age is not a mitigating factor,
11 we say that is wrong. It is a factor to be taken into account in determining the sort of
12 sentence and the length of sentence that your Honours pass.

13 At point (d), I'm moving on now to what the Prosecution say about --

14 PRESIDING JUDGE KORNER: [11:58:35] Before you do, can we go back to this
15 question of his houses, I'm afraid.

16 You said to me a moment ago, and this is at page 46, line 18, when I asked you about
17 the houses that we heard about in Rahad Al-Berdi and Garsila and elsewhere, and in
18 Nyala, that he no longer has those houses. But according to the report you've just
19 referred to, at paragraph 16 where he deals his family, where he says he had 11
20 children, five, you say, are still minor, and he says at the end -- or the report says, and
21 this appears to be a direct quote, "Some members of my family are staying in my
22 house in Nyala and some are in my town".

23 And that, of course, goes also to the point that Mr Laucci was beginning to develop
24 yesterday and proposes to go back to, I gather, about the question of reparations.

25 MR EDWARDS: [11:59:51] Yes, thank you, your Honour. The -- I was

1 referring -- well, certainly in paragraph -- there may -- there may be a house in Nyala
2 and maybe one in Rahad Al-Berdi, but the nature of the -- paragraph 38 of the report
3 says what kind of a house the house in Rahad Al-Berdi is. A straw house.

4 PRESIDING JUDGE KORNER: [12:00:16] Yes, it doesn't explain what the others are.

5 MR EDWARDS: [12:00:20] Well, perhaps that's something I can take instruction on.

6 PRESIDING JUDGE KORNER: [12:00:23] Certainly, you can do that over the break.

7 MR EDWARDS: [12:00:27] Thank you.

8 PRESIDING JUDGE KORNER: [12:00:28] Yes, you were moving on to --

9 MR EDWARDS: [12:00:32] Yes, point (d) of the Prosecution's submissions, this is at

10 paragraphs 154 and 55 - we deal with that at (g) of our submissions, paragraphs 87

11 and 88 - relating to behaviour in the courtroom and behaviour in detention, and the

12 Prosecution say it doesn't matter, completely irrelevant, they

13 submit -- they -- detainees, defendants should behave.

14 Unlike the situation that I addressed your Honour a moment ago relating to

15 jurisprudence of this Court relating to voluntary surrender, it's right to say that the

16 Appeals Chamber has weighed in on the question of good behaviour as being no

17 mitigation unless exceptional.

18 And with great respect to the Appeals Chamber, we say that they've got that wrong,

19 as a matter of principle. And we would invite your Honours to not follow that

20 Appeals Chamber jurisprudence. The Appeals Chamber says no, only exceptionally

21 good behaviour in court or in detention could make a difference, without defining

22 what exceptionally good behaviour in detention or in the courtroom would look like.

23 But, your Honours, the report from -- even if -- even if the Appeals Chamber is right

24 in saying that only this vague concept of exceptionally good should be taken into

25 account, we would submit that the report from the detention centre is enough, it

1 provides significant information of Mr Abd-Al-Rahman as being a model detainee.
2 He's not just fine, he's not just "he behaves himself", he's not particularly troublesome.
3 A model prisoner. The report says he is always friendly, respectful, pleasant and
4 polite. Not just sometimes. Not even most of the time. He's always friendly,
5 respectful, pleasant and polite. If that isn't exceptional, your Honour, I don't know
6 what is.
7 We all have bad days, I expect that there are people in -- that there are few people in
8 this courtroom who could be described as always friendly, respectful, pleasant and
9 polite. But Mr Abd-Al-Rahman is. We say that, as a matter of principle, such
10 model behaviour should be taken into account in mitigation.
11 Why? As a matter of principle, good behaviour in detention plays an important role
12 in fostering the orderly administration of detention centres. Respectful relations
13 between detainees and with detention staff creates a harmonious living and working
14 environment. Willingness to contribute to that harmonious living and working
15 environment provides strong evidence of a willingness to rehabilitate. And as
16 a matter of principle, we say that should be encouraged. There is nothing in
17 principle that would suggest that that isn't right.
18 If it is taken for granted in the way the Appeals Chamber in Ntaganda
19 says -- suggests is the right way forward, there's nothing to deter detainees from
20 acting up, from being violent, from being disruptive, from being disrespectful. If
21 there was evidence of that sort of violence and disruptive behaviour and disrespectful
22 behaviour, of course there would be nothing to plead in mitigation. It wouldn't
23 amount to an aggravating feature, but there would be nothing to plead in mitigation.
24 But when the good behaviour, not just exceptional behaviour, but when good
25 behaviour benefits everyone, that must be acknowledged.

1 And as for behaviour in court, it should be highlighted that Mr Abd-Al-Rahman has
2 never engaged in any conduct with -- that's been disruptive. He has never engaged
3 in conduct that was intended to delay proceedings. He has always been anxious for
4 the case to proceed as expeditiously as possible. He has never wanted to stand in the
5 way of the case moving forward. On those occasions when he's been physically
6 unwell or on the sad occasions when he was grieving, he never suggested that that
7 should hold up the work of the Court. If he ever preferred to remain in his cell for
8 whatever reason, he always sent a waiver, didn't he, rather than exercise his right to
9 be present in court and thereby allowed the work of the Court to continue
10 unmolested.

11 And moving on now to the cooperation between the team and the Prosecution, your
12 Honour on more than one occasion has mentioned that there has been good
13 cooperation. Dare I say exceptionally good cooperation between the Defence and
14 the Prosecution over the course of this trial -- well, almost the entire course, but that
15 has been made possible in no small part because of Mr Abd-Al-Rahman's positive
16 attitude to the Defence's relationship with the Prosecution.

17 What do I mean by that?

18 He could legitimately have given firm instructions from the outset not to engage with
19 the Prosecution, not to reach agreement to -- if I can take -- if I can put it this way,
20 throw sickies on a regular basis and say, "No, but I'm not going to waive my right to
21 be present". He could have done that. He could have pursued a -- what the French
22 would call *défense de rupture*, a sort of a defence strategy by which focus is on a denial
23 of the legitimacy of the institution engaging on total non-cooperation, legal
24 obstruction. There's a -- there's a well-known French lawyer called Vergès who has
25 made that his own, and I see your Honour is nodding.

1 He didn't. Mr Abd-Al-Rahman was always more than happy for there to be full
2 cooperation with the Prosecution whenever that was reasonably possible. And for
3 that, once again, he deserves recognition. It is, in our submission, necessary for that
4 to be taken into account in mitigation. Again, I'm not suggesting that you should
5 take off years, but it should be taken into account.

6 I now come on to conduct in Rahad Al-Berdi between 2009 and 2019, and the
7 Prosecution's submissions, and indeed the victims, that this should not be taken into
8 account. We address this in part (e) of our written submissions, (e)(i), (e)(ii) and
9 (e)(v).

10 Before diving into the substance, your Honour, two matters: Your Honour
11 addressed with Mr Laucci yesterday that -- the standard of proof point, and he
12 generously handed that on to me. So can I briefly address you on a point that is set
13 out in paragraph 58 of our written submissions, I think this is where it was originally
14 found.

15 PRESIDING JUDGE KORNER: [12:08:46](Microphone not activated) It appears an
16 awful lot through your submissions.

17 MR EDWARDS: [12:08:49] Yes.

18 PRESIDING JUDGE KORNER: [12:08:50] It's one of the things that is troubling me, I
19 have to say.

20 MR EDWARDS: [12:08:54] Well, paragraph 58 is where it starts off, as it were. But
21 really this is our point, and I hope I can summarise it briefly and accurately.

22 The Chamber found that the Prosecution established beyond reasonable doubt that
23 Mr Abd-Al-Rahman is and was Ali Kushayb. In so finding, you necessarily had to
24 find not credible those Defence witnesses that disavowed the connection. So in other
25 words, their evidence on that point was insufficient to raise a reasonable doubt.

1 Having said that, there were many Defence witnesses who spoke of other things -- in
2 fact, they all spoke about other things in the course of their testimony. As a matter of
3 law, I think it's uncontroversial to say that a witness can be found to be untruthful
4 about one aspect of their evidence but credible in relation to others. I mean, one
5 example is Witness D-7 and we address his testimony in paragraph 71 of our
6 sentencing submissions.

7 The Trial Chamber found that there was -- that he represented limited reliability and
8 credibility due to his evidence about the Ali Kushayb link. But other evidence did
9 not attract any specific adverse credibility finding against him and wasn't indeed
10 challenged by the Prosecution in their cross-examination. And here I'm talking
11 about how it is that Mr Abd-Al-Rahman saved the life of a soldier in Songo.

12 So since matters of mitigation need only be established by the Defence to the lower
13 balance of probabilities standard, we say that Defence witness who gave additional
14 evidence to the Ali Kushayb point, who gave evidence, let me put it this way, of
15 a more peripheral nature, evidence that could be categorised as character evidence,
16 can and should be relied on to that extent when there have been no adverse
17 credibility findings specifically to that character evidence. That's the point.

18 PRESIDING JUDGE KORNER: [12:11:21] Yes, I think I grasped that yesterday and I
19 see that. The trouble is, and I'll say this now generally as you're dealing with it, that
20 it's not always the case that you are not on the face of it seeking to go behind our
21 findings. For example, and let me take -- which is an aspect that has been referred to
22 by both the Prosecution and the representative of the victims, and that is this: it is the
23 empathy that Mr Laucci is going to deal with that it is said that the -- Abd-Al-Rahman
24 has with victims. But our finding is that he is responsible, in one form or another
25 and sometimes directly, for the death of those victims. So that is what I mean about

1 going behind -- trying to go behind our findings and saying on the balance of
2 probabilities. But if we weren't satisfied so that we were sure, convinced, then we
3 couldn't have found him guilty. So it seemed -- it is to me an intellectual conundrum,
4 to say the least, as to how you would expect us to deal with this.

5 MR EDWARDS: [12:12:51] Well, can I -- can I make it very clear that for the
6 purposes of a sentencing exercise, we rely on your Honours' findings. We don't ask
7 your Honours to go behind those findings. We can't. That would be wrong. But
8 there are circumstances where no specific adverse credibility findings have been
9 made in respect of Defence witnesses' evidence. And where that's the case, and
10 given the lower standard of proof, we say it is open to you to accept that evidence in
11 mitigation and that is all.

12 PRESIDING JUDGE KORNER: [12:13:26] Yes. All right. I think I do follow
13 clearly now what you're saying. Thank you.

14 MR EDWARDS: [12:13:34] And there's a -- there's a second preliminary point as
15 a response to the Prosecution's and the LRV's submissions about how the Defence
16 presented its arguments about Mr Abd-Al-Rahman as a man of peace, and specifically
17 paragraph 63 of our written statements, and I think a brief explanation is called for
18 here.

19 Paragraph 63, let me put it this way, that may be an instance of over exuberant
20 drafting, and I understand completely why my learned friends would have picked up
21 on it. The Trial Chamber did not describe Mr Abd-Al-Rahman as a man of peace in
22 the judgment, and our endeavour to extrapolate your Honour's acknowledgment of
23 him playing the role of a mediator may have been clumsy.

24 PRESIDING JUDGE KORNER: [12:14:29] I think you have to -- I, again, do not want
25 to go back over the judgment, we've said what we've said in the judgment, but I think

1 you need to look at the context of that one.

2 MR EDWARDS: [12:14:40] Yes.

3 PRESIDING JUDGE KORNER: [12:14:42] Where the word -- his role as a mediator.

4 MR EDWARDS: [12:14:47] Yes. Well, Ms von Wistinghausen made the point
5 yesterday and we accept those submissions to that extent, as it were, *nostra culpa*.

6 But what we don't accept is a deliberate attempt to mislead or a deliberate attempt to
7 misrepresent the evidence. It really wasn't. It may have been clumsy, but nothing
8 more than that.

9 Having said that, can I move on to the substance, and we say that the Prosecution and
10 LRV's positions on Mr Abd-Al-Rahman's character are not tenable and they should
11 not be given weight. Irrelevant considerations are focused on by them in an attempt
12 to convince your Honours not to treat his post-2004 behaviour as mitigation. And,
13 for example, they say that the evidence of his, as it were, good behaviour took place in
14 an entirely different location and at a time years after the offending behaviour. And
15 they make no attempt whatsoever to explain why only laudable actions undertaken at
16 the time of the criminal events or at the location of the criminal events as a matter of
17 law should be taken into account by the Trial Chamber. Once again, I come back to
18 Rule 142(a)(ii), the text, which places no limits of place or time on evidence of a
19 convicted person's good conduct after the act.

20 The rule says "after the act", so the relevance of a complaint by the Prosecution that
21 the evidence of good conduct doesn't relate to the time is completely misplaced. We
22 submit that the where and when factors are far less important than the what and the
23 why factors: what mitigating conduct did Mr Abd-Al-Rahman engage in and why did
24 he engage in it.

25 And to the extent that any attempt is made to rely on jurisprudence by the

1 Prosecution, the only support for its position is found at footnote 416, the Popovic
2 case before the ICTY. There is no case law from this Court cited. Your Honours,
3 you can ignore it.

4 You've seen that there is evidence of D-40 and D-41 before you, and I am not going to
5 take you through their statements. We have made full submissions on what they say
6 in our brief. It's right to say that some of the acts do relate to Mr Abd-Al-Rahman in
7 his capacity as a CRF officer. We accept that, but that is to miss the point. The
8 gravamen of D-40 and D-41's evidence relates to the efforts made, admittedly after the
9 events, but the efforts made by Mr Abd-Al-Rahman to bring together people from the
10 various tribes in Rahad Al-Berdi, including the Fur and the Masalit. D-40 refers to
11 Mr Abd-Al-Rahman's speeches calling on the need to live in peace without racism
12 and discrimination. And that these efforts resulted - I accept in 2014, not in 2003 or
13 '04, but in 2014 - that he was awarded a medal as thanks for all he did for the benefit
14 of the whole community.

15 D-41, he is not of the Ta'aisha tribe - and I say nothing more than that - describes
16 Mr Abd-Al-Rahman's speeches in which he talks about the brotherhood between
17 tribes. That all are equal before the law, that disputes should not result in violence,
18 that there should be peace. Your Honours, that is entirely consistent with the
19 essence of what Mr Abd-Al-Rahman exhorts to his audience in the Um Sory and the
20 Teachers videos. So when it is suggested that D-40 and D-41's evidence, you know,
21 "starkly contrast with the violent and inflammatory language" in the Um Sory and
22 Teachers videos, I'm afraid that is simply wrong, and it's not fair when you look
23 dispassionately at the context of those speeches.

24 PRESIDING JUDGE KORNER: [12:19:28] I think, however, that the Prosecution and
25 the CLRV were referring not just to the Um Sory video, but all the newspaper reports

1 and the like that were shown to Defence witnesses in roughly the period, I think it
2 was 2013 or thereabouts, in which he is still making allegedly inflammatory remarks,
3 is helping to expel the Salamat, and being accused of being responsible for Fur -- I'm
4 summarising like mad at the moment --

5 MR EDWARDS: [12:20:09] Yes.

6 PRESIDING JUDGE KORNER: [12:20:10] -- but of being solely responsible, as head
7 of the CRF in Rahad Al-Berdi, for the violence and indeed expelling, as I say, the
8 Salamat by violence.

9 MR EDWARDS: [12:20:27] Yes. Well, I don't -- again, you've made findings in the
10 judgment and we can't go behind those findings. All I ask your Honours to do -- all
11 we ask your Honours to do, is to look at the essence of what Mr Abd-Al-Rahman says
12 in those speeches, because they amount to strong evidence of exhortations for the
13 different tribes to live together without racism, without discrimination.

14 The Um Sory speech -- this is at DAR-OTP-00012474, he starts off by saying:

15 "First of all, dear brothers, there are no Zayds or 'Abids, only sons of Jinayd".

16 He says:

17 "There should be no tribalism, regionalism or racism. All of us are so tightly bonded
18 that you'd need a sword to divide us."

19 He is talking here about the community of his town that we heard from lots of
20 witnesses was a cosmopolitan town.

21 He says a bit later on:

22 "All people stand united ... all people: brown, black ..."

23 And your Honours can be sure that what he means by that is Arab tribes and, as it
24 were, African tribes.

25 "... all people are so tightly bonded to one another that you'd need a sword to divide

1 us."

2 That is a message of non-discrimination, of non-racism, and that is what we ask you
3 to focus on. It certainly nuances the evidence that the Prosecution rely on.

4 The Prosecution also suggests that the evidence of D-41 seems to contradict the
5 experience of D-29 and D-28. And, again, I want to stay in open session, so I don't
6 want to go into too much detail. But we say that the two sets of assertions are not
7 necessarily inconsistent. D-28 and D-29 speak of or told the Defence about the
8 actions of certain elders of a certain community. D-41, on the other hand, speaks of
9 the position of the community more broadly, not simply the leadership, so it's not
10 necessarily inconsistent.

11 And yesterday the Prosecution suggested, at page 33 of the uncorrected transcript,
12 that they are not credible and that had they been subjected to cross-examination they
13 would have been significantly damaged.

14 Now, we on this side of the Bar will always be the first in line to acknowledge the
15 advocacy skills of Mr Nicholls and his team, but he cannot assert as a matter of fact,
16 rather than as a matter of aspiration, that D-40 and D-41's evidence would have been
17 undermined. It is pure speculation, we say, and we ask you to attach no weight to it.
18 Coming back to Mr Abd-Al-Rahman's character.

19 In our written submissions at paragraphs 58 to 62, we provide evidence of his
20 generous tendencies as a pharmacist, the fact he gave medicine for free to those who
21 couldn't afford it. Again, his role in maintaining intertribal cohesion, and we say
22 that that is supported in the videos.

23 PRESIDING JUDGE KORNER: [12:24:23](Microphone not activated) Sorry, because
24 Ms von Wistinghausen picked on that business of -- she's says it's an aggravating
25 feature.

1 MR EDWARDS: [12:24:32] Yes.

2 PRESIDING JUDGE KORNER: [12:24:34] Because you as a medical man,
3 supposedly helping the community, are in fact wreaking, so she submits, destruction.

4 MR EDWARDS: [12:24:49] Yes.

5 PRESIDING JUDGE KORNER: [12:24:49] What do you say to that?

6 MR EDWARDS: [12:24:51] Well, to that extent, we will agree to disagree.

7 We say that he is a man who in the past, as a man of medicine, has helped the
8 community significantly. And we say that it is not an aggravating feature.

9 Just to summarise, we say that there is a different side to Mr Abd-Al-Rahman's
10 character than the one portrayed by the Prosecution than the one upon which the
11 evidence in this trial shone a light, because in the context of a trial, the Prosecution
12 will only shine the light on one side of a person's character. The evidence shows that
13 there is evidence that Mr Abd-Al-Rahman urged communal harmony, peaceful
14 resolution of disputes. And your Honours may think that in so doing, in the context
15 of Rahad Al-Berdi, in the past he must have prevented conflict, he may even have
16 prevented violence in the past. And, as a matter of fairness, we ask that that be
17 taken into consideration in determining his sentence.

18 I've come to the end to everything that I can say in open session.

19 My very last point is a point that can only be, I'm afraid, addressed in private session,
20 and I suspect I'm going to take -- I'm probably going to take us up to 1 o'clock.

21 PRESIDING JUDGE KORNER: [12:26:55] Yes, very well.

22 We'll go into private session.

23 (Private session at 12.27 p.m.)

24 THE COURT OFFICER: [12:27:05] We are now in private session, Madam President.

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9 (Recess taken at 12.58 p.m.)

10 (Upon resuming in open session at 2.34 p.m.)

11 THE COURT USHER: [14:34:09] All rise.

12 Please be seated.

13 PRESIDING JUDGE KORNER: [14:34:43] Yes, Mr Laucci.

14 MR LAUCCI: [14:34:46] Thank you, Madam President. And good afternoon to
15 everyone.

16 I will address the last mitigating circumstance relied upon by the Defence, which are
17 Mr Abd-Al-Rahman's words and actions in favour of the victims.

18 This topic is addressed at paragraph 91 to 100 of the Defence submission. I do not
19 repeat my submission.

20 At paragraph 149, the -- of its written submissions, the OTP submits that

21 Mr Abd-Al-Rahman is yet to express remorse, and I quote, "continues to assert the lie
22 that he is not Ali Kushayb and refuses to take responsibility for the crimes for which
23 he has been convicted".

24 This was anticipated and we dedicated paragraph 96 of our written submissions to
25 this topic, but I will just complete in response to what my learned friend from the

1 OTP said.

2 No, Mr Abd-Al-Rahman has not expressed remorse, because he could not. Any
3 remorse or admission that he is Ali Kushayb would have amounted to a confession of
4 his guilt.

5 PRESIDING JUDGE KORNER: [14:36:28] Mr Laucci, I can stop you. I agree. He's
6 contested the case and -- and it would be, can I put it this way, improbable if he
7 suddenly changed his mind and admitted it at the end. However, what is -- is
8 difficult, it seems to me, for you to advance in that event is sympathy that he feels for
9 victims when the Trial Chamber has found that he is, as I said to Mr Edwards, he is
10 responsible for the deaths, the torture, and the general ill treatment.

11 MR LAUCCI: [14:37:20] I will respond immediately to this, Madam President,
12 because you said it earlier this morning, so I had the opportunity to prepare the
13 response.

14 In full respect, I think this is conflating two different aspects. The first aspect is the
15 actions that you have found Mr Abd-Al-Rahman committed in 2003 and 2004. The
16 second aspect is his subsequent efforts in favour of victims, which I will develop very,
17 very soon.

18 Rule 145(2)(a)(ii) of the Rules identifies efforts in favour of victims as a mitigating
19 circumstance, and of course this mitigating circumstance is designed to play in favour
20 of a person who has been convicted.

21 Can I have the text, please?

22 PRESIDING JUDGE KORNER: [14:38:28] Yeah, you need the text, Mr Laucci.
23 I think it was Ms von Wistinghausen who pointed it out.

24 145(2)(a)(ii): "The convicted person's conduct after the act, including any efforts by the
25 person to compensate the victims."

1 That means him, personally, compensating, with the sale of his properties in
2 Rahad Al-Berdi, for example.

3 MR LAUCCI: [14:39:04] And I will cover that point fully this afternoon. That's in
4 my submissions.

5 PRESIDING JUDGE KORNER: [14:39:09] All right. Okay.

6 MR LAUCCI: [14:39:10] But what I want -- just, the only thing that I want to say
7 here is to say that Mr Abd-Al-Rahman's words and actions after the facts, after the
8 period that is covered in your trial judgment, may, if it amounts to, one way or the
9 other, compensation under 145(2)(a)(ii) be considered a mitigating circumstance.
10 And that's what I'm going to explain and try to convince you this afternoon, which
11 means that, because this provision is provided specifically for a person convicted and
12 found guilty, this cannot be made empty by the fact that, yes, indeed they were guilty.
13 Yes. You found Mr Abd-Al-Rahman guilty, but nevertheless I will ask you to
14 consider mitigating circumstances on the basis of his words and actions since the
15 period of the judgment.

16 So I take from your intervention, Madam President, that there is no -- no need for me
17 to insist more on the remorse aspect and I move immediately to the other aspects.

18 PRESIDING JUDGE KORNER: [14:40:47] Yeah. Because you did raise, or
19 somebody raised, the Al Mahdi question, but I had a look at it and it's clear that it was
20 the plea of guilty, plus his actions thereafter which showed remorse. And that
21 doesn't really apply in your case. But as I say, it is not something the Trial Chamber
22 would expect.

23 MR LAUCCI: [14:41:16] I remember you saying yesterday, Madam President, that
24 each case was different, and I think we can agree on that.

25 I move to the expressions of solidarity with the victims and why these, in the Defence

1 submission, these fall under 145(2)(a)(ii).

2 Mr Abd-Al-Rahman has expressed his solidarity for the victims in Darfur on two
3 occasions, the two occasions that he had to do so before this Court. Relevant
4 abstracts from his earlier interventions are quoted in the written submissions. I will
5 not repeat these.

6 In addition to these, Mr Abd-Al-Rahman requested on two occasions that a minute of
7 silence be observed in the courtroom in memory and prayer for the victims in Darfur.

8 The first time was his initial appearance on 15 June 2020 -- that's transcript number 1,
9 page 22, lines 4 to 22. And it was denied. The second time was before his first

10 appearance before the Appeals Chamber on 8 October 2020, and that's the filing,

11 ICC-02/05-01/20-175 OA2. It was again denied. The decision denying his requests

12 are, of course, out of his control, but they do not change anything to the fact that

13 Mr Abd-Al-Rahman repeatedly requested the opportunity to have these minutes of

14 silence and express compassion for the victims in Darfur, which makes that these

15 expressions of compassion and solidarity have been persistent throughout these

16 proceedings. They remain persistent. Tomorrow, Mr Abd-Al-Rahman will

17 take -- will speak a last time, with your authorisation, and you can be confident that

18 this will be another opportunity to do so.

19 The repeated expression of solidarity for the victims, of course, are worth what they

20 are. But the OTP has no grounds to submit that these expressions are not genuine.

21 Mr Abd-Al-Rahman's expression of solidarity in favour of victims are not directed at

22 the OTP anyway. The primary audience of these words is not even in this

23 courtroom. The primary audience are the victims and the affected community who

24 can see and hear Mr Abd-Al-Rahman expressing his compassion and solidarity

25 through the broadcasts and the outreach activities.

1 I stop here. My learned friend of the Legal Representative for the Victims told us
2 yesterday -- or I don't remember, I lose track of time -- that the victims have not
3 received these expressions of interest in a very positive manner and that's an
4 euphemism. The way they are received by the intended audience is unfortunately
5 something that is totally out of the control of Mr Abd-Al-Rahman. He does what is
6 in his power, that is to express his solidarity. The way these expressions are received,
7 he has no control over it. But these expressions of compassion and solidarity already
8 form part of a process of reparations that Mr Abd-Al-Rahman has been calling for
9 since his arrival at the court. And that's the filing of 17 July 2020, number 98 in the
10 records.

11 Mr Abd-Al-Rahman's repeated request to start the reparation phase in favour of the
12 victims without waiting for the outcome of his trial have been denied. This was
13 respected, but these denials have not prevented Mr Abd-Al-Rahman from starting to
14 offer reparations to victims by his own limited means through his interventions in the
15 proceedings.

16 Mr Abd-Al-Rahman claims reparation for the victims at the same time as he claims
17 his innocence. There is no contradiction, not even a tension between these two
18 aspects of his positioning before the Court. One can be innocent while suffering the
19 torment of the victims and wishing to offer them comfort.

20 PRESIDING JUDGE KORNER: [14:47:02] But I'm sorry, Mr Laucci, but I am going to
21 intervene here because, as you say, the likelihood is that people in Sudan, or in Darfur,
22 are listening -- or may be listening to this. The fact remains, you've asserted your
23 innocent -- Mr Abd-Al-Rahman's asserted his innocence, but we, the Trial Chamber,
24 have found that that assertion was untrue and we have convicted him, and by
25 convicting him it means we find him responsible for the death of these people who

1 are having to listen now to -- after the death and the injuries and all the rest of it, who
2 are now having to listen through you to him expressing sympathy for people that we
3 have found were his victims. And I mean to continue in this vein. You can, of
4 course, Mr Laucci, but you have said that you have no control over how victims have
5 received these expressions of sympathy, but on their behalf, Ms von Wistinghausen
6 has told you and therefore it's entirely a matter for you, but I wonder whether it's in
7 your or your client's best interests to continue like this.

8 MR LAUCCI: [14:48:25] Madam President, Mr Abd-Al-Rahman's first and second
9 expressions of compassion may not have been received in a way it was hoped, but
10 this does not discard the possibility that the third one may be more successful.

11 PRESIDING JUDGE KORNER: [14:48:49] Well, all right, Mr Laucci. I'll let you
12 continue.

13 MR LAUCCI: [14:48:54] Throughout this trial Mr Abd-Al-Rahman has seen victims
14 after victims appearing before this Court, before this Chamber, and explaining what
15 they had gone through. All of us in this courtroom listening to the victims and the
16 witnesses were -- we have all been moved by what they were telling us. Does that
17 make us guilty? Why is it that Mr Abd-Al-Rahman could not have felt the same
18 emotion, the same compassion as we did, and even closer solidarity because he,
19 unlike us, knows the conditions of living in Darfur. Why the fact that he was
20 accused and that he has been found guilty by your Chamber would that prevent him
21 from feeling and sharing this emotion when listening to the victims and witnesses?
22 Being an accused, or even a convict, is not a vaccination against compassion for the
23 victims of the crime. Mr Abd-Al-Rahman was accused, Mr Abd-Al-Rahman has
24 been found guilty by this Chamber, but that alone cannot prevent him, even less so
25 forbid him, from feeling compassion for the victims of the crimes he is accused and

1 found guilty of and for expressing his compassion to the victims.

2 The Office of the Prosecutor has full discretion to disbelieve his sincerity, but that is
3 irrelevant. The only thing that matters is that the victims of the crime can hear, if
4 they want, the person accused and found guilty of these express his compassion and
5 solidarity for them is -- in his own words, and on repeated occasions. That already,
6 we submit, forms part of a reparation process.

7 But words are not all. Words of compassion are little compared to actual proof of
8 compassion, and I now turn to this.

9 At paragraph 98 of its sentencing submissions, the Defence reminds this Chamber of
10 the application of 17 July 2020 to open immediately reparation proceedings in favour
11 of the victims without waiting for the outcome of the trial.

12 This application, of course, was made upon instruction from Mr Abd-Al-Rahman
13 after full discussion of its implications. And I will mention two.

14 In the first place, the first implication was the possible, even though inappropriate,
15 inference that some may have drawn from this application that he must have been
16 guilty or otherwise he would not have cared about reparations for victims. The
17 Defence had to be extremely pedagogue to try to rebut that inference. And let me
18 say that I'm not sure we were always successful.

19 The second implication was the possible consequences that Mr Abd-Al-Rahman
20 would face, should he eventually be found guilty, that is now, at the end of his trial.
21 None of these possible adverse consequences were enough to dissuade him from
22 instructing his Defence to file the application. The interests of victims prevailed on
23 that occasion.

24 More recently, the Defence, still acting on behalf of Mr Abd-Al-Rahman, contacted the
25 Trust Fund for Victims to inquire about reparations for victims in the Sudan situation.

1 Paragraph 99 of the submissions of the Defence.

2 A meeting took place with the Trust Fund on 4 November. I precise that this
3 meeting had been requested since September 2025, but the Trust Fund was not
4 available earlier.

5 During that meeting the Trust Fund advised the Defence that there were currently no
6 assistance or reparation programmes in favour of victims of the Darfur situation, and
7 that these would start with the issuance of a reparation order by your Chamber and
8 not before. The Trust Fund also advised that in the absence of ongoing programme,
9 the Fund had no possibility to receive earmarked contributions from private donors
10 for Darfur victims. Should the Trust Fund receive such earmarked contributions, it
11 would have to see and determine how to deal with these, but there was no
12 ready-made solution precisely in the absence of such earmarked contribution received.
13 Finally, the Trust Fund advised that its fundraising activities were primarily targeting
14 State Parties.

15 On the basis of that investigation and after thorough discussion with
16 Mr Abd-Al-Rahman, the Defence sent on his behalf letters calling States to consider
17 making earmarked voluntary donations to the Trust Fund in favour of the victims in
18 Darfur. The letters have been sent in two batches. The first one of 54 non-state
19 parties and, after consultation with the Trust Fund to ensure that this would not
20 interfere with their own fundraising activities, a second batch of 114 State Parties.
21 Sudan is not on the list of State Parties which have been contacted.

22 The Defence not only calls for earmarked contributions for the Darfur victims, but
23 offers to meets with States' representatives to answer their questions and facilitate
24 their donations to the Trust Fund. In short, at the request of Mr Abd-Al-Rahman,
25 the Defence team and its limited resources are actively engaged in fundraising

1 activities in favour of Darfur victims from now on and for an unlimited period of time.

2 This initiative is without precedent in the history of the Court and in the history of
3 international criminal justice since its origins. It is by far exceptional. As such, it
4 should heavily weigh in your determination on mitigating circumstances and on the
5 sentence that you will elect to impose on Mr Abd-Al-Rahman.

6 And, please, your Honours, don't go the easy way of saying that all these actions are
7 at no real cost for Mr Abd-Al-Rahman. Of course, Mr Abd-Al-Rahman is not
8 offering to pay for reparations for victims out of his money, and this is for the simple
9 reason that he has none.

10 I have taken the additional instructions, I come to this.

11 Let me remind you that his monthly salary as *musa'id* within the Central Reserve
12 Forces in 2020 was 660 Sudanese pounds per month. Back in time, at the time of the
13 initial appearance in June 2020, this equated to about 12 euros per month. You may
14 wish to check the current equivalent of 660 Sudanese pounds today. I did it on
15 15 November. On that date, 660 Sudanese pounds equated to 0.93 euros. That was
16 his salary per month. Even if Mr Abd-Al-Rahman offered the equivalent of his
17 monthly salary to the Trust Fund that would be no more than one euro per month.
18 Well, I prefer not to know what the OTP will have to say about the mitigating impact
19 of such a donation.

20 Coming to the houses, I can report the following. Mr Abd-Al-Rahman has a house, a
21 straw house in Rahad Al-Berdi, where two of his wives live with seven of his children
22 nowadays. This house, he bought it in 2013 with the money that he received after
23 the selling the house that he had Garsila. He left to Garsila, he moved to
24 Rahad Al-Berdi, he bought there a house that could welcome he and his family. The
25 price that he bought it, out of memory, in 2013, the price that he bought that house

1 was 25,000 Sudanese pounds. I made the conversion at today's rate. This amounts
2 to 35.85 euros. That's the cost, the price of the house in Rahad Al-Berdi.

3 Mr Abd-Al-Rahman has a second straw house in Garsila where his third wife lives
4 with five children, and he has this house since, out of memory, 1996.

5 Sorry, did I say Garsila? Sorry, no, my mistake. It's Nyala. That's the house in
6 Nyala.

7 I start again. Mr Abd-Al-Rahman has a second house, a straw house as well in
8 Nyala, where his third wife lives with five children. This house, he has it since, out
9 of memory, 1996. I asked him the price at which he has bought the house. I got a
10 response. I checked two times. It is so low I dare not share that with the Chamber
11 unless you really insist, but let me tell you that it's hard to believe how low the value
12 of this can be.

13 PRESIDING JUDGE KORNER: [15:01:01] Mr Laucci, I'm perfectly prepared to
14 accept that particularly these days in Sudan the property is pretty worthless, but,
15 in fact, you -- this originally started with Mr Edwards assuring me, and you I think,
16 that he had no property left, which it turns out, he says something different to --

17 MR LAUCCI: [15:01:28] Okay.

18 PRESIDING JUDGE KORNER: [15:01:29] Just a moment. I haven't quite finished.
19 Also, he told the person who prepared the report that we've been referring to that he
20 had 11 children, two of whom have now died. Now you tell us he's got -- and you
21 told us earlier he has got five minor children, and now we've got more children.

22 MR LAUCCI: [15:01:57] No. The number of 11 is inaccurate. The number
23 was -- 18 or 19?

24 (Counsel confers)

25 MR LAUCCI: [15:02:06] Initially, 18 or 19?

1 (Counsel Confers)

2 MR LAUCCI: [15:02:07] Nineteen, three of them died, makes 16 remaining. So
3 that's the correct number.

4 Now, regarding the assertion that he had no property, I'm totally prepared to accept
5 the blame. Mr Abd-Al-Rahman has these two houses, but in full honesty, the value
6 of this in my, well, respectful submission, equates to no property at all.

7 PRESIDING JUDGE KORNER: [15:02:43] It's not that. I'm perfectly prepared to
8 accept that. Equally, my recollection is that he had more than one house in
9 Rahad Al-Berdi because he was -- it was suggested to witnesses, or witnesses were
10 saying that he put up refugees in his houses.

11 MR LAUCCI: [15:03:03] Yes, precisely.

12 PRESIDING JUDGE KORNER: [15:03:05] Plural.

13 MR LAUCCI: [15:03:07] And I can explain this one. As I said, the house that he
14 currently has in Rahad Al-Berdi was purchased in 1993, when he moved to Garsila.
15 Before that period, he still had some -- I don't know exactly how many, but some
16 members of his family where in Rahad Al-Berdi while he was in Garsila and they
17 were living in the suburbs of Rahad Al-Berdi. That was sold as well to purchase the
18 house that is more in the centre of the city, so that's the house that is left.

19 PRESIDING JUDGE KORNER: [15:03:43] Yes, all right.

20 MR LAUCCI: [15:03:45] And to be complete --

21 (Counsel confers)

22 MR LAUCCI: [15:04:00] Mr Iain Edwards asked me to clarify. Two of the children
23 died since Mr Abd-Al-Rahman is with us before the Court. One died a long time
24 ago, which makes a total of three.

25 And, finally, no more cows, the last two cows that he had, passed as well.

1 Every money that Mr Abd-Al-Rahman earns, and my learned friend already
2 mentioned that, out of his work in detention goes to the family. Every single euro
3 that Mr Abd-Al-Rahman would deflect from supporting his family would expose
4 them to dire consequences and we submit that this cannot be required from him.
5 So, the question is, because Mr Abd-Al-Rahman has no money to offer for reparations
6 to victims, does that mean that he cannot receive mitigation pursuant to Rule
7 145(2)(a)(ii).
8 Rule 145(2)(a)(ii) provides that the convicted person's efforts to compensate the
9 victims should play as a mitigating factor. The Rule does not specify that such effort
10 should be of a financial nature. To interpret it so would amount to depriving
11 persons who, like Mr Abd-Al-Rahman, have no money from the benefits of this
12 mitigating circumstance. This interpretation, we submit, is excluded under
13 Article 21(3) of the Statute which requires the interpretation of the law to be without
14 adverse distinction, founded on grounds such as, I quote, "social origin, wealth, birth
15 or other status".
16 Mr Abd-Al-Rahman's efforts in favour of reparation for victims, even if they are not
17 of a financial nature, are a mitigating circumstance, we submit, under
18 Rule 145(2)(a)(ii).
19 By the way, if you allow me to make a short digression, my reference to Article 21(3)
20 of the Statute also applies to my learned friend's, Legal Representatives for Victims'
21 proposal of relying on Mr Abd-Al-Rahman's profession as a pharmacist as an
22 aggravating circumstance.
23 Article 21(3) forbids adverse distinctions founded on grounds such as, and this is not
24 limitative, social origin, wealth, birth or other status. Being a pharmacist has
25 nothing to do with the crimes and it cannot be used as an adverse distinction for the

1 purpose of aggravating circumstances. You are fully authorised to weigh his

2 profession -- is there something unclear in what I said?

3 PRESIDING JUDGE KORNER: [15:07:51] I'm not sure --

4 MR LAUCCI: [15:07:58] Let me check if I can see it.

5 PRESIDING JUDGE KORNER: [15:08:00] I'm just rereading what you said, or

6 attempting to read what you said.

7 Yes, I don't think --

8 MR LAUCCI: [15:08:16] Is there something unclear?

9 PRESIDING JUDGE KORNER: [15:08:17] Yes, I don't -- I don't think, Mr Laucci, that

10 Article 21(3) has anything to do with the fact that he chose to, whilst he was in the

11 army, apart from his other activities, take medical training and then, as the Chamber

12 found it, he committed crimes personally, including the use of an axe, which because

13 of his training, if nothing else, he would have known would cause serious injury and,

14 indeed, as the Chamber found, killed two people. And it surely is, is it not, an

15 aggravating feature of his crimes that he had the medical knowledge to know what

16 effect they would have.

17 MR LAUCCI: [15:09:17] Madam President, I would respectfully say that it doesn't

18 take to have a certificate in medicine to know that a hit with an axe can have bad

19 impact on the health of the target. That's obvious for everyone. I'm not a doctor,

20 but I can tell you so. Which means that the medical background and the fact that

21 Mr Abd-Al-Rahman was a pharmacist, once again I insist, has nothing do with what

22 you have found him guilty of.

23 This is his profession. This is his status. And Article 21(3), that's my submission,

24 forbids to use that as an adverse distinction for the purpose of aggravating a sentence.

25 PRESIDING JUDGE KORNER: [15:10:11] So, is that because -- for example, I don't

1 want to -- it's a very small point and I don't want to spend too long on it, but, for
2 example, a doctor has to take a Hippocratic oath which is not to kill or do any harm,
3 or whatever it is, and if that doctor goes out and deliberately commits crimes, such as
4 beatings, torture, murder, does that in your view aggravate his responsibility or not?

5 MR LAUCCI: [15:10:46] The fact that he is a doctor has no impact on the gravity of
6 the crimes.

7 PRESIDING JUDGE KORNER: [15:10:52] No, but on his own personal mitigation, if
8 you like, the fact that he has taken an oath to uphold life and deliberately and
9 consciously goes out and kills, you say that is not a factor?

10 MR LAUCCI: [15:11:06] Once again, my understanding of Article 21(3) is that this
11 factor, being a doctor, cannot be used as an adverse distinction.

12 PRESIDING JUDGE KORNER: [15:11:15] All right.

13 MR LAUCCI: [15:11:16] That's what I have to say.

14 PRESIDING JUDGE KORNER: [15:11:17] I just wanted to know.

15 MR LAUCCI: [15:11:18] But the fact that he is a pharmacist, we included it as a
16 mitigating circumstance because, once again, this is not an adverse distinction. This
17 is a distinction in favour which is not forbidden under Article 21(3) of the Statute.

18 So, to complete, Mr Abd-Al-Rahman, with no financial capacity to offer reparation for
19 victims, contributes to this by every other means available to him -- that is, through
20 his words - again tomorrow - through his instructions to his Defence to ask for the
21 opening of reparations and to engage actively in fundraising activities for victims in
22 Darfur through the Trust Fund.

23 The Defence is asking your Honours to give substantial weight to

24 Mr Abd-Al-Rahman's persistent, exemplary and unprecedented contribution to
25 alleviating the suffering of victims in your determination.

1 That closes my submission, Madam President.

2 PRESIDING JUDGE KORNER: [15:12:26] Well, on this aspect?

3 MR LAUCCI: [15:12:30] Yes.

4 PRESIDING JUDGE KORNER: [15:12:31] I see. You --

5 MR LAUCCI: [15:12:32] Oh, no, you want me to -- to address --

6 PRESIDING JUDGE KORNER: [15:12:35] Well, Mr -- Mr Edwards said that you
7 were going to address the parts that the Prosecution --

8 MR LAUCCI: [15:12:41] Absolutely.

9 PRESIDING JUDGE KORNER: [15:12:42] -- and the Representative of Victims
10 were -- made.

11 Firstly, you argue as mitigating circumstance (a) at paragraph 27, that he had a
12 "subordinate rank and low hierarchical position". And the Prosecution, and indeed
13 the CLRV, dispute that and say this is not the case at all.

14 In fact, you also stated in paragraph 27, that:

15 "... the Chamber finds that he was, at best, one among several local leaders of the
16 so-called Janjaweed [...] implementing orders received and/or acting under the
17 authority of higher ranking officials from the Sudanese Armed Forces (such as Hamdi
18 and Al-Tayyib) ...".

19 Now, you quoted a whole load of references for that and I would simply like you
20 to -- to refer us to a specific reference where we say that he was under the command
21 of Hamdi, or any of the others, other than, as he said himself, he was reporting to
22 Hussein and Harun.

23 MR LAUCCI: [15:14:03] Madam President, this is -- this will be, for you, a very easy
24 issue to resolve. The -- our submissions rely entirely on your trial judgment, the
25 paragraphs that we want to rely on are there. It's up to you to see whether these

1 paragraphs are supporting our submission or not. That's what we have to say.

2 And of course I will not relitigate anything that is in your trial judgment. We simply
3 rely on the findings that are in the footnotes 48 to 56.

4 PRESIDING JUDGE KORNER: [15:14:41] All right. Because, as you know, both the
5 Prosecution and CLRV say that it -- so you're just leaving it at that. Right.

6 MR LAUCCI: [15:14:49] Yeah. It's not a big surprise that we can disagree.

7 PRESIDING JUDGE KORNER: [15:14:53] Okay. Just a moment.

8 MR LAUCCI: [15:14:54] And the same, if that can help with obeying orders,
9 mitigating circumstance (b), I can do nothing more than referring you to paragraph 34
10 to 36 of our written submissions and the paragraphs of your trial judgment that we
11 rely on in footnotes.

12 PRESIDING JUDGE KORNER: [15:15:20] Yes. So what do you say to -- but there's
13 more than that. I mean, the CLRV say in terms that -- and it's nothing to do with the
14 judgment, that it wasn't a question of obeying orders.

15 Let me find what they actually said.

16 MR LAUCCI: [15:15:50] Madam President, if that can save you time. Really, my
17 answer is limited to what is in our written submissions on this topic. I have nothing
18 to add to this topic.

19 PRESIDING JUDGE KORNER: [15:15:58] You have nothing to add in light of what
20 the Prosecution or --

21 MR LAUCCI: [15:16:02] No.

22 PRESIDING JUDGE KORNER: [15:16:03] I see. All right. Okay.
23 Yes. All right. I think you dealt with all the other matters.

24 MR LAUCCI: [15:16:17] Ah, yeah.

25 Apparently, on the number of children, I am corrected after verification. So the total

1 was 18. Three died, two over these years, one sooner in the past, which means that
2 there are 15 children now. And that corrects what is said at page 91, lines 6 and 7 of
3 the real-time transcript of today.

4 PRESIDING JUDGE KORNER: [15:16:49] Yes. All right. Yes, thank you,
5 Mr Laucci.

6 Right. I think we should go back then - I don't mind who goes first - either to the
7 Prosecution or to the Representatives of the Victims. Unless you want time.
8 But as I say, Mr Nicholls, I do want to hear what the Prosecution say about this
9 business of the foreseeability of -- of sentence.

10 MR NICHOLLS: [15:17:24] Yes, your Honour, I'll -- I'll try, but I have -- I have some
11 other responses to what comes out today as -- as well.

12 PRESIDING JUDGE KORNER: [15:17:30] Right. Okay. Whichever. Yes. Well,
13 whichever -- of course, whichever way you want to deal with them.

14 MR NICHOLLS: [15:17:38] So then -- sorry, I got a little confused. So then, after
15 this, we go back for another session to the Defence?

16 PRESIDING JUDGE KORNER: [15:17:44] I think --

17 MR NICHOLLS: [15:17:46] I -- I -- sorry, I honestly got a little bit --

18 PRESIDING JUDGE KORNER: [15:17:52] Yeah. You're not as confused as I am,
19 either, about the order of things.

20 MR NICHOLLS: [15:17:55] I thought they were going to finish, then I was going to
21 go, but I'm -- I'm happy to.

22 PRESIDING JUDGE KORNER: [15:17:59] Yeah, I don't actually follow.

23 First of all, you -- yeah, Mr Laucci, you haven't finished? Or you -- because you say
24 you want to hear what has been said and then you have another go.

25 MR LAUCCI: [15:18:14] Well, what you have decided in the communications that

1 we received by email was that there would be two rounds of submissions for each
2 party and participant. The first one was essentially -- well, we can use it the way we
3 want, but the way the Defence used it was to respond to the written submissions of
4 our colleagues.

5 PRESIDING JUDGE KORNER: [15:18:37] And they did the same for you, yeah, they
6 responded to your -- yeah.

7 MR LAUCCI: [15:18:42] That is -- that is done. So the first round five minutes ago
8 is completed. Now our -- normally we should have had Witness D-16 in the middle,
9 but that worked out a different way.

10 So now, what I understand, is that we go for the second round for each party and
11 participant. And for this second round, when you inquire about the time that
12 we -- each party would need, our answer was one session for the Defence.

13 PRESIDING JUDGE KORNER: [15:19:12] But what happened to you -- aside from
14 Al-Rahman not giving -- making -- not giving evidence -- making some closing
15 remarks, what else do you want -- you covered everything, and you say you don't
16 need to add --

17 MR LAUCCI: [15:19:31] No, I have not covered everything. I have not made my
18 final submissions. And the final submissions are about issues that are not in reply to
19 the written submissions, so that means on aspects that were not covered in the written
20 submissions of my learned friends.

21 PRESIDING JUDGE KORNER: [15:19:49] All right. Okay. Right.

22 Okay. Right.

23 Okay, Mr Nicholls, you then go ahead in any order that you want.

24 MR NICHOLLS: [15:19:59] Yes. Thank you. And good afternoon, Madam
25 President, and your Honours.

1 I'll get to your question towards the end, but just a few points that have come up over
2 the last day or so.

3 Just, firstly, to correct a -- I think a good-faith mistake on the chart that my friend
4 showed yesterday, which showed recommended sentences by the OTP in one column,
5 and then maximum or possible sentences in Sudan in the other column. There was
6 one mistake there - I didn't want to interrupt - but it stated that in count 5 on that
7 chart we recommended five years, but if you look at our brief, we recommended 10.
8 It's not a big deal. I just wanted to correct that.

9 MR LAUCCI: [15:20:59] I fully trust you. It's accepted.

10 MR NICHOLLS: [15:21:04] Yeah. Yeah.

11 Also just to note, while talking about that chart, and my friend explained it that he
12 wouldn't put on sentences that couldn't be imposed here in order to avoid confusion,
13 but that meant that chart, for sentences like murder, left out the death penalty, left out
14 crucifixion. And so they confined it to terms of years, but it did not accurately
15 necessarily reflect the ultimate severity of the punishment that could have been
16 imposed domestically.

17 Some other quick responses. My friend said today it was mitigating that -- or not
18 mitigating, but asked you to take into account that their client was not convicted of
19 personally raping anybody. There's no hierarchy in modes of liability. He has been
20 convicted of 16 rapes, including elderly women, older women, and children. The
21 fact that he has not been convicted of personally raping one of these people, I would
22 say, diminishes virtually nothing.

23 A lot of talk about his age and surrender. I'll combine those two because I think they
24 kind of go together. And you've asked a lot of questions about this, so I'll try to keep
25 it short, but I want to address some points.

1 Again, he surrendered to avoid imprisonment or execution. He delayed that
2 surrender until he was forced to. He likely -- I mean, the evidence shows, and from
3 what my friends have said, he never would have surrendered if President Bashir
4 hadn't been overthrown and he faced the prospect of arrest, trial and then
5 imprisonment or execution in Sudan.

6 So just briefly responding to my friends. The mitigating value of surrender as an
7 absolute last resort should be extremely low to none. The only incentive that would
8 give somebody is, "Hey, if you've got no choice at all, you're about to be killed, you're
9 about to be put in a terrible prison, surrender and you'll get points for it," whereas
10 they don't need that incentive because they're doing it to survive.

11 The argument they make, if anything would incentivise the remaining ICC Darfur
12 fugitives, the ones for whom there are the warrants, or others in a similar position, to
13 wait until they're elderly and then surrender. So if you're to grant this, the message
14 to other persons wanted by this Court for crimes against humanity and war crimes is:
15 stay at home, live your life, be comfortable. When you're 69, surrender, and then
16 argue that you're too old to go to prison.

17 And it just wouldn't be fair. It would be the opposite of what deterrents needs to be
18 sent at this point.

19 And to the extent that he is suffering from normal age-related issues, which we don't
20 concede, but those that are natural, that's on him. That's because he waited. If he
21 had surrendered in 2007 he would have been around 58 at the time. He would have
22 been middle-aged. So this sadness, how sad it is to go to prison as an older person,
23 it's all due to him evading justice as long as he could, until it became impossible to do
24 so any longer and surrendering was the best option.

25 That is not the message to send, that that is mitigating. Or mitigating to any

1 significant extent.

2 Good behaviour in prison. Well, I would view that, your Honours, as lack of an
3 aggravating factor is not mitigating. It's expected that one is of good behaviour in
4 prison. And my friend said if you don't give weight to that, then there will be no
5 incentive for persons awaiting trial to behave. They'll be violent, they won't follow
6 the rules. That's not true, because in every jail, in every prison, there are sanctions
7 for misbehaviour. That's how they are run in -- everywhere in the world. And so
8 it's not as though chaos would break out at the Detention Unit unless there was
9 strong mitigation for good behaviour.

10 You questioned quite a bit on this, but I have to briefly address it.

11 This respect for victims, that rings very -- sorry, this respect for victims in Court,
12 which I'll talk about in a moment, this sympathy for the victims of Darfur, that rings
13 very hollow.

14 First, they would not be victims if not for him. There wouldn't be any need to
15 sympathise with people who lost their family members, who are living in refugee
16 camps now who were raped because of him. That rings very hollow. And I won't
17 say it's aggravating what they're trying to do, but it is certainly not mitigating.

18 Expressions for other victims of the conflict. I think I don't have his statements in
19 front of me, but I think in the first one he said, "I want to make a statement for all the
20 victims in Darfur". Well, his sympathy, his compassion for victims now, victims not
21 related to his crimes that he's been convicted of also should have no mitigation. And
22 as I think the LRV said, he can't have his cake and eat it. Now, if he had any -- well,
23 I won't say that.

24 Second, there's talk about the respect for the victims and the witnesses, and the
25 Defence did not challenge -- I almost drank the wrong water. The Defence did not

1 challenge the rape victims' account and that was a good thing to do. That wasn't
2 uniform. You'll recall P-878 where the cross-examination started with words to the
3 effect of "you've told lie after lie to this Court." My witness P-907 survived the
4 execution in Deleig, one of the executions, and at T-96, page 46, after he finished this
5 testimony -- this man crawled out from under bodies. He ordered that execution.

6 And Mr Laucci said:

7 "I wanted to put to you that the Defence is not taking the position as to whether what
8 you say is accurate. That, in our view, will be for the Chamber to decide, whether
9 miracles can be believed beyond reasonable doubt."

10 Which I reacted to at the time. I thought it was completely inappropriate.

11 The length of time spanning the crime period, August through March of the next year,
12 around about eight months, that's a significant period of time. And I don't think you
13 look at each -- you shouldn't break it up into, well, on this day was Bindisi, on this
14 day was Mukjar. That's only two days so it's not significant. This period he was
15 active in hunting down the Fur, committing these crimes, extended over a lengthy
16 period of time and he's been charged for some incidents within that period, so I don't
17 think we misstated there.

18 And the amount of time it takes to commit a crime doesn't affect its severity.

19 Srebrenica, 8 to 9,000 Muslim men and boys murdered in about a week. Doesn't
20 make it not serious that it only took a week.

21 On his medical background, which you asked some questions about, I would just add
22 there to keep in mind, I think it is significant that he had this medical background.

23 He knew how to treat people. In the army he had been a medical assistant, a nurse.

24 And the Defence in their opening said that he had treated people. Prisoners in

25 Mukjar -- I won't go over the description of the conditions again. Three of them died

1 while in detention. Nobody got any medical care from the medic who was holding
2 them prisoner.

3 And at paragraph 416 of the judgment, if I have the paragraph right, you found or
4 refer to the instance of him reprimanding his Janjaweed forces for not stealing, taking
5 the medication that was lying around a dead body.

6 So, just to sum up, because we've talked about it a lot, all these mitigating
7 circumstances, your Honours, I don't want to use a silly -- it's like a gram of
8 mitigation weighed against 10 kilos of the extreme gravity of these crimes.

9 Unfortunately, I need to go into private session to talk about the report that we
10 discussed earlier.

11 PRESIDING JUDGE KORNER: [15:32:00] Yes. How long do you think?

12 MR NICHOLLS: [15:32:07] Ten minutes.

13 PRESIDING JUDGE KORNER: [15:32:09](Microphone not activated) Sorry, private
14 session, please.

15 (Private session at 3.32 p.m.)

16 THE COURT OFFICER: [15:32:23] We are in private session, Madam President.

17 (Redacted)

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24 (Open session at 3.45 p.m.)

25 THE COURT OFFICER: [15:45:21] We are back in open session, Madam President.

1 MR NICHOLLS: [15:45:25] Thank you, your Honours.

2 Now, I'm going to talk a little bit about the issue of whether a life sentence -- a joint
3 sentence of life imprisonment should be imposed and some of the objections to that.

4 First of all, my -- first of all, my friends spoke the other day about his low rank of
5 *musa'id*, saying he had the highest rank of *musa'id*. The rank is totally irrelevant.

6 He was a *musa'id* in the army. Then he was a *musa'id* in the CRF. And, in between,
7 he was a leader of the Janjaweed, and that's the period that we're concerned with.

8 And in paragraph 396, your Honours, you found that he commanded a contingent
9 comprised of thousands, 6,000 Janjaweed in February 2004, around Mukjar, so 6,000
10 troops. That is a brigade. That's larger than your average brigade in terms of
11 number of troops.

12 Sorry, I don't know if this is in private session, but I don't think it hurts -- I can say
13 this. At T-72 -- okay, it is open.

14 P-883 testified at transcript 72, pages 53 to 55. He was asked by the Defence on the
15 size of a brigade in the Sudanese army, the SAF, at the time, and the witness
16 essentially said, "Well, I'm not sure exactly, but there's around 300 men in a battalion,
17 and there's about four battalions in a brigade in the SAF at this time". And then my
18 friend asked the question:

19 "So if we do, on the basis of this rough estimate, simple multiplication, if a brigade
20 had four battalions by [that] time, that would mean that the number of men in a
21 brigade would be around 1,200 men; is that correct?"

22 And the witness says:

23 "Approximately [...] [I didn't] bother [much] about these numbers."

24 But he says "approximately".

25 So, for the local area at the time - 883 was a witness who would know what he was

1 talking about - he commanded the equivalent of four brigades. So his rank as
2 *musa'id* before or after, or even if they called him that at the time instead of *agid*
3 *al-ogada*, is totally irrelevant.

4 The Defence submitted that under Article 78(3) the Chamber can only impose a joint
5 sentence of life if it has imposed at least one individual sentence of life for one of the
6 counts. That is, in our submission, just wrong.

7 My friend cited to various commentaries, including Triffterer, Schabas, Cassese. We
8 checked that and didn't find that to be the case. And in the fourth edition 2021,
9 Triffterer refers to Ntaganda case in talking about this issue. In Ntaganda, the Trial
10 Chamber imposed individual sentences between 12 and 30 years. And given that
11 the highest individual sentences imposed was 30 years, the Chamber in writing their
12 judgment considered and wrote that the overall joint sentence could only be 30 years
13 or life. That is what the Chamber in that case concluded.

14 If you look at the sentencing judgment, paragraph 25, their Honours in that trial
15 wrote:

16 "Article 78(3) of the Statute does, however, provide that any joint sentence of
17 imprisonment may not exceed 30 years, unless the extreme gravity of the crime and
18 the individual circumstances of the convicted person warrant a term of life
19 imprisonment."

20 And in 249:

21 "As the highest individual sentence is 30 years of imprisonment, and the maximum
22 imprisonment for a specified number of years is also 30 years, the Chamber can only
23 impose 30 years or life imprisonment as the overall joint sentence."

24 So, in that case there is precedence. It's not binding on you. That was their
25 interpretation. And it only makes sense.

1 I mean, you can imagine a case with lots and lots of counts, each of which - this case,
2 perhaps - each of which would carry 30, 30, 30, 30, and it would be -- it would not
3 make any sense. It would be ludicrous to say that life could not be imposed. And
4 I think what the Defence are kind of hanging their hat on on this --

5 PRESIDING JUDGE KORNER: [15:51:19] Well, they're saying it's far in excess of any
6 of the sentences that were passed so far at this Court, and upon accused who were
7 active for a far longer period.

8 MR NICHOLLS: [15:51:36] Yes. Well, that's one thing, but what they were arguing
9 was that you cannot -- you cannot pass a joint sentence of life imprisonment unless
10 you find that one of the underlying counts carries a sentence of joint life
11 imprisonment. So they were arguing that you cannot -- you could not, for instance,
12 say 30, 30, 30, and impose a joint sentence of life imprisonment. That is not correct,
13 and I think what they are kind of hanging this on is that if you look at 77(1)(b) of the
14 Statute, it states:

15 "A term of life imprisonment when justified by the extreme gravity of the crime and
16 the individual circumstances of the convicted person."

17 So it says "crime" not "crimes". And that makes sense because that is talking about
18 the applicable penalties following a conviction on a charge.

19 But I just -- I'll end it there, but it's just clear from Ntaganda that that is not the correct
20 interpretation.

21 If I can come back to the same point. When determining the joint sentence, your
22 Honours would take into account the amount of factual overlap between the different
23 crimes. You asked the question of me of that and I didn't answer it very well the
24 other day. But what we submit, your Honours, is while there is some overlap
25 between conduct underlying some of the crimes, not within these separate operations,

1 each operation is a separate criminal episode, and each one of those separate
2 operations - Kodoom and Bindisi, that's one, Mukjar and Deleig - have distinct
3 underlying facts. There's no overlap between the facts of those distinct operations.
4 That is what we would say, so that is why 30 years alone would not be sufficient for
5 the gravity in this case.

6 I'll just point out, your Honours, Rule 145(3) states only requires "one or more
7 aggravating circumstances" to impose life. And here, throughout the judgment, it's
8 aggravating circumstance after aggravating circumstance. I went through those in
9 my presentation on Monday. But it only requires one and there are many more in
10 this case.

11 Your Honour made the point the other day that there were no sentencing guidelines
12 for international courts and tribunals, and that's right. And that's because, as you
13 said, each case has to be considered on its own facts, on its own circumstances. So,
14 simply comparing counts or charges is not going to get you to a just verdict and is not
15 helpful.

16 PRESIDING JUDGE KORNER: [15:55:48] I have to say, Mr Nicholls, I've always
17 thought that it is possible to at least draft some basic guidelines, because at the
18 moment all sentencing is a bit like this, with people just throwing figures around.

19 MR NICHOLLS: [15:56:04] Yes. Well, that probably could be very helpful as long
20 as they weren't mandatory and you maintained your discretion.

21 But I'll also just take you to the Lubanga appeals judgment, paragraph 76, in which
22 case the Appeals Chamber stated:

23 "... while recognising that '[a] previous decision on sentence may indeed provide
24 guidance if it relates to the same offence and was committed in substantially similar
25 circumstances', any assistance may be limited, given the Trial Chamber's overriding

1 obligation to tailor a penalty to fit the gravity of the crime and the individual
2 circumstances of the accused."

3 And that's where I say, well, I was going through all of those points yesterday. The
4 appropriate and only just sentence in this case is a joint sentence of life imprisonment.

5 And I won't spend time on this, but you've recognised in your decision on the
6 presentation of additional evidence for this hearing we're going through, decision
7 1257, at paragraph 17, you noted:

8 "However, the Chamber accepts the CLRV's submissions (while deferring to the
9 Chamber's discretion on the admission of D-0016's evidence), that the Court not
10 bound by domestic sentencing practices and laws."

11 So it's of very little help.

12 I'm going to jump ahead a little bit.

13 My friends --

14 PRESIDING JUDGE KORNER: [15:57:56] Well, how much longer have you got,
15 Mr Nicholls?

16 MR NICHOLLS: [15:58:02] Oh, sorry.

17 PRESIDING JUDGE KORNER: [15:58:03] No. If you can complete within
18 10 minutes, I'll say carry on and we'll complete it.

19 MR NICHOLLS: [15:58:09] I cannot.

20 PRESIDING JUDGE KORNER: [15:58:10] No, that's what I thought.

21 MR NICHOLLS: [15:58:11] I probably have about 20-25.

22 PRESIDING JUDGE KORNER: [15:58:14] Well, I did that think. All right, in that
23 case we'll adjourn now until 9:30 tomorrow morning. Simply for timing, Mr Laucci,
24 you think you've still got another whole session, so we're likely to go through to
25 lunchtime, are we?

1 MR LAUCCI: [15:58:34] That's my expectation and -- well, with the submissions of
2 my learned friends not completed today, I would ask for an extreme favour, once they
3 are done, to have like, I don't know, a very short break to just digest and see if there's
4 anything I need to add to what I'm intending to say.

5 MR NICHOLLS: [15:58:59] No objection to that from me and I'll try to be quick
6 tomorrow.

7 PRESIDING JUDGE KORNER: [15:59:05] Yes, no. Certainly, Mr Laucci. I mean,
8 this is not an easy exercise.

9 All right. We'll adjourn then please until 9:30 tomorrow morning.

10 THE COURT USHER: [15:59:14] All rise.

11 (The hearing ends in open session at 3.59 p.m.)